H.R. 2837, INDIAN TRIBAL FEDERAL RECOGNITION ADMINISTRATIVE PROCEDURES ACT

LEGISLATIVE HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

Wednesday, October 3, 2007

Serial No. 110-47

Printed for the use of the Committee on Natural Resources

Available via the World Wide Web: http://www.gpoaccess.gov/congress/index.html
or
Committee address: http://resourcescommittee.house.gov

U.S. GOVERNMENT PRINTING OFFICE

38-138 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON NATURAL RESOURCES

NICK J. RAHALL II, West Virginia, *Chairman*
DON YOUNG, Alaska, *Ranking Republican Member*

Dale E. Kildee, Michigan
Eni F.H. Faleomavaega, American Samoa
Neil Abercrombie, Hawaii
Solomon P. Ortiz, Texas
Frank Pallone, Jr., New Jersey
Donna M. Christensen, Virgin Islands
Grace F. Napolitano, California
Rush D. Holt, New Jersey
Raúl M. Grijalva, Arizona
Madeleine Z. Bordallo, Guam
Jim Costa, California
Dan Boren, Oklahoma
John P. Sarbanes, Maryland
George Miller, California
Edward J. Markey, Massachusetts
Peter A. DeFazio, Oregon
Maurice D. Hinchey, New York
Patrick J. Kennedy, Rhode Island
Ron Kind, Wisconsin
Lois Capps, California
Jay Inslee, Washington
Mark Udall, Colorado
Joe Baca, California
Hilda L. Solis, California
Stephanie Herseth Sandlin, South Dakota
Heath Shuler, North Carolina

Jim Saxton, New Jersey
Elton Gallegly, California
John J. Duncan, Jr., Tennessee
Wayne T. Gilchrest, Maryland
Chris Cannon, Utah
Thomas G. Tancredo, Colorado
Jeff Flake, Arizona
Stevan Pearce, New Mexico
Henry E. Brown, Jr., South Carolina
Luis G. Fortuño, Puerto Rico
Cathy McMorris Rodgers, Washington
Bobby Jindal, Louisiana
Louie Gohmert, Texas
Tom Cole, Oklahoma
Rob Bishop, Utah
Bill Shuster, Pennsylvania
Dean Heller, Nevada
Bill Sali, Idaho
Doug Lamborn, Colorado
Mary Fallin, Oklahoma
Vacancy

James H. Zoia, *Chief of Staff*
Jeffrey P. Petrich, *Chief Counsel*
Lloyd Jones, *Republican Staff Director*
Lisa Pittman, *Republican Chief Counsel*

CONTENTS

LEGISLATIVE HEARING ON H.R. 2837, TO PROVIDE FOR ADMINISTRATIVE PROCEDURES TO EXTEND FEDERAL RECOGNITION TO CERTAIN INDIAN GROUPS, AND FOR OTHER PURPOSES. "INDIAN TRIBAL FEDERAL RECOGNITION ADMINISTRATIVE PROCEDURES ACT"

Wednesday, October 3, 2007
U.S. House of Representatives
Committee on Natural Resources
Washington, D.C.

The Committee met, pursuant to call, at 10:05 a.m. in Room 1324, Longworth House Office Building, Hon. Nick Rahall, II, [Chairman of the Committee] presiding.

Present: Representatives Rahall, Kildee, Faleomavaega, Abercrombie, Costa, Boren, Kennedy, Inslee, Herseth Sandlin, Shuler, Duncan, Fortuño, and Lamborn.

STATEMENT OF THE HON. NICK RAHALL, II, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

The CHAIRMAN. The Committee will come to order.

We are meeting today to once again receive testimony on a bill from my good friend and very valued member of our full committee, the gentleman from American Samoa, Mr. Faleomavaega, in hopes of making sense out of what is now called the Office of Federal Acknowledgement in the Department of Interior.

The gentleman has introduced this bill year after year after year after year. His effort is much like that of the tribes, who wait year after year after year after year for the recognition they so much deserve.

But instead, we hear horror stories about the administrative process, year after year after year after year. Well, you get the picture.

We hear that, first, petitioning tribes are stuck in the system, without finality, for more than 20 years. We hear tribes must spend huge sums of money, as much as $8 million, to produce the mountains of documentation required by the process. We hear the criteria are too vague and overly subjective. We hear the documentation accepted as proof for one tribe is not accepted for

another. And we hear that the system is inherently biased, leaning heavily toward denying recognition.

But when the Congress steps in to recognize an Indian tribe, there are those who say we should not. They say this despite the fact that Congress has recognized the overwhelming majority of Indian tribes. They say Congress should stay out, to avoid making the process political.

I say if you believe the Interior Department's treatment of Indian tribes is not political, I have some oceanfront property in my home state of West Virginia that I would like to sell you.

To those who say that Congress does not have the expertise to recognize an Indian tribe, I would say look at the record; the record speaks for itself.

We have heard Mr. Shuler speak up for the Eastern Band of Cherokee Indians. He knows they are an Indian tribe, and they were Congressionally recognized through legislation. Do not tell Mr. Kildee, for example, that the Little River Band of Ottawa Indians is not an actual Indian tribe; they were Congressionally recognized. And do not even think of telling Mr. Young, our Ranking Member, that the Central Council of the Tlingit and Haida do not deserve Federal recognition.

I would very much like to see us move legislation that will make the administrative Federal recognition process fair and manageable. But let me be very clear here: that this will not stop me from bringing before the Committee legislation to establish a government-to-government relationship with various Indian tribes when appropriate. It is right, and it is the responsibility of the Congress to recognize Indian tribes.

It is also the responsibility of the Congress to live up to its relationship with the various tribes, and provide enough funding to meet our Federal obligations. I am tired of the defamatory attacks, claiming that Indian tribes that have submitted applications only want recognition in order to try and open up a casino. I find that charge demeaning beyond words.

I cannot even imagine how degrading it must be to know who you are, and to know who your ancestors were, but not have the Federal government recognize that honorable heritage.

The final report of the American Indian Policy Review Commission said back in 1977, and I quote, "The results of non-recognition upon Indian communities and individuals have been devastation."

Coach Calvin Sampson, a Lumbee Indian, testified before this very committee in April, and most succinctly said, "I do not need your permission to call myself Native American. But unfortunately, in today's world, I need your validation."

Time and again, members of these non-recognized tribes rise up, enlist in the military, and fight for this great nation that will not even recognize them as Indians. I have always found it amazing that those who suffer the greatest poverty and prejudice are so often the first ones to stand up and defend our nation.

We have a chance to fix this. I ask everyone here today to help us fix the administrative process. Any phonies will be exposed quite quickly. Let us act now, so that no additional generations of Indian children will have to live the indignity of needing validation from the Federal government.

I now yield to the Ranking Member, Mr. Cole of Oklahoma.
[The prepared statement of Mr. Rahall follows:]

Statement of The Honorable Nick J. Rahall, II, Chairman, Committee on Natural Resources

We are here today to once again receive testimony on a bill from my good friend from American Samoa, in hopes of making sense out of what is now called the Office of Federal Acknowledgment in the Department of the Interior.

Mr. Faleomavaega has introduced this bill—year, after year, after year.

His effort is much like that of the tribes who wait—year, after year, after year—for the recognition that they deserve.

But instead we hear horror stories about the administrative process—year, after—well you get the picture. We hear that:

- Petitioning tribes are stuck in the system without finality for more than 20 years;
- Tribes must spend huge sums of money—as much as $8 million—to produce the mountains of documentation required by the process;
- The criteria are too vague and overly subjective;
- Documentation accepted as proof for one tribe is not accepted for another; and
- The system is inherently biased, leaning heavily toward denying recognition.

But when the Congress steps in to recognize an Indian tribe, there are those who say we should not. They say this despite the fact that Congress has recognized the overwhelming majority of Indian tribes. They say Congress should stay out to avoid making the process political.

I say—if you believe the Interior Department's treatment of Indian tribes is not political, I have oceanfront property in West Virginia I would like to sell you.

To those who say that the Congress does not have the expertise to recognize an Indian tribe—I say, take a look at our record, it speaks for itself.

We have heard Mr. Shuler speak up for the Eastern Band of Cherokee Indians. He knows they are an Indian tribe and they were Congressionally recognized through legislation.

Do not tell Mr. Kildee that the Little River Band of Ottawa Indians is not an actual Indian tribe. They were Congressionally recognized.

And do not even think of telling Mr. Young that the Central Council of the Tlingit and Haida do not deserve federal recognition!

I would very much like to see us move legislation that will make the administrative federal recognition process fair and manageable.

But let me be very clear here that this will not stop me from bringing before this Committee legislation to establish a government-to-government relationship with various Indian tribes when appropriate. It is the right and the responsibility of the Congress to recognize Indian tribes.

It is also the responsibility of the Congress to live up to its relationship with the various tribes and provide enough funding to meet our federal obligations.

I am tired of the defamatory attacks claiming that Indian tribes who have submitted applications only want recognition in order to try and open up a casino. I find that demeaning beyond words. I cannot even imagine how degrading it must be to know who you are and who your ancestors were, but not have the federal government recognize that honorable heritage.

The final report of the American Indian Policy Review Commission said back in 1977: "The results of "nonrecognition" upon Indian comminutes and individuals have been devastation..."

Coach Kelvin Sampson, a Lumbee Indian, testified before this Committee in April said most succinctly: "I do not need your permission to call myself Native American but unfortunately in today's world I need your validation."

Time and again, members of these non-recognized tribes rise up, enlist in the military, and fight for this great Nation that will not even recognize them as Indians. I have always found it amazing that those who suffer the greatest poverty and prejudice are so often the first ones to stand up and defend our Nation.

We have a chance to fix this. I ask everyone here today to help us fix the administrative process. Any phonies will be exposed quite quickly.

Let us act now so that no additional generations of Indian children will have to live the indignity of needing validation from the federal government.

Thank you.

STATEMENT OF THE HON. TOM COLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. COLE. Thank you very much, Mr. Chairman. If I may, I am going to read first the statement of the real Ranking Member, Mr. Young from Alaska. Then I want to offer a couple of comments of my own.

Mr. Chairman, let me thank you for holding this hearing on H.R. 2837, introduced by the gentleman from American Samoa. He has been a long and tireless advocate for the rights of Native American people.

There were several hearings during the last two Congresses on the issue of reforming the recognition process. What we learned from those hearings is similar to what I suspect we are going to hear from today's witnesses: the administrative processes at the Department of Interior are replete with delays and backlogs. Also, it is unclear whether criterion for recognizing the tribes are being applied in a rational, consistent manner.

I think we can all agree that reforms to expedite the process and to upgrade fairness, consistency, and transparency are warranted. We should also ask whether or not the Department should be authorized by statute to continue a role of recognizing tribes, or whether Congress should handle the recognition petitions.

I respectfully suggest that if this committee pursues changes in the recognition process, that the Department should ensure that no tribe seeking a decision on their petitions lose their place in line. Some tribes initially filed letters of intent in the 1970s, and have laboriously constructed their documented petitions over many years. While I do not speak to the merits of their petitions, they do deserve a final response before newer entrants are considered.

Again, I appreciate your scheduling this hearing, Mr. Chairman. I look forward to hearing from the witnesses.

Now, if I may, Mr. Chairman, just quickly add I am drawing from some personal experience, some observations here.

Number one, I want to echo Ranking Member Young's appreciation for you holding this hearing. I know I have asked that on many occasions, many Members have, because the recognition process that we are engaged in 'is so complex, so controversial, and frankly, has not worked well. And you are very much to be commended for helping us explore that process and figure out the best way to fix it.

In the case of my own tribe, the Chickasaws, we know we have been around a long time. DeSoto found us in 1540, and then we ran him out of our territory. So we have a long history of documentation. Matter of fact, I was back with members of my tribe and an archaeologist and historian two weeks ago, around Tupelo, Mississippi, just to explore the old tribal sites where we lived before removal.

What I think most people don't appreciate is how much the impact of European, and then American, contact on tribes has scrambled tribes up. In the history of my own tribe, you know, we absorbed the Natchez after the French essentially annihilated the Natchez in the early part of the 18th century, before there was a United States of America.

Now, the Natchez have also maintained a separate historical consciousness. It is a legitimate question. Are they now Chickasaw, having joined us in a defeat? Or do they have an independent existence if they wanted to assert that? And that is just a single example of what has happened again and again and again to tribes.

I would actually tell my friends the wonderful historian, Robert Remini, wrote a great book, "Andrew Jackson and His Indian Wars." And I remember him handing it to me. He said, I want you to read this book. You are not going to like it very much, but I want you to think about it at the end, because the thesis basically was if the tribes, including my own, had not been removed from Mississippi, they would have been destroyed. And that, while that was certainly not Jackson's intention, to help us, at the end of the day removal protected us, saved us, gave us more time, and we were able to survive as a collective force.

I read that book; didn't like it a lot, because I had been raised to hate Andrew Jackson. When I was five, I didn't know who he was, but I knew he was a very bad man and had done terrible things.

But after reading the book, I happened to be in Tishomingo, Oklahoma, where my tribe holds every year a festival, and frankly where I will be this weekend. It is our sort of homecoming. And there will be thousands of Chickasaws there from all over the country. And I thought you know, that might not have happened. It certainly wouldn't have happened in that place if it hadn't been for that process.

So there are a lot of interesting things here. And some of my friends in areas where tribes have been frankly shattered by European contact think that they have ceased to exist. And in some cases, that is true.

Recently I went to the Eastern Shore. And this was a weekend off. I enjoyed it, went traveling around in a boat, you know, one of these tour things where you spend a few bucks, and they take you around the Chesapeake. And it was a wonderful tour.

And I was listening to the recorded statement. They were describing, you know, native presence in the Chesapeake Bay in the 17th and 18th century. And then I heard the most jarring phrase by accident, totally unintended, in a recorded description I had ever heard. That was until the area had been "detribalized." Now, that is a nice way to say ethnically cleansed. You know, those tribes were shattered. They may or may not have continued to exist. I don't know their history. But it is worth thinking about.

So simply because a tribe, you know, we dealt with earlier this year, on this committee, Virginia tribes that clearly had been here a long, long time; were not very large, and, in my opinion, frankly were forced to give up some of their rights to get recognition in the first place, which I thought was unfortunate.

But they had maintained a collective identity. They had maintained a real existence. They had figured out that they needed to hide; they were in rather obscure places, and they maintained it. My own tribe had to do this. The Federal government basically—the great Cherokee Chief Wilma Mankiller likes to say, if my government had succeeded, I would not be here as a Cherokee. You know, we resisted the ability to destroy us as a country. And that

is what happened, or as a nation, to most of the tribes in Oklahoma.

I find it ironic that we find ourselves in many cases opposing people that are trying to reassert an historic identity that they have maintained collectively. And we always tend to question their motives. They are always base. They are always, you know, it is for the money. And that is what again, many of my friends that don't deal with tribes on a regular basis, don't understand.

Frankly, tribes are not genealogical societies or fraternal associations. They really do exist to improve the lives of their people. And they have maintained their existence in many cases under the most horrific of circumstances.

So I want to thank you, and certainly the gentleman from American Samoa, for putting so much attention onto something that I think is absolutely so critical, and part of our history that has not been given the appropriate amount of attention. I really appreciate this committee, on many cases, having to come in when the bureaucratic functions of the Department did not work, and do the just thing.

Now, I think we would all prefer that we had a process that was more orderly, because it is tough when you are a Member, and you don't know, and you are not from that area, to make these decisions. So there ought to be a much better process than we have had.

But if there is ever any question about—there is no question, of course, about Congress' right to recognize a tribe. But if we have ever erred in that process, it has been largely because there has been a bureaucratic failure ahead of time. And you know, your efforts, and the gentleman from American Samoa's efforts, to focus on how we fix it—or replace it, if that is the appropriate mechanism—I think are to be commended. Congress is doing, frankly, what it ought to be doing.

So thank you again for holding this hearing, Mr. Chairman.

[The prepared statement of Mr.Young follows:]

Statement of The Honorable Don Young, Ranking Republican, Committee on Natural Resources

Mr. Chairman, thank you for holding a hearing on H.R. 2837, introduced by the Gentleman from American Samoa, who has been a long, tireless advocate for the rights of Native American people.

There were several hearings during the last two Congresses on the issue of reforming the recognition process. What we learned from those hearings is similar to what we're going to hear from today's witnesses. The administrative process at the Department of the Interior is replete with delays and backlogs. Also, it is unclear whether criteria for recognizing tribes are being applied in a rational, consistent manner. I think we can all agree that reforms to expedite the process and to upgrade fairness, consistency and transparency are warranted. We should also ask whether or not the Department should be authorized by statute to continue a role of recognizing tribes or whether Congress should handle recognition petitions.

I respectfully suggest that if this Committee pursues changes in the recognition process at the Department, we should ensure that no tribes seeking a decision on their petitions lose their place in line. Some tribes initially filed letters of intent in the 1970's and have laboriously constructed their documented petitions over many years. While I do not speak to the merits of their petitions, they do deserve a final response before newer entrants are considered.

Again, I appreciate your scheduling this hearing, Mr. Chairman, and I look forward to hearing from the witnesses.

The CHAIRMAN. The Chair wishes to thank the gentleman from Oklahoma. We have heard you speak a number of times about the rights and the plights of Native Americans and Indian country. But for this particular gentleman from West Virginia, I must say every time I listen to you, I find it more enlightening and more interesting, and I learn something. And I appreciate very much your comments.

Another true leader on our committee for Native American rights and tribal sovereignty, the gentleman from Michigan, Mr. Kildee, I recognize you. And thank you for your decades of leadership.

STATEMENT OF THE HON. DALE E. KILDEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. KILDEE. Thank you very much, Mr. Chairman. And thank you for your great leadership. And whenever I see Tom Cole, I know this is a bipartisan obligation responsibility, which you have served very well, this idea of recognizing the reality of Indian sovereignty. You and I read regularly from the same Constitution, which says, "Congress shall have power to regulate Commerce with foreign nations, and among the several states, and with the Indian tribes." It does not say with fraternal organizations, right?

As you say, these are not fraternal organizations. These are sovereignties. And it is in the Constitution, and each one of us up here take an oath to uphold this Constitution. And the right of the sovereignty of the tribes is part of that oath.

I would like to thank you, Mr. Chairman, for this brief remark. Thanks for convening this.

We know that the tribal recognition process is broken. The fact that the current administrative process for Federal recognition can take up to 25 years or longer is just unacceptable, and it must be fixed.

I am particularly interested in hearing testimony today from Jim Keedy, a lawyer for the Michigan Indian Legal Services in my home state, who has been working with the Grand River Band of Ottawa Indians.

As you know, Mr. Chairman, in 1994 I worked with this committee to reaffirm the status of several Indian tribes in Michigan. At that time we had three, and President Clinton signed those three bills in the Oval Office.

I was going to do a fourth one, for the Grand River Band of Ottawas. But the tribe had been so burned by the Federal government, they no longer trusted the Federal government, and they weren't sure they wanted to be part of any Federal process. I mean, they just figured leave us alone; we know we are Indians, and for God's sakes, why don't you know we are Indians?

We signed treaties with them in 1836. One of my greatest tasks and honors was to read those treaties when I first became a member of the State Legislature back in 1965. And the State of Michigan recognizes them. Any member of that tribe can go to a public college in Michigan, and the State of Michigan pays the tuition. That is my bill that I introduced.

But they decided to be kept out of that bill, because they had been so burned by the Federal government. That has been the history, unfortunately.

Then in 1997 I worked with this committee to pass the Michigan Indian Land Claims Act, an Act that provided for the distribution of judgment funds awarded to certain Michigan tribes by the Indians Claims Commission.

With the Grand River in mind, knowing that they had great records of their sovereignty, I included a provision in the bill for unrecognized tribes that allow the BIA to have seven years in which to reaffirm the tribes if they met certain conditions. I believe that seven years was more than enough for them to review and make this decision. And the Grand River Indians met all those conditions.

And I put in there that a certain amount of that money and that claim would be set aside for a tribe like the Grand River Indians. And time went on, and time went on, and time went on. They applied through the regular process, and it just languished in the regular process. Right now it is up in one of the higher statuses right now for recognition, but still is stuck. You can be stuck in the higher status. You can work for years to get it up there, but it is still stuck there.

And the millions of dollars that I had set aside in 1997 for the Grand River Band went back to the Treasury. Again, that is the history of this government's relationship. The history has been better later, but we still have so much to do, as Mr. Cole and Mr. Rahall and Mr. Faleomavaega and I know.

So to realize that the Grand River Band, which petition is still languishing over there, has actually lost money back to the Treasury because of their, first of all, certitude that they were sovereign people. They were a sovereign nation. And their distrust of the Federal government, based upon facts that had taken place, makes it cogent upon us to make sure that we do modernize, bring up to date this system of recognizing these tribes.

And with that, Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. The Chair thanks the gentleman from Michigan, and now recognizes the sponsor of the bill we are considering today, Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I certainly want to thank you for calling this hearing to consider the proposed bill, H.R. 2837, a bill that I introduced, as you said earlier, Mr. Chairman, time after time after time, to provide the process to be mandated by Congress this time on how we should go about recognizing tribes.

Mr. Chairman, I was very moved by the gentleman from Oklahoma's statement, and probably the only member of this committee who is Native America, unless if I am wrong. Certainly I was moved by the fact that, given his own given experience of what Native Americans or Indian countries have to go through not just to receive recognition, but many other aspects of providing for their needs and their welfare.

I have stated time and time again, Mr. Chairman, not to blame the bureaucracy for setting up the recognition process, but the fact that it really comes right back to the Congress. Whether we took action, or by omission, which we failed to take action, just proves what Mr. Kildee has said earlier.

I do want to thank you for all the initiatives and the efforts that you have made in addressing the serious problems dealing with Native Americans.

I think the first policy that Congress or even this government has ever had toward the Indians was to kill them. A good Indian was a dead Indian, it seems to me the policy that we initiated first. And then it was to assimilate, the process of assimilation: let us make them all Americans. And then termination; terminate them as tribes.

And so now we find ourselves in the fourth era at this point in time in dealing with Native Americans. We now have to go through a process of recognizing them as Indians. It is a sad commentary, in my humble opinion, Mr. Chairman, of how we have dealt with the Indian country and members of the Native Americans, whether it be here or in Alaska.

I think, Mr. Chairman, you have a member of your staff here who is a member of a tribe from Louisiana that is not even recognized. Joshua, where are you? Now, if he doesn't look like an Indian, I don't know what an Indian looks like.

[Laughter.]

Mr. FALEOMAVAEGA. But this is how ridiculous the situation has become.

Mr. Chairman, this is not a new issue, as you have said. I think for the last 15 years, ever since I have been a member of this committee, and the time when Governor Richardson was sitting right next to me over there—Bill Richardson from New Mexico. And trying to have hearings after hearings after hearings, how, I should say terrible the process has been.

And I might also want to share this with my colleagues. There is no Congressional enactment that provides for the recognition of American Indians. It is all done by administrative authority of the Secretary of the Interior, by regulation.

And I remember distinctly the gentleman who wrote the regulations that provided some seven criteria, the current process, that the Indians have to go through these loops in recognizing. Before they can be recognized, you have to fulfill these seven criteria. And the gentleman who wrote these regulations sat right there and said, you know, if I were to go through the process, even I would have failed, in terms of how complicated and how terrible the situation has been in trying to give assistance to the Indians to be recognized.

Mr. Chairman, the administrative system for Federal recognition of Indian tribes needs reform. Structural and procedural constraints have transformed the Federal acknowledgement process into a cumbersome and overly stringent process.

I do not need to remind my colleagues of how important the Federal acknowledgement process is in Indian country. We all know that for Native Americans to be eligible for Federal benefits and services provided by the Department of Interior and the Indian Health Services, these tribes must be members of Federally recognized—to be Federally recognized.

In addition, Federal recognition of Indian tribes opens the door for government-to-government relationships between the Indian tribes and the Federal government. Most important, this process

recognizes the Indian tribes as sovereign entities. For these reasons, gaining Federal recognition is important in establishing rights and obligations, not only as a prerequisite for many government benefits and privileges, but also as sovereign entities.

Mr. Chairman, there are some 565 Federally recognized tribes listed. These tribes get recognized as sovereign nations, and as a trust responsibility of the Congress, and are eligible to receive benefits from certain Federal programs.

About 334 petitions have been filed with the Office of Federal Acknowledgement since October of 1978. Of the 334 petitions filed, only 62 have been resolved as of February of this year. Forty-three petitions were resolved by the Department of the Interior, nine by the Congress, and 10 by other means: either they merged with other petitioners, or dissolved, or just simply withdrew from the acknowledgement process.

Mr. Chairman, one thing is clear. For too long, Indian tribes have been denied recognition of their rightful heritage and identity because of cumbersome and restrictive regulations. The amount of paperwork, review, and documentation needed to establish the mandatory seven criteria for Federal acknowledgement of Indian tribes has led to monumental delays in the process. Extremely restrictive academic burdens of proof that exceed even the Courts' requirements have made it almost impossible to satisfy the demands of the Office of Acknowledgement.

Moreover, we have a process that operates on the presumption, presumption, that many Indian tribes are not legitimate. Essentially, the regulatory nature of the process has grown to impose tremendous burdens of proof on tribal petitioners. Consequently, many legitimate Indian tribes have been denied recognition, and been penalized because they failed to adhere to the seemingly impractical standards set for approval.

The petitions by Indian tribes for recognition are mired in the process of an average 15 to 20 years before they are finally reviewed.

Mr. Chairman, the evidentiary burden required to meet the mandatory criteria has also imposed a financial burden on many tribes. Cost of compliance has grown increasingly unbearable for many tribes, several of which already live in poor conditions and lack resources or capacity to raise needed revenues. In order to satisfy the requirements of the acknowledgement process, many Indian tribes have sought financial backing to mitigate horrendous financial burdens associated with the process. The results have been disastrous.

The great burdens of proof and related information costs have paradoxically thwarted efforts by Indian tribes to achieve Federal recognition and retain their sovereignty.

Mr. Chairman, because of limited resources and the many benefits of recognition, the process as it is set up has also caused contention and confrontation between recognized tribes and those seeking recognition. Sad, but it is true. Some tribes have decided to pursue different alternatives. Many have directly sought recognition from Congress. Others have either merged with other petitioners, dissolved, or withdrew from the process. Still others have been involved in litigation because of disagreements between tribes and the Office of Federal Recognition.

Mr. Chairman, the bill I have introduced does not seek to remedy all of these problems. My bill proposes and provides much-needed reform in the Federal process for recognition. The underlying purpose of the bill hopefully is to establish a process that will provide accountability, transparency, and helping the tribes to get recognized.

This is not a cure-all for the problems we have encountered over the years when tribes sought recognition, Mr. Chairman. However, through legislation, I do believe it is about time that Congress take action and provide some kind of a structure and a better procedure than the way it is done right now.

I am open to any and all suggestions from any country, the Administration, and my colleagues here in the Committee to make whatever changes that are necessary to resolve this problem.

Mr. Chairman, I am not going to read the rest of my statement, but I do want to personally welcome my good friend, the gentleman from Connecticut, who is here with us. And also, the two young ladies, beautiful young ladies whom I have dealt with for the last 100 years in dealing with Indian issues: Ms. Patricia Zell, former Staff Director of the Indian Senate Indian Committee, and also Arlinda Locklear, who is here with us and will be testifying. And I look forward to their statements, and also other members of the panel that will be testifying this morning.

Again, Mr. Chairman, thank you so much for finally, finally giving a hearing to this bill that I have introduced 100 times already. Maybe 101 will be all right. But it is time that Congress finally takes action on this. And I sincerely hope, I sincerely hope that we will find a solution to this problem that has been gnawing at us for all these years.

And I again thank you, and thank Mr. Cole, for your participation and leadership in moving this bill forward. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Eni. Any other members of the Committee wish to make statements? The gentleman from California, Mr. Costa.

STATEMENT OF THE HON. JIM COSTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. COSTA. Thank you very much, Mr. Chairman. I, too, want to commend you for your efforts to bring this issue to the forefront. I think it is fitting and appropriate that this committee raise the level of review on something that I think has been a problem throughout the country for decades.

And I would like to associate my comments with those that have been made by the gentleman from American Samoa, as well as from the gentleman from Oklahoma, who have spoken with such elegance about the challenges we currently face with Native Americans, and the misdeeds, the misdeeds that have occurred for centuries by those of us upon those who were here long before the migration to North America took place. And so it is important that we remember our history.

As this legislation I hope moves forward, I want to point out two areas that will be I hope under consideration just from my own experience in California. I believe we have 108 sovereign recognized

nations in California—107 or 108—and we have a significant number that choose to be recognized. I have met with a number of them about the lengthy and difficult process that they have been engaged in with the Bureau of Indian Affairs for recognition purposes.

Certainly it is fitting and appropriate when the gentleman from American Samoa talks about the four phrases I think that probably accurately capture what has been faced by Native Americans, at least in the last two centuries. And as we embark upon this new phase, hopefully for the better, we can correct some of those misdeeds.

But I think I would be, I think I would be frustrated not to mention two other factors that I think exist here as it relates to the recognition process, which I think needs not only an overhaul, but it needs continuing oversight, as this legislation hopefully is enacted.

And that is, not only as we de-listed tribes, but as they consider this process, there is some motivation among the 23 states that have gaming that they become recognized because of the potential of becoming a gaming tribe.

Now, there is nothing wrong with that. It is legal in those 23 states. But it ought to be put up there under the elements of consideration. Because I think one of the other areas that this committee and the Congress has been negligent in is really determining how, in the 23 states in which you have full Class III gaming, how we go forward prospectively. And obviously, that would impact any Native Americans who hope to once again regain their recognition as a tribe, and how we go forward with that.

I know we have a number of entities that are actually financing some of these individual Native Americans, with the hope through their process that if, in fact, they become recognized, then they will be part of their process to establish gaming. And that brings into another issue that I think needs to be looked at.

Because in a number of the 64 sovereign nations under which, out of the 108 in California, we have an issue—and I don't know how serious it is, but I think it deserves consideration—of de-listing that is taking place within those existing tribes. Certainly as a sovereign nation they have that authority and that ability to do so. But it seems to me that it is an issue that has also been raised, along with the desire to be recognized.

So for all of the right reasons, I want to commend again the gentleman from American Samoa for his efforts with this legislation; and I hope that we look at the full aspects that are involved in this and related issues. And I want to continue to work with all the Members of this committee as this legislation goes through the process.

I want to thank you gentlemen for you efforts, and pledge to continue to work with all of you.

The CHAIRMAN. The gentleman from Rhode Island, Mr. Kennedy.

STATEMENT OF THE HON. PATRICK J. KENNEDY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF RHODE ISLAND

Mr. KENNEDY. Thank you, Mr. Chairman. I, too, want to commend the Chairman, and particularly the gentleman from American Samoa, and also associate with the remarks of the gentleman from Oklahoma who did speak enormously eloquently to this issue.

I want to ask those that are going to be testifying to keep in mind, and to the extent they can answer this question, in the course of us considering this bill. In my area of the country, many tribes are settlement tribes. In other words, they made a deal with the states in which they were recognized on the assumption that they would be subjected to the state laws. And then they became Federally recognized, and then there is this dynamic now as to whether, which is first. Are they first subject to the initial agreement that they were subjected to by the state, under which they were initially recognized by these settlement agreements? Or are they then under the Federal IGRA as Federally recognized tribes?

Clearly, obviously Federal government takes, supersedes state law, and that is the way the Supreme Court has ruled in my case, in the Tribe of the Narragansetts in Rhode Island. But that is still being contested.

And if we are going to address this issue of tribal recognition, we have to address this issue of this netherworld of tribes in limbo. Because, as the gentleman from California just pointed out, it is one thing to be recognized, but it is another thing to be treated as a sovereign tribe once you are recognized. And that has to be the bottom line. Because you can be recognized, but if you are not treated as a sovereign tribe, then what is the good of it?

And I really hope that we can nail this down, because I think it is really unfortunate that these tribes, like the one in my state, the Narragansetts, are Federally recognized, but they are being denied by the state basically their IGRA rights. And they are the only Federally recognized tribe in the country that has been denied those rights.

Anyway, with that, I yield back the balance of my time.

The CHAIRMAN. Thank you. The Chair now will recognize our first panel, composed of—oh, I am sorry. I am sorry, I didn't see you seeking recognition.

STATEMENT OF THE HON. DAN BOREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. BOREN. Mr. Chairman, it will just take two seconds. I just wanted to make a few comments.

I just wanted to thank the Chairman for holding this hearing. And I would echo my colleagues' statements about the process.

I think most of us, the questions really are about the transparency of the process, questions about timing. You know, we had a bill Mr. Shuler was working on, obviously with the recognition of the Lumbee Tribe. And as a fairly new member of this committee and a new Member of Congress, all of us wrestled with whether or not it is the role of a committee in the Congress to recognize Indian tribes, or whether it is the purview of the BIA to do that.

And I think the problem is the fact that it is taking so much time. And will this legislation alleviate that problem?

And anyway, I want to commend the gentleman from American Samoa for introducing this legislation. And I think it is very, very important. The questions that I have are, again, about the transparency.

Is it really, is there a bias at the BIA? Because I would like to take the politics out of the situation, because so many of us, for whatever reason, with each individual tribe we have our own belief and our own bias toward that tribe, and whether they should be recognized.

And it is my belief that it should be an independent group. Whether the BIA can be independent, or whether it is this commission, and not the Congress, frankly. I think it too often gets into other issues that don't really pertain to those definitions as to what a tribe really is.

So again I want to thank the Chairman for holding this hearing, and for allowing us to be part of it. Thank you.

The CHAIRMAN. Thank you. The Chair now recognizes our colleague from Connecticut, Mr. Chris Shays.

STATEMENT OF THE HON. CHRISTOPHER SHAYS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CONNECTICUT

Mr. SHAYS. Thank you, Chairman Rahall, and to Members. And thank you for the opportunity to listen to your statements. It is a true privilege to be here, and I thank the courtesy of the Chair and the Committee for allowing me to provide a perspective than may be different than what has been discussed from the dais.

First, we all want, or we all should want, a balanced and fair process. Second, if the motive is to grant recognition to all petitioners, then I am simply in the wrong place. Because I believe not recognizing legitimate tribes is a true insult; recognizing a non-legitimate applicant is also a true insult to legitimate Indian tribes.

I make the point to you, you are not recognizing Indians; you are recognizing a tribe, a government, and, as you know, you are creating an independent sovereign nation that does not have to pay taxes; can play by its own rules within these United States. So this is truly a solemn obligation.

Currently there are seven active petitions that are currently being worked on by the BIA. Seven. Ten ready and waiting petitions, completed petitions BIA has not yet begun to work on. So you have 10 people waiting who should not have to wait.

You have 79 incomplete petitions, petitions that are lacking all the information the BIA needs to begin work on it. And you have 147 letters of intent, letters informing the BIA of a tribe wishing to file a petition for recognition.

In the appropriations process, we provided a measly $1.9 million to the Bureau of Indian Affairs. That is an absurdity. And yet everyone here says we want, and we want the process to work better. But you aren't providing the money necessary to have the BIA hire the people to do the research to be current. And yet you blame the BIA.

Don't blame the BIA. Don't blame the regulations. I think, speaking frankly, blame ourselves. Just appropriate the dollars necessary to get the BIA to do its work.

Now, what the BIA is trying to determine is, is there social, political, economic continuity pre-Colonial times. That is the regulation.

Now, if you decide you want to change the regulations and make it a different requirement, you have every right to do that. And maybe you should, as long as it is fair and balanced.

I would take issue with the fact that all petitioners want to be Federally recognized tribes because of gambling. Conversely, I would take issue with anyone who suggested some are not making that request because of Indian gaming. So it is a mixture, and you need to sort that out.

We have had far more applicants since Indian tribes have had that source of revenue. Out West it is a modest source of revenue. Where my colleague from Rhode Island and I come from, it is truly a license to print money. And that is why you have a significant financial backing of one tribe in Connecticut, the Golden Hill Paugussetts, being funded by a developer who, when the tribe was denied by the BIA, happened to make a contribution of $300,000 to a fundraiser for $300,000 under the previous Administration for someone very important in that race—Hillary Clinton. And all of a sudden there was a resurrection by the Department of Interior in re-examining that application.

We have another applicant who is being funded by a billionaire. It is because they want to realize the significant benefits of Indian gaming. They are not in this for altruistic reasons for the Indians. That is a fact. They are there to make money. So all of this needs to be part of the record. And I thank you for giving me this opportunity.

You may decide that the regulations are not fair. Change the regulations, but why kick it out of the BIA? Just fund them properly. Or you may decide that you want to take it out of the Department of Interior.

But in order to determine the legitimacy of each application, because some will be legitimate and some won't be, you need experts. If you are going to depend, and I wrote this down, take the politics out of the process. That is what we want to do, I agree with you.

Well, the BIA, the professionals, aren't the politicians. The politicians are the potential appointees to the Interior Department, and the Administration itself, whether it is Republican or Democrat.

I am really scared big time with legislation that puts the politics in. And in my judgment, the politics comes in when you take the professionals out. The politics comes in when you don't fund the Commission.

So you have a lot of ways you can go, I ill just summarize. You can properly fund the BIA, and I don't think we will have the backlog. Or you can set up a separate commission.

And I don't inherently have a problem with that, if they are appointed in a way that tries to take the politics out. But has to be based not on a political decision, but can you meet the criteria?

And then, as my colleague from American Samoa has pointed out, you could just change the requirements to be what you perceive to be fair and balanced.

And I thank you for giving me the opportunity to make this statement to you. I appreciate it a great deal.

[The prepared statement of Mr. Shays follows:]

Statement of The Honorable Christopher Shays, a Representative in Congress from the State of Connecticut

Thank you, Chairmen Rahall and members, and thank you for the opportunity to listen to your statements. It is a true privilege to be here, and I thank the courtesy of the chair and the committee for allowing me to provide a perspective that may be different than what has been discussed from the dais.

First, we all want, or we all should want, a balanced and fair process. Second, if the motive is to grant recognition to all petitioners then I'm simply in the wrong place. Because I believe that not recognizing legitimate tribes is a true insult. Recognizing a non-legitimate applicant is also a true insult to legitimate Indian tribes.

I make the point to you, you are not recognizing Indians, you are recognizing a tribe, a government, and as you know you are creating an independent sovereign nation that does not have to pay taxes and can play by its own rules within these United States. So this is truly a solemn obligation.

Currently there are seven active petitions being worked on by the BIA. Seven. There are 10 petitions ready and waiting—complete petitions—that the BIA has not yet begun to work on. So you have 10 tribes waiting that should not have to wait.

You have 79 incomplete petitions, petitions that are lacking all the information the BIA needs to begin work on them, and you have 147 letters of intent, letters informing the BIA of a tribe wishing to file a petition of recognition.

In the appropriations process we provided a measly $1.9 million to the Bureau of Indian Affairs. That's an absurdity. And yet everyone here says we want the process to work better. But you aren't providing the money necessary to have the BIA hire the people to do the research, to be current, and yet you blame the BIA. Don't blame the BIA. Don't blame the regulations. I think, speaking frankly, we should blame ourselves. Just appropriate the dollars necessary to get the BIA to do its work.

Now what the BIA is trying to determine is, does their social, political and economic continuity date to pre-colonial times. That's the regulation. If you decide you want to change the regulations and make a different requirement, you have every right to do that. And maybe you should as long as it's fair and balanced.

I would take issue with the fact that all petitioners want to be federally recognized because of gambling. Conversely I would take issue with anyone who suggests that some are not making that request because of Indian gambling. So it's a mixture and you need to sort that out.

We've had far more applicants since Indian tribes have had that source of revenue. Out West it is a modest source of revenue. Where my colleague from Rhode Island and I are from, its truly a license to print money, and that's why you have, a significant financial backing of one tribe in Connecticut, the Golden Hill Paugussetts, being fronted by a developer, who when the tribe was denied be the BIA, happened to make a contribution of $300,000 to a fundraiser under the previous administration for somebody important in that race, Hillary Clinton, and all of a sudden there was a resurrection by the department of interior in reexamining that application.

We have another applicant that is being funded by a billionaire. It is because they want to realize the significant benefits of Indian gambling. They are not in this for altruistic reasons for the Indians. That's a fact. They are there to make money. So all of this needs to be part of the record, and I thank you for giving me this opportunity.

You may decide that the regulations are not fair. Change the regulations. But why kick it out of the BIA? Just fund them properly. Or you may decide, that you want to take it out of the Department of Interior, but in order to determine legitimacy of each application, because some will be legitimate and some won't be, you need experts.

If you are going to depend, and I wrote this down, "take politics out of the process" and that's what we want to do. I agree with you. Well the BIA, the professionals aren't the politicians. The politicians are the potential appointees to the Interior Department, and the administration itself, whether it is Republican or Democratic.

I'm really scared big time with legislation that puts the politics in, and in my judgment the politics come in when you take the professionals out. The politics come in when you don't fund the professionals.

So you've got a lot of ways you can go, and I'll summarize: you can properly fund the BIA and I don't think we'll have the backlog. Or you can set up a separate commission, and I don't inherently have a problem with that, if they are appointed in a way that tries to take the politics out. The decision has to be based not on politics but on whether applicants meet the criteria and then as my colleague from American Samoa has pointed out, you could just change the requirements to what you perceive to be fair and balanced.

Thank you for the opportunity to make this statement. I appreciate it a great deal.

The CHAIRMAN. The Chair thanks the gentleman from Connecticut for his interesting testimony and perspective. And I am going to yield my time to the gentleman from Oklahoma if he wishes to ask questions.

Mr. COLE. Just quickly, because I think the gentleman from Connecticut made, as always, very good points. But is it just a funding issue? Or in your opinion—can I just call you Chris? My goodness, I almost said Mr. Shays.

Mr. SHAYS. Yes.

Mr. COLE. Chris, walk through with me, from you standpoint, the problems you see, other than just funding. Is it simply a matter of us writing a check? Or do you see things in the process of the——

Mr. SHAYS. Well, I can't get by the funding because I have spoken to the BIA over a course of many years. The staff is overworked and undermanned, and that is a fact. They have very few people.

$1.9 million is all we appropriate for them to go through these applications? When they have seven active, they have 10 pending? They don't have the people to do it.

And yet then we criticize people, the Bureau, for not doing it. They don't have the money.

Mr. COLE. Let us just say you could write whatever check you wanted.

Mr. SHAYS. You would hire more people. You would——

Mr. COLE. Well, who would they be? And let me ask you this, too.

Mr. SHAYS. Sure.

Mr. COLE. How long do you think would be a reasonable time? These really are tough issues, I grant you that, because frankly, the history involved in each tribe is very different. And trying to establish collective identity, when in some cases frankly that identity was hidden, because if it wasn't hidden, the tribe wouldn't have been able to continue to exist. I mean, literally.

Mr. SHAYS. Well, then, you may want to change the regulations. You may want to say if you are an Indian, you can get granted sovereignty, but you may not be a tribe.

Mr. COLE. No, I agree with that. We have no point of disagreement here at all. I am just asking you, I mean, you have obviously wrestled and thought about this issue.

It is pretty easy, a tribe the size of mine, 42,000 people can establish a continuous collective existence. That is easy. It is tougher with the smaller tribes. I am just asking you——

Mr. SHAYS. I can answer your question. You could put timelines. You could put timelines, provided the timeline begins when the ap-

plicant says this is my completed application, and you could say two years, you could say three, you could say four years. You could then make sure they were properly staffed.

Now, what may occur, and what has occurred, is that the tribe starts getting the message that they don't properly meet the standard. And then they back off and pull back their application. Or they may be asked to get information which may take them two or three years to try to assemble.

So it is not all the BIA's fault. It may be that simply there is information that, if they acted on that application based on the information, they would deny it. It is not unlike the FDA. You sometimes get the pharmaceutical companies coming in to the FDA, and then they have some bad tests and they pull back their application. Then they blame the FDA for not giving them, you know, taking too long.

Mr. COLE. Do you still recognize, I would assume—I don't know, I am asking this question—the legitimacy of Congressional action? We still retain obviously the ultimate right as the Congress to do the recognition process. Although I think most of us would prefer that that be settled before it gets here. But you are not interested in——

Mr. SHAYS. Congress has the inherent right to bypass the BIA and make me a tribe if it wants to. It has that right. It would be pretty stupid.

Now, the problem is, when I have to vote on it, what do I know about that tribe, when I am voting on the House Floor? What do I know? Am I going to depend on the elected official in that district, who has a political reason, as well? Or do I want to depend on professionals who can tell me that they have reached certain standards that we, Congress, have a right to set?

So to answer your question, we can set no regulations and recognize them; we can have regulations and ignore them, and accept a tribe. But the logical thing, to get the politics out of it, in my judgment, is have fair regulations, whatever they are. And then have everybody play by those rules. Maybe once in a while you have an exception. Maybe once in a while. And you then come out to the House Floor and say this is why there is an exception; because, you know, there was information that is simply not attainable because they were so obliterated over a course of time. You know, maybe on those cases you could.

Mr. COLE. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Are there other Members who wish to ask questions? Mr. Faleomavaega?

Mr. FALEOMAVAEGA. I just want to say to my good friend [speaks in Fijian].

Mr. SHAYS. [Replies in Fijian].

The CHAIRMAN. Thank you, Mr. Chairman.

Mr. SHAYS. That is a little Fijian. He is the only one I can speak with.

The CHAIRMAN. OK. I was getting ready to respond, but I guess I had the wrong language.

Mr. SHAYS. We said you are a magnificent Chairman, and we appreciate the good work you are doing.

[Laughter.]

The CHAIRMAN. I knew I was getting ready to respond.

Mr. FALEOMAVAEGA. Mr. Chairman, will the Chairman yield?

The CHAIRMAN. Yes, your time.

Mr. FALEOMAVAEGA. My good friend was a former Peace Corps volunteer on the Islands of Fiji, and we were just speaking in the Fijian language. So in case some of our friends don't know where Fiji is, it lies about 600 miles directly south of my islands, which is about 2300 miles directly south of Hawaii. So if that gives you a sense.

And by all means, I just wanted to share with my colleagues that we were talking about some of the history. Why is an American Samoan being the one introducing this legislation? It is interesting to note, Mr. Chairman, that an archaeologist did a DNA study of one of the ancient villages on my island. They called it chicken bones; I guess now they are making studies of chicken bones.

Well, they found that these same chicken bones are found in Chile. So some Samoan must have gone over to Chine, ate chicken over there, came back, and——

[Laughter.]

Mr. FALEOMAVAEGA. I just wanted to share that with you. But I do want to share Chris' concerns. They are very legitimate. And certainly if in the process, that some of these petitioners have motives only for purposes of gaming, then of course they are not to be recognized, or even given the time of day.

Mr. SHAYS. Will the gentleman yield?

Mr. FALEOMAVAEGA. Yes.

Mr. SHAYS. If they are a legitimate Indian tribe, and they also want gambling, then they have every right to want it and deserve it. I want to be on record with that.

Mr. FALEOMAVAEGA. I thank the gentleman for that.

Mr. SHAYS. So there is nothing wrong with them wanting to have an opportunity to have resources to help their tribe, and so on.

Mr. FALEOMAVAEGA. I can only cite, Mr. Chairman, the experience that I have had for the last 20 years. In hearings after hearings after hearings we had with the Lumbee Indians. And with all due respect to my good friend from North Carolina, Mr. Shuler, unbelievable the testimony that we have had to take from some of the members of this tribe, Mr. Chairman, where they have had to examine their teeth.

Now, this is out of the administration process. They had to examine their teeth, if their teeth looked like Indians. And I would say what in the world are we going through? But these are some of the things that are cited, I say just utterly ridiculous, in terms of this is how far-fetched the process has gone in determining what an Indian should be, or what he or she looks like.

And again I want to thank my good friend from Connecticut and his concerns. And we will certainly consider that, members of the Committee, and make sure that we do have a legitimate effort moving forward and seeing that the process—here is what I hope for the process.

I think two years is not unreasonable, compared to the 20 years that some of these tribes have had to endure in seeking recognition. That is basically what I think the process—and not to guarantee, also, that they become recognized, but that the process be-

comes transparent. I think more than anything that is what we are seeking here.

Again, I thank my good friend for his concerns.

Mr. SHAYS. Thank you.

The CHAIRMAN. Gentleman from Rhode Island, Mr. Kennedy?

Mr. KENNEDY. Yes, I appreciate your saying that about the legitimacy of tribes being able to do that, because having their own ability to have financial wherewithal if they are legitimate, because that is a good point to make.

I mean, there is nothing wrong with having money if they have a legitimate, you know, claim to being—I mean, the Narragansetts, what really were the biggest knocks against them was that they, it was exactly what you said. They, the Rhode Islanders, wanted the tribe to have the casino, but they didn't trust Harrod's coming in and financing the deal, because they thought Harrod's was going to get all the money. That was the bottom line.

And that was what killed the deal for the Narragansetts, ironically. So it was the exact opposite. It was exactly what you were pointing out.

If this thing had been all about the Narragansetts being able to get this deal, this thing would have passed, you know, three to one for the Narragansetts. It got killed only because the people of Rhode Island felt that there was something asunder; that some corporate gaming folks were going to get the benefit of the deal, not the Narragansetts.

So I appreciate what you are saying, I think it is well founded. We have just got to make sure that we do make it very transparent and on the up and up, so that the tribe ends up being the beneficiary of this.

The CHAIRMAN. The Chair recognizes Members in the order in which they came in, so Mr. Boren will be next.

Mr. BOREN. Thank you, Mr. Chairman. I would yield to Heath, he is kind of bigger than I am.

But anyway, quick question. Going back to politics. We talked a little bit about this bill, and one of the provisions of the bill that I was reading through says that the Commission will consist of three members appointed by the President. I can be corrected if I am wrong, but let us say, whether it is Hillary Clinton or George Bush, you know, you can have three Democrats or three Republicans, do you think that this commission should be separated between one Democrat, one Republican, and maybe an Independent?

And being someone who is a bipartisan Member of this body, what would be your opinion as to the makeup of this commission if you were drawing up the commission?

Mr. SHAYS. First I would want to have, I might suggest that it be five, just so that you could have Indian representation from tribes that have been clearly identified for a long time. Because I think they will have a sensitivity to respect the legitimacy of the process.

I would think they would have to be Senate-approved. And I would think that you would make sure that they, you do everything possible to insulate them from a political, and even financial—I would say frankly you would pay them a significant amount of money. Because I can't emphasize, in some parts of the country,

when a tribe is recognized they literally have a license to print money. We are talking about $1 billion a year in some tribes. It is a huge amount of money. Not out West, but out East.

Mr. BOREN. I appreciate that. And going back to the commentary of what actually happens when you have a recognition process of this committee, I would say everyone on this committee has been very thoughtful about, whether it be the Lumbee issue or any other issue.

But when you get into the full Congress and you have Members who frankly aren't as focused on these issues of tribal recognition, I won't say which Members, but you hear the conversations on the Floor, you know. They start talking about individual Members who are carrying this bill, and well, I like that person, so I guess I will go with that tribe. That is literally how these decisions are being made, and that is the wrong way that they should be made. They should really be made by people who understand the process, and understand what it really means to be a sovereign nation.

And so I appreciate you coming and testifying before the Committee. Thank you.

Mr. SHAYS. Thank you.

The CHAIRMAN. The gentleman from North Carolina, Mr. Shuler.

Mr. SHULER. Mr. Chairman, thank you. I just want to clear up, in all due respect, this Congress. The reason the Lumbees have never gone through the recognition process is because it is what has happened in the Congress actually stopped that recognition process. It wasn't the BIA, it was the body of Congress.

And if we are going to have—and you know, I have grown up in the mountains. I mean, math is pretty, you know, it is a basic education process. If you have three people trying to make a decision versus an entire organization, I just don't know how you are going to increase that backlog and get it a lot faster through the process. Three people making a decision of all the work and the research that needs to be done——

Mr. SHAYS. No, no. If I could, they have to have a sizable staff, far more than what—I envision that you would basically take the BIA folks who do recognition, and you move them under this commission. Whether they are directly still under the Department of Interior, they would have to provide extensive data to this commission.

Mr. SHULER. Well, that is what I would hope. I mean, really, we have to take the politics out of it, without a doubt. And I commend you for your work. And my friend from Oklahoma, Mr. Boren, we do. I mean, we are all caught in the middle of it in so many different ways, we understand the processes.

But outside of this committee, our Members outside this committee don't understand the process and the problems that we have had to deal with, and what has happened in the history of our country.

And so I commend everyone for their hard work and their dedication just finding the right, putting the right information together, that we can do the right thing this time and allow people to go through the process. That is why I offered my amendment for the Lumbees to actually go through the process and have that opportunity to be recognized, if so.

Mr. Chairman, I yield back.

The CHAIRMAN. The Chair thanks the gentleman from North Carolina. Any other Members wishing to be recognized?

[No response.]

The CHAIRMAN. If not, Chris, thank you.

Mr. SHAYS. Thank you again for this opportunity.

The CHAIRMAN. Thank you for your time and patience.

Mr. SHAYS. Thank you for your patience.

The CHAIRMAN. Our next panel is composed of the Hon. Carl J. Artman, the Assistant Secretary for Indian Affairs, Bureau of Indian Affairs, Washington, D.C.

Mr. Secretary, we welcome you. Thank you for your patience with us this morning, and you may proceed as you desire.

We do have your written testimony, and without objection, it will be made part of the record as if actually read. And you may proceed.

STATEMENT OF CARL J. ARTMAN, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, BUREAU OF INDIAN AFFAIRS, WASHINGTON, D.C.

Mr. ARTMAN. Good morning, Mr. Chairman and members of the Committee. And thank you for holding this hearing today.

As you stated, I do wish to submit the full statement for the record, but I will make some short comments regarding this hearing, the subject of this hearing.

My name is Carl Artman; I am the Assistant Secretary for Indian Affairs at the Department of the Interior. And to my right is Lee Fleming, the Director of the Office of Federal Acknowledgement.

Thank you for the opportunity to present our views on H.R. 2837, the Indian Tribal Federal Recognition Administrative Procedures Act. The Department supports the efforts to improve the acknowledgement process, and is, in fact, taking steps on its own accord to improve the process. However, the Department does not support the current bill, as written.

The Federal acknowledgement process may need reform; however, this legislative approval doesn't address at least six provisions that we would view necessary if Congress wishes to legislate the criteria for acknowledgement. And these necessary provisions would include the definition in the process as to how the petition will be reviewed:

Provide detailed standards of proof, as in 83.6(d) and (e) of the 25 CFR, which mandates that a reasonable likelihood standard of proof be used. Clarify the Privacy Act protections and Freedom of Information Act exemptions. Provide guidance as to how to address the splintering of petition groups, and the subsequent submission of letters of intent and documented petitions by factions of petitioning groups. Provide clarifications on the sunset rule, and provide the definition of the administrative record for purposes of judicial review.

This legislative proposal replaces the Secretarial decision-making authority with a decision-making body prone to political influence. The legislation does not provide criteria to ensure the appointed

commission members have the requisite ability or minimum skillset to make determinations on individual applications.

It doesn't address the institutional knowledge of the Department of the Interior on these matters, and lowers the bar for acknowledgement by requiring the showing of continued tribal existence only from 1900 to present, rather than from the first sustained contact with Europeans, as is in the current standard.

The Department does, however, support Congressional affirmation of the Department's authority to give clear Congressional direction as to what the criteria should be.

Congressional ratification of the acknowledgement standards would speed up the process, because the Department would no longer have to spend time and resources defending and preparing for litigation challenging its authority to acknowledge tribes or the specific criteria used to do so.

Courts have upheld the Secretary's authority in this area, and Congressional support would preclude further challenges.

The Federal acknowledgement process set forth in 25 CFR Part 83, procedures established in that an American Indian group exist as an Indian tribe, allows for uniform and rigorous review necessary to make informed decisions on whether to acknowledge a petitioner's government-to-government relationship with the United States.

The regulations require groups to establish that they have had a substantially continuous tribal existence, and have functioned as an autonomous entity throughout history until the present. A petitioning group must demonstrate that they meet seven mandatory criteria with a reasonable likelihood of the validity of the facts relating to that criteria.

We are considering several actions to expedite and clarify the Federal acknowledgement process, and anticipate that these clarifications would eliminate many of the backlogs and delays that have been discussed this morning. Among the proposed improvements that are in the written testimony are technological improvements to the process. The possibility of moving applications to the front of the ready and waiting for active consideration list, and streamlining various OFA processes.

We are also considering various ideas for improving the Federal acknowledgement process by amending regulations. These improvements would help to process and complete all applications within a set timeframe. These include hiring or contracting additional staff; establishing a timeline for responding to each step of the regulations to ensure that the petitions move along; issuing negative proposed findings or final determinations based on a single criterion, allowing for an expedited negative proposed finding if the petitioner has failed to adequately respond to a technical assistance review letter, or refuses to submit additional required materials in response to this review; and moving the first sustained contact requirement of 25 CFR 83.7(b) and (c) for some cases to start at the point when that area became part of the United States, or to 1776, to ease the burden on the petitioners and reduce the time-consuming research into the Colonial histories.

The acknowledgement of continued existence of another sovereign entity is one of the most solemn and important responsibil-

ities delegated to the Secretary of the Interior. Federal acknowledgement enables that sovereign entity to participate in Federal programs for Indian tribes, and acknowledges a government-to-government relationship between an Indian tribe and the United States. It confers unique privileges and immunities upon that government, and may yield substantial financial support from the Federal government for the operation of that tribe's government services.

Any opportunity to alter the existing legislative or administrative options available to petitioning groups must uphold this solemn responsibility with well-informed, endurable processes that anticipate the needs of all stakeholders.

Thank you, Mr. Chairman, Committee, for the opportunity to provide my statement on the Federal acknowledgement process, and I will be happy to answer any questions that the Committee may have.

[The prepared statement of Mr. Artman follows:]

Statement of Carl J. Artman, Assistant Secretary—Indian Affairs, U.S. Department of the Interior

Good morning, Mr. Chairman and Members of the Committee. My name is Carl Artman, and I am the Assistant Secretary-Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to present our views on H.R. 2837, the Indian Tribal Federal Recognition Administrative Procedures Act. The Department supports the efforts to improve the acknowledgment process embodied in H.R. 2837, however, as discussed below, the Department opposes the bill as written.

My testimony will address the current process and several proposals currently under consideration to improve the process. I will then turn to the legislation.

Implications of Federal Acknowledgment

The acknowledgment of the continued existence of another sovereign entity is one of the most solemn and important responsibilities delegated to the Secretary of the Interior. Federal acknowledgment enables that sovereign entity to participate in Federal programs for Indian tribes and acknowledges a government-to-government relationship between an Indian tribe and the United States.

These decisions have significant impacts on the petitioning group, the surrounding communities, and Federal, state, and local governments. Acknowledgment carries with it certain immunities and privileges, including partial exemptions from state and local criminal and civil jurisdictions, and the ability of newly acknowledged Indian tribes to undertake certain economic opportunities.

For instance, the Mashpee Wampanoag Indian Tribal Council recently received a positive decision under the Federal acknowledgment process and is now eligible to receive Federal health and education services for its members, to have the United States take land into trust that will not be subject to state taxation or jurisdiction, and to operate a gaming facility under the Indian Gaming Regulatory Act if it satisfies the conditions of that Act.

Background of the Federal Acknowledgement Process

The Federal acknowledgment process set forth in 25 C.F.R. Part 83, "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe," allows for the uniform and rigorous review necessary to make an informed decision on whether to acknowledge a petitioner's government-to-government relationship with the United States. The regulations require groups to establish that they have had a substantially continuous tribal existence and have functioned as autonomous entities throughout history until the present. Under the Department's regulations, petitioning groups must demonstrate that they meet each of seven mandatory criteria. The petitioner must:

(a) demonstrate that it has been identified as an American Indian entity on a substantially continuous basis since 1900;
(b) show that a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;

(c) demonstrate that it has maintained political influence or authority over its members as an autonomous entity from historical times until the present;
(d) provide a copy of the group's present governing document including its membership criteria;
(e) demonstrate that its membership consists of individuals who descend from an historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity, and provide a current membership list;
(f) show that the membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe; and
(g) demonstrate that neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

A criterion is considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. A petitioner must satisfy all seven of the mandatory criteria in order for the Department to acknowledge the continued tribal existence of a group as an Indian tribe.

The Federal acknowledgment process is implemented by the Office of Federal Acknowledgment (OFA). OFA is currently staffed with a director, a secretary, four anthropologists, three genealogists and four historians. A team composed of one professional from each of the three disciplines reviews each petition. Additionally, OFA has a contract that provides for three research assistants and three records management/Freedom of Information Act specialists, as well as one Federal acknowledgment specialist.

OFA's current workload consists of seven petitions on active consideration and ten fully documented petitions that are ready, waiting for active consideration. The administrative records for some completed petitions have been in excess of 30,000 pages. Two hundred forty-three other groups are not ready for evaluation because they have submitted only letters of intent to petition for federal acknowledgment as an Indian tribe or partial documentation.

The Interior Board of Indian Appeals (IBIA) just affirmed the negative final determinations for the Nipmuc petitioning groups 69A and 69B, but referred to the Secretary of the Interior issues as possible grounds for reconsideration. In addition, there are two pending lawsuits seeking review of acknowledgment decisions.

Proposed Improvements to the Federal Recognition Process

We are considering several actions to expedite and clarify the Federal acknowledgment process. Some of these would require changes to internal workload processes to eliminate backlogs and delays and some would require amendments to the regulations.

For example, we plan to distribute revised guidelines so petitioners and interested parties know what the OFA review teams expect and what the regulations require in order to provide more clarity in submissions. Additionally, to speed up the review, the OFA could recommend an application form for petitioners to use to point to the specific evidence in their submission that meets the criteria for specific time periods. OFA could also recommend petitioners present their genealogies in a common format used by genealogists (GEDCOM) and provide membership lists in an electronic database.

Once a petition has been received, the genealogist, historian and anthropologist in a research team evaluate a petition concurrently. We are considering changing this to a review in stages, with the genealogist first, followed by the historian and anthropologist. The genealogist's advance work, prior to the petition going on the "active" list, would prepare the way for the other professionals during the active review process.

The OFA plans to develop lists of common questions and procedures that the research team or new research staff will use to speed up the evaluations and note the potential deficiencies in the petitions.

Further, OFA is looking at the possibility of moving to the front of the "Ready, Waiting for Active Consideration" list groups that can show residence and association on a state Indian reservation continuously for the past 100 years or groups that voted for the Indian Reorganization Act (IRA) in 1934, if the groups appear to have met subsections (e), (f), and (g) of 25 C.F.R. § 83.7.

Limiting the number of technical assistance reviews and imposing a time period for petitioner response to a technical assistance review letter would also move petitions along faster. We will attempt to create more concise decision documents to speed the process and improve the public's ability to understand the decision.

The Department also plans to post decisions and technical assistance letters on its website for public access. These steps would free OFA to spend more time on review of the petitions and allow for greater transparency to the general public.

Technological improvements would also speed the OFA's task. We plan to revise the Federal Acknowledgment Information Resource (FAIR) computer database. The final version of FAIR 2.0 will also allow for electronic redaction of documents under the Freedom of Information and Privacy Acts. In addition, revisions to the FAIR computer database would allow faster work. FAIR provides OFA researchers with immediate access to the records, and the revised version will speed up the indexing of documents and allow for more data review capabilities, allowing OFA researchers to make efficient use of their time. The Department plans to purchase a heavy duty scanner, new computers and printers, establish an internet connection and software for faster scanning and work.

Our goal is to improve the process so that all groups seeking acknowledgment can be processed and completed within a set timeframe. We are considering various proposals for improving the Federal acknowledgment process. Several options we may consider include:

- hire or contract additional staff;
- establish a timeline for responding to each step of the regulations to ensure that petitions move along;
- issue negative proposed findings or final determinations based on a single criterion to speed work and maximize researcher time use;
- allow for an expedited negative proposed finding if a petitioner has failed to adequately respond to a technical assistance review letter or refuses to submit additional required materials in response to this review; or
- move the "first sustained contact" requirement of 25 C.F.R. § 83.7(b) & (c) for some cases to start at the point when that area became a part of the United States or at the inception of the United States in 1776 to ease the burden on petitioners and reduce time-consuming research into colonial histories.

The Indian Tribal Federal Recognition Administrative Procedures Act

The stated purposes of H.R. 2837 include ensuring that when the United States acknowledges a group as an Indian tribe, that it does so with a consistent legal, factual and historical basis, using clear and consistent standards. Another purpose is to provide clear and consistent standards for the review of documented petitions for acknowledgment. Finally it attempts to clarify evidentiary standards and expedite the administrative review process for petitions through establishing deadlines for decisions and providing adequate resources to process petitions.

While we agree with these goals, we do not believe H.R. 2837 achieves them. As such, and for the reasons discussed here, we opposed the legislation.

First and foremost, we object to the provisions within H.R. 2837 that create an independent commission tasked with making acknowledgement decisions, thus removing that authority from the Department of the Interior. Historically, the Department has had the authority, and the primary responsibility, for maintaining the trust relationship with Indian tribes, as well as the government's expertise and institutional knowledge on these issues. Moreover, the Department of Justice has indicated there are constitutional concerns with the appointment of members of the commission.

We are also concerned that H.R. 2837 would lower the standards for acknowledgment by requiring a showing of continued tribal existence only from 1900 to the present, rather than from first sustained contact with Europeans as provided for in 25 CFR section 83.7(b) and (c). Finally, the legislation, as drafted, could result in more limited participation by parties such as states and localities than provided for in the Department's regulations.

We want to acknowledge several provisions of H.R. 2837 that we view positively. For example, the bill would establish the criteria for acknowledgment through legislation, rather than through regulation. The Department supports this change as a means of affirming the Department's authority and giving clear Congressional direction as to what the criteria should be.

In addition, Congressional ratification of acknowledgment standards would speed up the process because the Department would no longer have to spend time and resources defending litigation challenging its authority to acknowledge tribes or the specific criteria used to do so. While several recent court decisions have upheld the Secretary's authority in this area, Congressional support would preclude further challenges.

The Administration is still reviewing other provisions of the bill and reserves the right to comment on these provisions at a later time.

Conclusion

We recognize the interest of the Congress in the acknowledgment process, and are willing to work with the Congress on legislative approaches to the Federal acknowledgment process. We believe that any legislation created should have standards at least as high as those currently in effect so that the process is open, transparent, timely, and equitable.

Thank you for the opportunity to provide my statement on the Federal acknowledgment process. I will be happy to answer any questions the Committee may have.

The CHAIRMAN. Before proceeding, the Chair wants to welcome to our full committee today the gentleman from Louisiana, Mr. Charlie Melancon. Without objection, I would like for him to be allowed to sit at the dais and participate in the hearings. We welcome you, Charlie.

Mr. Artman, you testified that the Department of Justice, and I quote, "has indicated there are Constitutional concerns with the appointment of members of the commission" in H.R. 2837.

Now, I realize these are probably not your words, but the Committee takes the Constitution very seriously, as the gentleman from Michigan, Mr. Kildee, is so prone to point out. And I find it odd that the Department of Justice would indicate such a thing without explaining in detail the problem.

So my question is, can you enlighten the Committee on this potential problem?

Mr. ARTMAN. Chairman Rahall, in my discussions with the Department of Justice, they are still developing that statement. And I would be happy to get that to you when it is complete.

As has happened before in this committee and with the Department of Justice, the Department of Justice does weigh in on these Constitutional matters. And we have seen it before in even legislation with the Hawaii Recognition Bill, as well.

The CHAIRMAN. Like OMB likes to weigh in on budgetary matters.

Mr. ARTMAN. As would be expected.

The CHAIRMAN. We appreciate that, thank you. We do appreciate your getting that information to us at a later time.

Mr. ABERCROMBIE. Mr. Chairman, will you yield?

The CHAIRMAN. Yes, I will be glad to yield.

Mr. ABERCROMBIE. I am not quite sure why you brought up the Native Hawaiian Bill. What did you mean?

Mr. ARTMAN. Well, just that the Department of Justice has weighed in on the Constitutionality of that, as well. This isn't——

Mr. ABERCROMBIE. You said it was developing some.

Mr. ARTMAN. I am sorry?

Mr. ABERCROMBIE. You referenced that. That has been going on for years.

Mr. ARTMAN. Yes. I only referenced it as the practice, Mr. Abercrombie.

Mr. ABERCROMBIE. Well, isn't that, then, just a commentary, a somewhat enlightening commentary, on the necessity of this bill? Is the Department of Justice so bereft of capacity to come to, to make decisions, that it would take years to do this?

Mr. ARTMAN. No. They were looking at this particular bill, sir.

Mr. ABERCROMBIE. What is taking them so long?

Mr. ARTMAN. I don't know, sir.

Mr. ABERCROMBIE. Well, do you think it is a good idea to have something take so long?

Mr. ARTMAN. Well, if you are talking about the Department of Justice review, I don't want to put myself in the shoes of the Department for answering that question. They have their processes for doing——

Mr. ABERCROMBIE. Well, you referenced them, though.

Mr. ARTMAN. Yes, I did.

Mr. ABERCROMBIE. Do you think there should be a time certain? Doesn't this bill call for time-certain decision making?

Mr. ARTMAN. Well, in the acknowledgement process, yes, it does. But I think what we are talking about here, Mr. Abercrombie, is the Department of Justice's review of this particular legislation, and the Constitutionality of the commission appointment.

Mr. ABERCROMBIE. How long do you think that is going to take?

Mr. ARTMAN. I don't know.

Mr. ABERCROMBIE. Should we postpone making a decision on this bill until the Department of Justice decides that we can move forward legislatively?

Mr. ARTMAN. That is not something that I can speak to, sir. That is within your control, sir. Thank you.

The CHAIRMAN. The Chair thanks the gentleman from Hawaii.

Mr. Secretary, you testified that you plan to distribute revised guidelines so the petitioners involved will know what is expected of them. How were these revised guidelines put together? And did the Department consult with the petitioners, Indian tribes, or other interested parties?

Mr. ARTMAN. The proposed guidelines. Let me just run through what some of those proposed improvements might include. There is a plethora of them, and we hope to have a final document that we can review and share with people in a number of weeks.

But some of the issues that we would address are developing a policy for addressing splintered groups. Right now, in many of the petitioners that are in the, well, the 17 that were mentioned earlier, there have been a number of splinters in the groups. And you have essentially created additional tribes in that same process, seeking the same recognition, using the same record. And we don't have a policy for dealing with that.

We are looking at potentially coming up with new forms to both deal with the application process, so there is a consistency in the information, as well as submitting the genealogical information on a consistent form and in a consistent method.

Also staging reviews, and looking at moving up petitioners on the ready list if they have been living on a state reservation for 100 years, or if they have voted for the Indian Reorganization Act in 1934. Limiting the technical assistance reviews so as to speed up the process and bring some finality to this stage.

More concise decision documents. Expedited negatives, both under the criteria, and if there is no response to the technical assistance letters.

In looking at whether or not, and how we roll these out, I brought these up, I have brought them up in forums such as this and in other speeches, and have invited people to participate.

When looking at the consultation process, the question becomes with whom do you consult. Right now the Executive Order on Consultation looks at Federally acknowledged tribes, but we are dealing with petitioners. We could consult with Federally acknowledged tribes, but then who are the tribes that are impacted by that? These are things that we are going to be reviewing in the upcoming weeks, when we have a final document that we can work with.

The CHAIRMAN. So as of yet, you have not consulted with the Indian tribes or the petitioners.

Mr. ARTMAN. We have not consulted with any of the Federally acknowledged tribes. No, we have not.

Mr. FALEOMAVAEGA. Would the Chairman yield?

The CHAIRMAN. Yes, I will yield.

Mr. FALEOMAVAEGA. I have a quick question to Mr. Secretary.

For 29 years, how many times have you made revisions of these regulations?

Mr. ARTMAN. We had the revisions in 1994.

Mr. FALEOMAVAEGA. That was the only time that you made revisions?

Mr. ARTMAN. That is the most, the largest amount of revisions were in 1994.

Mr. FALEOMAVAEGA. It seems from what I hear from you, Mr. Secretary, man, it is a whole revamping of the process, just the regulatory process itself that you just shared with the Committee this morning. And my question was that it sounds like you constantly are making revisions of the process. And this is what I am a little concerned about.

Mr. ARTMAN. No. And I understand your concern, sir, and that is maybe a moving target that the petitioners may not understand what they have to adhere to. But that isn't the case.

And we are going to be dividing up any changes we make into regulatory and guidelines, and there are even some we develop that may require legislative action.

What we are going to be coming out with in a number of weeks is going to be guidelines. That is going to be affecting the process under which the current regulations currently oversee——

Mr. FALEOMAVAEGA. So it just so happens that the revision process coincided with the proposal of the bill? Or has this been in planning for the last six years?

Mr. ARTMAN. No, it has been in planning since about March 6 of this year.

Mr. FALEOMAVAEGA. Of this year.

Mr. ARTMAN. Yes.

Mr. FALEOMAVAEGA. But not the previous six years.

Mr. ARTMAN. No.

Mr. FALEOMAVAEGA. OK. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Cole.

Mr. COLE. Thank you very much, Mr. Chairman. And Mr. Secretary, good to see you, and thanks for all you do. You are a good friend, and a wonderful background.

I have a series of very specific questions, and then frankly I wanted you to talk a little bit more about splinter groups, because I think this is a real challenging area.

Number one, Mr. Shays suggested if we just got you the resources, you could do the job. So in your professional opinion, is this primarily just that we haven't appropriated enough money for you to handle complex and difficult issues in a quick and timely manner?

Mr. ARTMAN. I think we are dealing with two issues here. One is the resources. Right now we have four teams looking at 17 active petitions. And if you have those four teams going through their normal process, that will take about four years each. So you are looking at quite a bit of time to get through those. Well, it is about five years to get through all 17.

With additional money we could hire more teams. When the GAO did a report, an investigation, a report on this recently, they found that it takes on average 8.3 years for the petitioning tribes to get through. But that is a bilateral process; that is also with the tribes submitting the information, having a complete application, as well.

It should be taking us, on average, about 4.7 years to get through this process. With additional staff, we can meet that average, certainly. But I think that we can also achieve expeditious review with greater efficiency. And that is what we are aiming at when looking at revising guidelines, potentially looking at new regulations, and also potential legislation.

Mr. COLE. If I may ask you your professional opinion on the wisdom of timelines, or literally drop-dead dates. Because I think that is part of the huge frustration, is that people seem to go into a bureaucratic situation and just simply get lost, for whatever reason. And there just seems to be no point at which a decision has to come.

So, you know, would it be wise, in your opinion, either at the departmental level or the Congressional level, for us to mandate that these cases be disposed in a certain period of time?

Mr. ARTMAN. I think at any level, timelines are going to be beneficial to the process. There are situations in our history where—it was just brought up earlier, a reference to applications spending 25 years in the process.

And in those situations, you know, one in particular that I am thinking of, a letter was submitted in 1978, I believe. And then a response, a technical review response, was sent back to that petitioner. And there was no response for five years. And there are these blank spaces in the process that accounts for that 25 years, but there is nothing that we can do about it. We can't reach in and say give us the information.

So timelines I think have to go both ways: timelines both on the petitioner, and also for the Department. And that is something certainly we are looking at, and something we would support.

Mr. COLE. I am going to skip ahead and ask you another question, then. On the approval process, let us say, do you have again a professional opinion on, let us say you come up at the departmental level with a decision? Frankly, Congress has the ultimate authority. What is an appropriate, if any, appeal process?

Mr. ARTMAN. Well, right now the appeal process goes through the administrative process, the IBIA, and then into the Federal Courts.

That seems to have worked. We do spend a lot of time questioning our ability to actually go through the acknowledgement process, but for the tribes that have gone into the process—I am sure that the ones that have not had a success at the end of the appeals process may disagree with this comment—but it seems to have worked.

Mr. COLE. So the problem seems to have been in the initial decision making. But you think once a decision is made, it has moved pretty well.

Mr. ARTMAN. Yes.

Mr. COLE. OK. Let me ask you this, because I do want to get to this splinter issue, because this whole question of tribes and European contact is a really interesting question. And I want to give you not a hypothetical, but reality.

What do you do—let us take two recognized tribes that were one at the point of European contact: the Eastern Band of Cherokees and the Cherokees in Oklahoma. Or let us take the Mississippi Choctaws and the Choctaws in Oklahoma. Or let us take the Seminoles in Florida and the Seminoles in Oklahoma. Those were tribes that American activity, you know, split asunder—forced removal and what-have-you.

So how could you possibly, if you have to go all the way back to European contact—and we recognize all these entities now as having maintained a collective identity. So this whole idea that tribes had to have existed in 1540 or 1680, when we took actions, they did not lose their corporate identity, but we split them asunder, that seems to me a contradiction.

I mean, how are you going to handle things like that when you are talking about "splinter groups?" Because that is part of their historical reality. They became a tribe, or continued to function in a tribal way, even though they had lost their homeland in one case, or had stayed, you know, retreating into the mountains in the Carolinas, for instance.

Mr. ARTMAN. I think the groups that entered, that have splintered prior to the petitioning process, or are there because they splintered off from a different tribe such as with the Cherokee—and we have quite a few, probably about a dozen different groups that claim to be of Cherokee descent—those are a separate issue.

Let me just address the European contact question, and focus on the splintering issue.

The European contact question, I think you raise a very valid point. How do you establish what happened in the pre-Colonial era; in the 1500s, 1600s? And that is why we are looking at moving up that date to first contact, or first contact after a region became a state, or in 1776. So there is a cut-off date, and we are saying we are not going to go prior to that.

With splinter groups, what is causing issues, the biggest issues for us is not those groups that splintered prior to, or there was a historical splinter. Those we can deal with through the normal process and the normal rules.

What becomes, if you have petitioners who are tribes that are seeking the Federal recognition, but they are acting as governments, you have those problems that oftentimes come with governments, especially the more local you get, of electoral disputes.

Right now we have a number of tribes that are Federally recognized, and they are having electoral disputes. There is no reason to think that petitioners wouldn't have the same problem with their government, and that is what we are seeing.

We are seeing groups, there was one group in particular recently that was split into two. And in that one, those two groups split into two, as well. And each one wanted to have and maintain its own place on the list, and not be subjected to additional review. They wanted to have each other's information. And the question becomes what do we do, then, with that.

That isn't so much a question of recognition of historical stance or historical position, but now that is a political question of who is actually in control of the situation. And while we look at one of the criteria is political control, these things happen. And it is almost a positive action that has occurred, because you do have an active and mature government fighting for control, vying for control of that one entity.

But in the petitioning process, it is viewed more as a splintering. And now we have two, three, sometimes four groups that are all vying for that same spot. In that we have oftentimes counseled with those folks, worked with those folks and tried to deal with them, but it becomes too difficult. Now it looks like we are beginning to insert ourselves into that political process.

We don't insert ourselves into the political process of Federally recognized tribes. We shouldn't be inserting ourselves into the process of petitioners, either. It is almost paternalism gone bad.

So we are trying to figure out a way to handle those. And right now, one of the potential ways of handling those that we are looking at is pulling them out of the entire process, and putting them off into a neutral area while they figure out what is going on. And when they are done, and they say that they are done, we can bring them back in where they were before.

Mr. COLE. Thank you, Mr. Secretary. Thank you, Mr. Chairman.

Mr. ARTMAN. Thank you.

The CHAIRMAN. The gentleman from Michigan, Mr. Kildee.

Mr. KILDEE. Thank you, Mr. Chairman. Just a point. I know there is a vast difference here, and my analogy is not that good, but it took us a matter of a week or two to recognize the Republic of the Ukraine, the Republic of Georgia, Azerbaijan, Armenia. We worked much more quickly once it was decided that the Federated States of Micronesia wanted to become an independent country. The Republic of Palau, the Republic of the Marshall Islands.

But when it comes to our own people here, I recognize the differences, and I accept those differences, and they are vast. But maybe we can learn some things from the State Department. They seem to be able to, you know, recognize sovereignty much more quickly than we are in the Interior Department.

I say that because I personally have been in contact with the Grand River Band for 42 years. No question they are sovereign. They are a nation. And yet, it took them 11 years for them to get in the ready for active consideration. The next step would be active consideration, and the next step would be recognition or denial.

They have been 11 years, it took them 11 years to get in that ready for active consideration. They have been in there since the beginning of this year.

How long do you expect, what would the ordinary time be for them to get into the next step, assuming that they are moving in the right direction, into active consideration? What is the average length of time they stay in that ready for active consideration?

Mr. ARTMAN. The average time to the final determination, should it be positive or negative, should be about 4.7 years. As I mentioned earlier, the average is turning out to be about 8.3 years, as the GAO found.

But again, this is, we are looking at two issues that are creating delays. One, it is a bilateral process. It starts off with the petitioner sending in a letter of intent, and we send a response.

The 4.7 years is best achieved when both sides are submitting information back and forth on a regular basis. But we do have periods where there is no communication between the parties for years at a time. And that can turn into five years, 10 years, and now, like I said, we have groups that have been out there for 25 years.

Time alone on the list doesn't make it right or wrong as to whether or not they should achieve that recognition. We have seven criteria. And if the seven criteria aren't right, if that is not what we should be using, then we certainly look to Congress to tell us what those correct criteria are. Or perhaps we even look to the courts, as has been desired by certain parties in the past.

But those are the criteria that we have, and those are the rules that everyone is living by. So that is one part of it.

The other part of it, as was mentioned earlier, is we do have only four groups that are looking into these petitions. There is only $1.9 million. Out of a $2.3 billion budget, we have a lot of other responsibilities, and this has to necessarily receive this $1.9 million because those other responsibilities, as you well know on this committee, involve everything from roads, taking care of land, fire suppression. It is a vast world of trust responsibilities that we take care of with that other $2.5 billion.

We have tried to find money when possible to—we have tried to move it up from four teams to five teams. It is a small change in the process, you know. And I know there is criticism of the delays and how long it takes, but this is a two-sided process.

Mr. KILDEE. Let me ask you this. Could you have thought of submitting a bill, your idea is of a bill to Congress that would expedite, modernize, and bring us into this century on this process.

Mr. ARTMAN. We have. And in looking, when I first came on board—and the reason I said March 6 was when we first started looking at this is because I came on board on March 5. And it was around near that time that I sat down with Lee, and a little bit later much of his staff, and asked that very question: what can we do to help change this process. You are on the front lines every day. You are the academics with the expertise. Where do you see potential need.

We looked at past hearings and critiques that we have received, and we came up with a great list of things that we can do. And then we divided them into guidelines, regulation, and legislation. So yes, sir, we are developing that potential legislation.

Mr. KILDEE. I appreciate that. You know, within the Department of Interior, the Department of Interior's budget is several billion dollars. You have $1.9 million for this. Isn't there some way within the Department, when you deal with OMB, say listen, can't we rearrange some priorities? There seems to me that within the billions of dollars Interior gets, that you only get $1.9 million; how zealous are you in telling OMB we need more, and shift some things around?

Cap Weinberg used to, you know, he used to slap the OMB around and shift things around within the Department of Defense. You need advocates within the Department to set proper priorities. It seems to me when you look at your budget and you find the billions you get in the Department of Interior, and only $1.9 million for this, that you have to become greater advocates when you approach the budget process each year.

Are there great advocates to—I mean, 1.9. I have made phone calls to get more money than that for an airport in my district.

Mr. ARTMAN. We are advocates for Indian tribes, sir. And when you look at the $2.3 billion—and the budget has decreased over the years. And this is something that we recognized within the Department. We are actually going out to Indian country; we have over the last month gone out to Indian country, and said here are the number of issues that we are facing. Here are the things that are problems that are creating stresses on the Bureau of Indian Affairs and the Bureau of Indian Education, and my office, the Indian Affairs Office. How can we change ourselves as a group, in talking to Indian tribes.

Consult, not even consultations, but just dialogue, starting a dialogue. How can we change ourselves to better meet what is coming up ahead.

One of the things that keeps coming back, one of the things we know of and one of the things we talk about every quarter with the Tribal Budget Advisory Committee, is how can we get more money into this process.

But when you speak with the Tribal Budget Advisory Committee, probably our main input from Indian country, on these budget issues, the priorities that come up are supplying more money for Indian reservation roads, dealing with the fraction nation issue.

The fraction nation issue alone is a multi-billion-dollar issue. That is probably $3 or $4 billion.

Then you have another $3 to $4 billion for water rights settlements. Then we have the water restoration issues that we have in the Upper Midwest and throughout the South and Southeast.

Additionally, as everyone here knows, there has been a number put on the Cobell settlement of $7 billion, but the $120 billion is still floating around out there. So there are a lot of priorities that are coming away.

And what we have to look at from the Bureau of Indian Affairs perspective, first and foremost, is that trust responsibility. Are we hitting our trust priorities and our trust responsibilities.

For better or worse, this doesn't rise to that level yet. This is something that we need to do. This is something that we have the expertise in. But getting that direction from OMB, or be it from

Congress, that is something that we would appreciate, as well. This is something that we consider to be very important.

The more money we have to deal with this issue, the quicker that we can dispose of all the ones that are out there: the 17 or the 243 that have incomplete petitions. We can deal with all of those. So this is an important issue. And we have a lot of staff, and we spend a lot of time dedicated to this issue.

And in fact, one of the things I did when I came on board was change the organizational chart so that Lee reported directly to me. This is how important I view the issue. But we have to make do with what we have right now.

Mr. KILDEE. I appreciate that, but you know, this issue right here, this is something that is embodied in our Constitution. This is not a peripheral issue. This is something that each one of us up here on the dais take an oath to uphold. This is written out in the Constitution in specific terms. And it seems to me that that should give it a higher priority within the entire Department of Interior when you go to OMB. Send them a copy of the Constitution, and tell them you have some obligation to try to recognize when there is real sovereignty.

Thank you very much.

Mr. ARTMAN. Thank you, Mr. Congressman.

The CHAIRMAN. The gentleman from Tennessee, Mr. Duncan.

Mr. DUNCAN. Thank you very much, Mr. Chairman. Mr. Artman, we have a briefing paper on this hearing that says under H.R. 2837, the entire pending caseload of more than 200 documented petitions and letters of intent to petition are transferred from the Department to a new commission. Also petitions previously denied by the Secretary would be entitled to an adjudicatory hearing.

I would like to know how many, if you know, how many are in each of those three categories. How many documented petitions do you have pending?

Mr. ARTMAN. We have seven that are on the active list. That means they are currently being, they are currently on the desk of one of our teams and being prepared for final determination, five of which should actually happen over the next, I think, six or seven months. We have another—I am sorry?

Mr. DUNCAN. And how many are on the non-active list?

Mr. ARTMAN. Well, we have another 10 that are on the ready and waiting for active consideration list. Those will naturally fill in as we deal with the seven that are on the active list.

And then we have 243 not ready, for any number of reasons. Either they have only a letter of intent in, or the petition application isn't complete.

Mr. DUNCAN. So that adds up to, that was 243, and you said——

Mr. ARTMAN. Seventeen. So 260-plus.

Mr. DUNCAN. All right. And then how many petitions previously denied would be entitled to a new hearing?

Mr. ARTMAN. Well, let me see. We have had 61 negative decisions over the past 28 years, so it would be, I guess, a potential——

Mr. DUNCAN. So you are talking about 320, basically.

Mr. ARTMAN. Yes.

Mr. DUNCAN. Do you have a rough guess as to how many Indians would be involved in those 320 petitions?

Mr. ARTMAN. No, sir, I don't. The populations for all of the petitioning groups varies from three or four all the way up to 50,000.

Mr. DUNCAN. So the total in the 320 petitions then would be many, many thousands.

Mr. ARTMAN. I would imagine so, sir.

Mr. DUNCAN. And how much are we spending at this point on the, for the budget for the Bureau of Indian Affairs, and Indian Health Service, and all the Indian, all related Indian programs?

Mr. ARTMAN. Well, for Indian Affairs, our budget is $2.3 billion. I am not sure what IHS's budget is. The Department of Education, the Department of Transportation, and Housing and Urban Development also receive money, as well.

Mr. DUNCAN. So you don't have really any idea of what we are talking about.

Mr. ARTMAN. No, not in those tangential points. Not outside of the Department of Interior.

Mr. DUNCAN. But at any rate, you would be adding huge amounts of expenditures if all of those 320 petitions were approved.

Mr. ARTMAN. I think yes, if all 320 were approved. And that is a draconian situation. Of the 61 that were negative, I am willing to stand behind those and say that there was good reasons for a negative determination. I am sure that—and a commission like this would still probably find the same thing.

The 243 in the list I believe also, you know, many of those folks sent in a letter of intent, and that is the last we have ever heard from them. We know for a fact that one of the individuals who sent in for a letter of intent was recently arrested in Florida for trying to pass himself off as an Indian tribe.

So many of these disappear. Many of these disappear. And one of the things that we are going to be doing in the next few months is calling that list of 243 and seeing how many real ones are actually out there. And I think you are going to see a substantial amount of those folks fall off, as well.

Mr. DUNCAN. A lot of people have doubts that you would have this many petitions were it not for the money involved in all of this. But at any rate, I yield back the balance of my time.

The CHAIRMAN. The gentleman from, let us see, where? Oh, OK, from American Samoa, then. I thought I had already recognized him. Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman, thank you. Mr. Secretary, you had mentioned, commented about the Department of Justice raising the Constitutionality of the proposed bill. Is this basically what you were making reference to?

Mr. ARTMAN. Of the commission appointment itself, I believe it was.

Mr. FALEOMAVAEGA. You are suggesting here that the Congress does not have the authority to set up a commission?

Mr. ARTMAN. I am not suggesting it. I only pointed out that the Department of Justice has raised concerns. I am not sure what those concerns are; I have not received a full and final briefing from them yet, so I really can't speak to those.

Mr. FALEOMAVAEGA. I am sorry that the bell has rung here. You know, I don't think there is any blame being put on the bureaucracy or the Department of Interior. The fact of the matter is that the Congress has simply never acted in setting up a system statutorily as far as the recognition process. So this is the reason why the Department of the Interior set up these regulations, and you came up with this seven-point criteria in order for a tribe to become recognized.

So that is simply the reason. And I am sorry to say it has taken this long for Congress now to propose a bill to mandate statutorily how we are going to go through the process of recognition.

You mentioned that you have a $2.3 billion budget, and out of that $1.9 million is allocated to do the recognition process. Does it tell me that there is not much of a priority, then, in the process, does it?

Mr. ARTMAN. Well, there are the other priorities that we have. While we would certainly like to have more in the budget, we have what we have. And that is something that we have worked out within the Administration, and the Congress, and that whole process.

But we do have the other trust responsibilities that we administer.

Mr. FALEOMAVAEGA. No, Mr. Secretary, I understand that fully well. But I am just simply saying out of a $2.3 billion, budget $1.9 million is allocated to the functionings of the recognition process. What it tells me, and I am not a mathematician, is that there is not much of a priority really given by the Department to do the process.

Mr. ARTMAN. That could be one way of looking at it. I am sure that the other 562 tribes might say yes, but we need the money, too.

Mr. FALEOMAVAEGA. I see. So for some 109 tribes in California and probably some others that have been seeking recognition for how many years now, that is not considered a priority as far as the Administration is concerned.

Mr. ARTMAN. The 109 that was referenced earlier, 108, there are 108 recognized tribes in California. And to those 108, they receive part of that $2.3 billion budget. I think in California that there are currently 74 tribes seeking recognition in that area.

Mr. FALEOMAVAEGA. Would you agree that the only reason why Congress hasn't taken steps with this is simply because there has been no legislation introduced to address the issue of recognition?

Mr. ARTMAN. I think that—well, certainly, in many respects we filled that void coming up with the regulations nearly 30 years ago.

Mr. FALEOMAVAEGA. How soon do you think the Department of Justice will come out with this legal opinion about the Constitutionality of this bill?

Mr. ARTMAN. I am not sure, sir. I will be happy to check with the people over there, and give you an answer.

Mr. FALEOMAVAEGA. Can you submit that for the record? Because I am very curious if this is going to be the big obstacle that is going to prevent this legislation from going forward, is it is because it is unconstitutional. Is that basically the gist of what I hear?

Mr. ARTMAN. I believe it is only a portion of the bill that is unconstitutional. They view it as unconstitutional. I am not saying that. I don't know. I haven't seen the full and final report, so I can't make a determination on that. Plus they would tell me they are the lawyers, and I am not.

Mr. FALEOMAVAEGA. Oh, I thought you were an attorney.

Mr. ARTMAN. I am an attorney, but it only goes when you step out of that role.

Mr. FALEOMAVAEGA. I see. You are now an attorney, but not a lawyer.

Mr. ARTMAN. Something to that effect.

Mr. FALEOMAVAEGA. OK. Thank you, Mr. Secretary.

Mr. ARTMAN. And that may be a good thing, I don't know.

Mr. FALEOMAVAEGA. Thank you, Mr. Secretary. I yield.

Mr. ABERCROMBIE. Is that OK if he yields?

The CHAIRMAN. Yes.

Mr. ABERCROMBIE. Mr. Artman, I am sorry, but I want to pursue this a bit more. Because I am looking at a sentence. "Moreover, the Department of Justice has indicated there are Constitutional concerns of the appointment of members of the commission."

Now, I am reading through the bill, and I would like Mr. Kildee—I carry with me a copy of the Constitution. And I carry it with me when I am walking around here in the Capitol, and I carry it when I go home, not particularly because it gives me any particular insight, but it gives me a sense of comfort and it reminds me of what I am supposed to do.

One of the reasons I do it is that I have discovered over time, and it has to do with Native Hawaiians and others, that this is constantly raised. And it is almost a throw-away line. And it is meant to stop us from legislating.

Precisely what concerns have been indicated, and how were they indicated to you by the Department of Justice? Do you have a letter? Was it a phone call? Do you have something that you can give us in evidence here to the hearing about what these concerns were and are, and how they were indicated to you?

Mr. ARTMAN. Congressman, no, I can't. And as I——

Mr. ABERCROMBIE. Then why is the testimony there?

Mr. ARTMAN.—told Mr. Faleomavaega, that we will get you a letter from the Department of Justice.

Mr. ABERCROMBIE. I beg your pardon?

Mr. ARTMAN. I said we will be happy to get, arrange for a letter to be sent from the Department of Justice to you on this issue.

Mr. ABERCROMBIE. No, no, no, no, no.

Mr. ARTMAN. I have nothing here today, and I am not going to speak to the issue.

Mr. ABERCROMBIE. Then why is this sentence in your testimony?

Mr. ARTMAN. And I believe it puts it in very soft terms, that there may be an issue with the commission process.

Mr. ABERCROMBIE. How do you know that?

Mr. ARTMAN. The Department of Justice has done its initial review.

Mr. ABERCROMBIE. Where?

Mr. ARTMAN. I don't have it with me.

Mr. ABERCROMBIE. So there is something on paper.

Mr. ARTMAN. I am sure there is.

Mr. ABERCROMBIE. No, no, no, no. Not whether you are sure there is. This is testimony. The Department of Justice has indicated there are Constitutional concerns. How do you know that?

Mr. ARTMAN. In conversations with the Department of Justice that have made——

Mr. ABERCROMBIE. So it is a conversation—a telephone conversation?

Mr. ARTMAN. I am sure there was. The staff put that in there, and I would be happy——

Mr. ABERCROMBIE. No, no, no, no, no, no, no.

Mr. ARTMAN.—and I will support it. But——

Mr. ABERCROMBIE. No, no, no. You know, don't fool with me on this.

Mr. ARTMAN. Did I have a conversation with the Department of Justice on this? Is that the question?

Mr. ABERCROMBIE. Yes. Did you?

Mr. ARTMAN. No, I haven't. I understand——

Mr. ABERCROMBIE. Who has, in your department?

Mr. ARTMAN. The staff that helped develop this——

Mr. ABERCROMBIE. So the staff has had conversations.

Mr. ARTMAN. Yes.

Mr. ABERCROMBIE. Who in your staff?

Mr. ARTMAN. Members from Congressional Affairs, members from the Indian Affairs staff.

Mr. ABERCROMBIE. Who on your staff has had conversations with the Department of Justice concerning Constitutional concerns over this bill?

Mr. ARTMAN. Mr. Abercrombie, I will be happy to get those names for you.

Mr. ABERCROMBIE. So you don't know.

Mr. ARTMAN. I will be happy to get a letter for you.

Mr. ABERCROMBIE. Who wrote this testimony?

Mr. ARTMAN. Various people.

Mr. ABERCROMBIE. Who put this sentence in the testimony?

Mr. ARTMAN. I will be happy to find that out for you, sir.

Mr. ABERCROMBIE. So you are reading testimony you haven't written or vetted.

Mr. ARTMAN. I had approved it.

Mr. ABERCROMBIE. You didn't ask the question.

Mr. ARTMAN. I did approve it.

Mr. ABERCROMBIE. Did you ask the question of anybody who gave you the testimony as who had the concern?

Mr. ARTMAN. Not of that particular line.

Mr. ABERCROMBIE. Why did you say it, then?

Mr. ARTMAN. Because if you are looking at it from the legal perspective—and again, I am going to be entering into areas which, you know, the lawyers are going to be better prepared to talk about in the Department of Justice. But I imagine——

Mr. ABERCROMBIE. It is a serious, it is a serious accusation. It is not an observation that legislation would be forthcoming, that we would be so cavalier, or the gentleman from Samoa would be so cavalier as to put forward legislation that hadn't been vetted at least minimally about whether it meets Constitutional standards?

This is constantly brought up in order to try and thwart legislation coming forward.

We have Constitutional concerns. What Constitutional concerns? At least, perhaps you can answer this. Can you give me minimally what you mean when you say there is a Constitutional concern about the appointment of the commissioners? Because I have the bill right in front of me. I have read it word by word, and I have reread it right now.

Mr. ARTMAN. It would be probably a separation of powers issue.

Mr. ABERCROMBIE. In what context?

Mr. ARTMAN. Into who——

Mr. ABERCROMBIE. The bill says that the President should make the appointment.

Mr. ARTMAN. And then I believe it also says that the Senate should confirm.

Mr. ABERCROMBIE. Yes. That is what the Constitution says. I have it right in front of me.

Mr. ARTMAN. Yes, it does. But there oftentimes commissions where Senate confirmation isn't always necessary.

Mr. ABERCROMBIE. That is right. And it specifically says in here shall not be an advisory. "The commission shall be an independent establishment as defined in Section 104, Title V, United States Code."

Mr. ARTMAN. OK.

Mr. ABERCROMBIE. Is Section 104, Title V, United States Code now an issue of Constitutionality?

Mr. ARTMAN. I don't think so, sir. But again, you know, we are going to need to get something from the Department of Justice to have a fully vetted debate on this.

Mr. ABERCROMBIE. You know, you may think that you are being pushed around here. It is not you individually; believe me, it is not. I am not trying to do that.

It is that we run into this over and over and over again. It is a tactic. I don't know if it amounts to a strategy with the Administration right now, but it is certainly some kind of tactic, whether these toss-away lines and everything, with respect to whether something is Constitutional. It is almost quotidian in the way it is quoted and appears in testimony. Well, there may be Constitutional—what the hell are you talking about?

It is not fair. It is not right. I will tell you something, it is not fair to you. It is not fair to your department for the Department of Justice to casually waltz in with a conversation, nothing in writing, or however the heck it came before you and however it appeared in the testimony here. Believe me, it is not just your department. This is done over and over and over again.

And I think it is disservice to you. It is a disservice to your section of the Department. It is a disservice to your testimony here to have this in here.

So I would like—and I hope you understand, I am not personally trying to hold you to—well, in some respects I am, because you were giving the testimony, and you have to stand by it. But surely you can see that by virtue of the answers you have had to give, that this is at best vague to the point of being in the ether somewhere.

And in terms of specificity, for us to be able to move forward, we need to know what are they talking about, and why is it in this testimony. And why are you being subjected to it, or your portion of the Department of Interior being subjected to this kind of imposition by the Department of Justice as to whether or not you could move forward with opposition or support for this legislation. OK?

Mr. ARTMAN. Thank you, Mr. Abercrombie.

Mr. ABERCROMBIE. Thank you.

The CHAIRMAN. The gentleman's time has expired, or whoever's time it was.

[Laughter.]

The CHAIRMAN. The Committee will stand in recess, pending three roll-call votes on the House Floor.

Mr. Secretary, we appreciate your continued patience, as I believe there are a couple other Members yet to ask questions. And they will have that opportunity when we return.

The Committee is in recess.

[Recess.]

Mr. FALEOMAVAEGA [presiding]. Is there anything anyone wishes to ask Secretary Artman? The gentleman from Oklahoma.

Mr. BOREN. Thank you, Mr. Chairman. I appreciate you all coming back. I had just a few questions. I want to make sure I have these in front of me here.

Well, one of the first questions I had, without looking at my questions, was you mentioned that there are four teams looking at 17 different petitioners. And can you talk a little bit about what comprises these teams? How many people are in these teams, and what do they actually do? If you could touch on that first, then I have several more questions.

Mr. ARTMAN. Thank you for your question, Congressman. Actually, I am going to defer to the Director of the Office of Federal Acknowledgement to answer that because he can do it in much better detail.

Mr. FLEMING. Each team is made up of an anthropologist, a genealogist, and a historian. And the teams then look at the evidence of a group.

Under the regulations, the team has 12 months to review all of the evidence. And we are talking between 10,000 to 30,000 pages of evidence. And it is not the quantity, but it is the quality of the evidence as it is applied under the seven mandatory criteria.

At the end of the 12-month period, the team provides a proposed finding, either to acknowledge the group as an Indian tribe or to deny acknowledgement as an Indian tribe. And the proposed finding outlines how the evidence has fallen under the seven mandatory criteria.

When notice of that proposed finding is published in the Federal Register, that starts a 180-day comment period for the petitioner and interested parties, and the public, to see what is being proposed. And comments are then, are provided by the petitioner or interested parties, or Jane Joe Q. Public. And at the end of that 180-day comment period, then the petitioner has 60 days to respond to any of those comments.

At the end of that 60-day period, or two months, then the Department again comes back with the team to review all of the com-

ments and the responses and the evidence, to come out with a final determination. And again, the final determination is to acknowledge or not to acknowledge the group as an Indian tribe.

At the end of that period, notice is published in the Federal Register, which then allows a three-month period to allow the petitioner or interested parties to request reconsideration before the Interior Board of Indian Appeals.

You add all of those regulatory time frames, and it comes to 25 months as a regulatory review. It also provides due process to the petitioner and interested parties, and all of that is taken under consideration.

Mr. BOREN. So again these four teams, with a little over two years, with all these time limitations, are these teams looking at, as was mentioned 17 different petitioners, are they doing it simultaneously? Are they handling three or four different petitioners? Or are they just handling that one, and then going to the next one after the 25 months are done?

Mr. FLEMING. Because of the different phases, the 12-month period, they are focused on just one petitioner to come out with that proposed finding. When it goes into the six-month public comment period, then they are able to switch to work on another case, generally perhaps a final determination, which takes lesser time to produce. So there is a give-and-take with how the teams work.

Mr. BOREN. Well, since it looks like I am getting the yellow light, let me go quickly to the money issue.

Secretary Artman, you brought up the fact that well, we need more money. How much more money do we need if we need to hire these, you know, more teams to handle this caseload? A, how much money?

And then, too, you also mentioned that timelines are beneficial. One of the answers to Congressman Cole's question was timelines are beneficial. Are the time limits, what should they be if you were writing the rule book?

And so those two questions, money and time. What would be your answer?

Mr. ARTMAN. With regards to the money question, I think one of the first questions we have to ask ourselves is how quickly do we want to get through this. Years ago, when the GAO did their report, they had a similar statement, that you are going to need more money to hire more teams to complete this.

And in looking at that issue, internally we did a study and determined if we want to get this done—I think it was inside five years in that respect—we are going to have to hire 15 teams. That is a huge ramp-up from where we currently are. And to do that, you are now looking at, you know, certainly something north of $15, $20 million.

Is that the right number? Is five years the right number? What is the urgency that we need to put on this? There is certainly this is something that is important that needs to be done, so we need to make that determination first. That number can fluctuate, depending on how many teams we end up at.

With regards to the deadlines themselves, we have, one of the things that we are looking at internally, as I mentioned before, we are looking at doing guidelines, regulations, and perhaps making

legislative proposals. As we are looking at those, we are looking at those deadlines.

One of the—as you look at the number of 260 applications, there are 243 that don't have complete petitions, that are only letters of intent. As you look, you—this body here—looks out at that and says my goodness, you have a backlog of 260 applications, I don't know that that is necessarily true. We have 17 that are certainly under active consideration. We have another 243 that aren't complete. How long do those linger on that list? How long—I mean, those have been there for decades.

Mr. BOREN. That is where you mentioned the petitioners having a timeline, as well, is that——

Mr. ARTMAN. Right, exactly. And I think certainly on ourselves, no issue. There has to be deadlines for the various stages that we have. And I would be happy to get you a more detailed study that we have, that we have gone through as to what those deadlines are.

But certainly with regards to the petitioners, as well, we want to see deadlines on those individuals, to promote getting the material in so that we can have that consideration, and so we can better determine how many teams that we do need to have.

There are a lot of questions out there that have to enter into the equation to get that final answer that you first asked: how about the money. And this is one of those questions. How many do we really have out there, and how quickly do we want to go through these.

Mr. BOREN. OK, I appreciate that. I have run out of time. Mr. Chairman, thank you.

Mr. FALEOMAVAEGA. I thank the gentleman from Oklahoma. Ms. Sandlin?

Ms. HERSETH SANDLIN. Thank you, Mr. Chairman. And thank you for your testimony. I apologize for not being here earlier; we were in a Veterans Affairs Committee hearing on the future funding of the VA. And I think that with the oversight which our various committees are tasked to do, I am pleased that this committee has been more aggressive in the oversight in the 100th Congress of various agencies. And I think the same question, but it perhaps goes beyond the particular bill we are discussing today.

And I know you had spoken before I got here about some internal reforms you are looking at, when you came on board earlier this year, to expedite the process, to make it work more effectively for petitioning tribes.

But I think the question beyond that that is an important one is the funding for the future of the BIA. And if you could talk a little bit—and maybe you have in response to some other questions—you know, as we are dealing with potential internal reforms, differing ideas about the particular bill that has been introduced to address the process, concerns of the petitioning tribes.

If all of the majority of the Indian groups who are presently petitioning for Federal recognition are Federally acknowledge, how, if at all, will other Federally recognized tribes be affected? In other words, what are the impacts that the BIA will experience? And are you addressing those simultaneously, as you are looking at the internal reforms that you discussed previously, to ensure that obliga-

tions of the Federal government in the sovereign-to-sovereign relationship that we have with currently recognized tribes, that we will have in establishing the recognition process for petitioning tribes? Can you elaborate a bit on what the impacts will be, and how you are seeking to address those, as well?

Mr. ARTMAN. Sure. And this is a very good question. This came up in the previous hearing a number of months ago when we were looking at the bills that concerned the Virginia and the Lumbee tribes. Because those were questions that we wanted considered here in this forum, is the impact that would have on the budget.

Earlier there was a determination that if every tribe on the list, all 260 plus the 61 that had not been recognized, had been recognized, that you could potentially have 320. I think that is probably a very high number compared to what the reality would actually be.

But just working with that large number, you are going to be looking at tens, hundreds of thousands of people that would be coming—individuals, under those tribal rubrics—that would be coming onto, that would require some additional funding from the Federal budget.

At this time, we are already drinking out of a fire hydrant in terms of need, and not being able to fulfill all of it. And that is with the 562 recognized tribes.

The 562 recognized tribes, with about approximately 2 million people, you have a budget that already amounts to $2.3 billion just for the Department of the Interior and Indian Affairs. And my peers over at—I am the Assistant Secretary for Indian Affairs. Beneath that in the organizational chart is the BIA. And if I didn't recognize that the Bureau of Indian Education is no longer under the BIA—so we have two bureaus now: Bureau of Indian Affairs and the Bureau of Indian Education—the Education folks would be irritated. So I certainly put their marketing out there. And so we have to look at both the BIA and the BIE.

That is $2.3 billion just for the Department of the Interior on Indian Affairs. We also have HHS through IHS, HUD and the Housing Program, Department of Transportation and the Indian Reservation Roads Program, Department of Defense, and some of the other agencies out there also have funds that are dedicated to Indians. I think that that would also increase, probably in a linear fashion, with the number of tribes and individuals that are recognized.

That would be the hope. That would be the hope. But even with increasing populations and increasing tribes, other priorities and other pressures on the budget haven't allowed that budget to increase or even stay competitive with the cost of living or inflation. And so we find ourselves each year looking at a more and more limited budget.

And now we are at the point we are asking the question that should be asked. Even if we had more money, this question should still be asked. But now it is certainly an even more imperative question. How do we operate more efficiently to continue to deliver the mission, goals, and services?

I think if all 320 were recognized, or even a third of that, we would have to ask that in an even more serious manner. And cer-

tainly we would require much more funding that we currently have.

Ms. HERSETH SANDLIN. Well, I appreciate your response. And Mr. Chairman, again, I appreciate the opportunity to participate in the hearing today.

You know, as a representative of nine land-based tribal nations recognized through treaties with the U.S. Government, I am acutely aware of the importance of tribal sovereignty. And when I meet with tribal members and leaders in South Dakota, I understand the desire to have the proud history of tribes recognized and respected by the Federal government, and I appreciate the difficulties that have been encountered by American Indian groups seeking Federal recognition; the frustration with the process that exists today. And I also understand the solemnity of the government-to-government relationship and the United States' trust responsibility established by the treaties and various Congressional actions.

But at the end of the day, I believe that the administrative processes to Federally recognize tribes much be sufficiently robust to ensure the integrity of this relationship, and that we are committed to simultaneously addressing our oversight responsibility as it relates to the BIA's budget, as well as the budgets of other agencies responsible for ensuring that the commitment to each tribe is fully recognized and respected, and that those obligations are fully funded, as well.

So thank you, and I appreciate the opportunity again.

Mr. FALEOMAVAEGA. I thank the lady from South Dakota for her remarks. Maybe I am being too simplistic sometimes, but we are spending $10 billion a month on the War in Iraq and Afghanistan, and here we are barely trying to provide $2.3 billion for a whole year to provide for the services of our Native American community. It just puzzles me a little bit.

The gentleman from Michigan.

Mr. KILDEE. Just one comment. Mr. Secretary, I appreciate your testimony. We ask tough questions up here, but I think we all are seekers after justice.

You mentioned the other programs that are Indian dollars. Some of them are. But you know, I have two citizenships. I am a citizen of the United States, and I am a citizen of the State of Michigan. And they bring to me certain rights and certain obligations.

Native Americans, I think that includes yourself, have three real citizenships. They are citizens of the state in which they live, they are citizens of the United States, and they are citizens of their sovereign tribe.

So some of the dollars you mentioned, whether they flow to them not so much as they are Indians, but they are Americans, right? Defense dollars. So you can't add all those dollars up and say these are, this is what we give to the Indians. Because many of them, they receive as citizens of the sovereign United States.

And so I think we have to distinguish certain programs. Even the Native American Housing Assistance and Self Determination Act (NAHASDA), of which I am chief sponsor, is directed toward Indians; they probably would be getting some of those dollars through the regular HUD program. So I think we have to be care-

ful of what things we add and say these are Indian dollars. Some flow to them as citizens of the United States.

But I do appreciate your testimony. OK, thank you.

Mr. FALEOMAVAEGA. I just wanted to, Mr. Secretary, you said that there are 562 tribes, equivalent to 2 million people? I was under the impression the total population of our Indian country is about 4 or 5 million. What happened to the other 2 million?

Mr. ARTMAN. I have seen about six or seven different numbers.

Mr. FALEOMAVAEGA. Take your choice.

Mr. ARTMAN. Exactly. And that is mid-ground.

Mr. FALEOMAVAEGA. So does this mean that we are actually providing for only 2 million Indians with the $2.3 billion?

Mr. ARTMAN. No. The way the Federal budget and the relationship with the tribes works, I mean, we don't look at it as one-to-one, here is how many dollars are going to this individual Indian.

Because of our government-to-government relationship, we don't even get beyond that government question. We know how much money goes to a particular region or a particular tribe for a particular project. But the population of that tribe, we don't get into how many dollars per individual. We don't even ask that question, and I don't think that we should, either, because of the government-to-government relationship. That is the floor.

Mr. FALEOMAVAEGA. No, I understand the government-to-government relationship. But I am still a little puzzled here. What is the real population of Indian country out there? You are saying it is only 2 million people, and I am saying there is 4 to 5 million Native Americans living in the United States.

And of course, we recognize the fact that some 100-some tribes are not recognized. So I am looking at it only for those who are recognized, and you are saying it is only 2 million of them.

Mr. ARTMAN. There is the census, and then each tribe also determines its own, how it views citizens, what it views its membership. There is no standard across the board.

And then there is also the, like you said, the tribes that aren't Federally recognized. Those individuals view themselves as Indians, rightfully so, and put that down on the census. So it is a moving number as to how many there are out there and how many we actually impact through our Federal funding.

Ms. HERSETH SANDLIN. Will the Chairman yield?

Mr. FALEOMAVAEGA. I gladly yield to the gentlelady.

Ms. HERSETH SANDLIN. This is a very important line of questioning the Chairman has pursued here. Because again, relating back to some of my earlier questions, and then how we, through the Federal recognition process as well.

Would you agree or disagree with the statement that the census has traditionally under-counted the number of Native Americans living on the various reservations across the country?

Mr. ARTMAN. I don't know. I am not familiar with the processes that the United States Census Bureau uses, nor am I an expert on determining whether or not those are, that is the way to count it.

Ms. HERSETH SANDLIN. But are you aware that certain tribes have undertaken—I think you referenced it.

Mr. ARTMAN. Yes.

Ms. HERSETH SANDLIN. Certain tribes have undertaken their own census, of sorts, their own counting because of their concerns that the U.S. Census has traditionally under-counted. And have you considered that as it relates to the internal reforms you are looking at for the recognition process?

I mean, which does your agency defer to when you are looking at the budgets, the programs that you administer. Are you deferring to the U.S. Census? Or are you showing some deference to the tribes' own census counts for their population of enrolled numbers?

Mr. ARTMAN. And again, to go back, in so many aspects our question stops at the tribal government. And the tribal government may be made up of six—I am sorry, the tribal membership of that government may be made up of six people, six citizens altogether, or it may be made up of 250,000.

But we don't spread out the money evenly across the tribe. Obviously, the size of the tribe or the program that you are trying to fund, which is oftentimes determined by the size of the tribe, determines how much money you receive.

But have we gotten into the question of which is the best way to count which numbers we are going to view as the accurate count? Not for the purposes of recognition we haven't, no.

Ms. HERSETH SANDLIN. Thank you, Mr. Chairman.

Mr. FALEOMAVAEGA. Mr. Secretary, I am totally confused now. The census has a different counting of Native Americans obviously, so the Department of Interior also has a different counting. You are saying you count by programs, and not necessarily numbers.

I would think that the reasons for the $2.3 billion is because we have to provide for some four to five million Native Americans. I assume that among the 562 tribes, that this is what is being officially recognized.

You are saying there are only two million of them out there. That is almost, that is almost 100 percent less than what I have always understood for the last 10 years, the increase, or the number of Native Americans in the U.S.

Mr. ARTMAN. We can provide you a list of various——

Mr. FALEOMAVAEGA. Could you, please?

Mr. ARTMAN. From the various different areas that we also have——

Mr. FALEOMAVAEGA. I would appreciate it.

Mr. ARTMAN.—including NCAI and NAIGA.

Mr. FALEOMAVAEGA. I would appreciate it if you would provide that for the record.

I have one more question. Who decides which anthropologist and genealogist and historian make up the team? Is this in consultations with the petitioner tribe? Or is this something that the division of the Federal acknowledgement process makes the ultimate decision as to?

Because what happens if the genealogist or anthropologist says hey, I have written some stuff about this, guys, and they are not for real. It is already prejudiced, before they even started doing the research.

Mr. FLEMING. I, as director of the office, we have the anthropologists that have specialties in different areas of the United States. If a group falls in the Northwest, I look at the available staff mem-

bers to see if one of those staff members has this expertise in that region which would help in the understanding of the evidence.

So it is a management decision to take a look at which staff members are available when a certain case comes forward, and we assign. And we focus on the seven mandatory criteria.

Mr. FALEOMAVAEGA. I don't question which staff is available. What I am questioning here is that, how can we assure that this anthropologist or this genealogist or this historian is going to be neutral in its efforts to come out with the facts and data, and not already said hey, I have written a book or some articles about this group, and I seriously question their petition as a tribe?

Mr. FLEMING. The regulations require that we notify the petitioners as to who is going to be assigned to the case. And then, when the proposed finding is issued, the petitioners and interested parties have the opportunity to request an on-the-record meeting to discuss the review, the analysis, the evaluation of the proposed finding. And if there are questions regarding some of the staff who were assigned, that is an opportunity to ask those questions.

Mr. FALEOMAVAEGA. OK, well, that is the reason why I asked. There is consultation with the petitioner and the division of fact, am I correct on this?

Mr. FLEMING. Well, we notify, yes.

Mr. FALEOMAVAEGA. Notify, but not consult, then. In other words, if the petitioner doesn't agree with the anthropologist, you are still going to go ahead and proceed and appoint that anthropologist.

Mr. FLEMING. We work with a team that we hope would be able to expeditiously review——

Mr. FALEOMAVAEGA. No, that is not what I asked.

Mr. FLEMING.—within the 12 months.

Mr. FALEOMAVAEGA. You are still going to appoint that anthropologist. I mean, it is your discretionary authority to make that appointment, right?

Mr. FLEMING. Yes.

Mr. FALEOMAVAEGA. OK, that is what I wanted to find out.

Well, Mr. Secretary, this has been a long morning for you. And I do apologize if we have taken you through much of your time. But I promise you, this will not be the last time you will be seeing us.

[Laughter.]

Mr. ARTMAN. You haven't taken too much time. I appreciate this.

Mr. FALEOMAVAEGA. But we do really appreciate your coming this morning, and to testify, and look forward to working with you and your office.

Mr. ARTMAN. And I appreciate your questions. And unfortunately, I won't be able to stay for the next two panels, but I am going to ask my staff to stay, and I will be speaking with them later.

Mr. FALEOMAVAEGA. And I would like to also state for the record the Committee will submit written questions, both from the Members as well as the Committee, and would really appreciate it if you could respond as soon as possible to be made part of the record.

Mr. ARTMAN. And I would hope as part of those written questions, that one of them will explore the Department of Justice issues. And we will get you a fuller explanation of that.

Mr. FALEOMAVAEGA. Could you, please.

Mr. ARTMAN. We got some information on the break, but we will be happy to——

Mr. FALEOMAVAEGA. We would really appreciate that.

Mr. ARTMAN. Thank you.

Mr. FALEOMAVAEGA. You can bet your bottom dollar. Is that how they say it? I am still learning English here, so is that how they say it?

Mr. ARTMAN. That will work.

Mr. FALEOMAVAEGA. You bet your bottom dollar? OK. Thank you, Mr. Secretary.

Mr. ARTMAN. Thank you.

Mr. FALEOMAVAEGA. We have as our next panel—I am sorry for all this time—Ms. Patricia Zell, the President of Zell and Cox Law Firm in Washington; Ms. Arlinda Locklear, also an attorney here in Washington; Mr. Mark Tilden, the Staff Attorney with Native American Rights Fund; and also Mr. James Keedy, Executive Director of the Michigan Indian Legal Services, Michigan.

I would like to, I would be more than happy to give the time to the gentleman from Michigan for introduction of one of the members of the panel.

Mr. KILDEE. Thank you, Mr. Chairman. I would like to particularly welcome the entire panel. But Mr. Keedy, Executive Director of the Michigan Indian Legal Services, Traverse City, Michigan; my father was born near Buckley, Michigan.

And when I was about seven years old, about the time I made my first Holy Communion, my dad told all of us children that the Indians had been treated unfairly. And that stuck with me.

And the first time I could do anything about that was 1965, when I was elected to the, took office in the State Legislature; introduced two bills: one establishing the Michigan Indian Commission, and the other Jackie Vaughn and I, Senator Jackie Vaughn and I introduced a bill in Michigan, the Indian Tuition Waiver Act, where any Michigan Indian can attend a public college in Michigan, and the State pays the tuition.

But I particularly greet you here. The Kildees arrived as immigrants from Ireland and settled in that area. And I am glad that my dad had that type of conscience, that he could recognize and pass on to his children that the Indians were treated unfairly there. And I appreciate your presence here today.

Thank you very much and thank you, Mr. Chairman.

Mr. FALEOMAVAEGA. The gentleman from Hawaii.

Mr. ABERCROMBIE. Thank you very much. Mr. Chairman, I do want to take advantage of the opportunity to introduce Pat Zell. I am doing this by way of full disclosure, too.

While I did not arrange for Ms. Zell to be on the panel, I wouldn't want to let the opportunity pass to express publicly my gratitude to her for, although she may not want to say it publicly, more than a quarter of a century of friendship, and what is more important, information and perspective provided to me that has been invaluable.

I won't repeat all of the qualifications that she has to be here today, as they are apparent in all the Members' files here. But suffice it to say that the Senate Indian Affairs Committee was depend-

ent upon her service, her insight, her perspective for the better part of 25 years.

And most important from the point of view of the legislation, the particular legislation that is before us today, I don't think we can find anybody that has a better legal perspective on the value of this bill and its direction and its legislative intent than Ms. Zell.

So I am taking a little bit of time, but you don't often get an opportunity, Mr. Chairman, to say, in public and in the legislative context, how valuable it is to us to have people working on a staff level that provide the foundation for our legislative activity.

We live in kind of a closed universe in here, sometimes maybe a parallel universe to the real world outside. But our real world of legislation is utterly dependent upon the professionalism and the dedication and the perception of people like Pat Zell.

Mr. FALEOMAVAEGA. I would, not taking anything away from Mr. Tilden and Ms. Locklear, but I do want to second the comments made by my good friend, the gentleman from Hawaii.

And I just want to say a fond "ya'ah'teeh" to Patricia Zell, who is with us for the first time that she will be testifying before our committee, to my distinguished colleagues.

Needless to say, her legislative accomplishments are too numerous to name. For the National Museum of American Indians, to Indian healthcare, the tribal water rights, and of course the Native Hawaiian rights.

And I cannot say enough to say how much you are well respected, Patricia. And I know that I speak for my colleagues to the tremendous service that you have given, not only to Indian country, but certainly to our nation.

And with all that said, let us get it moving. Patricia, could we have your testimony first?

STATEMENT OF PATRICIA ZELL, PRESIDENT, ZELL AND COX LAW, P.C., WASHINGTON, D.C.

Ms. ZELL. Yes. Thank you, Mr. Chairman, and thank you for your very kind remarks, Mr. Abercrombie and Mr. Chairman. I don't know that they are deserved, but I certainly appreciate your respect truly.

Mr. Chairman and Congressmen Abercrombie and Kildee and Boren and Sandlin, I thank you for the invitation to present testimony today on H.R. 2837.

The thoughts that I share with you arise out of my work on the Senate Indian Affairs Committee, and particularly very intensive work toward the end of my tenure there, which ended in May of 2005. So the information that we gathered in consultation with the Office of Federal Acknowledgement and the General Accountability Office and the Inspector General's Office of the Department of Interior, and tribal groups having gone through the process and those that were in the process, are identified problems that continue to plague the process. So in that respect, some of these issues remain timely, because problems haven't changed significantly over time, sadly.

I want to inform the Committee that our law firm has no clients in the acknowledgement process.

I think that the provisions of H.R. 2837 represent a very thoughtful approach to this whole range of issues, and I thank Chairman Faleomavaega for introducing the bill, and for his perseverance in pushing this bill forward so many times.

As you can imagine, over the course of my time in the Senate we held many, many hearings, oversight hearings, on the Federal acknowledgement process and the need for reform. And many Members, some Members of the Senate, have consistently adhered to the position that, rather than the Congress taking any further legislative action to extend recognition to a tribe, that the Federal acknowledgement process ought to instead be reformed, and that all tribal groups should go through the acknowledgement process.

However, that promise of legislation to reform the process has proven to be illusory. There has not been, there has been legislation introduced in every session of the Congress, but all these years later we have nothing to show for it except good intent and a lot of good work and effort gone into it. So I am very hopeful, as I know many of those in this room and those whom they represent are, we are hopeful that there will finally be action to provide support to this process.

Whether it is more resources at a minimum, or whether it is comprehensive reform, as this legislation proposes, it is long overdue. It is very much needed. And I think that what those of us who worked with this process for a long time know is that these petitioning groups are disenfranchised, to some extent. And to the extent that the Federally recognized tribes can gather around an issue, and if there is consensus they can speak with one voice.

All of these disparate groups that are in the process have no means of coming together and speaking with one voice, nor do they have the means by which to call the attention of Members of Congress to this issue and to these problems associated with the acknowledgement process. So you have given them a voice, you have given them a forum, and that is very important, if and of itself.

I want to say that in our consultation with those Federal groups, the General Accountability Office, the Inspector General's Office, and the Office of Federal Acknowledgement, we of course had that consultation within the confines of knowing that they are not authorized to make legislative recommendations. What we asked of them was to identify through their experience what they thought the problems with the process are.

And I am now going to speak very fast, because I see the yellow light is on.

Two things. The Office of Federal Acknowledgement staff is cast with an enormous amount of responsibilities. They ought to be divested of those responsibilities and given one task, which is to work on those petitions and get them processed.

The technical assistance function, which absorbs an awful lot of time, could be posited in another entity, so that the technical assistance, a very important function that the government serves to help tribes, help petitioning groups, could proceed, but not be taking the time of the acknowledgement staff, whether they are in Interior or in this new commission.

We suggested the possibility of exploring placing that technical assistance function in the Cultural Resource Center of the National

Museum of the American Indian, where so many documents and records that tribes and petitioning groups seek and rely on anyway—they are going there and using that information to document their petitions—perhaps that is a good place to house technical assistance.

The second thing is not to separate out both technical assistance function from the decision-making function. Because we are all human, and if we spend a lot of time providing technical assistance to a group, and then, by one way or another, later are called upon to make some decision about the merits of that petition, that is just difficult. You are just ultimately evaluating your own work, if you have provided a lot of technical assistance to a group, and that is not a good position to put anybody in.

So I will just summarize. I think that we need to take away, whether in a commission or otherwise, those things that draw upon the time of those experts—the historians, anthropologists, genealogists that Mr. Fleming has spoken of—and let them do their work. Put the other tasks to other, on other entities and to other people.

With regard, the last thing I want to address is that in recent years there have been a lot of allegations, particularly as they are associated with gaming, that this process is subject to external influence. And one of the things that we talked in depth about with all of those entities, Federal entities that I just referenced, was whether or not there ought to be a point in time where, in this case the commission, the petitioning group, and interested parties would file something with a Federal court, likely in Washington, D.C., and the Court would then supervise the process of each petition.

That is not a day-to-day activity, but it would basically do, as the Court has done for some groups that have petitioned the Court, to set some deadlines so that everyone has an idea of how long this is going to go, when certain things are going to happen. And to assure that one petition isn't taken out of order because the Court has directed the Office of Federal Acknowledgement to work on petition A, when petition B was really the one that was ready to go forward.

So we think that putting it in, or I don't suggest that it is a personal view, but rather a suggestion that if you had court supervision of each and every petition, you might provide a means for extricating any possibility of external influence on the process, as well as providing an orderly process. Including not having interested parties come in at any point in time that the process, a particular petition is being considered, and taking up the time of having to reproduce documents and bringing those interested parties up to speed.

So I thank you again, Mr. Chairman, for the opportunity to present testimony today.

[The prepared statement of Ms. Zell follows:]

Statement of Patricia M. Zell, Partner, Zell & Cox Law, P.C.

Chairman Rahall, Ranking Member Young, Delegate Faleomavaega, and Members of the Committee on Natural Resources, I thank you for inviting me to present testimony to the Committee today on H.R. 2837.

My testimony today is drawn from my prior work as the former Chief Counsel and Staff Director for the U.S. Senate Committee on Indian Affairs. In May of 2005, following almost 25 years of service on the Committee, I retired from the Senate

and am now engaged in the private practice of law, working with American Indian tribes, Alaska Native entities, and Native Hawaiian organizations. Our law firm does not currently represent any tribal group that has a petition pending in the Office of Federal Acknowledgment.

I want to begin by expressing my appreciation to Congressman Faleomavaega for the fine and clearly thoughtful bill that he has introduced, and to the Chairman for scheduling a hearing on this most important issue.

In my last few years on the Senate Indian Affairs Committee, in an effort to develop a framework for possible legislative reform of the Federal Acknowledgment process, we spent a considerable amount of time with the Director of the Office of Federal Acknowledgment and his staff, as well as with the team from the General Accountability Office that had conducted so much research on the acknowledgment process over the years, and the team from the Interior Department's Inspector General's Office who also had reason to examine the Federal acknowledgment process.

While we conducted those discussions with the understanding that none of the people with whom we consulted could make recommendations for legislative change, what we were able to discuss were some of the challenges that the Office of Federal Acknowledgment is faced with in trying to carry out its mandate.

For instance, we learned that a significant percentage of the Office's limited time and personnel resources was consumed in responding to requests made of the Office under the Freedom of Information Act (FOIA). Hours and hours were then being expended in locating the records that were the subject of a FOIA request and making photo copies for dissemination to those requesting the information.

Another significant amount of time was then being expended in the provision of technical assistance to those tribal groups that had petitions pending in the acknowledgment process. These two activities alone substantially diminished the amount of time that the small OFA staff could have otherwise expended on the processing of acknowledgment petitions.

Add to that the time consumed in preparing responses—when there are charges asserted that improper influence of one sort or another is being brought to bear on either the acknowledgment process, the OFA staff, or on Administration officials responsible for acknowledgment decision-making—and one begins to understand why the pace of action on petitions has slowed so dramatically in recent years.

Another dynamic arises out of frustration with the length of the process, as some tribal groups seek the involvement of the Federal courts and court-ordered time lines result in a petition having to be set aside so that work on another petition which is the subject of a court's order can be acted upon in compliance with those court-ordered time lines.

In recent times, we have also seen a marked increase in the number of so-called "interested parties" who want to intervene in the process—sometimes very late in the process—and who seek copies of all of the relevant documents associated with a petition. This unregulated intervention can and often does wreck havoc with an otherwise orderly acknowledgment process.

There have also been concerns expressed that the manner in which the process is administered puts the Office of Federal Acknowledgment staff in a position in which they must serve multiple roles—for instance, they often have to provide technical assistance to petitioning groups, sometimes over an extended period of time, and then later, they have to bring their independent judgment to bear on the merits of the same group's petition.

With these observations in mind, we developed a conceptual framework that the Committee may want to take into consideration as it reviews this legislation.

Separate the technical assistance function from the decision-making function: To address the potential for conflicts of interest as well as reduce the costs associated with documenting a petition, we thought that one possible approach to achieving this objective would be to establish the technical assistance function within the Cultural Resources Center of the National Museum of the American Indian—a place where the citizens of tribal nations already come to conduct research not only on objects with the Museum's collections but on documents that contain important information about a tribe's history, its culture and traditions, its interaction with other governments and private entities at specific points in time. This branch of the Center could be staffed with the same complement of expertise that currently is posited in the Office of Federal Acknowledgment, so that technical assistance could be provided to petitioning tribal groups.

Because some tribal groups, particularly those in California, have a common history—there could be a substantive benefit to the collection of historical information that might be relevant to the petitions of more than one group. Given the increasingly-prohibitive expense associated with the development of a full acknowledgment application, if historical information gathered by a prior applicant can be used by

another petitioning group to fill in gaps in that group's own records, there could be a meaningful savings of costs.

This Center could also serve as a useful alternative for a petitioning group that may have only the limited resources available through an Administration for Native Americans grant to hire private experts to assist the group in developing the historical, genealogical, anthropological and other documentation necessary to complete its petition.

Place responsibility for responding to Freedom of Information Act requests in a separate office or develop a data base in which both transparency and protection of proprietary information can be achieved: In the context of the proposed Commission, unless this time-consuming responsibility is delegated to another entity, responding to FOIA requests is going to take up as much of the Commission's time as it currently requires of OFA staff.

New software programs have been employed in the arena of environmental management and regulation that allow different users to have access to only that information that is appropriate to their role in environmental management and regulation. These programs are readily capable of being adapted to the Federal acknowledgment area—for instance, the petitioning group would have access to all documents that are submitted to the Commission, an interested party might have more limited access to documents—particularly no access to documents that contain proprietary information, and the Commission would have access to all documents. Rather than expending time duplicating paper copies of documentation requested under the Freedom of Information Act, the Commission could provide a point of limited access to information in the data base that the Commission deems appropriate to the FOIA request.

Divesting the Process of Assertions of Improper Influence, Limiting the Time in which Interested Parties may involve themselves in the process, Providing Certainty and Reliability for a Time Certain in which each petition will be fully processed: Filing of Acknowledgment Petitions in a Designated Federal Court: Several of those with whom we consulted felt that this would be a way to impose order on the process as well as address assertions of improper influence on decision-makers or the process itself. In the context of H.R. 2837, the Commission would file each petition with a designated Federal court—likely a court in the District of Columbia—then the court could establish: (1) a time frame in which interested parties may register and a date beyond which no further interested parties will be involved in the process; and (2) a series of negotiated deadlines for the processing of each petition that would be negotiated by the petitioning group and the Commission with the court's oversight.

Once a petition is in the court process, the Commission could not be pressured to set aside one petition for work on another petition—all petitions would be subject to a petition-specific time line that could only be altered by agreement of the petitioning group and the Commission with the court's supervision and entry of such changes. This would enable not only an orderly process but it would also provide the petitioning group with some certainty as to the period of time in which the group can predictably rely on a beginning and an end to the process.

Last, I would urge the Committee to consider providing authority for another member of the Commission to take official action on behalf of the Commission in circumstances when the Commission's Chairman is not able to do so.

Mr. FALEOMAVAEGA. Thank you, Ms. Zell. Ms. Locklear.

STATEMENT OF ARLINDA F. LOCKLEAR, ESQUIRE, WASHINGTON, D.C.

Ms. LOCKLEAR. Thank you, Mr. Chairman. I appreciate and welcome the opportunity to appear today on this important bill, H.R. 2837. I have worked on this issue for approximately 30 years now, and have had, during those years, the extreme pleasure of working with you, Mr. Chairman. On behalf of all of us who labor in this field, Mr. Chairman, we express our extreme gratitude to you for your faithfulness and your effort over many Congresses in trying to bring fairness in this process to all non-Federally recognized tribes. So thank you for that, and we hope this effort succeeds.

Let me start by saying most of the testimony that the Committee has heard this morning has focused on the procedural aspects of the question of how does one go about determining whether an Indian tribe exists. Is it done by the BIA? Is it done by independent commission? Do there need to be timelines?

Those are all important questions. Other witnesses who will testify on this panel will speak more specifically to the procedural questions.

Let me say, though, that I do strongly agree with those you will hear soon that the process needs to be taken entirely from the hands of the Bureau of Indian Affairs, as H.R. 2837 proposes, and placed in the hands of an independent commission.

With respect, I think the Committee heard today, in the testimony of the Assistant Secretary himself, the reasons for that.

The BIA has an important mission, and that mission is to serve Federally recognized tribes. As Mr. Artman correctly pointed out, the Bureau holds a trust responsibility to those tribes. That is as it should be.

However, it asks too much to expect that same institution to apply the recognition process in an even-handed manner to tribes on the outside: tribes for whom it does not have a trust responsibility; tribes for whom the recognition may impact the services it tries to extend now to presently recognized tribes. For all those reasons, I would urge that the Committee proceed with all of the provisions in H.R. 2837 that authorize that independent commission.

In addition, though, and I also strongly believe this, the creation of the commission does not solve the problem. That is only half of the problem.

If you transfer the existing regulations now to an independent commission, eventually that independent commission will be bogged down in the same minutiae of examination of tribal histories that the present process engages in. So to make the fix work, the Committee should also focus on what those criteria are.

In those respects, I would like to make some specific comments, some specific suggestions, as well as propose some particular amendments to H.R. 2837, to ensure that not only is the process where it should be, but that the process works as it should be, and is looking at the relevant criteria.

First, let us begin with what I consider a fundamental flaw in the process, and that is its extreme time dip. As it now functions, all of the seven mandatory criteria, except for criterion A, require proof of continuity from the time of first sustained White contact. In the case of many Eastern tribes, that could be 350 years.

More importantly, that is not necessary. The question before us is, is this a legitimate Indian tribe. An Indian tribe is a body of indigenous people who exercise inherent authority. It is not sovereignty that was delegated by a European power upon discovery; it is not authority that was delegated when the Constitution was adopted, or the Declaration was signed; it is inherent authority. So the time of White contact is legally irrelevant.

The inquiry need only be, have they existed long enough to establish their legitimacy. In my view, H.R. 2837 makes a great progress on that point by establishing the beginning point as 1900 for all the criteria. Arguably, we could bring it even sooner, and

some witnesses support bringing it sooner. But certainly, 1900 is a fair and reasonable approach that will streamline the process and save a lot of time and resources. That is the most significant flaw.

Second, though, and I urge the Committee to look at the criteria themselves, the criteria are written in a way that encourage subjective analyses of minutiae of tribal communities and internal relations within the tribe. Let me give you some examples.

The community criterion, known by shorthand as B by those people who exercise the authority to make these decisions.

The B criterion requires a petitioner to establish that there is significant interaction among a substantial number of community members. Mind you, this is an examination of internal relationships among the members of the tribe itself. Not only do they talk to each other, but how often do they talk to each other, and what do they talk to each other about.

There is one case, for example, that illustrates this problem, where the tribe actually had to produce telephone records of individual members to prove how many members each member talked to, and how often those members were talked to. That is the level of detail that takes a very long time to examine, and that needs to be fixed. We need objective criteria.

Similarly, for criterion C, political authority. Political authority is defined as, in the regulations, as a relationship between the leaders and the followers. In other words, are there significant issues on which a majority of the members will defer to the leadership of the leaders. This is referred to by the Bureau of Indian Affairs as bilateral political relations. That is their shorthand term for the phrase.

Again, though, it focuses on the internal dynamic of the tribe. It requires the tribe to document that it makes decisions, it has leaders who make decisions that affect the lives of individual members. That takes time and that takes resources; and again, it is not necessary.

If a community exists, then that community must have leaders. And if they can identify those leaders and describe for the decision maker how those leaders are selected, that should be all that should be asked of them.

Finally—and I see that I am out of time—I will very briefly describe one other idea that I think may serve to shorten and streamline the process for all tribes.

The Bureau discussed earlier the idea of an expedited denial, and expedited unfavorable for certain tribes that clearly cannot meet the standard. That makes some sense. It makes no sense for a tribe that can't even prove that its members are Indians, for example, to go through an analysis of significant community interaction. That makes sense.

However, on the other side, in all fairness, there should be an expedited favorable for certain tribes that all of us looking at it can see and tell plainly they are Indian tribes. Let me give you some examples.

Number one. If a tribe can prove that its present-day members descend from a tribe that was recognized by treaty with the United States, that ought to be the end of the inquiry. That tribe should be entitled to a presumption of recognition.

Another example. If a tribe can prove that it occupies a reservation that the state has held and governed as belonging to those people since 1900, a state-recognized reservation since 1900, those folks ought to be recognized. It is counter-intuitive to suggest that there is no community or political leadership.

Those are the kinds of things that, if those—let me give one other quick example, because it shows how easily this can be done.

Third example. If a tribe has been determined to exist as an Indian tribe under Federal law, by a Federal court, there is no reason for the BIA to make the detailed examination on community and political authority that it does. That tribe should be entitled to recognition, end of story.

So if the BIA is able to parse down its list of petitioners through those means, both favorable and unfavorable expedited consideration, that will streamline the process, as well.

In sum, we have reached a point where we have a process, and we can all debate as to how it got to this point, where there is so much focus on the individual tree, that they really are not able to see the forest. But in all of these cases, all of us, if we step back, the lines, the contours of the forest are visible. They are palpable. They are there. It is not that difficult to see, unless you remain focused on the individual tree.

If we reform the process, we must reform the criteria, so that we alter that focus so that we can allow all legitimate tribes to be recognized as such.

Thank you.

[The prepared statement of Ms. Locklear follows:]Y

Statement of Arlinda F. Locklear, Esquire

Mr. Chairman and members of the committee, I appreciate the opportunity to present my views on H.R. 2837, a bill to reform the process to extend recognition to Indian tribes. This is a vital issue to scores of Indian communities and your leadership on this issue, Mr. Chairman, is greatly appreciated by those communities. Those communities owe a particular debt of gratitude to Mr. Faleomavaega, not only for bringing this issue to the fore with the introduction of H.R. 2837 but also for his faithfulness over many congresses to the cause of fairness and justice for non-federally recognized Indian communities.

I have been involved in the process to recognize Indian tribes for thirty years now, having worked on approximately 10 petitions, some formally and others informally, before the Office of Federal Acknowledgment [OFA] and its administrative predecessors. In addition, I have testified at several hearings held by Congress on the subject—hearings on various reform bills and oversight hearings. I should also add that I have a personal interest in the subject, since I am an enrolled member of the Lumbee Tribe of North Carolina, the largest non-federally recognized Indian tribe in the country. While I continue to work for a number of non-federally recognized tribes in various capacities, the views I express today are not offered on behalf of any particular tribe but are my personal views only.

It is important to place this issue at the outset in its proper historical and legal context. This context is offered for two purposes: first, to encourage the Congress to take an independent and fresh view on the appropriate process and criteria to be employed in the recognition of Indian tribes; and second, to emphasize Congress' historic and continuing role in the recognition of tribes directly under certain circumstances. Next, I identify what in my view are the most important defects in the existing administrative acknowledgment process established by the Bureau of Indian Affairs in 1978. For legislative reform to succeed, we must learn from our experience under the existing administrative process. Finally, I express my support for H.R. 2837 and propose amendments so that Congress can meet its presumptive goal of insuring the recognition of all legitimate Indian tribes.

Federal recognition of Indian tribes—an historical and legal context

Any discussion of federal recognition of Indian tribes must begin with the proposition that broad authority over the conduct of Indian affairs, including the recognition of Indian tribes, resides in the United States Congress. From the earliest days of the Republic, the Supreme Court has begun its analysis of any Indian question with this observation. See, e.g., Worcester v. Georgia, 31 U.S. 551 (1832). With regard to recognition of tribes, the Court has specifically observed that there are minimal limitations on Congress' authority:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.

United States v. Sandoval, 231 U.S. 28, 46 (1913). This standard has been taken to mean that a group can be recognized by Congress if its members are indigenous people and its members are a people distinct from others. *Indian Issues: Improvements Needed in Tribal Recognition Process,* GAO-02-49, Nov. 2001, p. 23. It is noteworthy that Congress' determination to recognize a particular Indian tribe, by treaty or statute, has never been set aside by a court.

The Congress has exercised this constitutional authority time and time again. Of the currently recognized tribes [565 on last published list], 222 are Alaskan tribes added to the list of recognized tribes administratively in 1993. *Id.* Of the remaining federally recognized tribes, the overwhelming majority were recognized specifically by Congress through treaty, statute, or other course of dealing. *Id.* at 21-22. Even after the Department of the Interior established its administrative acknowledgment process in 1978, Congress continued to exercise its constitutional prerogative to recognize particular tribes under appropriate circumstances. *Id.* At 23-24.

Finally, it should be noted that the Congress has never expressed its intention to defer to the present administrative acknowledgment process in all cases. As the GAO observed, "In conclusion, BIA's recognition process was never intended to be the only way groups could receive federal recognition." Indian Issues: Basis for BIA's Tribal Recognition Decisions is Not Always Clear, GAO-02-936T, p. 8. There was no act of Congress directing the Department to establish this process. Instead, the Department relied upon its general supervisory authority in creating the process. See 25 C.F.R. Part 83, Source. In other words, the Congress did not mandate the particular process or criteria used by the Department of the Interior in its acknowledgment process and Congress is plainly not limited to or otherwise bound by those criteria and that process.

For the reasons set out below, the present acknowledgment process does not provide for the acknowledgment of every legitimate Indian tribe. If Congress' goal, then, is to provide for recognition of every legitimate tribe, it can and must consider alternative processes and criteria. In any event, Congress retains the constitutional prerogative to specially recognize any given tribe, so long as that tribe is a distinct group of indigenous people, if Congress is satisfied that particular circumstances warrant direct congressional action.

Defects in the existing acknowledgment process

Other witnesses focus on the defects in the process used by the BIA in its review of tribes' requests for federal recognition. The statement of Mark Tilden, with the Native American Rights Fund, explains the need for the independent commission proposed in H.R. 2837 and discusses procedural details to provide for the fair and smooth working of the commission. I endorse those comments. My comments here are limited to defects in the criteria used by the BIA to ascertain whether a group is an Indian tribe.

The administrative process requires that petitioning tribes demonstrate seven mandatory criteria. Criterion a (existence of an Indian entity) must be proved on a substantially continuous basis from 1900 to the present. Criteria b (community) and c (political authority) must be proved on a substantially continuous basis from the time of first sustained white contact to the present, or three hundred years or more in the case of many eastern tribes. Criteria d (governing document), f (membership not members of another recognized tribe) and g (Congress has neither forbidden nor terminated the federal relationship) are mechanical queries without any time depth. Finally, criterion e (descent from an historic tribe) has time depth since it requires a petitioning group to link itself genealogically to a tribe that existed at the time of first sustained white contact. Failure on any one of these criteria results in refusal to acknowledge the petitioner.

If the purpose of any process is to identify and recognize all legitimate Indian tribes, the present acknowledgment criteria fail to accomplish this goal for the following reasons.

1. Extreme time depth

With the exception of criterion a, the present regulations require that petitioning tribes establish the substantive criteria continuously since the time of sustained white contact. This is an extraordinarily long period for eastern tribes and requires all petitioners to document their existence by records maintained by the dominant society, even for those periods of time when the dominant society kept few records.

There is no legal or common sense rationale for beginning the inquiry at the time of sustained white contact. The ultimate question here is whether an indigenous group exists as a separate people, or community. Such groups hold limited, reserved sovereignty. This sovereignty does not derive from nor is it delegated by Europeans or the United States. Instead, it is an inherent sovereignty. See United States v. Wheeler, 435 U.S. 313, 322-323 (1978). As a result, the time of white contact is irrelevant to the inquiry of tribal existence. All that is required is sufficient time depth to demonstrate the actual existence of an indigenous people that has maintained its separate existence.

In my view, 1934 is a reasonable starting point for the inquiry. This year represents a significant change in federal Indian policy with the enactment of the Indian Reorganization Act—a policy intended to foster and support tribal self-governance and to repudiate earlier assimilationist policies. It seems only fair that non-federally recognized tribes should be able to take advantage of this major shift in federal Indian policy, particularly because there were no artificial incentives at the time (such as Indian gaming) that would have encouraged groups to falsely self-identify as Indian.

2. Highly subjective definitions for criteria b (community) and c (political authority)

These important criteria are defined by largely subjective factors: e.g., "significant social relationships connecting individual members"; "most of the membership considers issues acted upon or actions taken by the group leaders or governing bodies to be of importance..." §§83.7(b)(1)(ii), 83.7(c)(1)(ii). This necessarily produces idiosyncratic, arguably arbitrary results. For example, in the case of the Miami Nation of Indiana, the BIA refused to accept an annual tribal picnic, one held continuously by the Tribe since 1907, as proof of community, even though the BIA accepted proof of similar gatherings for other tribes as proof of community. It also requires microscopic examination of internal relations within non-federally recognized tribes. The Gay Head Tribe illustrates this point. In its proposed finding for Gay Head, the BIA proposed to decline acknowledgment largely because of insufficient proof of contemporary community. In its comments on the proposed finding, the Gay Head Tribe actually submitted telephone records of its members to document the extent and number of contacts among them. For the first time, the BIA reversed itself and issued a favorable final determination based on the Tribe's comments on the proposed finding. This inward focused, detailed examination results in a failure to see the forest for focusing on the trees.

This requirement that petitioning tribes prove the quality of relationships among members also puts a disproportionate and unfair burden on larger tribes. The Miami Tribe of Indiana also exemplifies this problem. With approximately 4,700 members, it was the largest tribe processed by the BIA at the time of its final determination in 1992. The Tribe calculated that, to carry its burden of proving significant interaction among its members, it was expected to document approximately 4.5 million relationships. Not surprisingly, the Tribe failed because the BIA found too little evidence of community and political authority from WWII to the early 1970's—the BIA emphatically did not find that there was no evidence of community or political authority, only that the evidence failed to meet some unspecified level of sufficiency under the regulations.

This focus on the quality of relationships among members, as proved by documents maintained by the dominant society, further tends to disadvantage more traditional Indian communities. For example, if a community follows a traditional subsistence life style, it is far less likely to generate the necessary documents over time. The Little Shell Tribe of Montana continued its traditional nomadic life style well into the twentieth century, which produced few contacts with the dominant society and thus few documents to prove community. Interestingly, the BIA issued a proposed favorable finding for this tribe but, at the same time and for the first time, strongly urged the Tribe to submit more documentation of community. The same holds true for the political authority criterion. Because of its focus on proof of assent to leadership by the members, the inquiry heavily favors Anglo-type governments

based on elections. More traditional governments, such as the Miami Nation of Indiana that relies on council members appointed by their traditional sub-groups, evidence of assent to leadership is more difficult to adduce.

Most importantly, there is no need for this myopic focus on internal relations among members to ascertain whether an Indian tribe exists. As the Supreme Court has implied, the mere continued presence of a separate group of indigenous people suggests the existence of a community and political authority over time. This should be sufficient. However, if those criteria are retained, there must be objective means for determining the existence of community and political authority. This would at least infuse predictability into the process and eliminate the obligation to demonstrate the number and quality of relationships among members.

3. Requirement that tribe prove a genealogical connection to an historic tribe

Criterion e of the present process requires that petitioning tribes demonstrate descent from an historical tribe, defined by the BIA as from the time of sustained white contact. While the regulations do not so require on their face, the BIA in practice accepts only genealogical proof of descent from an historic tribe. In other words, it is not enough that historians have identified a particular group as descended from a tribe shown on records at the time of white contact; the petitioning tribe must be able to connect its present members through a continuous line of birth, death, and marriage records to individual members of the historic tribe. Of course, this is impossible when the dominant society has failed to maintain such records on the petitioning group for any reason, even a good reason such as state policies for periods of history that no people in their borders would be identified as Indian in official records.

The problem with this criterion is related to the extreme time depth discussed above. If the beginning point for the tribal existence inquiry is moved forward in time from sustained white contact to 1934, the petitioning tribe would only be obliged to identify a tribe in existence at that point in history and demonstrate its descent from that tribe. Depending upon the beginning point that is selected, this may avoid many oppressive state policies or simple failures of the dominant society to maintain records. Whatever that beginning point may be, it would be helpful to specifically provide that evidence other than genealogical data can be used to establish descent from an historic tribe.

4. Absence of any expedited process for obvious cases, positive or negative

As others note in their statements, the generations long time delay that petitioners face in the process is a serious flaw. Modifications of the criteria suggested above would aid in speeding the process. After all, it takes considerable time and resources to establish and confirm thousands of individual relationships to prove community and political authority. Of course, the imposition of deadlines would also be helpful. In addition, there should be some expedited process for those petitioners that will presumptively fail and those that will presumptively succeed. These groups can receive final decisions based upon unrebutted proposed findings, thereby saving time and resources.

The BIA already appears to engage in a presumptive negative finding for groups that cannot demonstrate Indian ancestry, although this process is not set out or defined in the regulations. It makes sense that a petitioner which cannot demonstrate that 50% of its members are Indian should be denied in fairly short order without examination of the other criteria. This expedited negative should be specifically authorized and defined.

There should also be a presumptive positive finding for other groups. There are certain non-federally recognized tribes for whom detailed inquiry is unnecessary. These include:

- tribes for which a state has recognized a reservation since historic time (as redefined);
- tribes that can demonstrate 50% or more of their members descend from a treaty recognized tribe;
- tribes held to constitute an Indian tribe under federal law by a federal court.

There are a number of non-federally recognized tribes in these positions for whom it makes no sense to commit years and millions of dollars to examine in detail—tribes such as the Pamunkey Tribe of Virginia, the Mattaponi Tribe also of Virginia, the Shinnecock Tribe of New York, and the Little Shell Tribe of Montana. Once a tribe establishes one of these thresholds, the decision-maker should issue a proposed favorable finding without any further examination. This proposed finding should function as a presumption in favor of recognition, one that could be rebutted by evidence from an interested party demonstrating that the particular tribes cannot meet

one of the traditional criteria. In the absence of any negative evidence, the proposed favorable finding should become an automatic favorable final determination.

H.R. 2837 is meaningful and needed reform.

The pending bill addresses and resolves many of the defects in the present administrative process identified above. First, it transfers the recognition process from the BIA to an independent commission. This is absolutely vital to meaningful reform. As others have discussed at more length, the proposed commission with the procedures outlined in the bill promises fair, timely, and transparent processing of petitions. Second, it changes the time depth on the inquiry from first sustained white contact to 1900 for all criteria. This is a reasonable and reliable time period for tribes to document their existence. It insures legitimacy with one hundred years' proof of existence from a time at which no incentives for false identification as Indian existed (such as Indian gaming.) This one change alone will dramatically improve and speed the process. Third, it adds one objective means of establishing political authority (although not community.) Fourth, it provides another opportunity for tribes already turned down by the BIA if the change in the criteria might affect the outcome on their petition. In all fairness, this is absolutely essential. It provides tribes that were subjected to an unfair process with an opportunity to prove their tribal existence in a fair process.

There are amendments to H.R. 2837 that I urge the committee to consider in the interest of insuring that all legitimate tribes can be recognized as such:

- amend section 5(b)(2)(B)(x) to read "Not less than 50 percent of the tribal members exhibit collateral as well as lateral kinship ties through generations to the third degree" [addition in bold]—the goal here is to establish an objective means of proving community, but it must take all relationships into account, those across and through generations;
- add continuous state recognition since 1900 as an objective, alternative means of proving community, inasmuch as the continuous existence of state recognition necessarily requires the presence of an Indian community;
- establish an expedited negative process for groups whose members cannot demonstrate Indian ancestry and an expedited favorable process for groups whose members descend from treaty recognized tribes, groups for whom a state has recognized a reservation since 1900, and groups found to constitute an Indian tribe under federal law by a federal court;
- amend section 5(c) to require that previously acknowledged tribes must prove only contemporary community and political authority. Presently this subsection requires previously acknowledged groups to prove their existence continuously from the time of last acknowledgment to the present. This may have the inadvertent effect of requiring more, not less, proof from these tribes since the beginning point for all petitions has been moved forward to 1900.

H.R. 2837 is a good bill. With these modest changes, it establishes a fair process with reasonable criteria that could finally offer a real opportunity to non-federally recognized tribes for even handed and fair treatment.

Conclusion

Once again, Mr. Chairman, thank you for the opportunity to present my views on this important issue. I would be happy to assist the committee in any way as it moves forward in its continued deliberations on the subject.

Mr. FALEOMAVAEGA. Thank you very much.

Mr. Tilden.

STATEMENT OF MARK TILDEN, STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND, BOULDER, COLORADO

Mr. TILDEN. Good afternoon, Mr. Chairman and members of the Committee. My name is Mark Tilden, and I am a staff attorney with the Native American Rights Fund. And we are legal counsel to the United Houma Nation, the Shinnecock Indian Nation, the Pamunkey Tribe of Virginia, and the Little Shell Tribe of Montana. And we have worked on all of their petitions for Federal acknowledgement.

And today I have accompanying me one of the trustees from the Board of Trustees with the Shinnecock Indian Nation, Mr. Lance Gumms, who has testified before this committee on prior occasions.

To begin, the administrative acknowledgement regulatory process is only one pathway for Indian tribes to obtain Federal recognition. Under the Federal Constitution, the Congress has broad powers to recognize Indian tribes, so this morning was a little bit of a surprise that the Department of Justice has perhaps inquired into the scope of Congress' powers. And I am curious to see what the outcome of that situation is about.

Courts also possess the power to recognize Indian tribes. And Congress made this unequivocally clear in the Federally Recognized Tribe List Act of 1994, when it expressly stated in the legislative history that Indian tribes presently may be recognized by a decision of a United States Court, in addition to recognition through an Act of Congress or through administrative proceedings.

And the powers of Congress and the Judiciary to recognize tribes is not hypothetical. They both have been used when the situation calls for it to fulfill their Constitutional responsibility. And the Congress has found it appropriate 11 times since the promulgation of the acknowledgement regulations in 1978, and this track record virtually matches the number of tribes acknowledged by the Administration, which amounts to 15 acknowledgements.

And Congress has not hesitated to recognize Indian tribes through special legislation. And I urge this committee not to abdicate that responsibility, but to follow the precedent of recognizing Indian tribes legislatively when appropriate.

Turning to the Judiciary, it, too, has exercised its power, including after the enactment of the acknowledgement regulations. Twenty-five California tribes from 1978 to 1992 received a judicial determination of their status, and those tribes are now on the list of recognized tribes.

Most recently, on November 7, 2005, the United States District Court for the Eastern District of New York issued an order based on a full, factual record developed in extensive contested summary judgment proceedings, and expressly determined that the Shinnecock Indian Nation plainly satisfies the Federal common law standard for determining tribal existence; that the Shinnecock Indians are, in fact, an Indian tribe, and recognized the Shinnecocks as a tribe.

Yet the Department of the Interior has wrongly refused to place the Nation on the list of Federally recognized tribes. This inequity should be addressed by the Congress, because the Congress has stated that judicial recognition is a legally acceptable method of obtaining Federal recognition.

And I think I would follow up on Arlinda, Ms. Locklear's comments, too, about, you know, there is a certain point in time when I think it is really, it could really speed up the process if the Department were to take the position that tribes that are Federally recognized by a Federal court, or even by a state supreme court, like in the case of the Little Shell Tribe of Montana, that that is the end of the process right there; they are a Federally recognized tribe at that point in time. And that should be the decision itself, that they can be placed on the list of Federally recognized tribes.

Turning to H.R. 2837, it is unfair, it is extremely slow, and it is very, very expensive for the petitioners. And I think the one thing

I would like to really point out here is how expensive it is for petitioners.

In our experience, the petitions now cost over $1 million out-of-pocket expenses, and that doesn't include attorney times. So when the Administration is sitting here talking about additional funding, I think the other point to be made is that tribes also need additional funding. I mean, if it is going to cost millions and millions of dollars, where do tribes get that money?

Before, the Administration for Native Americans was providing some funding to tribes, although it was limited. But now they really don't provide any funding at all. That type of funding has really stopped altogether for tribes. And so a lot of tribes have had to turn to gaming developers out of necessity.

Unfortunately, the fact is that that source of funding has been used against tribes. And I can say this for a fact, that all of my clients, and I think a lot of the petitioners, really started the process way before the Indian Gaming Regulatory Act was even thought of.

And I think the other point, too, that I wanted to make was, there was a comment this morning by Congressman Duncan about the gaming situation, and the fact that a lot of tribes may have started the, may have submitted a petition for Federal recognition, or a letter of intent.

But I think, you know, the one thing that really peaked was in the early 1990s, when the Administration held meetings, and they really solicited the input of non-Federally recognized tribes. They held two meetings at the White House, where they invited all the non-Federally recognized tribes. And at that point, the Branch of Acknowledgement and Research get a lot of outreach to really welcome tribes to submit letters of intent or petitions for Federal acknowledgement. And so there was a peak around 1994 or 1995.

And so I don't think it was a result of Indian gaming; I think it was a result of some of these meetings that were held by the White House, as well as the outreach that was done by the Administration.

Again, the other problem is that it is incredibly slow. The BIA has said that it takes about—I mean, they decide 1.3 decisions per year. That has come out in the past. And for some, you know, and at that pace it is going to take a very long time.

I can give you one example: the United Houma Nation. They filed their petition in 1985, and that was over 20 years of waiting. And they submitted a response to their proposed findings in 1996. And so that is over 10 years of the tribe waiting for a final decision on their petition for Federal recognition.

So there is a lot of inherent problems with the Federal regulatory process, and I submitted written comments. And if those could be made part of the record—and I spelled out a lot of the recommendations that we made to help improve the Federal regulatory process.

Thank you.

[The prepared statement of Mr. Tilden follows:]

Statement Submitted on Behalf of the United Houma Nation, the Shinnecock Indian Nation, the Pamunkey Tribe, and the Little Shell Tribe by the Native American Rights Fund

The Native American Rights Fund represents the United Houma Nation, the Shinnecock Indian Nation, the Pamunkey Tribe, and the Little Shell Tribe. We appreciate the opportunity to submit testimony on H.R. 2837—"Indian Tribal Federal Recognition Administrative Procedures Act of 2007". This statement is based on our experience in representing the above, and other, tribes seeking and obtaining federal recognition.

H.R. 2837 is a response to the various problems that have been identified in the acknowledgment process established and currently used by the Bureau of Indian Affairs (BIA). Non-federally recognized tribes are mindful and appreciative of your dedication and earnestly hope that your efforts will bear fruit this Congress in the form of a fair and reasonable federal recognition process for Indian tribes to replace the present burdensome, expensive and unworkable administrative recognition process. Our experience with the process convinces us that the present administrative process is beyond repair and nothing less than a comprehensive remaking of the process by Congress can restore fairness and reason to the recognition process. We support the effort to deal with those problems. H.R. 2837 provides solutions to some of the problems. We have recommendations as to the others and as to some parts of the bill itself.

RECOGNITION

Although the government recognized most of the currently federally-recognized tribes in historic times, it continues to acknowledge tribes to the present day. Under current law, Congress, the Department of the Interior (Department or DOI) and the Judiciary have authority to recognize tribes. In section 103(3) of the Tribe List Act, 25 U.S.C. § 479a Note, Congress expressly stated that "Indian tribes presently may be recognized by—a decision of a United States court[,]" in addition to recognition through an Act of Congress or through administrative proceedings.

RECOGNITION PRACTICE

1. Congress

Congress has always had the broad constitutional power to recognize Indian tribes. United States v. Sandoval, 231 U.S. 28 (1913). Currently, it recognizes tribes through special legislation. It has done so eleven times after the federal acknowledgment process was established in 1978 (while the BIA has acknowledged fifteen). See e.g., Act of October 10, 1980, 94 Stat. 1785 (Maliseet Tribe of Maine); Act of October 18, 1983, 97 Stat. 851 (Mashantucket Pequot Tribe of Connecticut), Act of November 26, 1991, 105 Stat. 1143 (Aroostook Band of Micmacs); Act of September 21, 1994, 108 Stat. 2156 (Little Traverse Bands of Ottawa Indians and the Little River Band of Ottawa). This is congruent with its intent not to abdicate its constitutional responsibility. Indeed, the GAO noted that "BIA's recognition process was never intended to be the only way groups could receive federal recognition." Indian Issues: Basis for BIA's Tribal Recognition Decisions Is Not Always Clear, GAO-02-936T, p.8. Thus, Congress reviews and acts on requests for special recognition legislation on a case-by-case basis.

2. Judiciary

Section 104 of the Tribe List Act, 25 U.S.C. § 479a-1, requires that the Secretary annually, on or before every January 30, "shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

The Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 108 Stat. 4791, 25 U.S.C. § 479a et seq., specifically addresses the means available to Indian tribes seeking federal acknowledgement. In Section 103(3) of the Tribe List Act, 25 U.S.C. § 479a Note, Congress expressly stated that "Indian tribes presently may be recognized by...a decision of a United States court[,]" in addition to recognition through an Act of Congress or through administrative proceedings. In Sections 103(7) and (8), Congress stated that "the list published by the Secretary should be accurate, regularly updated, and...should reflect all of the federally recognized Indian tribes in the United States...." This should include any tribe recognized by a United States court, and any court of the various fifty states. Montoya v. United States, 180 U.S. 261 (1901); United States v. Candalaria, 271 U.S. 432 (1926); Koke v. Little Shell of Chippewa Indian of Montana, Inc., 68 P.3d 814 (Mont. 2003).

Indeed, twenty-five California tribes, from 1978 to 1992, received a judicial recognition of their status. Those tribes are now on the Tribe List.[1] Most recently, on November 7, 2005, the United States District Court for the Eastern District of New York issued a Memorandum and Order, on a full factual record developed in extensive, contested summary judgment proceedings, in which it expressly determined that the Shinnecock Indian Nation "plainly satisfies" the "federal common law standard for determining tribal existence," "that the Shinnecock Indians are in fact an Indian tribe" and "recognized the Shinnecocks as a Tribe." State of New York, et al. v. The Shinnecock Indian Nation, et al., 03 CIV 3243 (E.D.N.Y.),——, November 7, 2005 Order at 5, 12, 14. [This Order also is reproduced in full at 400 F. Supp. 2d 486 (E.D. N.Y. 2005).] Specifically, the District Court determined that the Shinnecock Indian Nation was "an Indian Tribe not only when the first white settlers arrived in the eastern end of Long Island in 1640, but were such in 1792 when New York State enacted a law confirming that fact and that [the Nation] remain[s] an Indian Tribe today," falling "squarely within the umbrella of the Montoya v. United States, 180 U.S. 261...(1901) and Golden Hill [Paugusett Tribe v. Weicker], 39 F.3d 51 [(2nd Cir. 1994)] line of cases...continuing to the present, [that] establish a federal common law standard for determining tribal existence that the Shinnecock Indian Nation plainly satisfies." Order at 10-12. These are the leading applicable cases regarding judicial recognition of Indian tribes. Finally, the Court determined that there was "no requirement or need for further inquiry into this matter," that is, its holding that recognized the Shinnecock Indian Nation to be an Indian tribe for purposes of federal law is final. Order at 10. This ruling in the Shinnecock case is entirely consistent with the Tribe List Act, which specifically addresses the means available to Indian tribes seeking federal acknowledgement. Yet, the Department of the Interior has wrongly refused to place the Nation on the Tribal List. This inequity should be addressed by the Congress.

As was reported in a 2005 report to Congress, the Congressional Budget Office ("CBO") in preparing a cost estimate for H.R. 5134, "a bill to require the prompt review by the Secretary of Interior of the long-standing petitions for federal recognition of certain Indian tribes," reported to the U.S. House of Committee on Resources:

> "CBO expects that the department probably would be unable to comply with the deadlines in the bill even with additional resources. In that event, the affected tribes *could pursue judicial recognition as they may under current law."*

Letter, From Peter H. Fontaine, CBO to Richard Pombo, Chairman U.S. House Committee on Resources, Nov. 18, 2004 (emphasis added).

3. Department of the Interior

Prior to 1978, DOI made acknowledgment decisions on an ad hoc basis using the criteria "roughly summarized" by Assistant Solicitor Felix S. Cohen in his Handbook of Federal Indian Law (1942 ed.) at pp. 268-72. In 1978, the Department issued acknowledgment regulations in an attempt to "standardize" the process. Both the process and the criteria established in the regulations were different than those used prior to 1978.

A. The Acknowledgment Regulations

In the 1970s various controversies involving nonrecognized tribes,[2] including an increase in the number of requests for recognition,[3] led the Department to review

---

[1] 1978—Hopland Rancheria; 1979 (Tillie Hardwick Settlement)-the Rancherias of Big Valley, Blue Lake, Buena Vista, Chicken Ranch, Cloverdale, Elk Valley, Greenville, Mooretown, North Folk, Pinoleville, Potter Valley, Quartz Valley, Redding, Redwood Valley, Rohnerville, and Smith River; 1981-Table Bluff Band; 1983-Table Mountain Rancheria; 1983-Big Sandy Band of Western Mono; and 1991-(Scott's Valley Settlement) Lytton Band of Pomo Indians, United Auburn Band of Pomo, Scotts Valley Band of Pomo and Guidiville Band of Pomo.

[2] In 1972, the Passamaquoddy Tribe of Maine sued the federal government to force it to file a land claim on its behalf under the Indian Nonintercourse Act, 25 U.S.C. § 177, even though it was not then federally-recognized. See, Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975). In the mid-1970s, a number of nonfederally recognized tribes attempted to assert treaty fishing rights in the United States v. Washington litigation. See, United States v. Washington, 476 F.Supp. 1101 (W.D. Wash. 1979), aff'd, 641 F.2d 1368 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982).

[3] For example, the Stillaguamish Tribe requested recognition in 1974. When the Department of the Interior refused to act on the request, the Tribe filed suit. The federal district court in Washington, D.C. ordered the Department to make a decision on the request. Stillaguamish v. Kleppe, No. 75-1718 (Sept. 24, 1976). The Department recognized the Stillaguamish Tribe in October 1976.

its acknowledgment practice. That in turn led to the promulgation of the 1978 acknowledgment regulations. 43 Fed. Reg. 39361 (Sept. 5, 1978) currently codified at 25 C.F.R. Part 83.[4] In publishing the regulations, the government explained that prior to 1978, requests for acknowledgment were decided on a "case-by-case basis at the discretion of the Secretary." 43 Fed. Reg. at 39361. The 1978 regulations were an attempt to develop "procedures to enable the Department to take a uniform approach" in the evaluation of the petitions. Id.

Under the 1978 regulations, groups submit petitions for recognition to the Assistant Secretary for Indian Affairs. 25 C.F.R. § 83.4. The petition must demonstrate all of the following "in order for tribal existence to be acknowledged": (a) identification of the petitioner as Indian from historical times; (b) community from historical times; (c) political influence from historical times; (d) petitioner's governing document; (e) a list of members; (f) that petitioner's membership is not composed principally of persons who are not members of any other North American Indian tribe; and (g) that petitioner was not terminated. 25 C.F.R. § 83.7(a)-(g).

Upon receipt of a petition, the Assistant Secretary causes a "review to be conducted to determine whether the petitioner is entitled to be acknowledged as an Indian tribe." 25 C.F.R. § 83.9(a). Most of the technical review is carried out by the Office of Federal Acknowledgment (OFA).[5]

The next step is active consideration by OFA. 25 C.F.R. § 83.9(d). The Assistant Secretary, then issues proposed findings for or against recognition. 25 C.F.R. § 83.9(f). Petitioners have the opportunity to respond to the proposed findings. 25 C.F.R. § 83.9(g). After consideration of responses to the proposed findings, a final determination is made. 25 C.F.R. § 83.9(h). The Assistant Secretary's final determination is final unless the Secretary of the Interior requests reconsideration. 25 C.F.R. § 83.10(a).

B. Practice under the Acknowledgment Regulations

The process used to consider petitions under the 1978 regulations is not as simple as the regulations suggest. In response to discovery requests in Miami Nation of Indiana v. Babbitt, No. S 92-586M (N.D. Ind. filed 1992), the Department described the actual process used in processing petitions for recognition under the regulations.

Once a petition is placed on active consideration, a three person team is assigned to evaluate it. Miami Discovery Responses. The team consists of an anthropologist, a genealogist, and a historian. Id. Each member of the team evaluates the petition under the 25 C.F.R. Part 83 criteria and prepares a draft technical report. Id. Evaluation of the petition consists of verifying the evidence submitted by the petitioners, supplementing the evidence submitted where necessary, and weighing the evidence as to its applicability to the criteria. Id. The individual reports are cross-reviewed by each team member. Id. Preparation of the reports includes comparing the petition to past determinations and interpretations of the regulations. Id.

Following completion of the draft technical reports, there is an "extensive internal review, termed peer review". Id. Peer reviewers are other OFA professional staff not assigned to the case. The technical reports are reworked "until the professional staff as a group concludes that the report provides an adequate basis for a recommendation to the Assistant Secretary." Id.

After review and editing by the OFA chief, the acknowledgment recommendations and reports are subject to legal review by the Solicitor's Office and Bureau of Indian Affairs line officials up to the Assistant Secretary. Id. If those officials require more information or clarification, OFA typically provides the information through meetings. Id.

C. The 1994 Revisions to the Acknowledgment Regulations

In 1991, DOI proposed revisions to the 1978 regulations. 56 Fed. Reg. 47320 (Sept. 18, 1991). The revisions were not finalized until February 25, 1994. 59 Fed. Reg. 9280 (February 25, 1994) codified in 25 C.F.R. Part 83 (1999 ed.). In promulgating the revisions, the federal government stated:

> None of the changes made in these final regulations will result in the acknowledgment of petitioners which would not have been acknowledged under the previously effective acknowledgment regulations. Neither will the

[4] The proposed acknowledgment regulations were first published for comment on June 16, 1977. 42 Fed. Reg. 30647. They were redrafted and published for comment a second time on June 1, 1978. 43 Fed. Reg. 23743. They were published in final on September 5, 1978.

[5] Technically, recognition decisions are made by the Assistant Secretary—Indian Affairs. Review of petitions and recommended decisions is done by the OFA staff (formerly called the Branch of Acknowledgment and Research, which was formerly called the Federal Acknowledgment Project).

> changes result in the denial of petitioners which would have been acknowledged under the previous regulations.

59 Fed. Reg. at 9280.

The 1994 revisions specify the types of evidence that will be accepted to establish the two most troublesome criteria, community and political influence. These are listed in 25 C.F.R. § 83.7(b) and (c). They also include a special provision for determining whether a group was previously recognized and the effect of previous recognition. 25 C.F.R. § 83.8.

PROBLEMS TO BE ADDRESSED BY H.R. 2837

There are a number of concerns with the Department's recognition practice under the acknowledgment regulations. Even before the current Departmental process was established in 1978, there was doubt that the Department and its Bureau of Indian Affairs could deal fairly with applicants for recognition. In addition, practice before the Department and BAR has shown a number of weaknesses in the procedures used to review and determine petitions. Those concerns, along with concerns about some of the provisions of H.R. 2837 and proposed solutions are set out below.

1. Independent Decision-Making

One of the fundamental issues is who should make recognition decisions. Congress has the ultimate authority, but DOI has interpreted the general grant of rulemaking in 25 U.S.C. §§ 2 and 9 to allow it to do so as well. It was under those general statutes that the Department issued the existing acknowledgment regulations. The numerous oversight hearings on those regulations and the legislative attempts to change the Department's acknowledgment process have all indicated that it is questionable that DOI's Bureau of Indian Affairs, which manages the government's relationship with federally recognized tribes, can make an impartial decision on the recognition of "new" tribes.

In the years 1975 to 1977, the American Indian Policy Review Commission (AIPRC) conducted a review of "the historical and legal developments underlying the Indians' relationship with the Federal Government and to determine the nature and scope of necessary revisions in the formulation of policy and programs for the benefit of Indians." Final Report American Indian Policy Review Commission, Cover Letter (May 17, 1977). The review included a study of the status of nonrecognized tribes and resulted in reports and recommendations concerning recognition policy. Id. Chapter Eleven; Report on Terminated and Nonfederally Recognized Indians, Task Force Ten, AIPRC (October 1976). The AIPRC described the posture of DOI in making recognition decisions and expressed concern about the ability of the Department to deal fairly with nonrecognized tribes.

> The second reason for Interior's reluctance to recognize tribes is largely political. In some areas, recognition might remove land from State taxation, bringing reverberations on Capitol Hill. There also is the problem of funding programs for these tribes.
>
> Interior has denied services to some tribes solely on the grounds that there was only enough money for already-recognized tribes....Already-recognized tribes have accepted this 'small pie' theory and have presented Interior with another political problem: The recognized tribes do not want additions to the list if it means they will have difficulty getting the funds they need.

Final Report AIPRC at 476.

Concern with impartiality has echoed in the various hearings on recognition that have been held since 1977. There is widespread apprehension that the Department, the Bureau of Indian Affairs, and OFA are subject to inappropriate political influence in making recognition decisions. See e.g. the Statement of Raymond D. Fogelson, Dept. of Anthropology, University of Chicago on S. 611, a Bill to Establish Administrative Procedures to Determine the Status of Certain Indian Groups Before the Senate Select Committee on Indian Affairs, 101st Cong., 1st Sess. 177 (May 5, 1989) ("While I respect the individual conscientiousness, competence, and integrity of members of B.A.R., I believe that an office separate from B.I.A. will be more immune to possible allegations of conflicts of interests or to the potential influence of Bureau policy and attitudes. It seems to me that the B.I.A. has enough to do in administering Federal Indian programs and serving the needs of the Indian clientele without also assuming the additional role of gatekeeper."); Deposition of John A. Shapard, Jr., former chief of BAR, in Greene v. Babbitt, No. 89-00645-TSZ (W.D. Wash.) at p. 33 ("there's a general, all-persuasive attitude throughout the bureau that they don't want anymore tribes"); see also, the Statement of Allogan Slagle in Oversight Hearing on Federal Acknowledgment Process Before the Senate Select Committee on Indian Affairs, 100th Cong., 2nd Sess. 198 (May 26, 1988) ("No matter how fair the BIA/BAR staff attempt to be, and no matter how they try to see

that their decisions reflect a common standard, the perception of many tribes is that there are inequities in the way that the requirements are enforced.")

Those concerns persist to this day and taint the existing DOI recognition process. In the creation of a Commission and an adjudicatory process to rule on petitions for federal recognition, H.R. 2837 solves half the problem in the current administrative process, that is, it requires an open decision-making process by a Commission that lacks the institutional biases of the BIA. Because its mission is to serve federally-recognized tribes, the BIA is institutionally incapable of fairly judging non-federally recognized Indian tribes, particularly through the closed decision-making process currently employed by the Bureau. The creation of an independent Commission is an important step that gives non-federally recognized tribes at least the prospect of a fair assessment of their petitions.

We have a suggestion, however, on this aspect of H.R. 2837. We suggest that the Committee consider one additional change to the provisions creating the Commission, that of adding to the end of Section 4(h) the following proviso: "provided that no individual presently employed by the Office of Federal Acknowledgment, Bureau of Indian Affairs, shall be employed by the Chairperson." This limitation is not meant to imply bias or lack of qualifications on the part of any individual staff member at OFA. It is unreasonable, however, to expect that those individuals, many of whom have worked under the dictates of the present acknowledgment regulations for years, could quickly adapt to the dramatically different decision-making process to be used by the Commission (and perhaps applying different criteria such as those suggested below). To insure a smooth and expeditious transition to the new way of doing business, the Commission should be required to employ fresh personnel.

Proposed Changes to H.R. 2837: Add to the end of Section 4(h) the following proviso: "provided that no individual presently employed by the Office of Federal Acknowledgment, Bureau of Indian Affairs, shall be employed by the Chairperson."

2. Hearing Process

Under the process established in the acknowledgment regulations, it is technically the Department's Assistant Secretary—Indian Affairs that makes recognition decisions. The OFA staff, however, do all the work of reviewing petitions, independent research, and decision writing. That work takes a number of years and is, in large part, hidden from petitioners.

H.R. 2837 makes a needed change from the DOI process. Formal hearings are provided in Sections 8 and 9. Such hearings will bring more transparency to the decision-making process thereby giving petitioners a much better idea of their obligations and more confidence in the ultimate decision. Such hearings will also focus the examination of the Commission and the staff in a manner that is completely lacking in the present process.

There are three matters that should be made more specific in Sections 8 and 9 of H.R. 2837.

1) It should be made clear that the Commission itself will preside at both the preliminary and adjudicatory hearings. Under the DOI acknowledgment regulations, it is the Assistant Secretary—Indian Affairs that makes recognition decisions. The Assistant Secretary, however, is not involved in most of the work that leads to those decisions. The OFA staff reviews petitions, does additional research, and writes the recommended decisions. The Assistant Secretary signs off on those decisions. Although there is no doubt that staff will be necessary to aid the Commission in making decisions, the Commission should be much more involved in decision-making than the Assistant Secretary. One way to accomplish that is to make clear that it is the Commission that presides at all hearings.

Proposed Changes to H.R. 2837: Sections 8(a) and 9(a), respectively. should be amended to state that the Commission will preside at the Preliminary Hearing or Adjudicatory Hearing with specific language to the effect "...the Commission shall set a date for a preliminary hearing, in which the Commission shall preside, and..." and "...shall afford a petitioner who is subject to section 8(b)(1)(B) an adjudicatory hearing, in which is shall preside."

2) It should be made clear that records relied upon by the Commission will be made available, in a timely manner, to petitioners. Both the present Departmental process and H.R. 2837 include preliminary decisions to which petitioners respond. Our experience with OFA indicates that it is imperative to make clear that the Commission and its staff provide petitioners with the documents and other records relied upon in making the preliminary decision. In one case, DOI issued proposed findings on the United Houma Nation (UHN) petition in mid-December 1994. Under the acknowledgment regulations, UHN had 180 days to respond to the proposed findings. OFA only began making records relative to the proposed findings available to the UHN's researchers in April of 1995 for a response due June 20, 1995. It was

past the June 20, 1995 deadline before most documents were received. (We note for the Congress that the UHN submitted its response to the BIA's proposed finding in November, 1996, and it is still waiting for a final decision, over ten years later. That type of delay is unconscionable.).

3) The bill should explain the precedential value of prior DOI recognition decisions and should make the records of those decisions readily available to petitioners. OFA has stated that it views its prior decisions as providing guidance to petitioners. It is very difficult, however, to get access to or copies of the records relating to those decisions or to get guidance from OFA as to the specific decisions it intends to follow in a given case. In one particular instance, for example, the Shinnecock Indian Nation submitted its petition in September, 1998 and subsequently met with OFA staff on March 1, 1999 to obtain technical assistance to strengthen its petition. The OFA staff advised the Nation's representatives to review two specific recognition decisions and federal court opinions. The Nation's representatives requested copies of those decisions and a list of those federal court opinions. OFA eventually provided the copies by March 2000—a relatively simple task to begin with. It never did provide the list of federal court opinions. With the transfer of petitions to the Commission, the precedential value of OFA, and earlier Departmental decisions, should be explained with specificity. If those prior decisions are considered precedent, the records of those decisions should be promptly made available to petitioners.

Proposed Changes to H.R. 2837: Section 8(c)(1)(A)(i) should be amended to state that all records relied upon by the Commission and its staff in making the preliminary determination shall be made available to petitioners including prior decisions relied upon and records relating to such prior decisions. Given the deadlines for hearings in the bill, those records must be available immediately, at least within 30 days.

3. The Criteria in H.R. 2837

The criteria in the DOI acknowledgment regulations and in H.R. 2837 are very similar. The creation of the Commission only solves half the problem with the present administrative process. Under Section 5 of H.R. 2837, the Commission would apply the substantially same criteria to the determination of tribal existence as those applied in the present administrative process. As written and applied, the criteria in the present regulations are so burdensome and heavily dependent upon primary documentation that many legitimate Indian tribes simply cannot meet them. If these same criteria are applied by the Commission, the Commission will become overwhelmed in expensive and time-consuming examination of minutiae much of which is unnecessary to the determination of tribal existence. Worst of all, the Commission will fail to recognize legitimate Indian tribes, just as the BIA has done under the current regulations.

Today's testimony by Arlinda Locklear, Esq., reiterates the unreasonableness of the current acknowledgment criteria. We support her testimony.

We ask the Committee to assume full responsibility in establishing reasonable criteria, rather than abdicating its responsibility by simply enacting into law the BIA's acknowledgment regulations, and to consider the recommendations by Ms. Locklear.

4. The Exclusion of Indian Groups Under Section 5 of H.R. 2837.

Unfortunately, H.R. 2837 would exclude Indian groups from the recognition process. That is unwarranted. H.R. 2837, as currently written, is a significant change from the process under DOI's acknowledgment regulations. For that reason, it seems fair to let those groups denied under the regulations have at least one chance under the Commission. And it is even more important for those large tribes like the United Houma Nation, which has over 10,000 members and received a negative proposed finding. The acknowledgment regulations were not designed to handle such large petitioners.

Proposed Changes to H.R. 2837: Section 5(a) should be amended to provide that groups that have been denied recognition under the acknowledgment regulations are allowed a hearing before the Commission. Section 5(a) should be amended by striking "if the Commission determines that the criteria established by this Act changes the merits of the Indian group's documented petition submitted to the Department." Section 5(a)(3)(C) should be deleted.

CONCLUSION

The Congress has broad powers to recognize Indian tribes. Courts also possess the power to recognize Indian tribes. Thus, the administrative acknowledgment regulatory process is only one pathway for Indian tribes to obtain federal recognition and does not displace other legal methods for determining tribal existence. Congress made this unequivocally clear in the Tribal List Act when it expressly stated that "Indian tribes presently may be recognized by...a decision of a United States

court[,]" in addition to recognition through an Act of Congress or through administrative proceedings.

Respectfully Submitted,

Mark C. Tilden
Senior Staff Attorney
Native American Rights Fund

Mr. FALEOMAVAEGA. Thank you, Mr. Tilden.
Mr. Keedy.

STATEMENT OF JAMES A. KEEDY, EXECUTIVE DIRECTOR, MICHIGAN INDIAN LEGAL SERVICES, TRAVERSE CITY, MICHIGAN

Mr. KEEDY. Good afternoon. My name is James Keedy; I am the Executive Director of Michigan Indian Legal Services. And I wish to thank the Committee for giving me this opportunity to testify.

I would also like to note that Mr. Ron Yob, the Chairman of the Grand River Bands of Ottawa Indians, is here today.

Michigan Indian Legal Services has worked with many tribes in the past 30 years as seeking Federal recognition, and I summarized all of that in my written testimony.

Today I would like to mention that MILS—Michigan Indian Legal Services—filed the first petition under the 1978 regulations. In fact, I have it with me here today. In this notebook is the petition, the tribe's constitution and all their supporting documents for the petition for Federal recognition. And that was filed in December of 1978.

Just 10 months later, October 1979, the BIA published proposed findings in favor of recognition of the Grand Traverse Band. Contrast that with a more recent case. On December 8, 2000, I and Mr. Yob and other members of the Grand River Bands delivered 21 banker boxes of documents to the BIA offices. And in just this year, seven years after that petition was delivered, they were placed on the ready and waiting for active consideration list.

While that is progress, it is estimated that the Grand River Bands will now wait 15 to 20 years for a decision, a final decision, on that petition. Obviously, something is very wrong with the eventual outcome for the Grand River Bands, justice is not served by such a delay. It is universally recognized that justice delayed is justice denied.

Can this problem be fixed? I think that H.R. 2837 presents an opportunity to do that. If the problem was simply a lack of resources, Congress could fix the problem by appropriating additional money. I believe that the problem cannot be solved by money alone.

The example of the Grand Traverse Band petition demonstrates that lack of money is not the problem, as it would seem clear that it cost a lot less to process this petition, and it took a lot less time, than what is happening today.

So while it would be nice if money could solve the problem, it appears that there is something else going on here.

I believe it has been amply demonstrated that Congress has the power to create a solution to this problem. The testimony of Mr. Tilden sets forth the many times that Congress has recognized tribes. Obviously, if Congress can recognize a tribe, it can certainly set forth the criteria and process by which tribes will be recognized.

And it is very important that Congress act. The lack of Federal recognition causes problems every day for ordinary tribal members.

For example, Congress created a very thoughtful response to the problem of massive numbers of Indian children lost to tribes and tribal culture by adoption into the majority culture. And they created the Indian Child Welfare Act.

The problem for members of tribes that lack Federal recognition is that the protections of the Indian Child Welfare Act are only granted to children whose parents are members of Federally recognized tribes.

In a book called American Indians: Time and the Law, Charles Wilkinson remarked that in his view, the effect of U.S. Indian policy was, for native people, the creation of a measured separatism.

But without the benefits of U.S. policy, members of tribes that are not recognized are at risk of being overwhelmed by the dominant culture and law. That may explain the comments of the Grand Traverse Band member that I cited in my written testimony. That on the day we got recognized, we were suddenly a people.

The Independent Commission created by H.R. 2837 is a very important idea, and one that has been suggested many times in prior hearings on Federal recognition reform. Commenters today and at prior hearings have noted the inherent conflict of the BIA in supporting existing tribes, while charged with determining if new tribes should split a pie in increasingly smaller pieces.

But beyond that, as the current process has evolved it makes it clear that a fresh start is needed. The current process was not intended to be so burdensome. Mr. Shepard, who helped draft the 1978 regulations, has stated that petitions like the Grand Traverse Band petition, were what was intended.

The process needs to be an adjudicatory function of government, and instead it resembles an academic exercise. The criteria that were the foundation for the current regulations that "Cohen criteria" cited in my written testimony were meant to be an aid and a fact-finder in establishing that the tribe continued to exist. And a fact-finder only looked at those criteria to see if the tribe continued in tribal relations. They weren't used to establish that a tribe existed.

The regulations in 1978 completely flip-flipped that, and said that the tribes had to prove that they exist now. And, not only—in the Cohen criteria, you looked at one of the factors as you could use in combination singly or jointly; now you have to meet all seven of the factors in the excruciating detail that we had earlier talked about, and meet any of them to a degree of 100 percent.

The elements we need to change I think are in H.R. 2837. It creates a separate commission. There is a sunset provision in funding for researching the petitioners. The criterion, however, are still problematical. And we would suggest a rulemaking process to develop the criterion.

The Grand Traverse Band of Ottawa Indians share the same treaties and history with the other recognized tribes in the State of Michigan: the Grand Traverse Band, the Little River Band, the Little Traverse Bay Bands, and the Sioux St. Marie Tribe.

Political power for all of these groups was derived from clans, which is very unlike the organized governments that the regulations envision. They were signatories to the 1821, 1836, and 1855 treaties. They petitioned for, and were refused, recognition under the IRA in the 1930s.

They received distributions of land claim settlements, and participated in discussions with Congress over payment of those claims. Yet they are the only tribe not recognized, and may not be for many years if the process is not reformed.

I thank you for taking up this bill and moving on a reform of the process.

[The prepared statement of Mr. Keedy follows:]

Statement of James A. Keedy, Esq., Executive Director, Michigan Indian Legal Services

Good morning, Chairman Rahall, Ranking Member Young and distinguished members of the House Natural Resources Committee.

My name is James A. Keedy and I am honored to appear before you today to offer my thoughts and recommendations for reforming the process for recognition of American Indian groups as Tribes by the Bureau of Indian Affairs (BIA) at the Department of the Interior. I began working as a staff attorney in 1987 for Michigan Indian Legal Services (MILS), an agency based in Traverse City, Michigan. In 1988, I was appointed Executive Director and have held that position since then. During the past 20 years, I have either been involved in, or have a working familiarity with, all the recognition work for Indian Tribes in Michigan.

As a staff attorney and executive director of MILS, I have personally worked with two Tribes that are or were in the federal recognition process. In the late 1980s, I began working with the leadership of the Pokagon Band of Potawatomi Indians to prepare and file a petition for federal acknowledgment. In 1988, the fully documented petition was filed with the Branch of Acknowledgment and Research, now known as the Office of Federal Acknowledgment (OFA). The BIA had not acted on the petition six years later when Congress directly affirmed the Tribe's federal status in 1994 by enacting Pub.L. No. 103-323.

Since 1994, I have been working with the Grand River Bands of Ottawa Indians (GRBOI). The GRBOI filed a fully documented petition at the OFA on December 8, 2000, after traveling by automobile from Grand Rapids with 21 boxes of documents. The trip started at 2:00 p.m. on December 7 and we arrived in Washington, DC at 3:00 a.m. on the December 8, in time for a 9:00 a.m. appointment at the BIA. To date, the GRBOI petition is still awaiting the review that will precede a final decision. My understanding is that, at the present pace of review, the GRBOI petition will not receive that review for at least 15 to 20 years.

MILS also provided assistance to the Lac Vieux Desert Band of Lake Superior Chippewa Indians (LVD), the Little River Band of Ottawa Indians (LRB) and the Little Traverse Bay Bands of Odawa Indians (LTBB) on the federal recognition efforts of those Tribes. LVD received recognition by an Act of Congress in 1988, Pub.L. No. 100-420. Congress then recognized both LRB and LTBB in 1994 by enacting Pub.L. No. 103-324, a companion bill to the Pokagon Band bill mentioned earlier.

MILS represented the Grand Traverse Band of Ottawa and Chippewa Indians when that Tribe sought federal recognition in 1978. MILS filed the petition for federal recognition in December 1978 under the newly promulgated regulations. Just 10 months later, the BIA published in the Federal Register "Proposed Findings for Acknowledgment of the Grand Traverse Band," 44 Fed.Reg. 60171, October 18, 1979. All the petition documents fit into a one-inch binder. Successful federal recognition decisions, therefore, can and have been made in much less time and with far less documentation than the current process requires. It is my hope that this hearing will result in a solution that will return the process to the pace and documentation requirements of this earlier time.

In Michigan, it has always been clear that whether a particular tribe is federally recognized is an accident of history. The Tribes of Michigan's Upper Peninsula all organized in the 1930s under the Indian Reorganization Act, 25 U.S.C. 461 (IRA), except for the Sault Ste. Marie Tribe of Chippewa Indians who were recognized in 1972 after a series of meetings and a letter from an assistant solicitor in the Department of the Interior.

The Lower Peninsula tribes, on the other hand, were all denied the opportunity to organize under the IRA because a BIA official decided that, since the federal government lacked funds during the Great Depression to purchase land and provide services, the people would be better off being served as non-Indians by the State of Michigan's public relief programs.

The Grand Traverse Band, the LRB, the LTBB and the GRBOI all share the same treaties and histories. Political power was derived from clans that, in structure, are more like extended families than the organized governments that the current recognition regulations envision. All these Tribes were signatories to the same 1836 and 1855 Treaties. All petitioned for organization under the IRA in the 1930s, yet three tribes are recognized and one is not. And the one not yet recognized may not be recognized for another 15 years, if ever, more than 30 years after all the other Ottawa Tribes achieved federal status. This offends any observer's sense of justice.

At this point, I would like to say that I strongly believe the BIA itself will never be able to fix the broken federal acknowledgment process (FAP) internally. It is imperative that Congress step in as soon as possible to provide a statutory framework for the FAP... Whether the FAP stays within in the BIA or whether Congress creates an independent agency to complete the work that remains to be done is a decision only Congress can make. But Congress can no longer defer to the process within the BIA that is—by all accounts—not only broken but clearly devastating to thousands of America's first inhabitants. The relationship between Tribes and the United States is a political one. Congress has the authority and responsibility under the U.S. Constitution to maintain that relationship with all Indian tribal groups, including those that have survived together as Tribes for more than 200 years with little or no help from anyone, not even the federal government.

The tenacity and strength of the American Indians who are members and leaders of Tribes that are not yet—and may never be—federally recognized is a constant source of amazement... There are few, if any, resources available for them to survive as tribal governments to allow them and to maintain their Indian cultures, languages and traditions. If the BIA's FAP is not fixed—and fixed soon—I believe that most of these tribal groups will literally disappear within the next 25 years. These Tribes simply cannot sustain themselves in this economy and political climate without the status and services that come with recognition by the federal government. This loss would be enormous, not only for the Indian people themselves, but also for the entire nation. It is certainly not a loss that we should accept before making a strong effort to ensure that it does not occur. It is difficult to express the importance of federal recognition to tribal members. A quotation from a member of the Grand Traverse Band in a Traverse City newspaper on the 20th anniversary of the Grand Traverse Band's recognition expresses it better than I could hope to do:

> To many tribal members, recognition represented both a validation and a turning point for the region's Indian community. "That day, I think the sun was shining for everybody," said Bonnie Inman, a tribal member who has worked for the band since its formal start. "[T]he day we got recognized, we were suddenly a people. I was suddenly a person. There was a feeling that there was no end to what we could do." *Tribe Remembers Humble Beginning,* Traverse City Record Eagle, May 21, 2000.

I have sat in countless meetings during the years discussing the progress of federal recognition efforts. Many times I have heard the plaintive cry from one of the members, "If only we can be recognized before my father dies, he has been waiting his whole life." Other times it is a mother, aunt or uncle who has been waiting for federal recognition for decades. I have also counseled many clients that the protections afforded by the Indian Child Welfare Act, 25 U.S.C. § 1901, do not apply to them or their families because the Act only applies to children with a parent who is a member of a federally recognized Indian tribe. I have had to advise the GRBOI that they could not join the State of Michigan when it sat down with the other 1836 Treaty Tribes to decide the rules for and allocation of fish and game pursuant to their treaty rights because the precedent of the federal court in Michigan declared that only federally recognized Indian Tribes could participate. These treaty rights were allocated among the recognized by the Tribes and the State of Michigan just last week.

It is apparent that the decision to grant or deny federal recognition is not only very important to the Tribes seeking acknowledgment, but it is also very important to the integrity of the United States. It is a solemn political decision made by the executive or legislative branches of government. It is not an academic exercise that can be exhaustively researched until someone is satisfied that all possible social interactions or cultural patterns have been described to their satisfaction. A child born to a GRBOI mother today may never have the protections of the Indian Child Welfare Act before the child reaches adulthood if Congress does not pass the GRBOI

recognition bill pending in the Senate or does not pass full-scale recognition reform legislation such as H.R. 2837.

The FAP was created by the BIA when it first issued regulations in 1978. Those regulations were not intended to create the kind of burden that the researchers at the OFA now place on petitioners. Attached to my testimony is a petition that MILS helped to prepare in 1978 for the Grand Traverse Band of Ottawa and Chippewa Indians. Grand Traverse was the first Tribe recognized under the new regulations. The Tribe's petition is 67 pages, and that number includes the Tribe's 24-page constitution. The entire process took about 10 months.

Compare that to the picture of the boxes of documents, also attached, that were submitted in 2005 by the GRBOI in response to a technical assistance letter from the OFA. These documents were provided in addition to the 21 boxes of documents that we delivered to the offices of the BIA in December 2000. The Tribe thought the 21 boxes (seven boxes of original documents and 14 boxes containing two copies of each of the originals) were the complete petition. Until the Tribe received the technical assistance letter in 2004, it did not realize how much more documentation was needed for a "complete" petition. The Tribe also provided all information in digital, electronic format.

The salient factors for the GRBOI are that:

- All of the members of the GRBOI have proof that they descend from the signatories of one of the three Treaties the GRBOI signed with the United States in 1821, 1836 and 1855;
- The Tribe petitioned for recognition in 1934, and BIA Commissioner John Collier stated that the Tribe should be allowed to organize under the 1934 Indian Reorganization Act;
- The Tribe won several land and accounting claims before the Indian Claims Commission, and Congress has passed several distribution acts to pay out the judgment funds from those claims to tribal members;
- The majority of the Tribe's members live where their ancestors have always lived;
- The State of Michigan has always recognized the GRBOI;
- Other recognized Tribes in the state also recognize the Tribe; and
- The Tribe's history is the same as the three Lower Peninsula Ottawa and one Upper Peninsula Chippewa Tribes that are federally recognized.

The GRBOI petition was moved to the Ready for Active list (of ten petitioners) in February 2007 but, despite all of this, it may take another 15 to 20 years for the BIA to process this petition. The first Tribe on the Ready for Act list (Brothertown Indian Nation of Wisconsin) was placed on the list by the BIA in 1996; over 11 years later, it has yet to move to the Active list.

And the chances for successfully going through the process diminish appreciably as the years go by. According to the BIA/OFA Status Summary of Petitioners, between 1980 and 2000, 14 Tribes were accorded federal status while 15 other groups were denied acknowledgment. Since 2000, only two Tribes have been acknowledged as federal tribes, while 10 other Indian groups have been denied—and four of these were denied after having originally been given final positive determinations.

From any objective view, the FAP is broken. There are many distressing and compelling stories to tell. The question before the Committee is, how do we fix the problem? Many observers, including me, would prefer to see the creation of an independent agency in which inherent bias is absent, where timelines are set by law and a quasi-judicial process is utilized.

H.R. 2837, introduced on June 22, 2007 by Rep. Faleomavaega, is a good bill and one that deserves the Committee's attention and consideration. The bill would create an independent commission to review petitions from American Indian groups and would include a sunset clause precluding the consideration of petitions filed after a date certain. Under the bill, Congress would delegate authority to the new commission the authority to recognize American Indian Tribes. The evidentiary standards would be clarified, and necessary resources would be provided to expedite the process.

These are all laudable and supportable goals, and I hope that members of this Committee will support this bill or a version of it. It is said that the devil is in the details. Thankfully, there are many competent people who have been part of this process for a long time who can help the Committee grapple with those details to come up with legislation that is both deserving of passage and deserving of the respect of all the American people but most especially the Native American people. My staff and I would be very happy to assist the Committee in this effort.

This year of 2007 marks the 30th anniversary of the submission of the Final Report of the American Indian Policy Review Commission (AIRPC). In 1975, Congress established the Commission to conduct a "comprehensive review of the historical

and legal developments underlying the Indians' unique relationship with the federal government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians." Members of both houses of Congress served on the Commission. A summary of the Commission's recommendations on recognition (Task Force 10) is attached to my testimony. The Committee will note that a major theme of the Commission's recommendations was that Congress should create a special office outside the BIA to establish by hearings and investigations that a group must meet any one of seven enumerated criteria.

For many years prior to the Commission's report the Department of the Interior recognized tribes under the "Cohen criteria". Beginning with the IRA, the question of which Tribes were to be recognized as Indian tribes became a frequent task. According to the "bible" of Indian law, Felix S. Cohen's Handbook of Federal Indian Law (1942), the Department of the Interior used a number of criteria to make that determination and, it should be noted, tribes were not required to meet every one of the criteria.

> The considerations which, singly or jointly, have been particularly relied upon in reaching the conclusion that a group constitutes a "tribe" or "band" have been:
>
> 1. That the group has had treaty relations with the United States.
> 2. That the group has been denominated a tribe by act of Congress or Executive Order.
> 3. That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
> 4. That the group has been treated as a tribe or band by other Indian tribes.
> 5. That the group has exercised political authority over its members, through a tribal council or other governmental forms.
>
> Other factors considered, though not conclusive, are the existence of special appropriation items for the group and the social solidarity of the group. See: page 271, emphasis added.

It is unfortunate that nearly 30 years has elapsed since the regulations were first published and the situation at the BIA has gone from moderately bad to the virtually intolerable. In 2007, if Congress were to pass H.R. 2837, it would be a great commemorative gesture to all those who worked so hard to bring the AIPRC findings and recommendations on recognition issues to light and to all the Indian people who have waited so long for recognition of their status. Unrecognized but legitimate Indian Tribes deserve no less.

Federal Recognition

American Indian Law Day 2002

James A. Keedy
Michigan Indian Legal Services

I. What is federal recognition? It's a moving target.

A. For first 150 years of federal/tribal history the idea of federal recognition was not thought of separately from treaty making. Governments have routinely been required to decide whether or not to recognize a foreign government.

B. The Indian Reorganization Act of 1934 (IRA), 25 USC 461, was a New Deal era attempt to reverse the Allotment era policies that were destructive to tribes. Because the act allowed tribes to organize under its provisions the government was called upon to decide whether a particular group was a tribe.

C. The IRA did not provide any guidance for deciding which groups were tribes. Officials of the Commission on Indian Affairs used a variety of tests to determine if a group was indeed a tribe. These tests eventually resulted in the "Cohen criteria". Felix S. Cohen's Handbook of Federal Indian Law (1942) states at 271;

> The considerations which, singly or jointly, have been particularly relied upon in reaching the conclusion that a group constitutes a "tribe" or "band" have been:
>
> (1) That the group has had treaty relations with the United States.
> (2) That the group has been denominated a tribe by act of Congress or Executive Order.
> (3) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
> (4) That the group has been treated as a tribe or band by other Indian tribes.

(5) That the group has exercised political authority over its members, through a tribal council or other governmental forms.

Other factors considered, though not conclusive, are the existence of special appropriation items for the group and the social solidarity of the group.

D. In light of the current criteria promulgated by the Bureau of Indian Affairs (below) it is interesting to note that a tribe did not have to meet all the Cohen criteria (singly or jointly) and that by and large the criteria require a group to provide objective evidence.

E. A January 7, 1974 letter from Commissioner of Indian Affairs LaFollette Butler to Senator Henry M. Jackson summarized the actions taken under the Cohen criteria in the previous 20 years. Nine tribes were recognized by a number of means including a Commissioner's letter, two Solicitor's Opinions, a Deputy Commissioner's letter and a letter from an Assistant to the Secretary of the Interior. See Nonrecognized American Indian Tribes: An Historical and Legal Perspective, The Newberry Library, Frank W. Porter III, editor, p. 39.

F. The Commissioner's letter referred to above concerned the Sault Ste. Marie Tribe of Chippewa Indians. In a two page letter dated September 7, 1972 the Commissioner relates that a delegation of tribal members, Bureau personnel, Assistant Solicitor and a member of Senator Hart's staff met to explore the possibility of the tribe organizing under the Indian Reorganization Act. The letter concluded that;

> the Sault Ste. Marie Band of Chippewa Indians is an historic Indian band; that members reside in several communities in Michigan and that, exclusive of the group known as the Bay Mills Indian Community, they have never voted on the question of accepting or rejecting the provisions of the Indian Reorganization Act.... and have arranged to acquire a 40-acre tract from the University of Michigan which they wish to use as a reservation base....that they have a well-documented membership roll based upon the Durant Census Roll of 1910.

The letter does not state how these facts were established.

G. Despite or because of the Cohen criteria relatively few tribes were recognized in the years between the enactment of the IRA and the mid 1970s. The American Indian Policy Review Commission (AIPRC) commented negatively on the process in 1976;

> Inconsistencies and oversights in the Indian policy of the United States are exposed by one stark statistic: there are more than 400 tribes within the nation's boundaries and the Bureau of Indian Affairs services only 289. In excess of 100,000 Indians, members of "unrecognized" tribes, are excluded from the protection and privileges of the Federal-Indian relationship.
>
> There is no legal basis for withholding general services from Indians, with the sole exception of specific termination acts. There is no legitimate foundation for denying Indian identification to any tribe or community. The BIA has no authority to refuse services to any member of the Indian population. Final Report of AIPRC, p. 461 as cited in Anderson and Kickingbird, An Historical Perspective on the Issue of Federal Recognition and Non-Recognition, Institute for the Development of Indian Law (1978), p. 1.

H. For the Michigan Ottawa and Potawatomi it was difficult to gain the benefits of the IRA because they never given an opportunity to apply the Cohen criteria. Chippewa tribes in Michigan's upper peninsula organized under the IRA. But when the Ottawa and Potawatomies of the lower peninsula applied under the IRA they met with an arbitrary decision to deny organization under the IRA to all the lower peninsula tribes. The Office of Indian Affairs received requests from all the lower peninsula tribes to organize under the IRA. The Office made a decision strictly on the basis of the lack of funding to deny all the petitions;

> Unless we have the funds and personnel to do a real job in Lower Michigan, we should stay out of that territory. We all know that neither the personnel nor the funds are available. Hence, it would be a crime to disturb the present excellent relations between the state, counties and the Indians. Memorandum for the Commissioner, October 11, 1939.

In response to this memorandum and others John Collier, Commissioner of Indian Affairs concluded on May 29, 1940 that "there be no further extension of Organization under the Indian Reorganization Act in Lower Michigan."

I. The AIPRC report and a possible Congressional remedy led the Bureau of Indian Affairs to promulgate regulations in 1978 to standardize the recognition

process, 25 CFR 83.1 et seq. Unfortunately the new regulations substantially changed the substantive requirements Under the new regulations a tribe must;

a. Prove that is has been identified as an American Indian entity on a "substantially continuous basis since 1900",
b. Show that a predominant portion of the petitioning tribe "comprises a distinct community and has existed as a community from historical times until the present",
c. Prove that is has maintained political influence or authority over its members as an autonomous entity from historical times until the present,
d. Provide a copy of the tribe's present governing document including its membership criteria,
e. Provide evidence that the tribe's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.
f. Provide evidence that its membership is composed principally of persons who are not members of any acknowledged North American Indian tribe,
g. Prove that neither the tribe nor its membership are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

J. To meet the current recognition regulations is expensive and time consuming. A fully documented petition will cost several hundred thousand dollars to assemble unless services of professionals are donated or provided at no cost. For example, in 2000 Michigan Indian Legal Services completed a petition for federal recognition. An ethnohistorian donated approximately $100,000 worth of time. MILS staff provided close to 2,000 hours of service. The petition and supporting documents were delivered to the Bureau of Indian Affairs in 21 banker boxes.

II. Federal Recognition in Michigan.

- Michigan tribes have a full range of experience under the evolving federal recognition standards.
- Michigan has four tribes that organized under the Indian Reorganization Act.
  - Bay Mills Indian Community organized under the IRA 11/4/36.
  - Hannahville Indian Community organized under the IRA 1936
  - Keweenaw Bay Indian Community organized under the IRA 12/17/36.
  - Saginaw Chippewa Indian Tribe of Michigan organized under the IRA 5/6/37.
- The Sault Ste. Marie Tribe of Chippewa Indians was recognized using the Cohen criteria in a letter from the Commissioner on September 7, 1972 and an opinion from the Associate Solicitor, February 7, 1974.
- The first tribe to be recognized under the new recognition procedures promulgated by the BIA in 1978 was the Grand Traverse Band of Ottawa and Chippewa Indians, 45 FR 19321 (1980).
- Two other Michigan tribes have been recognized utilizing the regulations.
  - Nottawaseppi Huron Potawatomi, 60 FR 66315 (1995).
  - Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, 62 FR 38113 (1997).
- One Michigan tribe had its status clarified by Congress in 1988, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, 25 USC 1300h et seq.
- Three Michigan tribes had their recognition reaffirmed by Congress in 1994.
  - The Pokagon Band of Potawatomi Indians, 25 USC 1300j et seq.
  - The Little Traverse Bay Bands of Odawa Indians and
  - The Little River Band of Ottawa Indians, 25 USC 1300k et seq.

Mr. FALEOMAVAEGA. Thank you, Mr. Keedy. I think we have a vote pending on the Floor, but I would like to ask the gentleman from Michigan if he has any questions.

Mr. KILDEE. Thank you very much, Mr. Chairman. Mr. Keedy, the Grand River Band's petition is on the ready for active list grouping now. Does the tribe have any indication when the BIA will move it to the active list?

Mr. KEEDY. No, they have not been given any indication of when it will happen.

Mr. KILDEE. Do they ever communicate with you to give you any idea of whether something has stalled, or is there a give-and-take at all, or asking for more information?

Mr. KEEDY. Well, we have had, and Chairman Yob and others, too, have had several meetings with Mr. Fleming and others in the Department to, you know, ask about those kinds of questions. It usually boils down to workload and things like that.

Mr. KILDEE. You know, you talked about the Congressional responsibility. And we have done that, and I was amazed today when they talked about the Constitutionality of Congress acting. Article I, Section 8 of the Constitution very clearly gives the Congress, and the Nonintercourse Act of 1789, I think, certainly indicates Congress' relationship with the various sovereign tribes.

But in 1980, I was chief sponsor for the Blackbear Bosin recognition; in 1994, I was co-sponsor of Little River and Little Traverse Band, which you are very familiar with. And I was co-sponsor of the Pokagon Band.

Congress, you know, is the competent body. And while I do, I agree, I think we have to really reform this system within the BIA, we should never give up our own responsibility. That is why I was surprised at the testimony this morning on that.

But would you comment on the role of the Congress, Mr. Keedy?

Mr. KEEDY. Well, I do agree that certainly the Congress has the power and has exercised it, and I would hope it would continue to exercise it, even if this process is reformed, when a proper case is put before it.

Mr. KILDEE. I think that is a very good answer. I appreciate it. When the proper case is put before it. Because we have had other bills here that have not passed the Congress, and we have had some who have. I think we are a competent body, and we generally act prudently on that.

But I think when you read the Constitution and read the Nonintercourse Act, you see that Congress was intended to play a very significant role in the sovereign-to-sovereign relationship there.

And I thank you very much for your response. Thank you for your presence here today.

Mr. KEEDY. Thank you.

Mr. KILDEE. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you to the gentleman from Michigan. I am going to proceed and continue raising some questions. I do want to thank all the members of the panel for your excellent statements.

I wanted to ask Ms. Locklear about your recommendation, which I think is well taken, that the Bureau of Indian Affairs should be in the business of providing for the 562 recognized tribes. And I would like to—it is a conflict of interest that you are administering the needs of the 562 tribes; and yet at the same time, you are going to consider if these other tribes seeking recognition should be recognized.

And I would like to ask the members of the panel if you agree or disagree. I happen to agree with Ms. Locklear's observation about this. Patricia Zell?

Ms. ZELL. I would agree that there is an inherent conflict of interest when you are trying to serve, essentially not two masters,

but two different groups, and you have the different legal relationships.

As Secretary Artman has articulated here today, and I think, with all due respect, he may have made the case more strongly than any of us, that they do feel obviously very much bound by their trust responsibilities. And that has to compromise, both in terms of resources and dedication of time and personnel.

As we have seen over many, many years the energy and effort that is put toward helping the petitioning groups get through the process, and bring an end to the process.

And so I think you posed the exactly right question. Thank you.

Mr. FALEOMAVAEGA. Mr. Tilden?

Mr. TILDEN. Well, I would totally agree with what Arlinda had to say about that. And also, too——

Mr. FALEOMAVAEGA. This is not just a legal, this is a matter of policy.

Mr. KEEDY. Right, it is. And just to sort of echo what Pat said about Mr. Artman sort of making the case here for the commission, because I think he did really emphasize the fact that the BIA does have a trust responsibility to the 562 tribes. And I think he does see that in terms of funding requirements, as well.

Because he talked in terms of priorities and funding to the Federally recognized tribes. And I think we see that with only $1.9 million out of a multi-billion-dollar budget. I mean, that is budget dust compared to what I think they really could offer and give to the Office of Federal Acknowledgement to go through these petitions.

And you know, I mean, it was just sort of remarkable sitting here listening to him make that case, that it just really presented the notion that there is an institutional bias against non-Federally recognized tribes.

And so it is one of those issues I think, too, where the commission, if that were to be established, the sole focus of that commission would be dedicated to the non-Federally recognized tribes, and to really sit there and to really analyze the petitions that have been submitted. And that is their sole obligation.

I think the other thing that Mr. Artman mentioned, too, were these guidelines that are forthcoming. And I think the one thing that would be really important in that respect, too, is to really seek the advice of non-Federally recognized tribes to some extent. And I kind of take that back to the White House meetings, back in the early nineties, where they invited all of the non-Federally recognized tribes, and the BIA went and did outreach——

Mr. FALEOMAVAEGA. I remember. We met at the White House, did the whole rigmarole, and produced nothing.

Mr. TILDEN. Yes, I mean, you know, at least they did the outreach. And I think that they tried to get the non-Federally recognized tribes involved in the process to the extent that, you know, what was taking place at that point in time, too, was legislation. And I think at that point in time, too, you had also introduced legislation to reform the Federal recognition process. Because there are inherent problems with it. And I think that is where this idea of a commission, an independent commission to take care of the institutional bias that was so illuminated upon today by Mr. Artman.

Mr. FALEOMAVAEGA. Mr. Keedy?

Mr. KEEDY. Yes, I certainly agree with the other members of the panel. I was struck that at the opening statement is, this is a very solemn obligation of the United States to make these decisions, and contrast that with the amount of resources that are devoted to meeting that very solemn obligation.

Mr. FALEOMAVAEGA. And if I may, I appreciate Mr. Fleming sitting in for Secretary Artman. Mr. Fleming, can you submit for the record exactly the whole procedure that has taken place, and how you go about getting recognition for the tribes that do petition? The timelines, just as you had stated earlier? I would really appreciate that, to make it part of the record. I would like to get that.

I don't think Mr. Conyers is going to need my symbolic vote, so I am not going to go vote on the Floor, how is that? A tremendous sacrifice on my part.

Arlinda, again, you mentioned that we seem to be doing this covering primarily procedural efforts. Could you elaborate a little further on that? I mean, does the proposed bill lack substance? Or, please, the record is open; I would welcome any suggestions or recommendations that all of you would like to make, as to make improvements on the bill. It is an open door for you to do this.

Ms. LOCKLEAR. The proposed bill uses by and large the same seven mandatory criteria that are now in use by the——

Mr. FALEOMAVAEGA. Does it have to be seven? That is what I am questioning. Does it have to be seven?

Ms. LOCKLEAR. There is an argument, as Mr. Keedy indicated earlier, that they could be made in the alternative, rather than all seven be required.

At a minimum, though—and I think the bill does make some movement in this direction. At a minimum, there must be an effort made to adopt some objective standards for determining whether a community exists, whether there is political authority, so that the BIA doesn't have to expend the energy and time to examine internal processes. Particularly when they are so objective. Any reasonable observer can come to different conclusions, and I suspect that happens sometimes at the Office of Federal Acknowledgement.

The bill does have some language on its definition of the community criterion B, which includes the objective standard of examining the level of kinship among the members. That is very helpful, because that is a yes or no kind of answer that different observers won't come to different conclusions about. And it is also a classic hallmark of an Indian community.

I would encourage the amendment of the bill to include a similar marker for political authority. For example, some language that would just say if the petitioner can simply identify a list of leaders and describe what they are, that should suffice. That should suffice, without determining on what issues and over what period of time those leaders were able to get assent from their members. Particularly on the political authority issue, it creates the consequence where more traditional Indian communities have a harder time of establishing their existence.

Because when you require documentary evidence of bilateral political relations, that is almost a vote. That is almost a democratic process that is reflected in the typical IRA constitution.

In the absence of a vote, where assent is demonstrated presumably because that person shows up and actually registers their assent to leadership through the vote, then it is more difficult. Traditional Indian communities, though, did not use that kind of process. They use a more family based process that depended on individual leaders who would come to the fore.

So that if we can get away from the focus on, again, the internal process by use of an objective criteria, then even if you keep the seven mandatory criteria, it at least gives petitioning groups an opportunity to do it without having to go through the internal examination that the BIA requires.

Mr. FALEOMAVAEGA. I noted Secretary Artman commented about the politicization of the process in selecting the three members of the commission. It could be three, it could be five, as it was suggested by others, as well.

But isn't it already politicized, just the sheer fact that when the President is nominating an Assistant Secretary of the BIA is going to be a Republican, in no way is going to be a Democrat?

Ms. LOCKLEAR. Absolutely. The decisions are made at the Department now by political appointees. And it is foolhardy to believe or pretend that there is no political influences brought to bear on that. We all know that is not the case.

Mr. FALEOMAVAEGA. Now, the bill does provide some standard, at least alerting the President when he makes his nominations, that there is careful evaluation and review of the process so that these three individuals have no conflicts with anything involving the recognition of the tribes; that they are as neutral as it could be. And then also subject to Senate confirmation, which adds another layer of making sure that these three individuals are going to be top people, and not a bunch of political lackeys, if that is another way of saying it.

Ms. LOCKLEAR. The bill also provides that they have set terms, which would presumably tend to minimize the ability of a political outsider to influence them by threat to their tenure on the commission. And we don't have that now in the present process.

Mr. FALEOMAVAEGA. I think Congressman Kennedy may have noted this, and I noticed in your statement, Mr. Tilden, that there are tribes that are also judicially recognized.

Mr. TILDEN. Yes.

Mr. FALEOMAVAEGA. Can you elaborate on this, the main difference from those that are Congressionally recognized?

Mr. TILDEN. Right. Well, I think the one thing I wanted to point out in that respect is that the Congress has spoke to that issue also in the Tribal List Act. And the legislative history has said that tribes can be recognized either by Congress——

Mr. FALEOMAVAEGA. Do you think we ought to make that as part of the bill to recognition?

Mr. TILDEN. Yes, that would help. I think that would really help to really clarify that, and make it very clear that judicial recognition is also one legal method of obtaining Federal recognition.

And it is really problematic right now, because for one of my clients here, the Shinnecock Indian Nation, a Federal court has made a decision that they are a Federally recognized Indian tribe. Yet

the Department of the Interior has refused to place them on the list of Federally recognized tribes.

And so I think it has taken away one of the legal methods that is available to tribes.

Mr. FALEOMAVAEGA. So does this mean the tribe has to petition the Court again to tell the Department of Interior you will recognize our tribe?

Mr. TILDEN. I mean, there is a lot of things that the tribe has to look at right now in order to force the Department of the Interior to place them on that list of Federally recognized tribes. And I think they brought a lawsuit to make sure that the Administration does what it is legally bound to do.

Mr. FALEOMAVAEGA. Which means more money, more resources that have to go into the process.

Mr. TILDEN. That is exactly right. I mean, aside from paying for the petition work—and I would like to point that out, as well, is just how much it costs to put these petitions together. I mean, we are talking millions of dollars now. And I think that that is where the Administration, you know, it really is placing the blame on petitioners, because they are telling this Congress that yes, if you give us more money, we can sort of go through these petitions a little quicker.

But I think what they fail to realize is that it is really, on the flip side of that is that the tribal petitioners need more money to put together these petitions because of what is now required under the Federal regulations, and how the Department interprets those Federal regulations, and new policy or new methodologies that they seem to come out with every time a new proposed finding or final determination comes down.

So every time a decision comes down, I have to take a look at that and say well, do we need to do additional work for the petitioner because some new methodology has just been articulated within the proposed finding or final determination.

So you know, we are talking millions of dollars now. And I think that it really needs to be forthcoming in the bill that there needs to be appropriate funding at levels that would be consistent with what it takes to put together a petition nowadays.

And I think that, you know—otherwise you are setting up the petitioners for failure.

Mr. FALEOMAVAEGA. Would you say that there are tribes out there right now who pass the criteria, as you suggested, but simply are without resources to petition, even to petition? As you said, it is a million-dollar case. So would you say that there many tribes out there who would love to go through the process, but they just cannot afford it?

Mr. TILDEN. I think just from experience, yes, there are. Because our organization does get requests for assistance, and we have to take a look at the resource issues right now. And we do get requests for assistance to help tribes go through the Federal regulatory process. But you know, if it is taking millions and millions of dollars, I mean, that could bankrupt our organization, which is a non-profit; but yet we have stepped up to help all of these other tribes in the past, and we continue to do so, to help tribes get through this process right now.

Mr. FALEOMAVAEGA. I remember years ago when I visited one of the gaming operations by one of the tribes in California. And the leader of the tribe took me on the side, and she said you know, it is kind of ironic. We have to buy back the land that we owned. In the process, simply because there was no other way to regain any sense of stability or economically viable, it is ironic that here we have taken the land from them, and now they have to go back and buy their land back. I mean, this is just unbelievable.

I know California, as my good friend, Mr. Costa, said earlier, there is at least over 100 non-recognized tribes in California.

What do you think of Mr. Artman's response on what I said about the fact that if there are 562 tribes and only two million of them? That kind of really shocked me a little bit, because for the last 10 years the population of Indian country has always been between four to five million. So what happens to the other two, two and a half million? Does it mean the services are not provided to them? Is that basically the bottom line?

Mr. TILDEN. Yes, I think that that is pretty clear that that is probably what happens. You know, there is a lot of Indians who probably do not receive Federal services or benefits simply because of the under-count by the Department, or by the Federal government in general. So you know, there is a lot of impoverishment to begin with, and I think that just exacerbates that problem.

And I think what is even worse is that non-Federally recognized tribes, you know, those that should be eligible for those Federal services and benefits are denied those. And it is really important, because I think it really gets down to this being a really critical decision that is made by the Federal government on how it impacts non-Federally recognized tribes.

I mean, if the Department were to put the Shinnecock Indian Nation on the tribal list of Federally acknowledged tribes, they would be able to access those Federal services and benefits. So it makes a big difference in terms of healthcare to their members, housing to their tribal members, all of those different things that, you know, puts bread and butter on the table and provides a roof over their heads.

So it really does have a direct impact on the tribal people themselves. It is not just some ephemeral, you know, this vague number that is out there. I mean, it is a real solid number of Indian people out there that are not being able to participate in those services and benefits, and they should rightfully be allowed to participate in those Federal services and benefits.

Mr. FALEOMAVAEGA. I just wanted to, I just don't want to point fingers at the BIA or Mr. Fleming and his office. I know they are very sincere in their efforts in trying to work the recognition process.

But it comes back to the Congress. I recall years ago, when the Lumbee Tribe petitioned, they got their recognition. And then Congress said no, we can't do it right now, because we don't have enough money to go around because of the other needs from other tribes. That was a reason why we never recognized the Lumbees, is because there wasn't enough money to go around.

Now the problem causing contention, as I said in my statement, among those of the recognized and the unrecognized, the fear is that as more become recognized, less in the pot for division.

But it hurts me when you say that we can't recognize these tribes because we don't have enough money to go around. Is that a good reason for Congress and for the government to say that we can't do this, simply because of lack of funds? Obviously it is not a good reason, OK?

[Laughter.]

Mr. TILDEN. Obviously it is no, it is not a good reason. And I think it really abdicates the responsibility that, you know, the Congress could exercise if it really needs to say OK, we need to get the money out there in order to recognize these Indian tribes, and to see that, you know, they do enjoy the services and benefits that they are eligible to participate in. So no, absolutely not, it is not a good reason.

Mr. FALEOMAVAEGA. Ladies and gentlemen, $10 billion a month we are spending on that terrible war that we have caused in the Middle East. Ten billion a month. And here we are barely squeezing the $2.3 billion to provide for the needs of Native Americans for one whole year, that we are saying well, we can't afford this, we can't afford that. Now it is cutting this and cutting that.

I know more than anybody Ms. Zell would understand and appreciate what I am talking about, what we are going through right now.

I cannot thank you enough for your most eloquent statements. And please feel free at any time to contact Marie or myself or Chairman Rahall. We need your input. Put the word out to Indian country: we will take any recommendations or any suggestions that will make this bill a good one for a goal, all right?

Thank you very much.

We have as our final members of the panel here—again, thank you so much for your patience—Mr. Derril Jordan, Partner with AndersonTuell, the law firm; and Mr. Steve Austin, the Cultural Anthropologist with Austin Research Associates here in Silver Spring, Maryland; Mr. Mike Lawson, the Senior Associate in Morgan, Angel and Associates Law Firm; and Mr. David Cramer, the attorney, also with Andrews and Cramer Law Firm. And also accompanied by the Chairman, Mr. Donny Fry, the Confederated Tribe of Lower Rogue, Coos Bay, Oregon. Am I correct on this?

And also unanimous consent in the record for the testimony of Mr. Joe Courtney of Connecticut, and the Connecticut Attorney General, Mr. Ricardo Blumenthal. And also unanimous consent to place them both into the record, that their statements be made part of the record. Without objection, they are in the record.

[The statement submitted for the record by Mr. Courtney follows:]

Statement submitted for the record by The Honorable Joe Courtney, a Representative in Congress from the State of Connecticut

I want to thank Chairman Rahall and Ranking Member Young for convening today's hearing on a matter of critical importance to eastern Connecticut.

An administrative process for tribal recognition was established in 1978 to take the politics and the money out of the acknowledgement process. Recognition was to be granted to those entities that satisfied an absolute set of criteria, developed over

30 years. Unfortunately, due to subjective application of the criteria, lack of resources within the Bureau of Indian Affairs (BIA), undue political and monetary influence, and an overall uneven playing field, I believe the federal recognition process is severely broken.

Instead of fixing the problem from within, or having Congress overhaul the system from outside, we now find tribes directly petitioning the Congress for recognition. This step is troubling for it lends itself to political influence, abbreviated examination of the documents and uninformed decisions. Simply put, we are trading one problem for another.

I believe that the BIA takes both too long to render its decisions and does not always follow the letter of the rules in its determination. These protracted examinations are unfair both to the petitioners and to the state and local towns impacted by tribal recognition. Passing the buck to Congress to make a quick acknowledgement decision is not a solution. Real reform must ensure a full and accurate examination of the facts so that tribes that meet the seven criteria are granted recognition and those that don't, are denied. Lowering the bar, in any way, is unfair and unacceptable.

Unfortunately over time, documents have shown that the BIA has applied the seven criteria in an arbitrary manner. This was made evident to me and the citizens of Connecticut during the early part of this decade when some petitioners from the state were granted recognition without satisfying all of the criteria. This is unacceptable.

This lack of procedure makes a mockery of the recognition process and casts doubt on future decisions. I fully support the right of entities to seek federal recognition and all that comes with that distinction, but I want the playing field to be level and fair—rooted in stable, concrete rules; free of inside conflicts of interest and subjectivity; and free from undue outside monetary and political influence.

To be sure, recognition brings federal government support and gaming opportunities to tribal entities, but it can have a myriad of impacts on state and local governments, local businesses, and surrounding infrastructure and land. Too often, during the acknowledgement process, petitioners are granted support and technical assistance from the federal government and outside backers, while the local stakeholders often find the ability to participate non-existent or cost-prohibitive. Local cities and towns must have a voice in the process.

I thank Representative Faleomavaega for his dedication to this issue. Unfortunately, I am concerned that the bill before the Committee, introduced by my colleague from American Samoa, does not adequately reform the recognition process. It does not authorize a set amount of funding for the Commission and does not provide adequate participation for the local stakeholders. The bill sets up a convoluted process; effectively giving petitioners that were denied another bite at the apple. If anything, this added layer of process aggravates many of the problems I have listed above. Further, there is still too much room for outside influence to creep into the process.

Congress must take steps to address the shortcomings of the current recognition process before the problem escalates beyond the point of no return. I look forward to working with members of this Committee to reach an equitable solution.

We have been working with the Attorney General of Connecticut on this issue and attached, please find his thoughtful comments. I ask that his statement be made a part of the Record.

[The statement of Attorney General Blumenthal follows:]

RICHARD BLUMENTHAL
ATTORNEY GENERAL

55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Office of The Attorney General
State of Connecticut

TESTIMONY OF
ATTORNEY GENERAL RICHARD BLUMENTHAL
BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES
OCTOBER 3, 2007

I appreciate the committee's acceptance of my testimony on H.R.2837, the Indian Tribal Federal Recognition Administrative Procedures Act.

Although no local or state officials involved in the tribal recognition process were invited to this hearing -- an unfortunate oversight, since the views of state and local governmental officials as well as private citizens affected by these federal decisions should be heard and needed to enact a fair and effective federal Indian recognition process.

Reform of the federal tribal recognition process is necessary and long overdue but H.R.2837 threatens more harm than good. The bill is fatally and fundamentally flawed, weakening long-standing recognition standards, creating a potentially-biased commission and providing multiple judicial appeals to Indian groups whose recognition applications have been rejected. After rigorous review, there should be no do-overs.

I commend the committee's interest in recognition reform. My recommendations for reform are simple and specific as they are essential:

- Abolish the Bureau of Indian Affairs (BIA) tribal recognition authority;
- Establish an autonomous and unbiased agency -- a Federal Tribal Recognition Commission (the Recognition Commission) composed of individuals knowledgeable about Native American history and genealogy -- with authority over recognition;
- Enact the present tribal acknowledgment recognition criteria contained in 25 C.F.R. section 83.7 -- which is based on United States Supreme Court decisions -- into statute;
- Provide sufficient resources to fund the Recognition Commission;
- Set strict, strong disclosure and ethics rules for the Recognition Commission; and
- Assist affected towns and cities in participating in the process.

Federal tribal recognition profoundly and significantly impacts affected communities, often involving taking of privately held property, operation of a casino or other forms of gaming, and establishment of a quasi-sovereign government within the borders of a state. Requests for

federal tribal recognition are commonly funded by international gaming interests that bet millions of dollars on federal recognition.

Whatever disagreements there may be about solutions, there seems to be a clear consensus on the central problem: the present tribal recognition process has proven to be susceptible to political influence and even corruption. While the BIA has recently taken steps to correct these problems, the potential for abuse still exists. We must permanently rid the recognition process of improper influences and regain public confidence and trust.

For fourteen years, I have been fighting for fairness and accountability in the tribal recognition process. For many of those years, mine was seemingly a singular voice. Those times were lonesome -- made less so only by local officials and citizens from North Stonington, Preston, Ledyard, Kent and other towns with the conviction and courage to stand up and speak out. I have fought for access to critical public documents from the BIA -- documents we were clearly entitled to receive under federal law. Protecting our state's interests, I have appealed arbitrary administrative decisions and challenged BIA findings lacking any basis in fact or law. I have also testified before congressional committees urging oversight investigations and reform.

The current process demeans and discredits groups that legitimately deserve federal tribal recognition, delays expeditious review of petitions and hinders participation of affected parties in the process. The influence of casino money has in the recent past transformed tribal recognition decisions into crude contests of influence instead of objective assessments of evidence. Some decisions were arbitrary and capricious, ignoring or bending the BIA's own rules to reach illegal recognition decisions. These decisions are distorted by powerful interests, enhancing casino interests at the expense of local communities and citizens.

H.R. 2837 fails to ensure a fair and effective recognition process:

1. **The selection process for members of the Independent Commission on Indian Recognition fails to ensure unbiased experts.** The panel that decides a critical and vitally-important federal recognition issue should be knowledgeable on Native American matters, expert in history and genealogy, and unbiased on the issue of recognition. H.R. 2837 fails to ensure impartiality. It requires that the President give consideration to views of Indian groups that may be seeking, or will seek, federal recognition -- while failing to require similar input by state and local officials or citizens.

2. **The criteria for determining federal recognition have been significantly weakened.** The existing regulations for recognition are demanding and exacting reflecting United States Supreme Court decisions, as they should be. Only Indian groups that have maintained a continuously cohesive organization since the time of first interaction with colonists or settlers and that have maintained a distinct culture and social structure -- and there are likely to be a number of such groups -- deserve the significant authority and quasi-sovereign powers of federal recognition. H.R. 2837 substantially dilutes the existing standards, enabling recognition even if the Indian group fails to exist as an organized tribe for decades but later is

reconstituted. Further, the current indication of tribal status that at least 50% of the members marry other members of the Indian group has been reduced to one-third. Finally, the proposal allows for the evidence of the community criteria to be proven by one factor rather than a combination of factors as required under current law.

3. **The proposal does not provide all parties to the recognition proceeding with equal access to documents and information.** H.R.2837 commendably provides the petitioning Indian group access to federal sources of information such as the National Archives, but fails to provide similar access to other parties such as town and state government officials. Only by ensuring a transparent and equitable information exchange process can the recognition decisions be fair and accountable.

4 **H.R.2837 fails to provide adequate resources to recognition petitioners to ensure that they are not beholden to private interests for funding.** Too many petitions are financed by gaming interests. The federal government should provide adequate resources to the petitioner and to the commission to ensure that the recognition process proceeds quickly and expeditiously. Moreover, any assistance to the petitioners should come from the Bureau of Indian Affairs -- an advocacy agency -- not the Commission, the impartial decision-maker.

I commend the committee's concern about improving the recognition process and urge you to seriously consider the views of all individuals with experience in the recognition process.

Mr. FALEOMAVAEGA. Gentlemen, thank you very much for your patience. This has been a long day. So let us have Mr. Jordan. Can you start off with your testimony, please?

STATEMENT OF DERRIL B. JORDAN, PARTNER, ANDERSONTUELL, LLP, WASHINGTON, D.C.

Mr. JORDAN. Yes, thank you, Mr. Chairman. And good morning to Mr. Chairman and committee members. I want to thank you for this opportunity to testify about H.R. 2837.

My name is Derril Jordan, a partner at AndersonTuell. I am a former Associate Solicitor of the Department of Indian Affairs, and I am also a member of the Mattaponi Tribe of Virginia, which is a state-recognized tribe. So I have a lot of interest in this subject, and I hope to be able to offer some meaningful testimony to Congress this morning that will help it to enact legislation that will ensure that all legitimate tribes are able to be recognized.

First I want to say that I believe that the creation of an independent commission is an important and necessary step in the right direction. I believe that it is the only way to ensure that decisions will be made by those who are entrusted by the law with that responsibility, and not the staff.

I believe that experts are important to this process, but I also believe that they aren't the only people with the ability to recognize the existence of an Indian tribe.

There are several criteria in the current regulations, and that are also in the bill, that I believe are redundant. First of all, one of the criteria is that a group must show that it has been identified as an American Indian entity on a substantially continuous basis since 1900. I believe that this is redundant with the criteria regarding community and political authority, because in order for a group to prove those two criteria, it basically has to show that it

has been identified by outside parties. That is where the documentation is going to come from, by outsiders.

I also think that it is an inappropriate criterion, because it ignores the history of what many of the unrecognized groups have had to go through. As we have heard from a number of members of the Committee and other witnesses this morning, many Indian groups basically had to lay low; they had to maintain a low profile if they were going to survive. Otherwise they would be removed to some other part of the country, or they would be subjected to incredible kinds of discrimination.

So to expect that there are records that others have identified that when, in fact, their very existence depended on not being identified, is contrary to reality.

And furthermore, I also think that this criteria, it asks the question if an Indian takes a walk in the woods and a White man doesn't see him, is he still an Indian. And it answers that question, no.

Mr. FALEOMAVAEGA. I guess he should wear moccasins.

Mr. JORDAN. There is also, I believe, an inter-relationship between the community criteria and the political criteria. I agree very strongly with the comments a number of the witnesses made, including Arlinda Locklear. You will not find a community without a political process, and there is not going to be a political process that is unassociated to a community. As Arlinda and others have pointed out, groups govern themselves by traditional means, through kinship groups. There were not tribal councils organized under the Indian Reorganization Act with people taking minutes. There simply is no paper trail of the exercise of governance.

But if you find a community, you will find that there is a political process that has created or established and enforced the social bounds that make that group distinguishable from other groups.

There is also a need, I believe, in the bill for an evidentiary standard. And I believe that that standard should be that a petitioner be required to show that it meet each criterion by a reasonable likelihood.

The bill requires that a petition meet the community and political criteria, political authority criteria, at a given period of time or at a given point in time. Now, unfortunately, the bill doesn't define what a period of time is, or what a point in time is. Is it every year, every 10 years, or every 20 years?

But more importantly, any number of years is arbitrary, because the events and forces of history and Federal policy do not confine themselves to tidy time intervals. A petitioner should not have to show that it meets a criterion for numerous artificial time periods. It should be enough that, considering all of the evidence, the petitioner has shown that it is reasonably likely that it has maintained a distinct community from 1900 to the present, or that it has exercised political influence over its members during that time.

If, in the alternative, petitioners are to be required to meet criteria for given time periods, I think Congress should clearly place the burden on OFA or on interested parties opposing acknowledgement to show, by clear and convincing evidence, that a group has abandoned, voluntarily abandoned its tribal relations. Putting the burden on OFA or opposing parties recognizes that evidence to

demonstrate community and political influence may not be available for certain time periods due to no fault whatsoever of the petitioner.

There is two quick points that I would like to make in closing, in response to some earlier testimony. Assistant Secretary Artman testified about conducting consultation on changes that they are considering to the Part 83 criteria. And I strongly believe that while it is important to conduct consultation with Federally recognized tribes, it is equally important that there be consultation with the groups that are seeking recognition. This protects obviously their lives, and these decisions are final, and they need to be consulted, as well.

And a final point about dealing with splinter groups. The United States, the Bureau of Indian Affairs does have a role to play in helping to resolve the disputes within Federally recognized tribes. I speak to that from two perspectives, one having worked for a couple of tribes as an in-house attorney that experienced internal disputes, and the BIA is involved in that process. And as the Associate Solicitor, I also worked on several matters where we helped to resolve internal disputes. And I think that the Bureau and the Department have a responsibility to deal with these disputes when they arise in petitioners, because it has to decide who it is that it is going to deal with, who controls the documents, who is making decisions. So I think it needs at some point to make a decision on those bases.

Thank you very much.

[The prepared statement of Mr. Jordan follows:]

Statement of Derril B. Jordan, Partner, AndersonTuell, LLP, Washington, D.C.

Mr. Chairman and Members of the House Natural Resources Committee, thank you for this opportunity to offer testimony regarding the process for acknowledging that an American Indian group exists as an Indian tribe. My name is Derril Jordan, partner at AndersonTuell, LLP. Our firm represents a number of Indian groups seeking federal recognition, but I am not offering testimony on behalf of any particular client of our firm. As a former Associate Solicitor of Indian Affairs at the Department of Interior, as a long-time practitioner of federal Indian law, and as a member of a state recognized tribe, the Mattaponi of Virginia, I have a keen interest in this subject. It is my intent to offer testimony that will assist Congress in enacting legislation that ensures that all legitimate tribes have their sovereign status recognized by the United States.

This is an issue of great significance, and Congress' attention to this matter is much needed and greatly welcomed. Numerous reform bills have been introduced over the last two decades, and there has been much discussion of the issue in the recent past. I hope that the 110th Congress will be the Congress that finally enacts legislation that establishes a fair and efficient process for the federal recognition of legitimate Indian tribes. I am committed to working with Congress to help it understand what is needed to make this process both timely and fair.

REVIEW OF H.R. 2837

Much can be said about the current process employed by the Office of Federal Acknowledgment (OFA) within the Bureau of Indian Affairs (BIA). I believe that it is necessary to look and move forward, and not back, so I will focus my comments on H.R. 2837. I will also offer other suggestions about the issue of federal recognition generally.

A. The Creation of an Independent Commission.

Section 4 of the bill creates an independent commission to be responsible for determining which groups are eligible to be recognized by the United States. I agree with the creation of an independent commission outside of the Department of Interior. It addresses directly the phenomenon known as staff capture. There has

also been much controversy surrounding the process lately, with complaints on both sides that the process is biased and unfair. The creation of an independent commission will help to give the recognition process a fresh start and provide a renewed sense of legitimacy to its decisions, whether they be to recognize a tribe or to decline to extend recognition.

There are other process-oriented reforms that I believe can go a long away toward improving the process, even if the creation of an independent commission proves to be beyond our grasp. For example, the creation of a peer review process would go a long way toward ensuring fair decisions. Independent contractors could be hired by the Assistant Secretary for Indian Affairs to conduct an independent review of OFA's analysis and recommendations and determine whether OFA's recommendation should or should not be followed. By creating this independent panel that has the time and resources to examine the case in its entirety, you will be providing an antidote to the phenomenon of staff capture, and you will be more likely to get decisions that are fair. Perhaps a pilot project could be authorized whereby the next five petitions that are on the "Ready And Waiting List but not yet under active consideration to be evaluated would undergo this peer review process and the results evaluated to determine whether the peer review process should be continued, or whether other reforms should be considered.

B. The Elimination of Redundant Criteria.

Several of the criteria are redundant and unnecessary. The use of redundant criteria is costly to petitioners and slows the process down, adding to the backlog of petitions.

1. Criterion (a)—Identification as an American Indian Entity.

Like Section 83.7(a) of the current regulation, section 5 (b)(1) of H.R. 2837 requires that a petitioner demonstrate that it has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence to be relied upon must show identification by entities other than the petitioner itself or its members. It is both unnecessary and inappropriate to require a petitioning group to show identification by outside entities. It is unnecessary because this criterion overlaps with the criteria of sections 5 (b)(2) and (b)(3) (§§ 83.7(b) and (c), respectively, of the current regulations) which require that a petitioning group demonstrate continuous existence as a community and continuing political influence or authority, respectively. Generally, the evidence relied upon by a group to meet the community and political authority criteria has been created by third parties such as the United States, state or local governments, newspapers, other Indian organizations, and scholars. These are virtually the same sources that are listed in section 5 (b)(1) of the bill and § 83.7(a)(1)-(6) of the current regulations. Because a group must, at least in part, rely on records created by third parties to meet the community and political authority criteria, it is redundant to have identification by outsiders as an independent criteria.

Moreover, it is an inappropriate criterion because it ignores the effects of federal, state and local policies and actions upon tribes throughout history. During much of United States history, especially in the late nineteenth and early twentieth centuries, there were considerable incentives for Indian tribes and their members to remain unidentified as such. Threats of removal, racial and ethnic animus, as well as economic, educational, and religious discrimination were commonplace. Indian groups in many places had to maintain a low profile in order to survive. In essence, this criterion is Eurocentric. It asks the question: if an Indian takes a walk in the woods and a white man doesn't see him, is the Indian still an Indian? Most distressingly, it answers that question in the negative! Simply put, identification by third parties can provide evidence that a group is a tribe, but it should not in itself be a criterion for proving tribal existence.

2. The interrelationship between the community and political authority criteria.

Sections 5 (b)(2) and (3), like criteria 83.7 (b) and (c) of the current regulations, require a petitioning group to demonstrate that it has maintained a continuing community and continuing political authority or influence over its members. These criteria overlap considerably. It is hard to imagine a community without a political process, however informal and, in turn, a political process without a community. Moreover, sections 5 (b)(2) and (3), as well criteria 83.7 (b) and (c) of the current regulations, explicitly acknowledge the interrelationship of these criteria. For example, both H.R. 2837 and the existing regulations provide that if a group can demonstrate community by certain evidence, it will be deemed to have demonstrated political authority. See section 5 (b)(3)(C) and 25 C.F.R. § 83.7(c)(3). Likewise, the bill and the existing regulations both provide that if political influence is demonstrated by certain evidence, the group will be deemed to have met the community

requirement. See section 5 (b)(2)(C)(v) and 25 C.F.R. § 83.7(b)(2)(v). These provisions demonstrate the interrelatedness, and redundancy, of these criteria. Furthermore, it should not matter what type or form of evidence a group has relied upon to establish community or political authority; if it can show that it meets one criterion by any evidence, it should be deemed to have met the other criterion. Thus, these two criteria should be combined to be but one: that a group show that it has maintained a continuous community, with political process or form of leadership being one type of evidence that can be used to show that it has met this criterion.

C. The Need for an Evidentiary Standard.

H.R. 2837 does not establish a standard of proof necessary to meet each of the criteria. One standard that is applicable to all criteria should be established, and that standard should require a petitioner to show that it meets each criterion by a reasonable likelihood.

The bill retains an element of the current regulations that is most problematic. In several instances, the bill requires that a petitioner meet the community and political authority criteria at "a given period of time," or "a given point in time." See sections 5 (b)(2)(C) and (b)(3)(C). First, the bill does not define what a "period of time" or a "point in time" means. Is it every year? Every ten years? Or every twenty years? What's more, any number of years is arbitrary. The events and forces of history and federal policy do not conform themselves to tidy time intervals. For example, the period of forced assimilation in Indians affairs lasted from the early 1880's to the mid 1930's, a period of over fifty years. A petitioner should not have to show that it meets a criterion for numerous artificial time periods. It should be enough that, considering all of the evidence, the petitioner has shown that it is reasonably likely that it has maintained a distinct community from 1900 to the present, or that it has exercised political influence over its members during that time.

In the alternative, if petitioners must meet each criterion at a given point or period in time, Congress should clearly place the burden on OFA or interested parties opposing acknowledgment to demonstrate by clear and convincing evidence that a petitioning group has voluntarily abandoned tribal relations before a petitioning group can be denied acknowledgment on the basis of a lack of evidence for a specific time period. If a Tribe meets a criteria during the 1920's, and meets that same criteria in the 1950's to the present, isn't it logical to assume that it has met that same criteria for that intervening 30 years? Placing the burden on OFA or opposing parties recognizes that evidence to demonstrate community or political influence may not be available for certain time periods due to no fault of the petitioner. For example, some public records may have been lost or destroyed, as is the case in Virginia. Also, many Indian groups were forced to refrain from engaging in political activities and to otherwise keep a low profile in order to survive in an environment hostile to their existence. Placing the burden on OFA and opponents of recognition also introduces equity into the process by recognizing that the Unites States bears some responsibility for its failure to extend recognition to the group at an earlier time or because it illegally terminated the tribe.

D. The Significance of Prior Recognition.

Under our Constitution, only Congress has the authority to terminate a treaty relationship, but the BIA does not. If a tribe has a ratified treaty with the United States, and can demonstrate that the majority of its members are the descendants of the group which signed that Treaty, and that those families have continued to interact as a tribal community over time, the Tribe must be presumed to continue to exist as a federally recognized tribe in the absence of clear and convincing evidence that the entire tribe or band has ceased to exist.

With regard to other non-treaty forms of prior federal acknowledgment, I note that Section 5 (c) of H.R. 2837 provides that a group that can demonstrate prior recognition must meet the criteria set forth in section (5) only from the date of last recognition to the present. I suggest that the Committee refer to section 5 (c) of H.R. 361, which was introduced in the 106th Congress. That provision requires that a group demonstrate only the existence of current political authority from ten years prior to the submission of its petition to the present.

While I would urge changes to section 5 (c) of H.R. 361, I would recommend that provision over the provision in the current bill. Such a provision would introduce equity into the process that is necessary to account for the wrongful conduct of the United States. If a group was previously recognized but no longer appears on the list of federally recognized tribes, it is because Interior illegally terminated the federal-tribal relationship, either through neglect or by deliberate action unauthorized by Congress. The current regulatory standard and the provision in H.R. 2837 penalize a petitioning group for the United States' illegal conduct. Requiring that

the group demonstrate political authority only for the ten years prior to filing its petition recognizes that the petitioning group has been disadvantaged by the United States' illegal conduct.

E. The Significance of State Recognition.

Many Indian tribes are recognized by the government of the State in which they reside. Some state recognitions are based on colonial era treaties and are characterized by well documented, centuries-long relations involving the appointment of trustees or overseers and the presence of well-defined land bases. Residence on a state-recognized reservation since 1900 should constitute conclusive proof that the group is entitled to federal acknowledgment as an Indian tribe.

F. Additional Comments on H.R. 2837

The definition of "continuous" or "continuously" in section 3 (6) should be amended to delete the words "throughout the history of the group," and the words "until the present" should be added in their place.

It should be made more clear that the types of evidence listed in subsection 5 (b)(2)(C) entitle a petitioner to a finding that it meets the continuing community criterion without the consideration of other evidence, but that showing one or more of these kinds of evidence is not required. Likewise, it should be made more clear that the types of evidence listed in section 5 (b)(3)(B) entitle a petitioner to a finding that it meets the political influence criterion without the consideration of other evidence, but that such types of proof are not required.

Section 5 (b)(3)(A) requires a petitioner to show that it has maintained political influence or authority over its members "from historical times until the time of the documented petition." The requirement that political authority be shown from "historical times" is inconsistent with the definition of "continuous" or "continuously," which mean "extending from 1900 to the present. It should be made clear that criteria (1)-(3) need only be met from 1900 to the present.

I have already commented on the exception for tribes that can show prior recognition, but there are other suggestions that can be made. First, the standard for demonstrating prior recognition should be the same for establishing that the petitioner meets the criteria for recognition: by a reasonable likelihood. Second, if a group was identified as Indian tribe or band by an Indian agent whose job it was to inventory Indian communities in a state or territory, that identification should be considered prior recognition even if no land was ever set aside or federal assistance provided to the group. This was a common occurrence in California, where Indian agents were sent out to identify Indian communities in need, and many of the communities identified never had land set aside for them or received assistance from the United States because there was no cheap land available, not because the United States did not recognize its fiduciary relationship.

The types of evidence necessary to show tribal membership listed in section 5 (b)(5)(C) should be more clearly stated to be in the alternative because no petitioner will be able to provide all such forms of evidence.

Section 7 (a)(4) requires the Library of Congress and the National Archives to allow petitioners access to their resources, records, and documents. Petitioners, as members of the general public, already have such access. Is the point of this provision to make such access free of charge to petitioners?

The publication of the list of federally recognized tribes eligible to receive services from the United States should remain the responsibility of the Department of Interior, especially given that the Commission will terminate after twelve years.

Finally, the provision of financial assistance to petitioners should be based on need, and Congress should provide sufficient funding to ensure that all deserving groups receive at least some assistance. I would also note that this financial assistance should be provided throughout the entire review of a group's petition. While the Administration for Native Americans once provided assistance to tribes in preparing their petitions, that assistance stopped once the BIA's review was initiated. This left the petitioning group with no funds to respond to the BIA's requests for additional information on a particular topic and no funds to respond to issues raised by third parties opposed to recognition. Decisions of this magnitude should be based on facts and a group should not be penalized because it does not have the resources to fully document its petition. This is particularly important if there is going to be a sunset provision on the recognition process.

THE SPECIAL CIRCUMSTANCES OF CALIFORNIA INDIAN GROUPS

The report of the Advisory Council on California Indian Policy (ACCIP) on the federal recognition process recommended the modification of the current federal recognition process due to the unique and brutal legacy of Indian policy in California.

To this end, the ACCIP's recommendations included the enactment of legislation to establish a California-specific recognition process. The ACCIP, created by Public Law 102-416, reported that literally two-thirds of the Indian people in California are not members of recognized tribes, which fact is due to the haphazard methods through which tribes were recognized, which is attributable to the lack of a coherent federal Indian policy in California from the time of statehood till the present. If the entire process is not reformed, a California-specific process should be established.

PRESERVATION OF OTHER FORMS OF RECOGNITION

Congressional action to reform the administrative process for recognizing Indian groups as sovereign tribes is much needed. Nevertheless, there are other legitimate means through which groups can be recognized. Congress, of course, retains the authority to recognize tribes, and it should not hesitate to do so in appropriate circumstances. There will always be cases where a legitimate group does not fit squarely into any given set of regulations because of its unique historical situation, and some tribes may be prohibited from going through the Part 83 process. In such instances the Congress has an obligation to examine the facts and render a fair and equitable decision.

A number of tribes have been, in effect, administratively terminated by the neglect or wrongful conduct of the Department of Interior. Congress has affirmed the recognition of some of these tribes in the past, and it should not hesitate to do so in the future. In 1958, Congress enacted the Rancheria Act, (72 Stat. 69), which provided for the termination of forty-one California rancherias. All but eight of those rancherias have been restored, either through litigation, or by Congress. In cases such as Hardwick v. United States, No. C-79-1710-SW (December 15, 1983), Scotts Valley v. United States, No. C-86-3660 WWS (March 16, 1991, N.D. California), Duncan v. Andrus, 517 F. Supp. 1 (N.D. Calif. 1977), and Table Bluff v. Andrus, 532 F. Supp. 255 (N.D. Calif. 1981), the courts decided, or the United States agreed through stipulations, that it had not fulfilled the statutory pre-conditions to termination and that the termination of these rancherias was, therefore, unlawful. The Department of Interior should be directed to negotiate settlements with the last eight remaining terminated rancherias without the need for further litigation or the need for legislation.

As the Hardwick, Scotts Valley, Duncan, and Table Bluff cases demonstrate, judicial restorations and recognitions are also possible. The recent judicial recognition of the Shinnecock Tribe by a federal district court in New York is the most recent example of this. State of New York v. The Shinnecock Indian Nation, 400 F, Supp. 2d 486 (E.D.N.Y. 205). Any legislation enacted regarding federal recognition should direct the Department of Interior to add a tribe that is recognized by any of these means, including those recognized via litigation, to be added to the list of federally recognized tribes maintained pursuant to 25 U.S.C. § 479a (the Tribal List Act).

I thank you for this opportunity to testify on this important issue. I look forward to answering questions and to providing further assistance to the Committee in its consideration of H.R. 3837 and the federal recognition process.

Mr. FALEOMAVAEGA. Thank you, Mr. Jordan.

Mr. Austin.

STATEMENT OF STEVE AUSTIN, CULTURAL ANTHROPOLOGIST, AUSTIN RESEARCH ASSOCIATES, SILVER SPRING, MARYLAND

Mr. AUSTIN. Thank you for the invitation to come and address the Committee today.

My name is Steven Lee Austin. I am an anthropologist, and I have been working in the tribal recognition field for 14 years now. I have something of an interesting perspective to share in that I worked for six years for the Bureau of Indian Affairs, what was then known as the Branch of Acknowledgement and Research. And since 1999 I have been working as a contract anthropologist working on behalf of Indian tribes who are seeking to put together these kinds of petitions for acknowledgement.

I think that the legislation that we are considering today in particular has several very important elements to it: elements that,

whether this bill is passed or not, they should find their way into legislation to help improve the process.

I think the first thing that needs to be done is to set dates certain by which petitioners need to have their petitions in to the Federal government; and also dates certain by which the Branch of Acknowledgement and Research, or now the Office of Federal Acknowledgment, or the commission if the commission is passed, those things need to have dates certain by which everyone involved in the process will know that this issue is being dealt with in a timely fashion. Petitioners deserve timely answers, the states in which they reside deserve timely answers, the Bureau of Indian Affairs and the Federal government, and individual citizens out there who are going to be impacted by these decisions, deserve timely answers.

I think that another aspect of this that needs to be addressed, particularly if stringent time frames are going to be mandated by way of legislation, is to provide sufficient funding. The funding would need to go to either, again, the commission or to the Office of Federal Acknowledgement, or you can't expect them to handle a flood of petitions coming in. Say we set a timeline of 20 years by which we expect this process to be done.

There is no way that they are going to be able to handle 200 petitions in 20 years, with the resources that are currently available. We have heard this over and over again, from testimony, and the Committee members have also recognized it today.

I remember when I was working for the Bureau of Indian Affairs, the difficulty of watching the branch chief, who at that time was being told as she came to committee meetings to try to explain why the process was taking so long, she was told that she couldn't, the one thing that she could not come into this committee room and ask for was more funding. Even if she was asked directly do you need more funding, she was not allowed to answer that she needed more funding.

She ended up getting answers somewhat like we got today, though I think some of the answers we got from the assistant secretary were a bit more promising than ones we have gotten in the past. But they usually end up answering by saying, well, this is the amount of money we have got, and let me tell you what we are doing with it to try to make the process work better.

Unfortunately, that still does not bring any kind of finality to the process; it doesn't bring any clearer answers for anybody involved in terms of when are these petitions finally going to be dealt with.

And so I think that by providing dates certain by which these things have to be done, that calls on the petitioners, to finally do their part and get their petitions done and presented, and then it calls on the government, in the form of the Office of Federal Acknowledgement, to do its part, to resolve these petitions, to look at them and render decisions on them.

That would go a long way toward helping to resolve it. But then it needs to be properly funded. And I would agree with Mr. Tilden, who was giving testimony on the previous panel, that the funding not only needs to go to the Office of Federal Acknowledgement or to the commission, but funding also needs to be provided to the petitioners.

I don't know how many petitioners there are. You asked if Mr. Tilden thought there were a lot of petitioners that could benefit from that. I know that there are several clients of my own—I can say at least three or four—that would be taking a much more active role in this process and participating much more regularly if they had the adequate funding.

However, there is now no funding, as Mr. Tilden indicated, from the Administration for Native Americans; there are no more status clarification grants. I was glad to see that your bill calls for reinstituting those, because I think they play a very important role, especially for tribes like the ones I am talking about now that do not have the opportunity to enter into a business relationship with somebody that could help them fund the research.

The people I have in mind, for example, are in south Louisiana, down in the bayous south of New Orleans. They are not in a position where they will ever be able to benefit from Indian gaming, and they really don't have anything else that they can really do to raise funding.

I have been working for tribes like that, like another one in New Mexico, which is in a similar position, perhaps not quite so desperate. But if they had a market for mosquitoes, these guys in Louisiana could perhaps raise some funds; or if there was a way to sell rocks on a Navajo reservation, those guys could come up with some funding to pay for research.

As it is, persons like myself—and I know I have many colleagues who are doing the same thing out there—end up having to work on a pro bono basis. And that means that they get attention when I can give them the attention. They are not getting the just attention that they rightly deserve.

So restoring funding through the ANA for the tribal acknowledgement status clarification grants would be a major step forward.

I am one of the few people that thinks that the criteria are probably stated about right in the current regulations. However, the other thing that I would advocate for—and this is not, I don't think, adequately dealt with either in the bill or in the current acknowledgement process—that would be calling for greater peer review by independent scholars and legal specialists in the field of Indian affairs. The Bureau of Indian Affairs Office of Federal Acknowledgement does do its own internal peer review, but I think that a lot of the decisions recently that have been coming out are a little bit on the uneven side. They are really difficult to sometimes grasp the logic behind some of the decisions that have been coming out, where evidence is seen in some years to be showing that a tribe is there, and then for another 20 years after that there is no tribe there. And then after that, another 30 years, there is evidence of political leadership there.

I would be very pleased to present the evidence that we have had in other cases to an independent review board of specialists to say, given the standard of evidence that is in the regulations, the reasonable likelihood of the validity of the facts, would you say that that tribe was in existence for 20 years, suddenly went out of existence for another 20 years, and then came back for another 30 years and was in existence again? Or is it more likely to assume that

that tribe was there all along? Especially when there is nothing that contradicts that the tribe was there all along.

It is issues like that that will drive the petitioners and scholars and attorneys in this process crazy, because we feel like the decisions are very uneven sometimes. And that would also——

The final thought I have that I would like to share this afternoon would be, bear in mind that while the criteria, in my opinion the criteria are important, and I think they should be the first line of defense or the first line of evaluating petitions that come in; there are going to be some instances in which the Congress needs to stand ready to act. And there are going to be some groups out there that are not going to be able to meet the criteria as they are stated, and particularly not as they are currently being interpreted by the Office of Federal Acknowledgement. Groups like the Burt Lake Band of Ottawa Indians in Michigan for whom I worked.

I think it is important to watch some of the signals that come out of the Interior Department on things like this, when they say to you they do not oppose legislation to recognize a group, or that they—I don't think I ever heard them say it, but if they ever did say they were in favor of legislation to recognize a group, Congress needs to pay attention to that.

In the case of Burt Lake, they went through the process. I personally think that they got an unjust decision, a decision based on an unfair reading of the evidence. But this is one that, when the Office of Federal Acknowledgement was asked to testify earlier about a bill to recognize Burt Lake, they said that basically they had no objection to the legislation.

I think that Congress needs to perk up its ears when they hear that, and say this is somewhere where we need to step in. And even though the BIA is saying they couldn't be recognized under the process as it is currently standing, we need to step in and do it because it is the right thing for the government to do.

[The prepared statement of Mr. Austin follows:]

Statement of Steven L. Austin, PhD, Anthropologist, Austin Research Associates, Silver Spring, Maryland

Greeting and Thanks to the Committee Members

Good morning. My name is Steven Lee Austin. I am an anthropologist, with a PhD in Anthropology from American University. I wish to thank The Honorable Members of the House Committee on Natural Resources for holding a hearing on this bill and allowing me to speak on this very important topic. I have some concerns about the creation of an "Indian Recognition Commission." However, I view several aspects of it as representing major steps forward, and even if this bill is not passed, there are several provisions in the bill that Congress could pass separately that, in concert, would dramatically help improve the current tribal acknowledgment process.

These provisions include:

1) legislating a sunset provision for the tribal acknowledgment process, to create a date certain by which all of the petitions currently on hand, and those submitted by the sunset date; will be resolved;
2) authorizing and appropriating more funding for the process in order to hire adequate staff to review petitions and provide technical assistance to petitioners;
3) authorizing and appropriating funds for status clarification grants to petitioners, so that they may conduct research and prepare their documented petitions; and,
4) implementing measures that would contribute to a reasonable interpretation of the seven mandatory criteria for tribal acknowledgment (25 CFR 83.7).

Overview

When the administrative process was first established, it was never envisioned that it would still be in operation 30 years into the future. Rather, the scholars and attorneys responsible for designing the process thought it would last a few years, and the issue of tribal recognition would, for the most part, be settled once and for all. The original regulations for the tribal acknowledgment process were finalized and published in 1978. In 2008, the process will reach its 30th anniversary; yet, from the point of view of many of the Indian groups seeking acknowledgment, there is little, if anything, to celebrate. Leaders from all of these groups who are here today could tell you painful stories about waiting for justice while a generation or two of their elders have passed on.

I have worked as an anthropologist for nearly 20 years, since 1988. Beginning in 1993, I accepted a job with the Bureau of Indian Affairs, evaluating petitions for Federal acknowledgment. From 1993 to 1999, I was part of several review teams, evaluating the petitions from the Ramapough Mountain Indians, the Mohegan Indian Tribe, the Chinook Indian Tribe, and the two Nipmuk petitioners. I also served on peer review teams for several other petitioners, including the Jena Band of Choctaw, Match-e-be-nash-she-wish Pottowatomie, the Huron Band of Pottowatomie, the Duwamish Indian Tribe, and the Cowlitz Indian Tribe. In 1999, I left the Bureau of Indian Affairs to begin my own consulting business, which primarily focuses on developing documented petitions for unrecognized Indian tribes. From 1999 to the present, I have consulted with petitioning groups from Connecticut, Massachusetts, Louisiana, New Mexico, California, and Michigan. As I considered my testimony this morning, I reflected on my experience over the past 20 years and I tried to think of insights that I could share which would constitute a unique contribution to this hearing.

I keep two questions in mind as I work on matters related to tribal acknowledgment. The first question is: "What is best and most just for Indian Country as a whole?" I include tribes that are yet to be acknowledged as part of the legal construct "Indian Country." Based on that perspective, I believe that it is in the interest of Indian country to acknowledge Indian tribes that meet the seven mandatory criteria (as stated in the Code of Federal Regulations) based on a reasonable interpretation of the genealogical, historical, and anthropological evidence, and who currently have the strength and fortitude to maintain a bilateral, government-to-government relationship with the United States. Generally speaking, it would not be in the interest of Indian Country for the Federal government to acknowledge those Indian groups that cannot meet the criteria and are not in a position to employ the unique rights and fulfill the responsibilities that attend the government-to-government relationship. To do so would, from my point of view, be a disservice to Indian country, and undermine the status of federally recognized tribes.

The second question I keep in mind is: "Given the totality of the evidence and circumstances of each case, what is the just and proper action for the Government to take?" It should be remembered that there are going to be some very rare cases that will compel the Government, in the interest of fairness and justice, to acknowledge the existence of a tribe that can present a case with sufficient merit, even though the petitioner has not met all seven of the mandatory criteria as traditionally interpreted by the OFA. This is one of the areas that Congress can be of assistance in the process as it is currently designed. Particularly when the OFA or the Department of the Interior provides congressional testimony or otherwise indicates that it will support, or, at least, will not oppose, legislation to recognize a specific tribe, as it recently did at a hearing on a bill to recognize the Burt Lake Band of Ottawa and Chippewa Indians in Michigan.

The Office of Federal Acknowledgment (OFA) is often criticized for being too slow and tedious, as well as for being inconsistent in its interpretation of the seven mandatory criteria. It seems that everyone with a hand in the process, scholars, petitioners and interested parties, and some members of the Legislature and the Judiciary, whether generally pro or con regarding tribal acknowledgment, are in agreement that the process moves too slowly. The specific accusations of inconsistency depend on the political goals of the critics, with petitioners typically complaining that the criteria (or the OFA's interpretation of them) are too demanding, and those interested parties who are opposed to the Government acknowledging more tribes complaining that the criteria (or the OFA's interpretation of them) are too lenient. First, I would like to address some of the concerns about the pace of the tribal acknowledgment process. Second, I will discuss a few examples of what I view as inconsistencies and unreasonableness in the OFA's interpretation of the regulations. Finally, I will make some additional comments on H.R. 2387.

The Current Tribal Acknowledgment Process and the Issue of Timely Resolution

The administrative process for acknowledging Indian tribes was set up to investigate the claims of Indian groups across the country that wanted their status, as tribes, affirmed by the United States government. In 1978, there already were 40 groups that had applied for that status, and it was anticipated that there might be a few more unrecognized tribes who had yet to make application. Altogether, they anticipated a relatively limited number of groups, and expected to review and decide those cases in a brief time period. Thirty years later, the Department of the Interior, through its Office of Federal Acknowledgment (OFA), has resolved about 40 cases, 9 petitions have been resolved by Congress, and 10 have been resolved "by other means" (mostly groups that withdrew from the process; statistics are based on the OFA's Status Summary of Acknowledgment Cases, dated February 15, 2007). However, having resolved 40 cases in 29 years (an average of 1.4 petitions resolved per year), the OFA now has a list of over 250 groups that have submitted a letter of intent to petition and whose cases have not yet been resolved. This is over 6 times the number of petitions they started with in 1978. The end result is that the burden on the Federal government has not diminished, but grown over time.

These numbers are sobering. In their own defense, the representatives of the OFA usually point out that not all 250 groups have completed petitions that are ready for immediate evaluation; therefore, OFA cannot reasonably be held responsible for not having evaluated everyone on the list. They would say that there are only nine petitioners with completed petitions that are awaiting evaluation, and that is the only real "backlog." While that is true, it cannot be very comforting to these Government officials or their superiors to know that, at some point in time, all of those petitions must eventually be resolved in one fashion or another, at least as the process is now designed.

There are several personal insights I would like to share on the issue of the time required to evaluate all of those petitions, and why there might be some hope for the future.

First, there really are not another 250 petitioners with merit. When I was still working at the Branch of Acknowledgment and Research (as the OFA was then known), I was aware that there were a number of Indian groups who clearly would never meet the requirements of the tribal acknowledgment process. Without getting too specific, I can tell you about just a few of those cases. There is one petitioner in Connecticut that consists almost exclusively of non-Indians, individuals who were taken off the membership roll of a recognized tribe and subsequently reorganized as their own "Indian tribe." There was a petitioner in California whose petitioning group consisted of an elderly woman, quite probably Indian, along with her daughter and grandchildren. In Texas, there is another petitioner that consisted of a father and son. In California, there was another group of about 30 individuals who had no evidence of Indian ancestry, tribal continuity, or any organic relationship to each other. Clearly these are petitioners that will never meet the standards for being acknowledged as an Indian tribe. Yet, as the regulations are now written, anyone can become a petitioner, simply by submitting a letter of intent to petition. A one-paragraph letter is all that is required; no substantiating evidence or additional information needs to be submitted.

However the Government chooses to deal with the issue of tribal acknowledgment in the future, whether through the current regulatory process or through a Presidential Commission like that proposed in the bill under consideration at today's hearing, it would seem to be in the best interest of Indian Country, the Government, and interested parties, to remove groups like those mentioned above from the acknowledgment process. In other words, a screening process should be established for making a first cut on whether or not the groups that are requesting petitioner status have any chance at all of meeting the standards as set forth in the seven criteria. This might involve requiring applicants for petitioner status to submit their membership list (as defined in the regulations), and/or some other information and evidence regarding the history of their group when they submit their initial request for petitioner status. To prevent an appearance of a conflict of interest for the OFA, perhaps these initial determinations should be made by an independent panel of experts.

A provision like this was made in the 1994 revised regulations, which allowed for petitioners to receive an expedited negative proposed finding, if it were determined that they had not provided acceptable evidence of Indian ancestry, and were unlikely to be able to do so. This provision in the 1994 revised regulations has largely been unused, but I believe the OFA, or the Commission, should reconsider its usefulness. Such an expedited review would cut down on the amount of time the OFA's

researchers would need to spend evaluating the more spurious or weak petitions and allow them to focus their time and effort on the more substantial cases.

I view the problem of too many petitioners and not enough resources to evaluate them that has resulted from the current administrative process as a failure, not on the part of the researchers at OFA, but on the part of both the Legislative and Executive Branches. The Executive 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 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. 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.

Not only was the Branch Chief told she could not request more funding, but we were bucking a general trend in Government during the 1990s, under the banner of "Reinventing Government." When I first arrived at the BAR in 1993, it quickly became apparent to me that we were not making adequate headway with the cases that we were supposed to be resolving. On paper, we had three research teams (each with an anthropologist, historian, and genealogist), three support staff members, and a Branch Chief. In reality, we usually only had two teams, one support staff person, and a Branch Chief, with two or three positions going unfilled at any given time. The Executive Branch decided to downsize the Federal bureaucracy several times, and during that process, the first staff positions that we lost were those that were not actually filled. Then, through attrition, we lost other positions that were vacated through resignations, retirement, and transfers, etc. We were made to feel thankful that we did not suffer even greater reductions in force. In some ways we were thankful: the BIAs Central Office staff was cut by 50 percent, overall, while our office only lost 30 percent of its staff positions. After I left in 1999, the OFA spent the next several years trying to regain those downsized researcher and support staff positions, and I think they may now have four full research teams, and they have increased the number of support staff.

Given all of these ups and downs, it is amazing the OFA has accomplished as much as it has. One can point to a slight increase in productivity in regard to the number of cases resolved by the OFA during the first seven years of the new millennium (See Table I), when compared to the 1990s. Still, this is not enough. It is true that a journey of a thousand miles begins with one step. But that is no real consolation when each time one step is taken, another thousand mile stretch is added to the end of the journey. This would seem to be a good analogy for the OFA: running as fast as they can, they are not really making adequate progress in accomplishing their overall mission; and, in fact, they are losing ground as the mission continues to increase in scope, as new petitioners are regularly added tot he process.

All participants in the petition review process deserve a timely resolution of these petitions. I believe it would be in the best interest of Indian Country, the Government, and other participants in the Federal acknowledgment process to provide a sunset clause, bringing the process to a close after the passage of a specific term of years, and I am pleased that H.R. 2837 calls for one. As I understand the provisions of the bill, petitioners would be given a maximum of eight years to submit a documented petition, once the Commission begins to hold meetings. Then the Commission would have four years to complete its review and make decisions on all of the remaining, pending cases. Generally, I think that the time frames called for in the bill are unrealistically short. More than likely, it will take 20 years to complete reviewing and ruling on all of the petitions that have yet to be submitted.

As a matter of analysis, to help determine if this bill should be passed or if the current process should be revised, the Committee may use the Sunset Clause as a frame of reference for a cost-benefit analysis. Rather than explain what it has done to try and speed up the process, the OFA should be called on to provide a plan for what it needs to complete its mission, fully and competently, in 20 years, including changes they view as necessary or desirable and the amount of money and personnel. It may be more cost-effective to carry on with the current process, with Congress instituting a sunset clause by a passing a law for that purpose. However, if the OFA responds that it cannot possibly complete its mission in 20 years, or if its

estimate is cost prohibitive, then perhaps it is time to transfer the process to a commission or some other venue.

A sunset clause will generate the need for more resources, on several fronts. The OFA (or the Presidential Commission) will need additional personnel to become more proactive in providing more technical assistance to petitioners. Additionally, petitioners will need to have funds to help them complete their documented petitions. In spite of the propaganda of some opponents of the acknowledgment of more tribes, there are still some petitioners whose cases have merit, yet they do not have adequate funding to put together an adequate documented petition. For that reason, I am pleased to see that H.R. 2837 calls for the restoration of funding for status clarification grants through ANA. Like many of my scholarly colleagues, I have chosen to do the best I can to work for some of those petitioners whose cases have merit but are not in a position to pay for my services. I feel it would be a tragedy for an Indian group to have their petition declined simply because they lacked the resources to hire professional researchers and document an adequate petition. Yet, I know that working for them on a pro bono basis, they are not getting the attention and time from me that they rightfully deserve. In my opinion, it would be a great service to Indian Country for Congress to restore this funding whether or not the Indian Recognition Commission bill is passed. I do not know why the funding for those grants was discontinued, but if there were problems with the way the program was administered, the problems should be addressed in a constructive manner, rather than by punitively cutting off the funds completely.

The Reasonableness of OFA Decisions

Petitioners as well as interested parties to the acknowledgment process not only deserve timely decisions, but reasonable ones, as well. Some might object that what is reasonable to one scholar or attorney might be unreasonable to another. Still, there are some common sense standards that could strengthen the outcomes of acknowledgment cases through a process of independent peer review. Some of the common sense standards include the following:

1) applying the scholarly standards of the disciplines used to evaluate petitions;
2) ensuring the decisions are consistent, both internally and across cases;
3) adhering to the evidentiary standard called for in the current regulations, which is the "reasonable likelihood of the validity of the facts;" and,
4) taking into consideration historical circumstances of each petitioning group and the kinds of evidence available for each case for various historical time periods;

In my view each of these standards has been violated in recent OFA decisions, and I believe this could have been avoided had there been an independent peer review of the decisions, either during active consideration of the petitions or during IBIA appeals of OFA decisions, or both. Let me provide an example of each of these in turn:

1) The 1994 revised regulations for tribal acknowledgment provided for a "sufficient" level of evidence for demonstrating both criteria (b) and (c), by showing that the petitioner's members married each other at a rate of 50 percent or higher. While the OFA initially agreed with the method I used for calculating the marriage rate, it reversed itself upon appeal without a reasonable explanation and in spite of an overwhelming demonstration, in the form of an extensive literature review, that I had used the method advocated by every social scientist who ever wrote explicitly on the matter.

2) When discussing the issue of maintaining tribal relations as it relates to tribal membership, the OFA advised during a technical assistance meeting that their basic principle was that if a family, or part of a family, could not be demonstrated by evidence to have participated in tribal affairs for more than one generation, then that family, or portion of that family, would be considered to have left tribal relations and would not be eligible for membership in the modern tribe.

In another case, I used this principle, when calculating tribal residence and marriage patterns, to eliminate from consideration tribal descendants for whom there was no evidence that they had been involved in tribal affairs for more than one generation. Many of these individuals had married outside of the Tribe and there was no evidence that they had continued to live in tribal relations with the petitioning group. I saw no point in including them in the calculations, since the point of the research is to discuss the behavior of the petitioning group's members. However, the OFA decided that such individuals should be included in the calculations, even though there was no evidence they were still in tribal relations or that they continued to be members of the petitioning group.

The inner contradiction here, is that when trying to describe the breadth of an Indian community at various points in time, one cannot include as tribal members individuals for whom there is no evidence of tribal activity for more than one generation. Yet, when calculating residency or marriage rates, the OFA insists on including individual descendants who have moved away or married out of the Tribe (factors that can be counted against a petitioner), even when there is no evidence that they have continued to participate in tribal affairs for more than a generation.

3) In the research I did for one petitioner, I calculated the marriage rate for the Tribe's members from 1800 to 1900. The evidence showed that the petitioner's members married each other at a rate of 50 percent or more from 1800 to 1820, and from 1850 to 1870, which was sufficient evidence that the petitioner met criteria (b) and (c) for those decades. But the OFA concluded that the Tribe did not meet (b) and (c) based on this evidence during the 1830s and 1840s. This indicates to me a failure to apply the stated, regulatory standard of the "reasonable likelihood of the validity of the facts." I would be happy to have an independent peer review team consider the following: Is it reasonably likely that the Tribe continued to exist as a tribal political entity during the 1830s and 1840s, or is it more reasonably likely that the Tribe ceased to exist for twenty years and then suddenly came back into existence from 1850 to 1870?

4) The OFA failed to accept Colonial/State recognition of tribes as an equivalent or reasonable substitute to Federal recognition, even though that recognition was shown to be continuous from first contact to the present, was substantive (it dealt with matters of significance, the same exact matters that the Federal government managed for federally recognized tribes); primary among the issues was the trust management by the State of the Tribe's Reservation, and the application of resources generated from the Reservation to the improvement of the lives of tribal members.

Neither the current OFA process and budget, nor the Indian Recognition Commission bill provide for independent peer review of decisions, and I think that is a serious shortcoming in both processes. An independent peer review team would best include a representative of each of the three fields used to evaluate petitions, as well as an attorney familiar with the basic issues involved in tribal recognition. Before it passes out of this Committee, H.R. 2837 should be revised to provide for independent peer review, somewhere between the final adjudication by the Commissioners and the appeal of the decision to Federal Court.

Additional Comments on H.R. 2837

It raises the possibility of increased politicization of acknowledgment decisions. Political pressure has always been present, and may have become more effective in recent years. These cases should be decided primarily on their merits. Acknowledgment should not be granted or denied based on a political favor or whim.

The bill does not call for a specific budget amount. The only amount specifically called for is the salaries of the Commissioners themselves. That makes it difficult to know if the bill is a reasonable or better alternative to the process that is already in place.

There seems to be no specific provision for professional staff to review the petitions. Is it the intention of the bill that the Commissioners themselves will read all of the materials in each petition, make a judgment on the same, and then write up their own opinion? That does not seem realistic to me. There should also be in-house counsel for the Commission, to advise the Commissioners on legal matters, including the legal sufficiency of the decisions rendered.

The qualifications of the Commissioners are not specified. Indian ancestry or tribal membership does not in and of itself provide a guarantee of impartiality. Some of the greatest opponents of the acknowledgment of more tribes can be found among federally recognized tribes, even those recently recognized through the OFA process. Without some background in one of the professions currently employed in evaluating the petitions (anthropology, history, and genealogy), the Commissioners may lack the expertise to determine if the information they have been presented in a petition is valid, truthful, and accurate.

Criteria (b) and (c) should not only focus on 1900 to the present, for at least two reasons. First, it does not in any way address the issue of continuity with a historical tribe or tribes that have combined and functioned as a single autonomous entity. Second, the period from 1900 to 1930 is one of the most difficult periods for some petitioners to produce evidence of community and political authority. For them to begin with 1900 might be to put them in a position of discussing their history by starting with what may appear to be a weak evidentiary period. Stronger evidence may be found for some petitioners in the 1700s and 1800s, and could be used to

compensate for weaker evidence for the brief period during the early 1900s (when evidence is sometimes weak or lacking).

Table I
Summary of the 40 Cases Resolved by the OFA
(by decade)

	Outcome		
Decade	Positive	Negative	Total
1980s	7	11	18
1990s	7	3	10
2000-2007*	2	10	12
Total	16	24	40

*The statistics for this decade are, as yet, incomplete, the data having been compiled by the OFA in February 2007.

Mr. FALEOMAVAEGA. I like you, Mr. Austin. Time for humor.

I recently had an interview with Steve Colbert, the Steve Colbert Show?

Mr. AUSTIN. Oh, yes.

Mr. FALEOMAVAEGA. You might want to look at it. Very interesting. What I wanted to say is that I think it was Shakespeare's play, Henry VIII, that said the first thing that we do, we kill all the lawyers.

I want to say, the first anthropologist I catch coming to my islands, I want to shoot them.

Mr. AUSTIN. I had heard that before the hearing today, and I was a little—I was thinking about changing my profession before I spoke. But I stuck with anthropologist.

Mr. FALEOMAVAEGA. That is OK. That is why I like you, Mr. Austin. We have had enough anthropologists coming to my islands and studying us, like we are some specimens for some scientific study if we are human beings or not.

But at any rate, I like you. I think you are a good anthropologist. But the ones I have seen coming to my islands, I will shoot them the first chance.

Anyway, thank you so much. Mr. Lawson.

STATEMENT OF MIKE LAWSON, SENIOR ASSOCIATE, MORGAN, ANGEL AND ASSOCIATES, LLC, WASHINGTON, D.C.

Mr. LAWSON. Mr. Chairman and members of the Committee, I also thank you for providing me with the opportunity to provide testimony today.

I am a historian and a senior associate——

Mr. FALEOMAVAEGA. You, too.

Mr. LAWSON.—with Morgan, Angel and Associates, which is a public policy consulting firm here in Washington. And I am offering my comments today not as a representative of any organization or group, but rather as a professional researcher and consultant who has been deeply involved in issues regarding Federal tribal acknowledgement and recognition for more than 23 years.

For nearly 10 years I served as a historian in the Bureau of Indian Affairs Branch of Acknowledgement Research, where I helped to evaluate petitions, and also participated in the process of revising the Federal acknowledgement regulations. Steve and I

worked together for a brief time. I was leaving the Bureau about the same time that he was coming into the branch.

Since my retirement from the Federal government in 1993, I have provided consultation and research to dozens of tribal groups to assist in their pursuit of Federal acknowledgement and/or Congressional recognition. I have also provided research and consultation to interested parties in the tribal acknowledgement process, including state and local governments and law firms.

I support H.R. 2837 in principle as a generally well-conceived plan to revise and hasten Federal acknowledgement process, and also to bring it under statutory law.

However, I think that the proposed legislation could be improved along the lines that I recommended in my written comments.

As I describe in detail in my written statement, the fundamental problem—I think a lot of people have touched on it here this morning—with the Interior Departments' current process is a lack of resources. The task of fully documenting a petition for Federal acknowledgement is beyond the physical and financial capability of the vast majority of unrecognized tribal groups.

At the same time, the Interior Department has not provided sufficient resources to evaluate petitions in a timely manner. In fact, when I consider other administrative procedures in government, I can't think of any one that takes as long for petitioners to get a final decision. Certainly, broadcasters can get a license to broadcast from the FCC, drugs can be approved by the Federal Food and Drug Administration in a fraction of the time.

Whether or not the proposed legislation can succeed in streamlining the acknowledgement process also comes down to a question of resources. The provisions of H.R. 2837 have the potential of vastly improving the process, as well as bringing it to closure. However, in my view, this legislation can only reach this potential if Congress provides generous appropriations.

For that reason, I recommend that the proposed legislation specify an initial budget for the Commission on Indian Recognition, as well as the amount to be initially appropriated to the Department of Health and Human Services, to aid acknowledgement petitioners, both of which should be based on a realistic needs assessment, perhaps developed by the Government Accountability Office.

In order to be of maximum benefit to petitioners, I recommend further that the Department establish a grant program that is not fiercely competitive; but rather, one that would be fairly generous in providing limited seed money to a majority of petitioners. Those petitioners that make progress demonstrable to the Department with their initial grants should then be made eligible for implemental increased funding.

In order to keep both continuity with the current process and to meet the demands of its ambitious schedule, I also recommend that the proposed legislation specify that the commission would have its own legal and research staff, consisting of an office of a general counsel and several teams of cultural anthropologists, genealogists, and historians.

In my opinion, timelines set forth in the proposed legislation are overly ambitious and problematic. The majority of petitioners would not be able to produce a documented petition within eight

years unless they received substantial funding. The commission would face a herculean task in trying to resolve all of the pending documented cases within its first year, as well as all of the remaining cases within its 12-year life span.

In a hypothetical scenario I describe in my written comments, the commission might face a potential docket of as many as 386 cases that would have to be resolved in 12 years. This would require an average of 32 decisions a year, or approximately one every eight working days.

Federal acknowledgement of a tribal group can have a significant impact on surrounding communities, including neighboring tribes and state and local governments. Because of this potential impact, interested informed third parties have played a key role in the acknowledgement process in supporting, monitoring, and opposing the Federal acknowledgement of tribal petitioners.

H.R. 2837 gives the appearance of having reduced the role of interested parties in the acknowledgement process. For that reason, I would suggest that the Committee consider revising the language of the bill to give interested parties a role in nominating commissioners, participating in all hearings, and appealing final determinations.

Finally, because litigation is also expensive and could be beyond the means of most petitioners, I do not favor a provision for an appeal of the commission's final determinations to the U.S. District Court for the District of Columbia. Instead I recommend an appeal process to an independent panel of administrative law judges, dedicated to the purpose of hearing Federal acknowledgement appeals.

This concludes my statement. I would be happy to answer any questions that the Committee may have. And I would also be willing to submit further written comments to the Committee upon request.

[The prepared statement of Mr. Lawson follows:]

Statement of Michael L. Lawson, Ph.D.

Mr. Chairman and members of the Committee, I thank for inviting me to provide testimony today in regard to House Bill 2837, the Indian Tribal Federal Recognition Administrative Procedures Act. I am a historian and a senior associate with Morgan Angel & Associates, a public policy consulting firm here in Washington. I offer my comments today not as a representative of any organization or group, but rather as a professional researcher and consultant who has been deeply involved in issues regarding Federal tribal acknowledgment and recognition for more than 23 years. My background and experience has allowed me to gain a broad perspective on these issues. The academic training for my career included earning a Ph.D. in American history at The University of New Mexico, with a specialty in the history of Federal Indian policy. I subsequently worked as a historian for the Bureau of Indian Affairs (BIA) for 13 years. For nearly ten of those years, I served as a historian in the BIA's Branch of Acknowledgment and Research, where I helped to evaluate petitions and also participated in the process of revising the Federal Acknowledgment regulations that were published in 1994.

Since my retirement from the Federal Government in 1993, I have provided consultation and research for dozens of tribal groups to assist in their pursuit of Federal acknowledgment through the administrative process or Federal recognition from Congress. During this same period, I have also provided consultation and research to interested parties in the acknowledgment process, including State and local governments and law firms.

There has long been a broad awareness that the Department of the Interior's current Federal acknowledgment process is essentially broken, if not fundamentally flawed. Many observers view the mandatory criteria as unjust and unfair because, at their core, the requirements demand that marginalized people who seldom kept

good records extensively document their tribal and family histories and describe in detail their social and political relations since first sustained contact with Euro-Americans.

The most serious deficiencies of the Interior Department's current acknowledgment process are that:

1. It has not been able to provide due process to petitioners in a timely manner.
2. It has escalated the burden of evidentiary proof required of petitioners and interested parties.
3. It has failed to provide petitioners and interested parties with adequate guidelines and meaningful technical assistance, and
4. Despite its efforts to respond to a 2001 General Accounting Office report critical of its procedures, the Department has not succeeded in making the acknowledgment process more open and transparent for all partied involved.

Since at least the late 1980's, Congress has consistently considered legislation that might help fix the process and bring it under the authority of statutory law. The provisions of H.R. 2837 have the potential of vastly improving and streamlining the process, as well as bringing it to closure. However, this legislation can only reach this potential if Congress provides adequate appropriations to both the Commission on Indian Recognition and the Department of Health and Human Services

The provisions of H.R. 2837 that I think are best suited to revising the process include those

1. that reduce the evidentiary burden on petitioners by providing that they only need document their historical continuity since 1900 instead of from first sustained contact with Euro-Americans. However, in my opinion, the burden could be further reduced another 50 years to 1950. This further reduction of the evidentiary burden would hasten the process even more, in my view, without significantly changing the number of groups that could ultimately meet the historical continuity standard.
2. that recognize the critical need to provide greater funding to petitioners for the purpose of documenting their petitions through a expanded grant system of the Department of Health and Human Services.
3. that provide more direct interaction between decision makers and petitioners through the process of preliminary and adjudicatory hearings.
4. that give priority in the process to tribal groups that have had a previous Federal relationship.

The fundamental problem with the Interior Department's current process is a lack of resources. The task of fully documenting a petition for Federal acknowledgment is beyond both the physical and financial capability of the vast majority of unrecognized Indian tribes, which tend to be small groups with few resources. 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. The Administration for Native Americans (ANA) of the U.S. Department of Health and Human Services no longer provides the "status clarification" grants, which helped so many unrecognized groups launch their acknowledgment efforts.

Federal acknowledgment has gained wider public attention in recent years because newly acknowledged tribes have the potential of developing casino gaming facilities in accordance with the Indian Gaming Regulatory Act of 1988. There is a myth out there that gaming investors are providing financial backing to a large number of acknowledgment petitioners. However, in reality, only a small percentage of petitioners have received such backing and their numbers are dwindling.

Financial backers with gaming interests have become significantly less interested in funding unrecognized groups after witnessing the losses sustained by some major players that invested tens of millions of dollars in supporting petitioners that were ultimately unsuccessful in the process. Gaming interests quest for the big jackpot, but they also want favorable odds and a quick return on investment, neither of which is a realistic scenario in regard to the chances of unrecognized tribes gaining Federal acknowledgment. In my opinion, few, if any, financial backers will be drawn to petitioners in the future, unless they are far along in the process with a high likelihood of success. The rub is that few, if any, petitioners can make it to that stage without significant financial backing.

At the same time that resources are lacking on the tribal side, the Interior Department has not been provided sufficient resources to evaluate petitions in a timely manner. Since the Acknowledgment regulations were established in 1978, 324 petitioners have become part of the Acknowledgment process, submitting at least a letter of intent to petition (based on February 2007 data). Yet, during this period of nearly 30 years, only 60 groups have submitted sufficient documentation to be declared ready for active consideration and allowed to advance further through the

process. In the meantime, the Department has only managed to resolve 43 cases during this 29-year period, a historical average of a little less than 1.5 (1.48) cases per year.

Because of its lack of resources, the Department now faces an overwhelming backlog of 17 fully documented but not yet resolved cases. If the Department cannot increase its historical rate of resolution, a petition declared ready for active consideration today might have to wait more than 11 years for a final determination. If the resolution rate is not increased, it will also take the Department considerably more than 175 years to resolve the 260 cases of all of the present petitioners, assuming that each can somehow find the wherewithal to be able to document its petition. Factoring in new petitions received during this period might easily expand the workload of the present process out beyond two centuries.

I am not aware of any other administrative process in Government that takes so long to issue a decision. Pharmaceutical companies can get new medicines approved by the Food and Drug Administration, and broadcasters can get new stations licensed by the Federal Communications Commission in a fraction of this time.

The reason that the acknowledgment process is not timely is because unrecognized tribal groups do not represent a politically significant constituency. The Department is not eager to extend services to new tribes and most recognized tribes are not excited about splitting their share of the Federal budget with new groups. Some of the most aggressive opposition to the acknowledgment of groups has come from federally recognized tribes. If it becomes known that a petitioner is considering gaming in its future, the group is more often opposed than supported by State and local governments and surrounding communities. It may also be opposed by nearby tribes that already have gaming or are planning casino development.

Whether or not the proposed Commission on Indian Recognition can succeed in streamlining the acknowledgment process also comes down to a question of resources. The Commission's ability to meet its ambitious agenda will be dependent on a generous appropriation, one that is exponentially higher than the Interior Department's present budget for acknowledgment purposes. It is impossible to predict what the Commission can accomplish and whether it will provide a better acknowledgment process without knowing how much it can spend. For that reason, I think that the proposed legislation should specify an initial budget for the Commission. In order to determine the amount needed, I would recommend that the Committee request the Government Accountability Office (GAO) to determine an estimate of startup costs.

Similarly, it is my view that the amount appropriated to the Department of Health and Human Services to aid acknowledgment petitioners should likewise be specified in the legislation and realistically based on a needs evaluation (perhaps also conducted by the GAO). The experience of most tribal groups that formerly received status clarification grants from the Department has proven that a grant cap of approximately $65,000 to $100,000 per year was not adequate to meet the needs of documenting a petition. I would recommend a grant system that is not fiercely competitive, but one that is fairly generous in providing limited seed money to a majority of petitioners. Those petitioners that make progress demonstrable to the Department with their initial grants should then be eligible for increased funding. In the past, Health and Human Services was not effective in measuring the progress of status clarification grantees. Many groups that had not yet proven their Indian ancestry continued to receive substantial funding. Proving descent from a historical tribe should be the first priority for petitioners, as well as the Department's initial measurement of a petitioner's progress.

The proposed legislation should also specify that the Commission would have its own legal and research staff. To both keep continuity with the current process and to meet the demands of its ambitious schedule, the legislation should specify that this support staff shall consist of an office of general counsel with attorneys solidly experienced in Federal Indian law, and several teams of cultural anthropologists, genealogists, and historians that have extensive training and experience in the history and relations of Native American tribal communities and families.

The timelines set forth in this proposed legislation are overly ambitious and problematic. The majority of petitioners would not be able to produce a documented petition within 8 years unless they received substantial funding from the Department of Health and Human Services. Even if only half of the current 243 petitioners without fully documented petitions managed to submit a documented petition, the Commission would face a Herculean task in trying to resolve all of these cases within its 12-year lifespan. In this hypothetical scenario the Commission would have basically 11 years to resolve approximately 122 cases (assuming that the Commission would spend its first year resolving the Interior Department's backlog of docu-

mented petitions). This would require an average of 11 decisions per year or approximately one every five weeks.

The Interior Department received approximately 102 new letters of intent from petitioners during the last eight years. If the Commission received a similar amount of new petitioners during its 8-year lifespan, and half of those petitioners were able to fully document their petitions, the demand on the Commission would further increase to almost 16 decisions per year or one every three weeks (total of 173 decisions over 11 years if half of the petitioners succeed in presenting a documented petition).

Under the most miraculous scenario, all of the 243 present undocumented petitioners and all of the approximately 102 potential petitioners would be able to fully document their petitions. In that case, the Commission would face the challenge of resolving 345 cases in 11 years or an average of approximately 31 per year or one every week and a half.

Add to this workload the challenge of resolving the Department's pending 17 documented petitions within the first 360 days of the Commission's existence. If you further consider the potential of having 24 groups that have been denied acknowledgment by the Department requesting adjudicatory hearings the Commission might face a potential docket of 386 cases in 12 years (which would require an average of 32 decisions a year or approximately one every eight working days).

Federal acknowledgment of a tribal group can have a significant impact on surrounding communities, including neighboring tribes, and State and local governments, Because of this potential impact, interested and informed third parties have played a key role in the acknowledgment process in supporting, monitoring, or opposing the Federal acknowledgment of tribal petitioners. H.R. 2837 gives the appearance of having reduced the role of interested parties in the acknowledgment process. For that reason, I would suggest that the Committee consider revising the language of the bill to give interested parties an opportunity to make recommendations to the President regarding fitting candidates for the Commission, to submit evidence to and participate in all hearings, and have the right to appeal the Commission's final determinations.

I do not favor the provision for an appeal of the Commission's final determinations to the U.S. District Court for the District of Columbia. This is because litigation is expensive and could be beyond the means of most petitioners. In addition, this Court already a prodigious docket of cases and has limited experience, if any, on the subject of Federal tribal recognition. The current appeal process to the Interior Board of Indian Appeals (IBIA) allows petitioners to appeal without legal counsel and fees. The problem with the IBIA process is that the appeal criteria are limited and its decisions are not timely. For that reason, I recommend an appeal process to an independent panel of administrative law judges thoroughly experienced in Federal Indian law and dedicated to the purpose of hearing Federal acknowledgment appeals. This appeal board should have the power to deny the appeal, remand it back to the Commission, or recommend that the appeal be further pursued in a Federal court of the petitioner's preference.

Other Problems With the Existing Process

The Acknowledgment regulations are complex and convoluted and the Interior Department has been notoriously deficient in providing adequate technical assistance in explaining both the regulations and its acknowledgment decisions. The best way that anyone can begin to gain a realistic comprehension of how the Department interprets and applies the Acknowledgment procedures and requirements today is by thoroughly reviewing the findings and determinations it has issued since 2000, as well as the decisions issued by the IBIA since that time, and the procedural notices that the Department published in the Federal Register in 2000 and in 2005. The questions that remain after such a review should then be directed to the Department.

The evidentiary burden for both petitioners and interested parties has increased over the years as the Department has established new precedents for analysis and evaluation in its decisions. One need only compare the size of early documented petitions, interested party submissions, and Departmental findings with those of recent years to measure the escalation of required evidence. For example, the Department's first summary of evidence and recommendations for a Proposed Finding (Grand Traverse Band of Ottawa and Chippewa, 1979) totaled 67 pages. Its summary of evidence and recommendations for a Proposed Finding for the Nipmuc Nation in 2001 ran to approximately 455 pages. Both of these documents were in single-spaced type. In response to this negative Proposed Finding, the Nipmuc petitioner submitted narrative reports that totaled approximately 900 pages (double-spaced) and a digital database containing in excess of 15,000 documents.

In addition to establishing a heavy evidentiary burden, the Acknowledgment regulations are complex, convoluted, and beyond the ability of most readers to fully grasp. Above all, they fail to communicate how the Department really interprets the mandatory criteria and the evidence necessary to meet the requirements. To this end, the Department issued Official Guidelines for the Acknowledgment process in September 1997. However, in its attempt to dummy down the regulations, these guidelines oversimplified the criteria and process to the point of being unrealistic. For example, the guidelines suggest that petitioners can easily document a petition through volunteer efforts of their members and that professional help is not necessary. Yet, no petitioner has ever succeeded without professional help and if professional consultation is not necessary in the process, then why does the Department employ a staff of scholars and attorneys to evaluate petitions?

The Acknowledgment regulations establish that the Department must provide technical assistance to petitioners and interested and informed parties, and the Department encourages all parties to request such assistance. However, the reality is that the Department is notoriously unresponsive and unhelpful, and it is difficult to establish any meaningful dialogue on Acknowledgment issues. It is hard to schedule meetings or conference calls and it can take weeks or months for the Department to respond to a letter.

The OFA thinks that it is providing guidance in its Technical Assistance letters to petitioners, but most readers of these TA letters probably also need a weeklong seminar with the authors to understand what the OFA is trying to communicate. Much of the OFA's advice to petitioners and interested and informed parties is neither clear, cooperative, or realistic. The best opportunity that petitioners and interested parties have to obtain technical assistance from the Department regarding a particular petition is when they request a formal on-the-record meeting to inquire into a proposed finding.

For most of the history of the Acknowledgment process, the Department's research teams conducted independent research as part of their petition evaluation. This purpose of this research was to validate, support, rebut or modify evidence submitted by petitioners and interested and informed parties. The research routinely included field trips to the petitioner's locale to interview tribal officials and knowledgeable tribal and community members and review documents that were not included in the petition. The team also conducted research in relevant libraries, repositories, and collections in the petitioner's region. In addition, the team looked for further information in some of the primary research facilities in Washington, D.C., such as the Library of Congress, the National Archives, the Smithsonian Institution's National Anthropological Archives, and the Library of the Daughters of the American Revolution (DAR), a good source for family history and genealogy. I would hope that a Commission on Indian Recognition would encourage its support staff to return to this more intensive and personally interactive model of evaluation.

I conclude my remarks by stating that I support H.R. 2837 in principle as a generally well-conceived plan to revise and hasten the Federal acknowledgment process. However, I think it could be improved along the lines I have recommended in my comments. This concludes my statement and I would be happy to answer any questions the Committee may have. I would also be willing to submit further written comments to the Committee upon request.

Mr. FALEOMAVAEGA. Thank you very much, Mr. Lawson.

Mr. Cramer.

STATEMENT OF DAVID CRAMER, ATTORNEY, ANDREWS AND CRAMER, LLC, LINCOLN CITY, OREGON, ACCOMPANIED BY CHAIRMAN DONNY FRY, CONFEDERATED TRIBE OF LOWER ROGUE, COOS BAY, OREGON

Mr. CRAMER. Thank you, Mr. Chairman, members of the Committee. I certainly appreciate the opportunity to testify.

I am David Cramer, legal counsel for the Confederated Tribes of the Lower Rogue. With me today is Donny Fry, who is the Chairman of the Tribal Council.

The Confederated Tribes of the Lower Rogue is an entity composed of Chetco and Tututni tribes residing in their homeland in the Rogue River Valley in southwestern Oregon.

In the latter part of the 19th century and the first half of the 20th century, the Federal government maintained a regular relationship with these tribes, just as it did with many of their sister tribes in Oregon. But that all changed in 1954, when Congress passed 25 U.S.C. 691 to 708, commonly known as the Western Oregon Termination Act.

This sweeping Act terminated all Federal relationships with "any of the tribes, bands, groups, or communities of Indians located west of the Cascade Mountains in Oregon," and went on to list dozens of tribes by name, including the Chetco and Tututni.

This enormous social experiment was part of a social policy of the day that could be summarized as kill the Indian to save the man.

There have been five groups of Oregon Indians who have been able to overturn this Act and win restoration for their individual tribes. In passing those restoration bills, this committee had opportunities to evaluate the Western Oregon Termination Act. This committee's conclusion was that it was a complete failure, with disastrous consequences for the tribes who were given no opportunity to defend their standing, but were terminated solely because of geography.

The Western Oregon Termination Act is not merely a dark chapter in our nation's past legal history. For us, the termination era is happening right now. For the last 10 years, the Confederated Tribes of the Lower Rogue has been seeking restoration of the relationship the Chetco and Tututni tribes held with the Federal government before termination. We have been told time and again that Congress is no longer as receptive to requests for legislation granting Federal recognition because an administrative proceeding through the Office of Federal Acknowledgement has been established for that purpose.

The problem for us, though, is that the regulations governing the Office of Federal Acknowledgement specifically exclude tribes that have been terminated by Act of Congress. As 25 C.F.R. 83.7(g) of the seven criteria that have been talked about, that is criteria no. 7. We are ineligible to apply for acknowledgement through the Office of Federal Acknowledgement. We can't even get on the waiting list.

Likewise, if we turn to the bill under consideration here today, section 5(a)(3)(d) contains the same exclusion language. So even if this bill passes, we will still be left out, still barred by an unjust and racist 50-year-old law that should never have been enacted.

So we are not here today either to support or oppose H.R. 2837 as it is presently written; we are here to ask for your help.

Five times between 1973 and 1989, you and your predecessors who sat in those chairs in this committee condemned the Western Oregon Termination Act in the strongest language. But we now have before us a bill that would, in effect, ratify the Termination Act, and essentially give it a stamp of approval, as though it were not an unjust law, because it would again close the door to any terminated tribes. This is just as the existing OFA procedure does.

So I am here today to ask what remedy can there be for us who are still living in the era of termination? And I am not really sure what that is. Possibly an amendment to this bill. If it is an amend-

ment to this bill, maybe there could be set up a separate procedure for tribes that were terminated.

Mr. FALEOMAVAEGA. Mr. Cramer, so that I won't lose my train of thought, what do you think of just simply rescinding the law?

Mr. CRAMER. I think that is a wonderful idea, if the entire Western Oregon Termination Act were simply repealed. That would be a good start, although I would have to say then, our next step I guess would have to be to get in line and start a petition with the Office of Federal Acknowledgement. That is a daunting task, because we would have to get in line behind everybody else. And just as has been mentioned by some of my colleagues on this panel, I don't think we can afford it.

It took most of this tribe's available cash to provide the plane tickets for Mr. Fry and I to come here today. I represent this tribe pro bono as best as I can, and still provide for my family. We don't have $8 million.

Mr. FALEOMAVAEGA. I am sorry, I didn't mean to interrupt you.

Mr. CRAMER. No, that is quite all right. I was actually about wrapping up.

[The prepared statement of Mr. Cramer follows:]

Statement of Attorney David V. Cramer, Legal Counsel for Confederated Tribes of the Lower Rogue, accompanied by Donnie Fry, Chairman, Tribal Council

I. From 1856 to 1954: A few left behind grow into a distinct, federally recognized tribe.

The Confederated Tribes of the Lower Rogue is an entity consisting of Chetco and Tututni tribal remnants residing in the lower Rogue River valley in southwestern Oregon, in the traditional homeland where Chetco and Tututin peoples have lived from time immemorial. White settlers began moving into this area of Oregon in the mid 1800's. Between 1854 and 1856, the U.S. Army forced the bulk of the Chetco and Tututni tribes, and many other southern Oregon coastal tribes and bands, to leave their homeland, marching them north along the coast to the Siletz reservation.

However, not all members of the tribes were taken. Small numbers of Chetco and Tututni people (mostly women) were able to hide in the wilderness and remain in their homeland. Though they intermarried with white settlers, they maintained their ethnicity and their cultural identity, and preserved their traditions, stories, handicrafts, and their language. From those early days until the present, they have recognized themselves as a distinct and cohesive tribe. Throughout this time they have recognized the authority of their council of elders in matters of tribal governance. Although the Chetco and Tututni tribes recognize their blood kinship to present day members of the Confederated Tribes of Siletz Indians (now a Federally recognized tribe), they themselves are not eligible to join the Siletz tribe, because their ancestors were never on the original Siletz reservation rolls, as they are the descendants of those few who were never taken to the Siletz reservation.

In the late 19th and early 20th Centuries, the U.S. Government maintained a relationship with the combined Chetco and Tututni tribes living in their homeland. The historical records of many tribal families show that they were given Indian land allotments. Through the first half of the Twentieth Century, a Bureau of Indian Affairs agent was stationed there in Agness, Oregon. Until it was deliberately terminated, a government-to-government relationship remained in place for decades.

II. The Western Oregon Termination Act of 1954: A wall across the Cascades.

In 1954, Congress passed 25 U.S.C. §§ 691-708, commonly known as the Western Oregon Termination Act. This law effectively terminated any federal relationship with western Oregon tribes, terminating Federal supervision over trust and restricted property lands and administration of federally owned land and distributing the same. The act applied to "any of the tribes, bands, groups, or communities of Indians located west of the Cascade Mountains in Oregon," and went on to list dozens by name, including specifically the Chetco and "Tututui" (an alternate spelling of Tututni) tribes. 25 U.S.C. § 692.

Reading the Termination Act itself, along with its legislative history and secondary legal, historical, and sociological sources of the day, the clear social policy behind it was to "Kill the Indian to save the man." The theory was that termination of the tribes would result in assimilation into white society, with resulting economic improvement for Oregon's Native Americans. In short, this social experiment was a failure. The Native Americans of western Oregon did not experience improved socio-economic circumstances. Neither did they cease to be Indians. Despite their poverty, which became markedly worse following the Termination Act, they remained strong in their cultural identity.

One by one, different groups of western Oregon Indians have made the difficult journey to Washington to obtain restoration. Although Congress has never repealed the Western Oregon Termination Act as a whole, on five separate occasions, it has repealed the Act for specific tribes and passed laws recognizing them. The tribes and restoration acts are as follows:

Confederated Tribes of Siletz Indians, 25 U.S.C. § 711 (1977)
Cow Creek Band of Umpqua Tribe, 25 U.S.C. § 712 (1982)
Confederated Tribes of the Grand Ronde Community of Oregon, 25 U.S.C. § 713 (1983)
Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, 25 U.S.C. § 714 (1984)
Coquille Indian Tribe, 25 U.S.C. § 715 (1989)

In the committee reports and other legislative history of these restoration acts, we see that Congress came to a clear conclusion as to the merits of the Termination Act of 1954, calling it a "disastrous experiment," "ill conceived." Rather than accelerating the merging of Indians into mainstream America, Congress found that Indians affected by the Termination Act had "more often than not suffered great psychic, social, and economic hardships as a result." 95 Cong. Rec. H.R. 7259, 36279-86 (Nov. 1, 1977). "This policy did not work....It was a disastrous mistake....The terminated tribes found themselves stuck between two cultures—ignored by the government as Indians, yet lacking the economic wherewithal to successfully manage entry into the white society." 95 Cong. Rec. S. 1560, 36768-69 (Nov. 3, 1977). "Rather than realize the anticipated socioeconomic benefits of this policy...terminated Indians experienced steadily deteriorating conditions." 98 Cong. Rec. H.R. 5540, 22420-23 (Aug. 6, 1984). "This termination came without notice, explanation, or hearings to defend their standing. It appears the only reason the tribes were terminated was because they resided west of the Cascade Mountains." 98 Cong. Rec. H.R. 5540, 27764-66 (Sept. 28, 1984). "The termination era was one of the darkest periods of Federal Indian policy. It represented an attempt to eradicate government-to-government relations, abolish cultural values, and abrogate treaties. That era is over and let us hope it will never return." 101 Cong. Rec. H.R. 881, 10032-34 (May 23, 1989).

III. The Confederated Tribes of the Lower Rogue: Our Journey.

When the Confederated Tribes of the Lower Rogue first began asking how they could follow in the footsteps of sister tribes like the Coquilles and obtain Federal recognition, they were informed that Congress was no longer receptive to such petitions from Indian tribes. The reason for this was that Congress had established the Board of Acknowledgement and Research (BAR) within the Bureau of Indian Affairs for the purpose of hearing petitions from Indian groups wanting to establish relations with the Federal government.

Our next step was to contact the BAR. However, this did not get us far. We soon learned that there are seven criteria, listed in 25 CFR 83.7(a)-(g) that we must prove to establish our validity as a tribe and gain acknowledgment. The first six criteria pertain to historical authenticity and legitimacy, of which we feel we can make a strong case. The seventh criterion, however, is a simple yes/no test which we fail: Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship. 25 CFR 83.7(g). We were told by BAR representatives, in effect, that since we had not yet submitted a petition, they were not sure who we were, but if we were who we said we were, and were indeed Chetco and Tututni descendants, since those two tribes were listed by name in the Western Oregon Termination Act, we were not eligible for acknowledgment under their proceeding. Our only hope would be an act of Congress. Since then, we have been working with Congressman DeFazio's office to do just that. However, if the Termination Act itself were repealed, or some other means were created to circumvent it, such as this H.R. 2837 presently before the Committee, we would not then need to go through the exhaustive procedure of seeking a restoration act for our individual tribe.

Mr. FALEOMAVAEGA. Your testimony hit me like a rock here, in terms of saying can you share for the record what surrounded this whole idea of terminating the Oregon tribes? I mean, why did Congress pass this law 50, 60 years ago?

Mr. CRAMER. To tell you the truth, I am not entirely sure. The social policy of the day was termination; that by wiping out——

Mr. FALEOMAVAEGA. No, first it was to kill the Indians.

Mr. CRAMER. Yes.

Mr. FALEOMAVAEGA. Then assimilate the Indians.

Mr. CRAMER. Yes.

Mr. FALEOMAVAEGA. Then terminate the Indians, and now recognize the Indians.

Mr. CRAMER. Right. The research that I have been able to find on the legislative history research and so forth—and I am not a historian; maybe I should ask a gentleman like yourself—on that Act itself is not too extensive. I am not entirely sure what prompted it.

As far as I can tell, there was really no input whatsoever from the terminated tribes themselves.

Mr. FALEOMAVAEGA. I am going to request staff that we put this as a matter of history, finding out exactly what prompted the Congress in that point in time to specifically pass a law to terminate the tribes of just your state. I am curious, why pick on Oregon?

I thought maybe it was flat-out everybody is to be terminated. But to say that this was done specifically against the Oregon tribes, that surprises me.

Mr. CRAMER. I know of other termination laws, but I don't know of any other sweeping laws like that that just, an entire geographical area, all of the Native Americans in it, none of you exist any more. I think that that law is somewhat unique.

And the legislative history for the Restoration Acts, you know, this committee had in its reports discussed that law in more detail, and said that apparently its intention was that it would create, it would essentially force an assimilation into White society; that it would alleviate poverty somehow. Obviously it had the reverse effect of that. And that was the Committee's finding on each of the times of when the Restoration Acts came up.

Mr. LAWSON. I can provide some analysis.

Mr. FALEOMAVAEGA. Please, Mr. Lawson.

Mr. LAWSON. In the screening that the Bureau of Indian Affairs was doing during that time of tribes who were eligible for termination was that, whether or not they had enough resources, that they thought that they could become essentially a county government. That they would be self-sufficient based on the resources they had. And that is the first tribes that they targeted.

Mr. FALEOMAVAEGA. That was the first mistake.

Mr. LAWSON. And tribes like Menominee in Wisconsin, and in Klamath in Oregon, but other tribes, primarily based on their timber resources, were added to that list because they thought that they could be self-sufficient and thrive without government aid, based on having these resources.

Mr. LAWSON. I could add also that there was a Western Washington termination bill, but it was never passed. It was proposed,

but never passed. So as a point of contrast, you might want to look into why one was passed, and one wasn't.

But I will tell you what I think is most frightening about the termination era, is I am hearing discussions now from the current Administration that filter into the recognition issue, of trying to limit the Federal government's responsibility and liability to Indian tribes.

And one of the outcomes of that, I think, is some of the decisions that we have seen recently, is to damper the number of new tribes that are going to be approved, because they simply don't want to have more responsibility and more expense caused by having more tribes on the recognized tribes list.

I think that termination, while it was first proposed 50-some years ago, I am afraid that we are seeing it raise its ugly head again in the current day. It is something to be very aware of, because I don't think Indian tribes are necessarily taking it in quite as strongly as they need to. I am not hearing enough outcry from Indian country, as much as I think is warranted on that issue.

Mr. FALEOMAVAEGA. Isn't it ironic that it was President Nixon that was pretty much the, probably one of the few presidents that have really been a great advocate of Indian rights and the problems in the mid-seventies? And now how ironic that it is a Republic Administration that is trying to get rid of the Indians? Or at least have the least responsibility to provide for their needs?

I am sorry, Mr. Cramer, I didn't mean to interrupt your statement. Are you through with your statement?

Mr. CRAMER. I was. I was just at the close of my statement. Thank you, sir.

Mr. FALEOMAVAEGA. All right. I just want to ask the members of the panel, I really appreciate the recommendations and the suggestions that you offered. Definitely the staff and myself and other members of the Committee, Chairman Rahall and Mr. Cole, will definitely review some of the suggestions that you are offering here.

I don't know when we are going to be putting this up for markup, but I sincerely hope very soon, in a way that we might get some more positive results and response from the Department of the Interior. And then hopefully by then we will have the official letter from the Department of Justice challenging the Constitutionality of the right of Congress to pass legislation to provide for the needs of Native Americans. I am very curious about this.

But gentlemen, I cannot thank you enough for being here. I hope that maybe at another time we will have another hearing on this issue, if there is still going to be more questions that maybe some of the Members may want to raise concerning this proposed bill.

And again, I cannot thank Chairman Rahall for his leadership in finally taking this issue more seriously than ever; and that by the fact that we are holding this hearing, to me is a very strong indication that he really wants to do something about this. And we are certainly going to push this legislation as much as we can on this committee.

And with that, gentlemen, thank you again. The hearing is adjourned.

[Whereupon, at 2:30 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows:]

[A statement submitted for the record by the Schaghticoke Tribal Nation follows:]

Statement submitted for the record by the Schaghticoke Tribal Nation

Many in Congress are spurning legislative recognition of tribes on the grounds that an administrative process exists through the Bureau of Indian Affairs (BIA) through which groups may achieve a government-to-government relationship with the United States. These legislators rest in a misguided belief that the administrative process produces the fairest, most reliable and least political determinations of whether a group constitutes a tribe deserving that relationship. The Schaghticoke Tribal Nation wishes it were so. Unfortunately, the Federal Acknowledgment Process (FAP) as it exists now suffers inherent problems that result in unfair outcomes. In our case, for the first time in the entire history of the Bureau's Federal Acknowledgment Process, the Bureau reversed its own published Final Determination acknowledging Schaghticoke Tribal Nation (Schaghticoke or STN) as a tribe and, bowing to intense political pressure, manipulated implementation of its criteria and standards to justify withdrawal of its acknowledgment. The injustices visited upon Schaghticoke can and should be legislatively corrected.

As it now exists, the federal acknowledgment process is governed by BIA's regulations, found at 25 C.F.R. Part 83. These regulations establish the administrative process for acknowledging groups as tribes as a prerequisite to engaging in a government-to-government relationship with the United States. The regulations require petitioners to satisfy all of the criteria at 25 C.F.R. 83.7. The seven mandatory criteria are:

(a) The group has been identified as an American Indian entity continuously since 1900;
(b) A predominant portion of the group has been a community from historical times to the present;
(c) The group has maintained political influence over its members from historical times to the present;
(d) The group has submitted a copy of its governing document, including membership criteria;
(e) The group's membership consists of individuals who descend from a historical Indian tribe or a combination of tribes that functioned as an single entity;
(f) The group's membership is composed principally of people who are not members of other acknowledged tribes; and
(g) There is no law that expressly terminated or forbids a federal relationship with the group.

25 C.F.R. 83.7.

Schaghticoke, based upon its experience with the BIA's implementation of the Federal Acknowledgment Process, urges that Congress require changes to the FAP and its criteria that encompass the following in order to rectify inequities in the process. Changes we recommend include:

1. Long-standing occupation—that is, the use for tribal purposes—of a state-recognized reservation should under certain circumstances be considered as evidence that the petitioner historically has comprised a distinct community and that the petitioner historically has maintained political influence over its members.
2. Criteria (c), political influence, should be abandoned as unnecessary and redundant, and therefore unjustifiably adding to the petitioning tribe's already extreme document collection burden.
3. Policies and definitions adopted in a proposed finding should be maintained throughout the process; at a minimum, tribes should not be denied acknowledgment based on changes of policy by the Department of the Interior (DOI) made midway through review of a petition.
4. Petitioners whose petitions have been denied under the current administrative process should be allowed to resubmit petitions under certain circumstances.

Each of these recommendations is discussed in more detail below.

1. Long-standing occupation—that is, the use for tribal purposes—of a state-recognized reservation should under certain circumstances be considered as evidence that the petitioner historically has comprised a distinct community and that the petitioner historically has maintained political influence over its members.

a. *Why this change is needed.*

By refusing to consider long-standing occupation of a state-recognized reservation in its acknowledgment process, the BIA arbitrarily rejects solid evidence of the continuity of the petitioner's existence as a tribe. Very few tribes can show long-standing occupation of a reservation but in instances where they can, that occupation is highly indicative that the group has survived since the creation of the reservation, and continued as a community. Nonetheless, BIA has chosen to ignore such evidence. We urge Congress to instruct BIA that long-standing occupation of a state-recognized reservation should be viewed as probative of continuous existence from the time the reservation was first occupied.

b. *Schaghticoke Tribal Nation's experience.*

In 2004, the BIA published a positive Final Determination by which it extended federal acknowledgment to the Schaghticoke Tribal Nation. Eighteen months later, for reasons driven by political pressure, Associate Deputy Secretary James Cason withdrew that acknowledgment. BIA accomplished this by adopting a strained, exaggerated reading of an Interior Board of Indian Appeals (IBIA) order remanding the Final Determination back to the BIA so that the BIA could more fully explain how it weighed Connecticut's long-standing relationship to Schaghticoke as evidence. Rather than following IBIA's remand, the BIA reversed itself and refused entirely to consider long-standing occupation on a state-recognized reservation as evidence of criteria (b), community, and ", political influence. The BIA then based its reversal of its earlier published acknowledgment of the tribe on insufficient documentation.

In the case of Schaghticoke, the BIA's post-acknowledgment decision not to give any weight to the Tribe's state recognition has led to the wildly inequitable result of withdrawal of that recognition. Schaghticoke's relationship with what is now the State of Connecticut is continuous from the period pre-dating the creation of the State and the United States. Schaghticoke has had and maintained what has now been reduced to a 400-acre Reservation in Kent, Connecticut, since colonial times. The State has treated the tribe as a separate political entity, as evidenced by passing legislation determining oversight, protecting the Reservation, and exempting the Reservation from taxation. In fact, the State historically has played the role that is typically played by the federal government, administering funds and services for tribal members and their land, exercising oversight of the Reservation, and providing services to individuals based on their status as members of the tribe.

Schaghticoke's Federal Acknowledgment Process petition included direct evidence of both community and political influence from colonial times to the present. In its Final Determination acknowledging the Tribe, BIA relied on our continuing relationship with the State as evidence of community and political influence. This was helpful to us because, of course, it is difficult to collect large amounts of other documentary evidence for these criteria precisely because a government that often maintained policies trying to ruin Indian communities and political entities is not likely to have kept records that support tribal existence. Furthermore, for much of our history, tribal members were self sufficient on the reservation and tried to avoid unnecessary contact with outsiders. In other words, the extreme burden placed on petitioners by the document-intensive criteria set forth in the BIA's regulations could and should be alleviated to some degree where there is clear evidence of state recognition and of the tribe's use of a state reservation. Within that context, Schaghticoke's reliance on the tribe's relationship with the State, as was made in the positive Final Determination, was fair and appropriate. The law should make clear, as did the positive Final Determination, that "[c]ontinuous state recognition with a reservation provides additional evidence—where specific evidence of community exists."

2. Criteria ", political influence, should be abandoned as unnecessary and redundant and therefore unjustifiably adding to the petitioning tribe's already extreme document collection burden.

a. *Why this change is needed.*

The BIA requires that tribes provide extensive documentation of both community (criterion (b)) and political influence (criterion ") continuously from historical times to the present. Presumably both of these criteria speak to the question of whether the petitioning tribe can demonstrate a continuity of existence. Failure to document either one of these criteria allows BIA to decline to acknowledge a tribe.

This administrative rigidity leads to unreasonable results, in part because BIA's consideration of whether a tribe's production of documentation meets these two criteria is "adequate" is highly subjective. making production of direct evidence extremely difficult. It is an unconscionably difficult standard to meet, particularly given tribes' historical relationships with both the federal government, whose policies toward Indians has included extermination and assimilation, and state govern-

ments, who were similarly hostile to continued tribal existence, yet are relied upon to have kept tribal documentation in their archives.

More importantly, the requirement that both community and political influence be documented is redundant and overly burdensome. The kinds of evidence used to document community and political influence overlap. BIA itself recognizes this in its allowance of "cross-over" evidence, that is, allowing proof of political influence—through (1) allocation of group resources, (2) settlement of disputes among members on a regular basis, (3) exertion of strong influence on individual members' behavior, or (4) organizing economic subsistence among members—to meet the community criterion and allowing "more than a minimal level" of community evidence to be used to meet the political influence criterion. 25 C.F.R. § 83.7(b)(v), (c)(iv). Thus, the regulations themselves admit the interdependence of the criteria. Maintaining them as separate analyses is unnecessarily, sometimes impossibly, burdensome to tribes and not helpful in answering the ultimate question of whether a group has had continuous existence giving rise to the right to a government-to-government relationship with the United States. If a tribe has maintained its community, political leadership and influence can be assumed. Maintaining the regulations as they are thus serves only BIA's self-imposed needs and perpetuates a system that encourages and enables the agency's ever-widening, potentially endless paper chase for documentation.

b. *Schaghticoke Tribal Nation's experience.*

Schaghticoke's experience with criteria (b) and—shows that the BIA has become unreasonable in its approach to its criteria. STN's own odyssey in the FAP began 23 years ago, when in 1981 it filed its Letter of Intent. Schaghticoke filed tens of thousands of documents in support of recognition. The sheer number of documents submitted by the Tribe resulted in the petition being used by BIA to develop a new database for electronic access to the information, a database that is now used for other recognition petitions. In short, many years and resources—both of STN and of the BIA—have been expended in researching and evaluating documentation pertaining to both criteria (b) and ", when ultimately the question of continuous existence can be answered by a combination of evidence supporting either. A separate evaluation of each of the criteria does not render Schaghticoke either more or less deserving of acknowledgment, but serves only BIA's interest in meeting its own artificial criteria.

3. Policies and definitions adopted in a proposed finding should be maintained throughout the process; at a minimum, tribes should not be denied acknowledgment based on changes of policy by the Department of the Interior (DOI) made midway through review of a petition.

a. *Why this change is needed.*

To the detriment of tribes going through the process, the BIA has changed its policies and definitions in the middle of evaluating certain petitions. BIA has, for example, changed its policy on allowing state recognition to meet community and political criteria (see discussion above). It has changed its methodology for calculating whether at least 50 percent of marriages in the group are between members of the group, as set forth in the regulations on community at 25 C.F.R. § 83.7(b)(2)(ii). Finally, it has changed its policy on whether unenrolled community members may be considered in determining whether the community criterion is met. While there may be instances where the agency, based on additional knowledge, needs to change its scientific methods, there is no fairness in changing its policies or approaches midway through an individual petitioner's evaluation (or in our case after our positive Final Determination had been published) and using that change as grounds for declining acknowledgment. At a minimum, a petitioner should be given the opportunity to comment on any proposed changes in BIA's methodology and be able to respond and submit additional evidence for the record.

b. *Schaghticoke Tribal Nation's experience.*

Ten years after it began examining STN's documentation, BIA issued its 2004 Final Determination finding that STN met all of the seven mandatory criteria, including community and political influence. It found sufficient evidence in the record to substantiate each criterion; as to criteria (b) and ", BIA accepted both direct historical evidence of community and political influence and corroborating evidence based on the fact that the State of Connecticut had recognized the group as a tribe since colonial times and had established the group's reservation in 1736.

In Associate Deputy Secretary Cason's 2005 Reconsidered Final Determination withdrawing recognition, BIA abruptly reversed its acknowledgment of Schaghticoke based on criteria (b) and ", community and political influence or authority. BIA rejected its previous use of continued state recognition as evidence for both criteria (see discussion above), thereby creating "gaps" in time periods which in its 2004 Final Decision BIA had found to be adequately covered. BIA rejected its own positive Final Determination's conclusion that STN had met the political influence cri-

terion by showing that at least 50 percent of the marriages in the group were between members of the group (25 C.F.R. § 83.7(c)(3)) for periods 1801 to 1820 and 1840 to 1870.[1] Unbelievably, the DOI Office of the Solicitor went so far as to prohibit the Office of Federal Acknowledgment staff from reading documentation that STN submitted to try to rebut this change in policy. The BIA also reversed its own positive Final Determination evaluation of community which used unenrolled members who could be enrolled in its calculations of community and political authority for the period after 1996. These changes in the method of evaluating community and political influence were used by the Department as justification for reversing Schaghticoke's acknowledgment. A fair process would not countenance such reversals.

4. Petitioners whose petitions have been denied under the current administrative process should be allowed to resubmit petitions under certain circumstances.

a. *Why this change is needed.*

The criteria as they now exist and have been implemented by the BIA do not assure fair results. The BIA has declined to acknowledge tribes for failure to document each criterion to its satisfaction, including for those periods during which the federal government's policies were to destroy Indian community and political influence and during which State policies mirrored those of the federal government. In addition, petitions have been rejected as a result of BIA's changing policies regarding evidence and BIA's own changing definitions, sometimes with no notice to the petitioners and no opportunity to comment. In fairness, any tribe that has been denied recognition through FAP as it is now implemented should be allowed to re-submit its petition if any legislative amendments affect the merits of the petition. Because the goal of Federal Indian policy should be absolutely to ensure that all tribal groups meriting acknowledgment receive that acknowledgment, groups that have been denied fair consideration of their petitions should not be precluded from receiving fair re-consideration. Schaghticoke thus approves of Rep. Faleomavaega's concept, set out in H.R. 2837, which allows re-evaluation of applications whose outcomes might have been different if judged under more fair criteria.

b. *Schaghticoke Tribal Nation's experience.*

For most tribes, BIA's publishing a positive final determination represents the end of the very long Federal Acknowledgment Process. Not so for Schaghticoke. The State of Connecticut and its congressional delegation—for political reasons, intent on fighting against an additional Indian casino in the State—inserted themselves squarely in the process and DOI, inappropriately, responded to that pressure. On the very day the Final Determination was issued, Representative Christopher Shays (R-CT) issued a public statement excoriating the Department of the Interior for acknowledging Schaghticoke. In the statement, he made clear that his opposition was entirely driven by his desire to prevent STN from gaming rather than from a genuine concern about the propriety of BIA's acknowledgment of STN: "It is extremely disappointing the Bureau of Indian Affairs recognized the Schaghticokes as a federal tribe...This recognition may enable the Schaghticokes to build a casino, which I believe would be very detrimental to the state." He vowed to join forces with Connecticut's Attorney General Richard Blumenthal to assist in getting the Final Determination reversed. Thus began the final long, sustained attack, presumably on the expansion of Indian gaming, but carried out on the Department and the STN's petition for acknowledgment.

I am sorry to report that the Department bent to that political pressure. While we do not fully understand why the Department succumbed to political pressure, we know the result: summary rejection of the reasoned analysis of decades of research. The Department manipulated the FAP's criteria, particularly the community and political influence criteria, abruptly changing its policy after issuing the Final Determination, in order to accommodate political ends. Justice requires that petitions such as Schaghticoke's be given a second chance when Congress renders the process more fair and when justly considered evidence of a tribe's historic survival, not political pressure, may determine the outcome.

Conclusion

It is this great body, the Congress of the United States, which first extended federal recognition to tribal governments through the treaty making process. When the Department of the Interior unilaterally sought to create an administrative process

[1] In the Final Determination, BIA had analyzed marriage rates by counting each individual tribal member's marriage in calculating the percentage of marriages in the group. The State of Connecticut argued that the calculation should be based only on the number of actual unions between tribal members. In the RFD the BIA adopted Connecticut's method of calculation, thus lowering the percentage calculated, and rendering the requirement of 50 percent unmet.

to perform that same function, it did so without any statutory guidance from the Congress. We believe that it is highly appropriate for Congress to provide direction and guidance to the Department in these matters, and we appreciate this Committee's efforts to tackle these difficult issues.

I thank you for giving me this opportunity to express the deep frustrations of the Schaghticoke Tribal Nation, and I urge you to give us a reason to have continued hope for the future.

[A letter submitted for the record by the Cherokee Nation follows:]

ᏣᎳᎩ ᎠᏰᎵ
CHEROKEE NATION™
P.O. Box 948 • Tahlequah, OK 74465-0948 • (918) 453-5000

ᎤᏂᏩᎫ
Chad "Corntassel" Smith
Principal Chief

ᏗᏞᏬ ᏗᏝᏂᏬ
Joe Grayson, Jr.
Deputy Principal Chief

October 2nd, 2007

The Honorable Nick Rahall
United States House of Representatives
2037 Rayburn House Office Building
Washington, DC 20515

Dear Congressman Rahall,

The Cherokee Nation opposes H.R 2837, legislation that seeks to unnecessarily remove the Federal acknowledgment process from the Bureau of Indian Affairs and transfer the responsibility for the process to an Executive-appointed "Commission on Indian Recognition."

The Cherokee Nation continues to support the current Bureau Acknowledgement Process (BAR) and would further support making statutory, the seven criteria for acknowledgement set forth in Title 25.

The Cherokee Nation agrees that there should be an open and fair process in recognizing tribal governments. The seven criteria used for the BAR set forth in Title 25 eliminates any abuse or unfair opportunity, and requires each petitioning entity to meet the guidelines for recognition. The criteria adds transparency to the process, and allows the Office of Federal Acknowledgement (OFA) staff to base decisions on fair, measurable, objective standards without accusations of unfair treatment or political influence. This process simply requires each petitioning entity to meet the criteria necessary for recognition. It is not the BAR that is holding up the process. The Cherokee Nation believes that the onus is on the petitioning parties to provide the necessary research and documents that support their petition for recognition. To eradicate this process for the proposed reform in H.R. 2837 would not expedite the administrative review process. It would simply terminate an experienced team with decades of institutional knowledge with the recognition process.

The Cherokee Nation continues to encourage Congressional Support to the OFA, including reform for efficiency, enactment of statues setting forth the seven criteria, increased funding for the discharge of their duties and sunset legislation. The Cherokee Nation opposes H.R. 2837 because there is no need to circumvent the appropriate BAR process through this proposed legislation that reduces tribal acknowledgement to a Commission of political appointees.

Thank you for the opportunity to submit this written statement for the record. Please contact Paula Ragsdale in the Cherokee Nation Washington Office located at 126 C. Stree, NW, Washington, D.C., 20001, phone # (202) 393-7007 or at pragsdale@cherokee.org should you have any questions or should you need additional information.

Sincerely,

Chad Smith
Principal Chief
Cherokee Nation

○