NOTES

THE INCOMPLETE LOOM:

EXPLORING THE CHECKERED PAST AND PRESENT OF AMERICAN INDIAN SOVEREIGNTY

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It has been said that "the Indian Wars never ceased, they only changed venue." We are still fighting. We are fighting in courts, we are fighting in Congress—we are still fighting. And probably we'll always fight, or else we'll really be exterminated, through both acts of aggression or apathy.[1]

Rev. Dr. John R. Norwood

Kelekpethakomaxkw

(Smiling Thunderbear)

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1. Interview with the Reverend Doctor John Norwood, Nanticoke Lenni-Lenape Tribal Delegate to the Nat'l Cong. of Am. Indians, in Moorestown, N.J. (Mar. 15, 2011) [hereinafter Norwood Interview].

I. INTRODUCTION

For decades, the Eastern Pequot Tribal Nation eagerly awaited the status of its federal recognition petition filed with the Bureau of Indian Affairs ("BIA"). Filing their petition in 1978, the Eastern Pequots sought affirmation of their sovereign status by the United States government.[2] Other American Indian tribes in the state of Connecticut, such as the Mohegans and Mashantucket Pequots, had already joined the rolls of federally recognized tribes.[3] To meet the criteria established by the BIA for federal recognition,[4] the Eastern Pequots' petition consisted of historical records tracking their tribal history, their standing in the community, and their governing structure within the tribe. Federal recognition was important to the Eastern Pequots because recognized tribes enjoy "almost exclusive access to about $4 billion in funding for health, education, and other social programs provided by the federal government."[5] Because federally recognized tribes are regarded as sovereign entities, tribal lands are exempt "from most state and local laws and regulations—including, where applicable, laws regulating gambling."[6]

Due to this wrinkle, many outside, non-Pequot investors, looking

2. Rick Green & Jesse Hamilton, *No Doubts: Indians Lose; Tribes Stunned but Defiant; Casino Opponents Praise Denial of Recognition,* HARTFORD COURANT, Oct. 13, 2005, at A1.

3. *Id.*

4. *See infra* Part II.b.

5. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-49, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 1 (2001), *available at* http://www.ncai.org/ncai/resource/documents/governance/gao-02-49.pdf [hereinafter INDIAN ISSUES].

6. *Id.*

to open a new casino in Connecticut, began funneling money to the tribe to aid it in its quest for recognition.[7] In 2002, after waiting twenty-four years, the Eastern Pequots were granted their long-awaited federal recognition by meeting the requirements of the BIA.[8] Upon recognition, the BIA combined the Eastern Pequots with a separate tribal faction, the Paucatucks, to form the "historical Eastern Pequot tribe" and recognized them as one entity, stating that both factions had descended from the same tribe.[9] By allying themselves with the casino industry, however, the tribe drew the ire of the most powerful figures in the State of Connecticut, including various citizens' groups, the State Attorney General, and the Governor.[10] Looking to prevent another American Indian[11] casino in the state, Connecticut rejected the existence of the tribe and challenged its federal recognition, though historical documents showed that members of the tribe had lived in Connecticut on

7. *See, e.g.*, Rick Green, *Angry Trump Plays the Lawsuit Card; Claims Tribe, Investors 'Unfairly' Shut Him Out of Potential Casino Role*, HARTFORD COURANT, May 29, 2003, at A1 (reporting that Donald Trump purportedly gave more than ten million dollars to the Paucatuck Eastern Pequots in exchange for a role in developing a casino with the tribe if the tribe was federally recognized).

8. In the initial article reporting the tribal recognition, the *Hartford Courant* mentioned the casino issue. The opening sentence of this historic announcement read: "At least one more gambling casino for Connecticut became a near certainty Monday when the federal Bureau of Indian Affairs granted final recognition to a single 'historical Eastern Pequot Tribe.'" Rick Green & William Weir, *A Single Tribe; and Another Casino Could Follow,* HARTFORD COURANT, June 25, 2002, at A1. As the newspaper with the largest circulation within the State of Connecticut, it can be argued that the *Hartford Courant* helped to fuel the antirecognition factions within Connecticut by focusing its coverage on fighting the building of a casino, rather than reporting on the benefits of a federally recognized tribe within the community.

9. Rick Green, *State Denies Existence of Tribe*, HARTFORD COURANT, Sept. 27, 2002, at B1.

10. Rick Green, *Anti-Casino Forces Meet; State, Local Leaders Vow to Keep Fighting Tribal Recognition,* HARTFORD COURANT, July 3, 2002, at B1; *see also* Jeff Benedict, Editorial, *Praise the Governor for Joining the Casino Fight*, HARTFORD COURANT, Sept. 30, 2002, at A7 (noting that Governor John G. Rowland's opposition to further casino expansion in Connecticut is a dramatic shift from his "longstanding position of neutrality toward tribal recognition and casino[s]").

11. There is much disagreement among scholars about the proper terminology for groups that identify as "American Indian." In various Supreme Court opinions, congressional findings, treaties, and laws, the terms "American Indian," "Indian," "Native American," and "native" are used interchangeably to refer to the indigenous populations of the United States. Unfortunately, terms such as "Native American" confuse and muddy the distinctions between tribes and also can include natives of Hawaii, Eskimos, and Aleuts—which are not discussed in this Note. *See* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE, at xi (1997). Canadian and Alaskan indigenous groups use the phrase "First Nations"; however, this term has never gained traction in the United States. *Id.*

reservations for over three centuries.[12] Facing enormous political pressure, the BIA decided in 2005 to reverse its earlier decision to recognize the tribe, the first time the agency had ever reversed a final determination for recognition.[13] In the eyes of the United States government, the Eastern Pequot Tribal Nation members no longer formed a sovereign entity.

The Pequots appealed this decision to the Department of the Interior; however, they were denied because "[t]he two separate communities [that came about] after the early 1980s are not the same community that existed before that time."[14] By forcing the Pequots to merge with the Paucatucks, the BIA created a situation in which the Eastern Pequots could neither prove their existence as a unique tribe throughout history nor satisfy the Interior Department's criteria for recognition.[15] To the delight of political leaders in Connecticut,[16] it would be impossible for the Pequots to meet this unique requirement as the Paucatuck merger created a brand new tribe that did not exist before the BIA's action.

As former U.S. Attorney General Hugh Swinton Legaré stated, "there is nothing in the whole compass of our laws so anomalous, so hard to bring within any precise definition or any logical and scientific arrangement of principles, as the relation in which the Indian stands towards this [United States] Government and those of the States."[17] Trying to understand the legal relationship between American Indian tribes and the United States government can be a difficult challenge.[18] With hundreds of tribes currently seeking federal recognition, the task is even more daunting. Welcome to the world of American Indian federal recognition.

This Note presents the history of American Indian sovereignty in the United States by examining the legislative history of the

12. *See* Green, *supra* note 9.

13. *Id*. ("No state has ever successfully challenged and reversed a BIA decision."); *see also* Green & Hamilton, *supra* note 2 (noting that the BIA's decision to reverse the Eastern Pequots' federal recognition distinction was delivered via facsimile, stunning tribal leaders due to its impersonal nature).

14. Green & Hamilton, *supra* note 2 (second alteration in original) (internal quotation marks omitted).

15. *See id.*

16. U.S. Rep. Nancy L. Johnson marked the occasion by calling it a "victory for Western Connecticut," and Governor M. Jodi Rell stated "common sense" prevailed. *Id.* (internal quotation marks omitted).

17. CONG. GLOBE, 32D CONG., 1ST SESS. 33 (1851) (internal quotation marks omitted).

18. The body of case law on American Indian sovereignty was once referred to as "a middle-eastern bazaar where practically anything is available to those who are eager and earnest and have the resources for persisting in the adversary system of justice." Joyotpaul Chaudhuri, *American Indian Policy: An Overview, in* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 15, 23 (Vine Deloria, Jr. ed., 1985).

recognition process and analyzes the legal quagmires facing American Indians as they pursue successful recognition of their sovereignty. This Note aims to navigate some of the intricacies, qualms, and confusions surrounding BIA recognition. Part II will discuss the history of the acknowledgment process. It will analyze the pivotal Supreme Court decisions that shaped American Indian policy in the United States. Part III will discuss the history of tribal recognition by the federal courts. While many courts still defer to the BIA as the only authority for acknowledgment of American Indian tribes, this Note will explore avenues in which courts have made determinations of tribal existence themselves. Part IV will introduce a southern New Jersey tribe currently involved in the recognition process and will discuss how the tribe has prepared its membership for potential recognition as a sovereign entity. It will also explore the challenges of interpretive ambiguities that this tribe has faced during its journey toward federal acknowledgment. Finally, Part V will conclude by exploring ways to improve the current BIA process for federal recognition and offer recommendations to both the federal government and to the judiciary when faced with an American Indian tribe seeking to assert its sovereign status.

II. HISTORICAL AND LEGAL DEVELOPMENT OF THE BUREAU OF INDIAN AFFAIRS FEDERAL ACKNOWLEDGMENT PROCESS

According to the 2010 census, the estimated population of American Indians in the United States, including those mixed with another race, was 5.2 million or 1.7% of the entire population.[19] In all, 2.9 million individuals identified themselves as American Indian alone, without identifying with any other race on their census forms.[20] In 2005, the Bureau of Indian Affairs reported that the population within *recognized* tribes[21] was 1.98 million, nearly one

19. TINA NORRIS ET AL., U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION 4 (2010), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

20. *Id.*

21. "'Indian tribe' means any Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(e) (2006). Though the definition has been debated over time, very similar definitions appear in the following statutes: Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 (2006); Indian Health Care Improvement Act, 25 U.S.C. § 1603 (2006); Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, 25 U.S.C. § 2403(3) (2006); and Indian Child Welfare Act, 25 U.S.C. § 1903 (2006); *cf.* Land Records and Title Documents, 25 C.F.R. § 150.2(e) (1995) (defining tribe as "tribe, band, nation, community, rancheria, colony, pueblo, or other Federally-acknowledged group of Indians"); Loans to Indians from the Revolving Loan Fund, 25 C.F.R. § 101.1 (1995) (defining tribe as "any Indian tribe, bank, nation, rancheria, pueblo, colony or community, including any Alaska Native village . . . which is recognized by the Federal Government as eligible for

million less than the census figure.[22] According to the BIA, there are currently 565 federally recognized American Indian tribes.[23] "Federal recognition" acknowledges the sovereign status of an American Indian tribe and welcomes the tribe into a "government-to-government relationship with the United States."[24]

A. Historical Development of the Federal Acknowledgment Process

Founded in 1834,[25] Indian Affairs is the oldest bureau within the Department of the Interior.[26] Despite the creation of the position of Commissioner of Indian Affairs and the formation of the BIA, Congress retained the power to recognize tribes as sovereign through the treaty-making process.[27] This practice ended in 1871 when Congress terminated its treaty-making authority.[28] From 1871 to 1934, the Department of the Interior did not establish any type of "recognition determinations until after the passage of the Indian

services from the [BIA]"); Housing Improvement Program, 25 C.F.R. § 256.2(g) (1995) (defining tribe as "any Indian Tribe, Band, Nation, Rancheria, Pueblo, Colony, or Community, including any Alaska Native Village which is federally recognized as eligible by the United States Government").

22. *See* U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, 2005 AMERICAN INDIAN POPULATION AND LABOR FORCE REP., at iii (2005), *available at* http://www.bia.gov/idc/groups/public/documents/text/idc-001719.pdf. Though mandated by Congress to publish a biennial report on American Indian populations, the BIA has not published a report since 2005. *See* Indian Employment, Training and Related Services Demonstration Act of 1992, Pub. L. No. 102-477, § 17(a), 106 Stat. 2302, 2305 (1992) (codified as amended at 25 U.S.C. § 3416(a) (2006)).

23. *Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, http://www.bia.gov/FAQs/index.htm (last visited Feb. 21, 2012) [hereinafter *BIA FAQs*]. This figure includes Alaska Native tribes. *Id.*

24. *Id.*

25. Act of June 30, 1834, ch. 162, 4 Stat. 735 (codified as amended at 25 U.S.C. § 1 (2006)).

26. *Who We Are*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, http://www.bia.gov/WhoWeAre/index.htm (last visited Feb. 21, 2012). Though the congressional Act of June 30, 1834, establishing the BIA was not passed until 1834, the BIA website claims that it was founded in 1824, with no verification or citation to support this fact. *See id.*

27. Act of March 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2006)); *see also* Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 57 (2d Cir. 1994) ("Between 1834 and 1871 Congress continued to deal directly by means of its treaty-making power with American Indian tribes . . . .").

28. 16 Stat. at 566. The decision to stop making treaties came as a result of political maneuvers. The strategic military applications of treaties declined with the War of 1812 and as southern tribes began to ally themselves with the Confederacy in the Civil War. *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 1.03(6)-(9) (2009 ed.) [hereinafter COHEN HANDBOOK]. In order to better balance the powers of the two houses of Congress, the House of Representatives forced the abandonment of the treaty-making power. *Id.*

Reorganization Act,"[29] which created benefits that were only available to "recognized" Indian tribes.[30] The Bureau did not establish any uniform policy to acknowledge American Indian tribes as sovereign until 1978.[31] Between 1934 and 1978, the BIA "recognized . . . tribes on a case-by-case basis."[32] The agency considered tribes sovereign if they had actively participated in treaties and agreements with either the United States or the various European states.[33] These relationships were enforceable "under the Articles of Confederation, the Northwest Ordinance, and the . . . U.S. Constitution."[34]

Prior to 1924, treaty provisions or land grants bestowed U.S. citizenship upon "nearly two-thirds of all [American] Indians."[35] After World War I, the United States extended federal citizenship to all Indians, whether they wanted it or not.[36] This gesture was intended to extend to the tribes the same protections and rights that American citizens enjoyed; however, it would not protect them from various future challenges, especially in the area of property rights. This period of time, particularly throughout the 1940s and 1950s, was extremely difficult for American Indians, as the national attitude shifted from tribal recognition of sovereign status to assimilation or destruction.[37]

Named the "Termination Era," the unofficial goal of the United States government was to destroy tribal identity,[38] and many American Indians decided to hide their tribal status or disguise themselves as another racial group.[39] Further, dual citizenship

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29. *Golden Hill*, 39 F.3d at 57.

30. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (2006)).

31. INDIAN ISSUES, *supra* note 5, at 3-4; *see* 25 C.F.R. § 83.2 (2011).

32. *Golden Hill*, 39 F.3d at 57.

33. WILKINS, *supra* note 11, at 22-23.

34. *Id.*

35. *Id.* at 24.

36. Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2006)) (granting citizenship to all noncitizen Indians born within the territorial limits of the United States).

37. Norwood Interview, *supra* note 1.

38. United States v. Washington, 476 F. Supp. 1101, 1103 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981) ("During the latter part of the 19th century and early part of the 20th century it was the policy of the United States Government to encourage the breaking up of Indian reservations and destruction of tribal relations and to settle Indians upon their own allotments or homesteads, acculturate and incorporate them into the national life, and deal with them not as nations or tribes or bands but as individual citizens."); *see Termination Era 1950s, Public Law 280*, FEDERAL INDIAN LAW FOR ALASKAN TRIBES, http://tm112.community.uaf.edu/unit-2/termination-era-1950s-public-law-280 (last visited Mar. 21, 2012).

39. *See Washington*, 476 F. Supp. at 1103. This era caused many American Indian tribes to lose or stop keeping records of their actions as they went underground to

(tribal and federal) placed American Indians in a political and legal "limbo" at a time when national policy focused on "detribalization, individualization, and assimilation."[40]

Before the Federal Acknowledgment Process was finalized in 1978, the government recognized tribes through treaties,[41] executive orders,[42] acts of Congress,[43] administrative decisions of the BIA,[44] and court decisions.[45] In the Constitution, American Indians are considered separate sovereign entities from the citizens of the United States, akin to foreign nations.[46] The explicit powers of Congress in Indian affairs are found in the Commerce Clause, but the Constitution is silent on the powers of the states.[47] With authority over tribes vested in a myriad of sources, many believed that the tribal-federal relationship was marred by inconsistency, establishing

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prevent the federal government from terminating them. *See id.* Unfortunately, when these tribes apply for federal acknowledgment from the BIA, many are criticized or rejected for these "unexplained" gaps in their historical records. *See, e.g.*, Green & Hamilton, *supra* note 2.

40. WILKINS, *supra* note 11, at 25.

41. Past treaties would still be upheld, and those tribes that were original parties to treaties would remain recognized. 25 U.S.C. § 71 (2006); *see BIA FAQs*, *supra* note 23.

42. *BIA FAQs*, *supra* note 23; Act of June 30, 1834, ch. 162, § 17, 4 Stat. 735, 738 (codified as amended at 25 U.S.C. § 9 (2006)) (granting the President authority "to prescribe such . . . regulations as he may think fit, for carrying into effect the various provisions of this act, and of any other act relating to Indian affairs").

43. Congress restored the Confederated Tribes of Siletz Indians of Oregon as a federally recognized sovereign Indian tribe. Siletz Indian Tribe Restoration Act, Pub. L. No. 95-195, 91 Stat. 1415 (1977) (codified at 25 U.S.C. § 711a (2006)).

44. *See* INDIAN ISSUES, *supra* note 5, at 25; REVEREND JOHN NORWOOD, DELEGATE'S REPORT ON THE NATIONAL CONGRESS OF AMERICAN INDIANS: 2011 MID-WINTER EXECUTIVE SESSION 1 (2011) ("Bureau of Indian Affairs has been in violation of [the 1994 List Act] because they have refused to list tribes [for federal acknowledgment] following court rulings of their status.").

45. The Supreme Court has long struggled with the definition of "tribe." *See* United States v. Candelaria, 271 U.S. 432, 442-43 (1926); Kan. Indians, 72 U.S. (5 Wall.) 737, 756-57 (1866); United States v. Wright, 53 F.2d 300, 306-07 (4th Cir. 1931). The language most frequently cited is found within *Montoya v. United States*, which was decided in 1901: "By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory . . . ." 180 U.S. 261, 266 (1901).

46. American Indians are distinctly mentioned as separate from the official population in the U.S. Constitution for purposes of determining congressional representatives. U.S. CONST. art. I, § 2, cl. 3. ("Representatives . . . shall be determined by adding to the whole [n]umber of free [p]ersons . . . and excluding Indians not taxed . . . ."). The Fourteenth Amendment also refers to "Indians not taxed" for the same reason. U.S. CONST. amend. XIV, § 2.

47. U.S. CONST art. I, § 8, cl. 3 (granting Congress the power "to regulate [c]ommerce with foreign [n]ations . . . and with the Indian [t]ribes").

the need for a uniform procedure.[48]

B. The Current Federal Acknowledgment Process

In 1978, the BIA first established the formal process to recognize American Indian Tribes, known as the Federal Acknowledgment Process ("FAP").[49] To petition the FAP, the governing body of a tribe seeking recognition must first submit a letter of intent to the Assistant Secretary of the BIA.[50] After receiving this letter, the BIA "publishes a notice in the *Federal Register*, publishes a legal notice in a local newspaper, notifies the governor and attorney general of the tribe's state, sends a letter of response to the tribe, and establishes an administrative file."[51] The next step of the FAP requires the tribe, now considered a "petitioner," to provide enough historical documentation to satisfy the seven criteria established by the FAP to determine if the tribe is a "political and social community that is descended from a historic tribe."[52] To satisfy the seven criteria, a petitioner must:

(a) Establish that it "has been identified as an American Indian entity on a substantially continuous basis since 1900";[53]

(b) Establish that a "predominant portion of the . . . group comprises a distinct community and has existed as a community from historical times until the present";[54]

(c) Establish that the group "has maintained political influence or authority over its members as an autonomous entity from historical times until the present";[55]

(d) Provide a "copy of the group's present governing document including its membership criteria. In the absence of a written

48. *See* DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 9-10 (2001) ("Within the federal government, Congress has not always agreed with the Supreme Court, the president has not always agreed with Congress, and bureau chiefs have often had their own particular visions or agendas.").

49. This process was first published in the *Federal Register*, 43 Fed. Reg. 39,361 (Aug. 24, 1978), and later added to the *Code of Federal Regulations*, 25 C.F.R. §§ 83.1-83.11 (1982). *See BIA FAQs*, *supra* note 23. The Federal Acknowledgment Process has been revised a handful of times since 1978, however, there have been no changes to the requirements for recognition. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. §§ 83.1-83.13 (1994) (clarifying evidentiary requirements); Changes in the Internal Processing of Federal Acknowledgment Petitions, 65 Fed. Reg. 7,052 (Feb. 11, 2000) (providing updates to internal processing procedures).

50. 25 C.F.R. § 83.4(c) (2011); *see* INDIAN ISSUES, *supra* note 5, at 4.

51. COHEN HANDBOOK, *supra* note 28, § 3.02(7)(a).

52. *See* INDIAN ISSUES, *supra* note 5, at 4.

53. 25 C.F.R. § 83.7(a) (2011).

54. *Id.* § 83.7(b).

55. *Id.* § 83.7(c).

document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures";[56]

(e) Show that the "membership consists of individuals who descend from a historical Indian tribe or from historical tribes which combined and functioned as a single autonomous political entity";[57]

(f) Establish that the "membership of the . . . group is composed principally of persons who are not members of any acknowledged North American Indian tribe";[58] and

(g) Establish that "[n]either the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship."[59]

To satisfy these regulations, the petitioner "must include thorough explanations and supporting documentation in response to all of the criteria."[60] The petitioner will succeed if the BIA determines that "the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion."[61]

Upon submitting documentation, the petitioner's materials are placed under "technical assistance review" by the BIA's Branch of Acknowledgment and Research ("BAR").[62] This "preliminary review" is the petitioner's dress rehearsal, allowing the BAR to review the documents, make comments, and inform the petitioner of any

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56. *Id.* § 83.7(d).

57. *Id.* § 83.7(e). It is unclear just how much of the membership must meet this criterion, leaving the matter up to the subjective determination of the Assistant Secretary. *See* INDIAN ISSUES, *supra* note 5, at 13.

> In one case, the technical staff recommended that a petitioner not be recognized because the petitioner could only demonstrate that 48 percent of its members were descendents. The technical staff concluded that finding that the petitioner had satisfied this criterion would have been a departure from precedent established through previous decisions in which petitioners found to meet this criterion had demonstrated a higher percentage of membership descent from a historic tribe. However, in the proposed finding, the Assistant Secretary found that the petitioner satisfied the criterion. The Assistant Secretary told [the authors of this report] that this decision was not consistent with previous decisions by other Assistant Secretaries but that he believed the decision to be fair because the standard used for previous decisions was unfairly high.

Id.

58. 25 C.F.R. § 83.7(f).

59. *Id.* § 83.7(g).

60. *Id.* § 83.6(c).

61. *Id.* § 83.6(d). While the standard set by statute was originally "a reasonable likelihood," this standard has shifted over time to be interpreted as "beyond a shadow of a doubt." Norwood Interview, *supra* note 1.

62. *See* COHEN HANDBOOK, *supra* note 28, § 3.02(7)(a) (internal citation and quotation marks omitted); 25 C.F.R. § 83.10(b)(1). The understaffed BAR is comprised of "an [sic] historian, an anthropologist, and a genealogist." *See* Rachael Paschal, Comment, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209, 216-17 (1991).

deficiencies that can be corrected before the petition reaches the Assistant Secretary of the BIA for active consideration.[63] After the technical assistance review, the tribe's petition is placed in "ready" status for active consideration, and notification will be sent to the petitioner and any other interested parties, which "includes the governor and attorney general of the state in which [the] petitioner is located, and may include . . . local governmental units, and any recognized Indian tribes and unrecognized Indian groups that might be affected by an acknowledgment determination."[64]

With the petition complete, the BAR will compile the "underlying evidence, reasoning, and analyses" into a "Proposed Finding" recommendation for or against recognition, to be published in the *Federal Register* within one year.[65] These recommendations are submitted for review to "the Department's Office of the Solicitor and senior officials within [the] BIA, culminating with the approval of the Assistant Secretary-Indian Affairs."[66] Once the Proposed Finding is published, "the petitioner or any individual or organization wishing to challenge or support the proposed findings shall have 180 days to submit arguments and evidence to the Assistant Secretary to rebut or support the proposed finding."[67] During the 180-day period, the Assistant Secretary may hold a meeting between the petitioner and interested parties,[68] and following this period, the Assistant Secretary publishes a final determination in the *Federal Register* "within 60 days from the date on which the consideration of the written arguments and evidence rebutting or supporting the proposed finding begins."[69]

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63. 25 C.F.R. § 83.10(b)(1).

64. 25 C.F.R. §§ 83.1, 83.10(d). It is at this stage that many of these "[i]nterested part[ies]" will join the fight against the tribe's recognition, similar to the Eastern Pequots in Connecticut, out of fear of a looming casino.

65. COHEN HANDBOOK, *supra* note 28, § 3.02(7)(a). The Secretary can grant extensions to the one-year publishing schedule. 25 C.F.R. § 83.10(h).

66. INDIAN ISSUES, *supra* note 5, at 4.

67. 25 C.F.R. § 83.10(i).

68. *Id.* § 83.10(j)(2). Perhaps this regulation was added to prevent interested parties from blocking tribal recognition for frivolous reasons and unfounded fears.

69. *Id.* § 83.10(l)(2). The Assistant Secretary and the BAR do not always agree on their recommendations. Recent decisions have involved the BAR recommending against recognition, and despite this fact, the Assistant Secretary found that the petitioner adequately satisfied the criteria. *See* INDIAN ISSUES, *supra* note 5, at 11.

> In one case, the technical staff recommended that a petitioner not be recognized because there was a [seventy]-year period for which there was no evidence that the petitioner satisfied the criteria for continuous existence as a distinct community exhibiting political authority. The technical staff concluded that a [seventy]-year evidentiary gap was too long to support a finding of continuous existence. The staff based its conclusion on precedent established through previous decisions where the absence of evidence for shorter periods of time had served as grounds for finding that petitioners did

The Assistant Secretary's final determination "will become effective [ninety] days from publication unless a request for reconsideration is filed pursuant to [25 C.F.R.] § 83.11."[70] These reconsideration requests will be considered by the Interior Board of Indian Appeals.[71] Using the criteria set forth in 25 C.F.R. § 83.11(d)(1)-(4), the Board may affirm or vacate the Assistant Secretary's recommendation based on a preponderance of the evidence standard.[72] The Assistant Secretary's decision is considered final and effective 120 days after the reconsidered decision is published in the *Federal Register*, so long as the Board finds no request for reconsideration to be timely.[73] A successfully recognized tribe "shall be considered eligible for the services and benefits from the Federal government that are available to other federally recognized tribes[;] . . . shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States[;] . . . shall also have the responsibilities and obligations of such tribes[; and] . . . shall likewise be subject to the same authority of Congress and the United States as are other federally acknowledged tribes."[74]

C. Legal Development of the Federal Recognition Process

i. The Marshall Decisions (1823-1835)

Over the years, the Supreme Court decided many cases defining the unique tribal, state, and federal relationship. The foundation for this body of case law lies in three Supreme Court decisions of the early 1800s. John Marshall, the third chief justice in U.S. history, presided over decisions dealing with emerging American Indian issues such as: "(1) tribal property rights, (2) tribal political status in relation to the states, (3) tribal status in relation to the federal government, and (4) the international standing of tribal treaty rights."[75]

The legal definition of the relationship between American Indians and the federal government developed through a trio of cases dealing with land title claims between tribes and private citizens.

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not meet these criteria. However, in this case, the Assistant Secretary issued a proposed finding to recognize the petitioner, concluding that continuous existence could be presumed despite the lack of specific evidence for a 70-year period.

Id. at 12.

70. 25 C.F.R. § 83.10(l)(4).

71. *Id.* § 83.11(a)(1).

72. *Id.* § 83.11(e)(9)-(10).

73. *Id.* § 83.11(h)(1).

74. *Id.* § 83.12(a).

75. WILKINS, *supra* note 11, at 28.

Johnson v. McIntosh[76] created a type of "'landlord-tenant' relationship between the federal government and the Indian tribes."[77] The Court was tasked with finding if American Indians had the power to grant private citizens title to their lands and if those titles could be enforceable in United States courts.[78] In his decision, Marshall crafted the "discovery doctrine" to explain that as its citizens settled in America, the United States government claimed these lands as part of their "absolute title" power bestowed upon colonization.[79] As "civilized inhabitants," the United States had "an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[80] The Marshall Court recognized that the tribes' "rights to complete sovereignty, as independent nations, were necessarily diminished [upon the founding of the colonies], and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[81] Therefore, by discovering North America, the British colonists claimed a right to absolute title of all lands within.[82] Marshall also included: "Indian inhabitants are to be considered merely as occupants, to be protected . . . in the possession of their lands, but to be deemed incapable of transferring the absolute title to others."[83] While the relationship between American Indian tribes and the federal government would evolve beyond that of "tenant/landlord," *Johnson*

76. 21 U.S. (8 Wheat.) 543 (1823).

77. WILKINS, *supra* note 11, at 31; *see also* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 26-27 (1983) ("The federal government, as the ultimate landlord, not only possessed the power to terminate the 'tenancy' of its Indian occupants but also could materially affect the lives of Indians through its control and regulation of land use.").

78. *See Johnson*, 21 U.S. (8 Wheat.) at 571-72.

79. *See id.* at 587-88.

80. *Id.* at 587.

81. *Id.* at 574. Neither American Indian tribe involved in the land transaction at issue was named as a party in this case. *See id.* at 543 (stating the case concerns an action of ejectment involving plaintiff's purchase of land from the Piankeshaw Indians and defendant who was granted the land from the government). Therefore, these decisions concerning American Indian land rights were made with no representative of the tribal community present. Furthermore, it is unclear (and doubtful) that this decision was ever communicated to the American Indian tribes so that they could adjust their behavior accordingly.

82. *See id.* at 587 (disclaiming American Indians' rights to title in land).

83. *Id.* at 591. Though he would refer to them as "independent nations" and "rightful occupants," *id.* at 574, Marshall showed that he simply did not trust leaving the country in tribal hands: "But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . . ." *Id.* at 590.

and its discovery doctrine still remain "good" law.[84] Though the Marshall Court chipped away at this holding in subsequent decisions, *Johnson* "is still regularly cited by commentators" on the subject, and the effects of the discovery doctrine still linger in American Indian law.[85]

Following *Johnson,* the Marshall Court backtracked on the discovery doctrine and redefined the unique tribal-federal relationship. In *Cherokee Nation v. Georgia*, Chief Justice Marshall wrote that American Indians "are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government," and that the relationship between American Indians and the United States resembled a "ward to his guardian."[86] Rejecting tribes as "foreign nations," Marshall found a new descriptor: "They may, more correctly, perhaps, be denominated domestic dependent nations."[87] Marshall explained his difficulty in finding a proper definition for this relationship as "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."[88]

One year after *Cherokee Nation*, Marshall attempted to further "modify" his ruling in *Johnson*. This correction, introduced in the decision *Worcester v. Georgia*,[89] only brought more confusion to the status of American Indians. Marshall referred to them as "a distinct people, divided into separate nations, *independent of each other and of the rest of the world*, having institutions of their own, and *governing themselves by their own laws*."[90] Where in *Johnson,*

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84. *See* WILKINS, *supra* note 11, at 35.

85. *Id.* Marshall seems to acknowledge that the discovery doctrine is founded on legal fiction, and tries to justify its use through practice:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

Johnson, 21 U.S. (8 Wheat.) at 591.

86. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). Marshall explains his "ward" classification further: "They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father." *Id.*

87. *Id.*

88. *Id.* at 16.

89. 31 U.S. (6 Pet.) 515 (1832).

90. *Id.* at 542-43 (emphasis added). Marshall contradicts the "absolute title" theory from *Johnson:*

> It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the

Marshall was clear that the United States "diminished" those land rights of the occupying tribes,[91] in *Worcester*, he determined that the discovery doctrine was

> an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession [like American Indians], either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.[92]

In summation: "The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood. . . . [These colonial grants and charters merely] asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned."[93] Though *Worcester* seemed to redeem the rights of American Indians, the issue of the discovery doctrine remained after Marshall's tenure with the Court.

ii. After Marshall

Three years after *Worcester* was decided, *Mitchel v. United States* washed away the effects of the *Johnson* holding that Indians lack the power to convey their lands.[94] Decided after Marshall's term as Chief Justice, Justice Henry Baldwin wrote on behalf of the Court: "[F]riendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them . . . ."[95] Baldwin continued referring to the American Indians' "right of occupancy . . . as sacred as the fee simple of the whites."[96] Therefore, if American Indians held their land in fee simple, they were free to sell those lands and transfer their titles without incident. But Baldwin went a step further: "The Indian right to the lands as property, was not merely of possession, that of alienation was concomitant; both were equally *secured, protected, and guaranteed* by Great Britain and

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> discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

Id. at 543.

91. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

92. *Worcester*, 31 U.S. (6 Pet.) at 544.

93. *Id.* at 545-46.

94. *See* Mitchel v. United States, 34 U.S. (9 Pet.) 711, 758-60 (1835) (noting that American Indians had the right to alienate property under the British and Spanish crown).

95. *Id.* at 745.

96. *Id.* at 746.

Spain . . . ."[97] Where once American Indian rights to land titles were extinguished by the mother nations of colonizing forces, based on this case, by 1835, these rights were believed to be *guaranteed* by those nations.

This back-and-forth from the High Court on the issue of the relationship between American Indians and the federal government persisted depending on the composition of the Court. In 1846 Chief Justice Taney, perhaps best known for his decision in *Dred Scott,*[98] penned a decision as damaging to American Indians as *Scott* was for African Americans. Found within the dicta of *United States v. Rogers,* Taney stated that tribes "have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied."[99] Directly contradicting the idea that American Indians were independent entities that held their land in fee simple found in the *Worcester* and *Mitchel* opinions, Taney's words were a step backward—a direct attack on tribal sovereignty and property ownership rights. He wrote that the land "has been assigned to [the Cherokees] by the United States, as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority."[100] To emphasize his point, Taney continued: "the whole continent was divided and parceled out, and granted by the governments of Europe . . . and the Indians continually held to be, and treated as, *subject to their dominion and control*."[101] This opinion also introduced the "political question" doctrine, which prevented many tribes from seeking redress through the judicial system for violations of sovereign rights.[102]

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97. *Id.* at 758 (emphasis added).

98. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superceded by constitutional amendment*, U.S. CONST. amend. XIV.

99. United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846).

100. *Id.*

101. *Id.* (emphasis added). Though these statements are widely considered to be dicta, they had an immediate effect on the landscape of American Indian law. In the summer of 1846, after the *Rogers* decision, a Senate Committee on the Judiciary met to consider the issue of extending federal laws into Indian territory. WILKINS, *supra* note 11, at 51. Offering his opinion, Commissioner of Indian Affairs William Medill stated that the federal government had the "original power . . . to subject the Indian tribes within the limits of their sovereignty to any system of laws having for their object the prevention or punishment of crimes, or the melioration of the condition and improvement of the red race . . . ." *Id.* (quoting S. REP. NO. 29-461, at 2 (1846)). Medill revealed that "[t]he correct doctrine on this point . . . . [was in the] views of the highest judicial tribunal of the land [and] must be deemed to be conclusive." WILKINS, *supra* note 11, at 51 (third alteration in original) (internal quotation marks omitted). Influenced by the *Rogers* decision, Medill echoed the recent decisions of the federal government's dominance over tribal sovereignty and clearly presented them to Congress as fact.

102. *See Rogers*, 45 U.S. (4 How.) at 572.

Despite his previous statements in *Rogers,* Taney presented in his infamous *Dred Scott* opinion another Supreme Court reversal on the issue of American Indian sovereignty.[103] While deciding that slaves could not be citizens of the United States, the Court also distinguished the African American population from the American Indians.[104] In a passage that cannot be reconciled with his opinion in *Rogers*, Taney writes "although [American Indians] were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws."[105] Directly contrasting *Rogers,* Taney stated:

> These Indian Governments were regarded and treated as *foreign Governments* . . . and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have *always* been treated as foreigners not living under our Government.[106]

These statements underscore Taney's drastic indecisiveness from one case to another. In *Rogers,* Taney asserted that American Indians had never been considered foreign entities.[107] Eleven years later, Taney declared that tribes had always been acknowledged as equal to foreign governments.

Through the years, the United States' acknowledgment of the inherent sovereignty of American Indians remained in flux. In *The Cherokee Tobacco*, the Court held that all congressional acts would apply to American Indian tribes unless Congress expressly excluded them.[108] By the late 1880s, the Court paved the path for the Executive Branch and Congress to continue to intervene on tribal sovereignty. In *United States v. Kagama*, the Court embraced the

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103. *Dred Scott*, 60 U.S. (19 How.) at 403-04.

104. *Id.*

105. *Id.* at 403.

106. *Id.* at 404 (emphasis added). To his credit, Taney does return to his previous ideology when it comes to land rights:

> It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy.

Id.

107. *Rogers*, 45 U.S. (4 How.) at 572.

108. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870). This case was published in *United States Reports* as simply "The Cherokee Tobacco." It can be found in the *Lawyer's Edition* and the *Supreme Court Report*, under its full title: "*Two Hundred and Seven Half-Pound Papers of Smoking Tobacco, etc., Elias C. Boudinot et al., Claimant Plaintiffs in error v. United States.*" *See* WILKINS, *supra* note 11, at 54.

foundation set by *Cherokee Nation* and reestablished that "Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States,—dependent largely for their daily food; dependent for their political rights."[109] Ironically, the Court noted the American Indians' plight stemmed from the United States government: "From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen."[110] With this passage, the Court further diminished the notion of tribal sovereignty and elevated Congress to a role of paternal "plenary" power. This blanket statement that power over tribes had "always" belonged to the executive and legislative branches ignored decades of established case law and treaties. While the "protection" of tribes sounded virtuous, Congress used this power to intervene further into intratribal affairs.

iii. Advocating Toward Sovereignty

These ideas of "wardship" and "dependency" permeated American Indian philosophy until congressional reform came in the form of the Indian Reorganization Act of 1934 ("IRA").[111] The IRA served as an attempt to identify and preserve tribes on a national roll. The IRA is also credited with "terminating the notorious [land] allotment policy, [giving] rise to widespread empathy for Indian culture, allow[ing] a measured degree of Indian self-government, and garner[ing] congressional support for Indian education, Indian preference, and other necessary economic development projects."[112] However, this list was not without controversy, as tribes who were not specifically invited were left off the roll and had no knowledge of its creation.[113] The new Commissioner of Indian Affairs, John Collier, was largely credited with the creation of the Act. The Act promoted a new philosophy that "offered an alternative answer to Indian dependency: reconstitution and strengthening of Indian tribes in some sort of autonomy, self-sufficiency, semisovereignty, or self-determination."[114]

The Civil Rights Movement of the 1960s afforded tribes a number of significant legal victories and a return to self-determination at a time when the nation grew more aware of

109. United States v. Kagama, 118 U.S. 375, 384 (1886).

110. *Id.*

111. 25 U.S.C. § 476 (2006).

112. WILKINS, *supra* note 11, at 118.

113. Norwood Interview, *supra* note 1.

114. FRANCIS P. PRUCHA, THE INDIANS IN AMERICAN SOCIETY 56 (1985); *see* Norwood Interview, *supra* note 1.

differing cultures. These victories came through extreme activism on behalf of the tribes[115] and efforts by "several non-Indian organizations, a number of state officials, and some members of Congress from states where tribes were gaining positive legislative and judicial results."[116] This period included triumphs over the executive banch,[117] Congress, and the Court.[118] In some of these cases, federal recognition status was a deciding factor in whether or not a tribe prevailed.

Two particular legal battles, generating two inconsistent opinions, inadvertently led to the creation of the FAP. In the first, *United States v. Washington*, the Ninth Circuit held that only treaty signatories and federally recognized tribes were entitled to their right to fish on reservations without state regulation.[119] In contrast, the First Circuit held that the State of Maine had to return acres of tribal land to the Passamaquoddys, an unrecognized tribe.[120] Because it was unclear whether a tribe needed to attain federal recognition to assert its sovereignty and self-governance, American Indian tribes began to apply for federal acknowledgment at a record pace.[121] Due to

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115. These acts included the occupation of Alcatraz prison in 1969, "the 1972 Trail of Broken Treaties, . . . the 1973 occupation of Wounded Knee on the Pine Ridge Indian Reservation, [and] the untold fish-ins, marches, demonstrations and boycotts." WILKINS, *supra* note 11, at 186; *see* FRANCIS P. PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 410-19 (1994) (discussing the early organized Indian activism that occurred and the movement toward restoring Indian tribes' treaty-status relationship with the U.S. government).

116. WILKINS, *supra* note 11, at 186.

117. *See* Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564, 564-67, 575-76 (July 8, 1970) (noting President proposed "legislation which would empower a tribe or a group of tribes or any other Indian community to take over the control or operation of Federally-funded and administered programs").

118. *See, e.g.*, United States v. Washington, 520 F.2d 676 (9th Cir. 1975) (determining fishing rights); Morton v. Mancari, 417 U.S. 535 (1974) (determining preference regulations); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me. 1975), *aff'd*, 528 F.2d 370 (1st Cir. 1975) (determining tribal recognition and land claims).

119. *Washington,* 520 F.2d at 692-93. However, the court also noted:

> Rights under the treaties vested with the tribes at the time of the signing of the treaties. Nonrecognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no impact on vested treaty rights. Whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure is a factual question which a district court is competent to determine.

Id.

120. *Passamaquoddy Tribe*, 528 F.2d at 372-73; *cf.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 594 (1st Cir. 1979) (finding plaintiffs were ineligible for protections under Indian Nonintercourse Act because they did not exist as tribal entity).

121. *See* William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 360-

the influx of requests, the BIA was forced to suspend all active considerations until a formal process could be established.[122] Though the BIA explored many possibilities,[123] the agency ultimately decided on the lengthy criteria outlined above in 1978.[124]

III. A SECOND PATH TO ACKNOWLEDGMENT - FEDERAL ACKNOWLEDGMENT BY THE COURTS

As Congress reaffirmed in the Federally Recognized Indian Tribe List Act of 1994 ("List Act"),[125] federal acknowledgment by the BIA is not the only gateway for American Indian tribes to be recognized as sovereign. In creating the List Act, Congress declared that "Indian tribes . . . may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations [the FAP] . . . or *by a decision of a United States court*."[126]

The courts are currently split on their role in determining American Indian Sovereignty under the List Act. While some federal courts have used their List Act power to recognize a tribe,[127] others have continually deferred to the BIA as the only source of authority

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63 (1990).

122. *Id.* at 363. This sudden suspension caused the D.C. District Court to conclude that the delay in the decision to recognize the Stillaguamish Tribe was "arbitrary and capricious." Stillaguamish Tribe v. Kleppe, Civ. No. 75-1718, 1976 U.S. Dist. LEXIS 17381, *3 (D.D.C. Sept. 24, 1976). The court forced the BIA to make an immediate decision. *See id.* The Department of Interior proposed federal acknowledgment regulations ten months later. *See* Quinn, *supra* note 121, at 363.

123. There were:

> [Four hundred] meetings, discussions, and conversations about Federal acknowledgement with other Federal agencies, State government officials, tribal representatives, petitioners, congressional staff members, and legal representatives of petitioning groups; 60 written comments on the initial proposed regulations of June 16, 1977; a national conference on Federal acknowledgment attended by approximately 350 representatives of Indian tribes and organizations; and 34 comments on the revised proposed regulations, published on June 1, 1978.

Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Aug. 24, 1978) (to be codified at 25 C.F.R. pt. 54).

124. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 23,743 (proposed June 1,1978) (to be codified at 25 C.F.R. pt. 54).

125. 25 U.S.C. § 479a-1 (1994).

126. H.R. 4180, 103d Cong. § 103(3) (1994) (enacted) (emphasis added). Also of note, §103(4) states that "a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress." *Id.* § 103(4). Therefore, the BIA's 2005 termination of the Eastern Pequot tribe from the acknowledgment list would be in direct violation of this statute absent "an Act of Congress." *Id.*

127. *See, e.g.*, New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 497-98 (E.D.N.Y. 2005).

for acknowledgment purposes.[128] Furthermore, the BIA has "refused to list tribes following court rulings on their status," even if a court has recognized their existence.[129]

A. The Montoya Decision

In 1901, the Supreme Court established common law criteria for determining the existence of an American Indian tribe. In *Montoya v. United States*, the plaintiff petitioned the United States and the Mescalero Apache Indians to recover the value of stolen livestock that were allegedly taken by a band of Mescalero Apache Indians.[130] To establish jurisdiction in the Court of Claims, the plaintiff had to satisfy a showing that the thieves "belong[ed] to any band, tribe, or nation in amity with the United States."[131]

The Court of Claims determined, and the Supreme Court affirmed, that this group operated in a separate and distinct manner from the peaceful Mescalero Apache Indians, who were considered "in amity with the United States" government—the equivalent of federal acknowledgment today.[132] Though members of the tribe had once belonged to the Mescalero, they "carr[ied] on a war against the government as an independent organization."[133] Interpreting the Indian Depredation Claims Act under which the claim was based, the Supreme Court defined the meaning of the word "tribe" as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[134] The Supreme Court presented this definition as its general understanding of the word "tribe" and did not indicate that the characterization was limited to this particular act.[135]

This opinion is significant to tribal sovereignty[136] in two ways.

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128. *See, e.g.*, W. Shoshone Bus. Council v. Babbitt, 1 F.3d 1052, 1056-57 (10th Cir. 1993).

129. REVEREND JOHN NORWOOD, DELEGATE'S REPORT ON THE NATIONAL CONGRESS OF AMERICAN INDIANS: 2011 MID-WINTER EXECUTIVE SESSION 1 (2011).

130. 180 U.S. 261 (1901).

131. *Id.* at 264 (quoting Indian Depredation Claims Act, ch. 538, 26 Stat. 851 (1891)).

132. *Id.* at 268-69.

133. *Id.* at 270.

134. *Id.* at 266.

135. *See id.*

136. While the *Montoya* decision provided the definition of the word "tribe," the Court was hesitant to classify American Indian tribes as "nations." *Id.* at 265. The Court defined "nation" to "impl[y] an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries, and the power to enter into negotiations with other nations." *Id.* Because of the "natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits,

First, it established that tribes were sovereign from each other—one tribe would not be held responsible for the acts of another, even if members of both entities had once belonged to the same American Indian nation or bloodline.[137] Second, and perhaps most important, the Court created precedent that would determine how courts could recognize the existence of a tribe.[138]

B. Montoya in Action

Before the BIA finalized the FAP in 1978, courts used the *Montoya* definition as the standard for determining whether a group constituted a tribe. In *United States v. Candelaria*, the Supreme Court used the *Montoya* test to interpret a provision of the federal Indian Trade and Intercourse Act,[139] which voided transfers of land "from any Indian nation or tribe of Indians" unless approved by Congress.[140] The Court found that the Pueblo Indians were "plainly within" the "spirit" of the Act because they were "Indians in race, customs, and domestic government, always have lived in isolated communities, and [were] a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races."[141] The Court was able to make this factual finding on its own, without deferring to the BIA or Department of the Interior,[142] which had been established for

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and lack of mental training," the Court reasoned that the word "nation" was nothing more than a "misnomer" when applied to "uncivilized Indians." *Id.*

137. *Id.* at 270.

138. *See, e.g.*, United States v. Candelaria, 271 U.S. 432, 442 (1926); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 582 (1st Cir. 1979); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 378 (1st Cir. 1975).

139. 25 U.S.C. § 177 (2006).

140. *Candelaria*, 271 U.S. at 441 (quoting 25 U.S.C. § 177).

141. *Id.* at 441-42. The Supreme Court did not always believe that the "simple, uninformed" Pueblos were within the "spirit" of the "intercourse Act." *See Passamaquoddy Tribe*, 528 F.2d at 378. In an earlier decision, the Court held that the Pueblo were not Indians under the Trade and Intercourse Act because they were too "civilized." United States v. Joseph, 94 U.S. 614, 617 (1876). The *Candelaria* decision did not overrule the *Joseph* decision, allowing the notion that "civilized" tribes were exempt from the Intercourse Act to remain as good law. *See Candelaria*, 271 U.S. at 440-42; *Passamaquoddy Tribe*, 528 F.2d at 378 (noting that the *Candelaria* Court "did not expressly overrule the *Joseph* view" but rather suggested that the Act was limited to "simple, uninformed people").

142. *Contra* Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 56 (2d Cir. 1994) (concluding that a judicial decision should be withheld "until [the BIA] has made an administrative ruling"); James v. U.S. Dep't of Health & Human Servs., 824 F.2d 1132, 1138-39 (D.C. Cir. 1987) (refusing to decide whether the evidence of historical recognition presented by an American Indian group supported their claim of tribal legitimacy because Congress had permitted the executive branch to regulate Indian affairs); W. Shoshone Bus. Council v. Babbitt, 1 F.3d 1052, 1057 (10th Cir. 1993) (declaring that they were "strongly persuaded by" the *James* case in determining that the court must defer to a decision of the BIA to settle recognition claims).

over ninety years by the time of this decision.[143] Although the legislative act before the *Candeleria* Court was different than the Indian Depredation Act considered in *Montoya,* the Court used the *Montoya* test to find the Congressional intent of the term "Indian tribe" as applied to the 1834 and 1851 acts.[144]

In 1975, the First Circuit used the *Montoya* decision to consider whether the Passamaquoddy Tribe of Maine was a tribe under the Nonintercourse Act.[145] Years earlier, the tribe had petitioned the United States Government to enter a claim on its behalf to recover millions of acres of tribal lands lost in a treaty transfer with the State of Maine in violation of the Act.[146] The federal government, with the advice of the Acting Solicitor of the Department of the Interior, refused to bring the suit because the Passamaquoddies were not a tribe recognized by the United States and, therefore, could not fall within the protection of the Act.[147] The First Circuit concluded that "there [was] no question that the Tribe [was] a 'distinctly Indian' community"[148] by using historical evidence of recognition by the State of Maine,[149] a history of the federal government's contact with the tribe,[150] and a stipulation by the United States Government that the Passamaquoddies were "a tribe in both the racial and cultural sense."[151]

Despite the fact Indian Affairs was operational for 140 years[152] and had not yet recognized the Passamaquoddies, the court ruled that the tribe "plainly fit[]"[153] the *Montoya* common-law definition of a tribe and was protected by this Act.[154] More importantly, perhaps, the First Circuit rejected the argument that because the Passamaqoddy tribe had not been recognized in the past by federal treaty or statute, it was not a tribe for the purpose of federal

143. *See supra* Part II.a.

144. *See Candelaria*, 271 U.S. at 442.

145. *Passamaquoddy Tribe*, 528 F.2d at 377 n.8. Though the full title of the statute is the Indian Trade and Intercourse Acts, the acts came to be known as the "Nonintercourse Act." *See id.*

146. *Id.* at 372.

147. *Id.* at 372-73, 377.

148. *Id.* at 377 n.7.

149. "But the Passamaquoddies were a tribe before the nation's founding and have to this day been dealt with as a tribal unit by the State." *Id.* at 377-78. The court also noted that "[s]ince its admission as a state, Maine has enacted approximately 350 laws which relate specifically to the Passamaquoddy Tribe." *Id.* at 374.

150. *Id.* at 374-75 (noting that the "government's dealings . . . [were] few" but providing a brief record of various requests for funding for Indian schools, agriculture, and federal assistance programs).

151. *Id.* at 377 n.7.

152. *See supra* Part II.a.

153. *Passamaquoddy*, 528 F.2d at 377 n.8.

154. *Id.* at 379.

programs and statutes.[155] In concluding that "the absence of specific federal recognition in and of itself provides little basis for concluding that the Passamaquoddies are not a 'tribe' within the Act,"[156] the First Circuit dispelled the widespread fallacy that courts could not determine whether a tribe was "Indian" on their own.[157]

C. Deferral to the Federal Acknowledgment Process

With the creation of the FAP in 1978, the courts employed a new strategy in dealing with determinations of tribal status.[158] Rather than applying the *Montoya* criteria and making decisions based on a consideration of the historical records submitted by the tribes, the courts deferred decisions on tribal status to the BIA under the doctrine of "primary jurisdiction."[159] The court initially employed this doctrine to resolve issues where "a claim is originally cognizable in the courts, but enforcement of the claim requires, or is materially aided by, the resolution of threshold issues, usually of a factual nature, which are placed within the special competence of the administrative body."[160] The Second Circuit explained that the two-fold purpose of the primary jurisdiction doctrine was: "consistency and uniformity in the regulation of an area which Congress has entrusted to a federal agency; and the resolution of technical questions of facts trough the agency's specialized expertise, prior to judicial consideration of the legal claims."[161]

Faced with the familiar question of the status of a tribe under the Nonintercourse Act, the Second Circuit completely ignored the body of case law decided under *Montoya*[162] and remanded the case to the district court with directions to stall the proceedings until the

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155. *Id.* at 378.

156. *Id.*

157. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 268-72 (1971) (discussing cases that addressed "[q]uestions of tribal existence").

158. Some would argue that before 1978, the Court had already decided that it was Congress' role, and not that of the courts, to determine the legitimacy of an American Indian Tribe:

> [I]t is not meant . . . 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 that 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 . . . are to be determined by Congress, and not by the courts.

United States v. Sandoval, 231 U.S. 28, 46 (1913).

159. Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 58-61 (2d Cir. 1994).

160. *Id.* at 58-59.

161. *Id.* at 59.

162. Cherokee Nation of Okla. v. Babbitt, 117 F.3d 1489, 1499-1503 (D.C. Cir. 1977) (holding that "the court must itself decide whether the [tribe] constitute[s] a sovereign tribe").

BIA reached a decision on the tribe's recognition claim.[163] The court recognized the *Montoya-Candelaria* definition of tribal status and mentioned how this definition and "BIA criteria both have anthropological, political, geographical and cultural bases and require, at a minimum, a community with a political structure."[164] Though the two definitions may "overlap," the court acknowledged that they could lead to different conclusions.[165] The Second Circuit affirmed that the federal courts "retain[] final authority to rule on a federal statute," but it felt that the court "should avail itself of the agency's aid in gathering facts and marshalling them into a meaningful pattern."[166] Finally, the court decided, without precedent, that "deferral [to the BIA] is fully warranted here where [a] plaintiff has already invoked the BIA's authority."[167]

Oftentimes, judicial deference to the BIA is a disservice to both the tribes and the other parties involved in litigation. Concerned that "[i]nnocent landowners" may suffer a "cloud on their titles" for up to two years while the BIA determined the federal recognition status of the Golden Hill tribe,[168] the Second Circuit ruled that the Golden Hill Tribe could "reapply to the trial court for a ruling on the merits, if within 18 months the BIA [had] not then ruled on [their] tribal status."[169] With this ruling, the Second Circuit showed that courts could make a federal acknowledgment decision on the merits, if they felt compelled to do so.[170]

In Connecticut, the district court brushed aside the notion that administrative delay should prevent deference to the BIA and placed a stay on a lawsuit brought by the Schagticoke Tribe until a determination on its status could be made.[171] One year later, after a

163. *Golden Hill*, 39 F.3d at 61.

164. *Id.* at 59.

165. *Id.*

166. *Id.* at 60.

167. *Id.* The court left open the question of deferral "if no recognition application were pending." *Id.* In 2009, a district court in New York applied the *Montoya* common law criteria to hold that a tribe that had not been federally recognized could assert sovereign immunity to dismiss a lawsuit. Gristede's Foods, Inc. v. Unkechuage Nation, 660 F. Supp. 2d 442, 467 (E.D.N.Y. 2009). *But see* W. Shoshone Bus. Council v. Babbitt, 1 F.3d 1052, 1056-58 (10th Cir. 1993) (deferring to the BIA administrative process for a determination of the tribal status of the Western Shoshone Tribe for purposes of the Nonintercourse Act when the Western Shoshone have not pursued the FAP).

168. *Golden Hill*, 39 F.3d at 60. It is humorous to note that the court is more concerned about the effect that the unreasonable BIA delay could have on the "[i]nnocent landowners" of Connecticut than the effect on the Golden Hill tribe, who are depending on this federal acknowledgment decision for access to precious federal benefits and programs, as well as their standing in this litigation. *Id.* at 57-60.

169. *Id.* at 60.

170. *Id.* at 61.

171. *See* United States v. 43.47 Acres of Land in Litchfield, 45 F. Supp. 2d 187, 194

hearing held by the Senate Committee on Indian Affairs revealed that the head of the FAP expressed that the process had "broken down and . . . admitted that the current administration would be unable to reform it,"[172] the District Court of Connecticut decided that the BIA's "expertise [was] outweighed by its now-demonstrated inability to make such determinations in anything remotely resembling a timely manner."[173] This lawsuit also featured a claim under the Nonintercourse Acts, where the Supreme Court had once applied the *Montoya* definition to determine tribal status, without deferral to the "broken down" BIA process.[174] The Tenth Circuit also deferred on a case involving a tribe's status under the Nonintercourse Act, refusing to entertain precedent that predated the FAP,[175] or involved Indian groups from Hawaii and Alaska.[176] Although these decisions found that tribes that were not federally recognized could still be protected under the Act, the court dismissed them as unpersuasive.[177]

The courts were hesitant to find "unreasonable delay" by the BIA in the 1980s.[178] At that time, however, applications for

(D. Conn. 1999) (stating "even [a] great delay will not prevent agency consideration where all other factors lean heavily in favor of deference").

172. United States v. 43.47 Acres of Land in Litchfield, 2000 U.S. Dist. LEXIS 14289, *3 (D. Conn. Sept. 11, 2000) (quoting Richard L. Velky Aff.).

173. *Id.*

174. *See* United States v. Candelaria, 271 U.S. 432, 441 (1926) (holding Congress's use of the term "Indian Tribe" included the Pueblo Indians despite no express reference to the tribe specifically).

175. It refused to acknowledge *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (Pre-Federal Acknowledgment Process), and *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 581 (1st Cir. 1979) ("[T]he [BIA] does not yet have prescribed procedures and has not been called on to develop special expertise in distinguishing tribes from other groups of Indians.").

176. *See* W. Shoshone Bus. Council v. Babbitt, 1 F.3d 1052, 1057 (10th Cir. 1993). The cases involving Indian groups from Alaska and Hawaii include: Native Village of Tyonek v. Puckett, 957 F.2d 631, 635 (9th Cir. 1992) (applying tribal status tests of *United States v. Sandoval*, 231 U.S. 28, 46-47 (1913), and *Montoya v. United States*, 180 U.S. 261, 266 (1901), to Alaskan Native village); Native Village of Noatak v. Hoffman, 896 F.2d 1157, 1160 (9th Cir. 1990) (recognizing Alaskan Native village organized under the Indian Reorganization Act, 25 U.S.C. §§ 461-479, for purposes of jurisdiction under 28 U.S.C. § 1362); Price v. Hawaii, 764 F.2d 623, 626-29 (9th Cir. 1985) (using regulations regarding acknowledgment, as well as other factors, for guidance in determining tribal status of native Hawaiian body). While it is true that these tribes do not participate in the same acknowledgment procedure as tribes within the continental United States, these court decisions are still good law, and their analysis should have some persuasive authority on dealings with indigenous people as a whole, regardless of geography.

177. *W. Shoshone Bus. Council*, 1 F.3d at 1057.

178. *See, e.g.*, James v. U.S. Dep't of Health and Human Servs., 824 F.2d 1132, 1138 (D.C. Cir. 1987) ("[The Branch of Acknowledgment and Research] staffs two historians, two anthropologists, and two geneological researchers and has evaluated some twenty petitions for federal acknowledgment. It is apparent that the agency should be given

acknowledgment were less than 100 pages in length, and the Branch of Acknowledgment and Research held the burden to disprove a tribe's existence.[179] As the burden shifted, forcing tribes to affirm their existence beyond a reasonable doubt, and the BAR increased the amount of required documentation for federal acknowledgment, the petitions grew larger and the time for review grew longer as the BIA remained perpetually understaffed.[180] At present day, a federal acknowledgment petition can be over 100,000 pages long[181] and cost over $5 million to assemble;[182] the BIA estimated time for completion of the review is 30 years.[183] Applying the current set of standards, known as the TRAC factors,[184] for determining whether an agency's delay is reasonable, it is clear that the current state of the BIA FAP is not "reasonable." This conclusion can easily be reached when considering the "nature and extent of the interests prejudiced by delay,"[185] as well as the "human health and welfare . . . at stake"[186] in the millions of dollars that tribes lose every year revising petitions, waiting decades on acknowledgment decisions to receive federal benefits,[187] and losing lawsuits for lack of standing.

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the opportunity to apply its expertise prior to judicial involvement.").

179. Norwood Interview, *supra* note 1.

180. *Id.*

181. *See* Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment,* 37 NEW. ENG. L. REV. 491, 495 (2003) (noting that administrative petitions and records range from 30,000 to over 100,000 pages).

182. Norwood Interview, *supra* note 1.

183. *Id. See also* Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (referencing the "extremely complex and labor-intensive task" for the BAR staffers).

184. The TRAC Factors are as follows:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) *delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake*; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

Tummino v. Von Eschenbach, 427 F. Supp. 2d 212, 231 (E.D.N.Y. 2006) (emphasis added) (citing *In re* Barr Labs., Inc., 930 F.2d 72, 74-75 (D.C. Cir. 1991)) (quoting Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984)) (emphasis added).

185. *Id.*

186. *Id.*

187. Jack Campisi & William A. Starna, *Why Does It Take So Long?: Federal Recognition and the American Indian Tribes of New England*, 57 N.E. ANTHROPOLOGY 1, 12 (1999).

D. The Revival of Montoya – The Shinnecock Breakthrough

Many courts justify their deferrals to the BIA as a means to avoid bypassing the administrative process and allowing tribes to frustrate the intent of Congress. However, Congress in its findings in the 1994 List Act[188] identified "a decision of a United States court"[189] as one of the possible ways for a tribe to be "recognized[,]" suggesting that the legislative branch intended for courts to have some role in determining federally recognized tribal status.[190]

In 2003, the Shinnecock tribe decided that it was time to assert its sovereignty. Officially recognized as an American Indian tribe by the State of New York for over 200 years, yet unrecognized by the federal government,[191] the tribe decided to use its inherent sovereignty to begin construction of a casino facility on land that it had purchased and claimed that it had historically been within its control.[192] The State of New York declared that the tribe was precluded from building its casino without first obtaining a permit from the State because the Shinnecock were not a federally recognized tribe, and because they were building on land that was not considered a federal Indian reservation.[193]

Furthermore, the State claimed that the Shinnecock could not legally apply for a permit because they were "not an Indian Tribe in fact because they had not been recognized as such by the Bureau of Indian Affairs,"[194] even though the tribe was recognized by New York State. Using a variety of evidential records presented by the Shinnecock, including historic boundary disputes of the 1600s, U.S. Census Bureau reports, state enactments with the tribe, BIA documentation, and even the plaintiffs' Complaint and statements in court—referring to the Shinnecock as an Indian tribe with a recognized "government-to-government relationship for [over] three hundred (300) years,"[195] the District Court for the Eastern District of New York found that the Shinnecock were an Indian Tribe as a matter of fact,[196] and fell "squarely within the umbrella of . . .

188. 25 U.S.C. § 479a-1 (2006).

189. Federally Recongized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 103 Stat. 4791 (1994) (codified as amended at 25 U.S.C. § 479(a) (2006)).

190. *See id.*

191. New York v. Shinnecock Indian Nation (*Shinnecock I*), 400 F. Supp. 2d 486, 487 (E.D.N.Y. 2005) (citing Provenzano Aff. Supp. Def. Mot. Summ. J. Ex. A, K, and L) (internal abbreviation omitted).

192. *Shinnecock I*, 400 F. Supp. 2d at 487-88.

193. *Id.* at 488.

194. *Id.*

195. *Id.* at 488-89, 497 n.7 (quoting Transcript of April 26, 2004 Hearing, p. 20, lines 5-7) (internal quotation marks omitted).

196. *Shinnecock I*, 400 F. Supp. 2d at 495. The court mentioned an interesting wrinkle to this case. The United States, by opting out of the lawsuit, waived its

Montoya."[197] For the Shinnecock, who were state-recognized as a tribe by New York for more than 300 years,[198] but had been waiting on their federal recognition since 1978,[199] this court decision, in conjunction with the congressional findings within the List Act, was federal acknowledgment of their sovereign status.[200] Following the decision, the BIA refused to list the Shinnecock as a federally recognized tribe.[201]

The Shinnecock sued the Department of the Interior, asserting that the 2005 decision should allow their tribe to be listed on the federal acknowledgment rolls under *Montoya*.[202] Further, the tribe presented historical evidence of recognition from the executive and legislative branches to support its claim.[203] After dispensing of executive and legislative support,[204] the court decided that the 2005 decision did little more than define the tribe at common law.[205] Citing *Golden Hill*, the District Court of the Eastern District of New York held that "[a] court decision cannot accomplish federal recognition of an Indian tribe where the BIA has not yet issued a final determination."[206] Limiting the significance of common law recognition to the prior decision, the court held that it "ha[d] no binding effect on the BIA."[207] The Eastern District of New York also rejected the argument that the congressional findings of the 1994 List Act opened the door for courts to make federal acknowledgment decisions before BIA's final determination.[208] Conceding that congressional findings are normally "entitled to much deference,"[209] the court declared that because Congress did not include this

objection to the Shinnecock's claim that it was an Indian tribe. *Id.* at 490-91. The court felt that the United States Attorney had enough time, a period of five months, to become familiar with the facts of the case and determined that it had no interest in its outcome. *Id.* at 491. Similarly, the State of New York waived its right to claim that the United States was an "indispensible" party in the determination of the tribe's status when it allowed the United States to opt out. *Id.*

197. *Id.*

198. *Id.* at 497 n.7.

199. *Id.* at 488.

200. *Id.* at 489.

201. Shinnecock Indian Nation v. Kempthorne (*Shinnecock II*), No. 06-CV-5013, 2008 U.S. Dist. LEXIS 75826, at *1 (E.D.N.Y. Sept. 30, 2008).

202. *Id.* at *2-3 (highlighting the four claims that the Shinnecock had against the Department of Interior).

203. *Id.* at *32-35, *40-42.

204. Note that the court did not defer to the BIA in rejecting the idea that various statutes cited by the tribe had conferred federal recognition status. *Id.* at *37-38.

205. *Id.* at *52-53.

206. *Id.* at *48.

207. *Id.* at *53.

208. *Id.* at *54-56.

209. *Id.* at *54-55 (citing Thompson v. Colorado, 278 F.3d 1020, 1033 (10th Cir. 2001)).

language within the text of the statute itself, Congress did not intend to grant such a "significant substantive right"[210] to "bypass the elaborate federal recognition process through the Executive Branch that had existed for years, pursuant to federal regulations."[211]

In making this determination, Judge Bianco completely ignored precedent where the courts have made determinations without the BIA,[212] as well as evidence presented by the tribe containing statements by senators to establish congressional intent in making their comments on the List Act.[213] Although stripping the Shinnecock of their 2005 federal acknowledgment victory, this decision concluded by finding the tribe had successfully demonstrated a claim for unreasonable delay[214] and that the court may require the BIA "to adhere to a reasonable deadline."[215] Therefore, the BIA was in a difficult political position. If it decided not to recognize the Shinnecock as a tribe, it would be in direct contradiction with the Connecticut court that had previously acknowledged the group in 2005.[216] The BIA finally decided to recognize the tribe in June of 2010;[217] however, the agency still entertained a claim against the Shinnecock and refused to list the group on the roll until the claim was resolved in November.[218]

IV. THE NANTICOKE LENNI-LENAPE TRIBAL NATION

A. Brief History

The Nanticoke Lenni-Lenape Tribal Nation is an American Indian tribe comprised of members who descended from two separate

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210. *Id.* at *55.

211. *Id.* at *56.

212. *See supra* Part III.A.

213. *Shinnecock II*, 2008 U.S. Dist. LEXIS 75826, at *56.

214. *Id.* at *77. The Shinnecock had originally petitioned the BIA in 1978, the first year in which the FAP was introduced. *See* New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 488 (E.D.N.Y. 2005). After some reviewing and revising of its petition, the Shinnecock claimed that its petition had not been processed further for ten years until this decision. *Shinnecock II*, 2008 U.S. Dist. LEXIS 75826, at *76. When asked, the BIA told the Shinnecock that their acknowledgment would not be completed until 2014, and it even refused to "bind itself to that time limit." *Id.* In short, regardless of the district court's determination, review, and ruling in 2005 that the Shinnecock is a tribe within the meaning of the common law, it would still take the BIA another six years to make that conclusion. *Id.*

215. *Id.* at *78 n.20.

216. This contradiction would most likely be ignored, based on Judge Bianco's 2008 decision in *Shinnecock II*.

217. News Release, Office of the Assistant Sec'y-Indian Affairs, U.S. Dep't of the Interior, Skibine Issues a Final Determination to Acknowledge the Shinnecock Indian Nation of Long Island, NY (June 15, 2010), *available at* http://www.bia.gov/idc/groups/public/documents/text/idc009847.pdf.

218. Norwood Interview, *supra* note 1.

groups, the Nanticoke and the Lenni-Lenape.[219] The Nanticoke, called the "tidewater people," established territory in Delaware and Maryland, "along the eastern shore of the Chesapeake Bay."[220] The Lenni-Lenape were considered the "grandfathers" or "ancient ones" by other tribes and made their homeland "from southeastern New York through northeastern Delaware," claiming land across New Jersey and much of eastern Pennsylvania.[221] The tribe traces its heritage through historical records reaching as far as the 1600s,[222] sharing its "homeland with the Swedes and Finns, Dutch and British."[223]

In the 1740s, due to increasing encroachments on tribal life, many Nanticoke and Lenni-Lenape migrated from the East Coast westward into Oklahoma.[224] Some members of the tribe joined the French in the French and Indian War, and out of fear that the Lenape within New Jersey would join their brethren on the battlefield, the State of New Jersey offered a piece of land as a reservation in exchange for Lenape claims to land in the state.[225] Founded in 1758,[226] "Brotherton" reservation, the first and only reservation in New Jersey,[227] allowed the State to keep an eye on the Lenape during the war and promised the Lenape safety from

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219. *Our Tribal History*, THE NANTICOKE LENNI-LENAPE: AN AMERICAN INDIAN TRIBE, http://www.nanticoke-lenape.info/history.htm (last visited Apr. 9, 2012).

220. *The Ancient Ones*, NANTICOKE AND LENAPE CONFEDERATION LEARNING CTR. AND MUSEUM (May 4, 2010), http://nanticokelenapemuseum.org/museum/the-ancient-ones/.

221. *Id.*

222. For a comprehensive timeline of the history of the Nanticoke Lenni-Lenape, see REV. DR. JOHN R. NORWOOD, WE ARE STILL HERE! THE TRIBAL SAGA OF NEW JERSEY'S NANTICOKE AND LENAPE INDIANS 35-53 (2007), *available at* http://www.nanticoke-lenape.info/images/We_Are_Still_Here_Nanticoke_and_Lenape_History_Booklet_pre-release_v2.pdf [hereinafter WE ARE STILL HERE!].

223. *About Us*, NANTICOKE LENNI-LENAPE TRIBAL NATION, http://nanticoke-lenapetribalnation.org/about/ (last visited Feb. 26, 2012).

224. *See, e.g.*, *The Keepers of the Land*, NANTICOKE AND LENAPE CONFEDERATION LEARNING CTR. AND MUSEUM (May 4, 2010), http://nanticokelenapemuseum.org/museum/the-keepers-of-the-land/ (providing map that depicts the direction of Lenape migration towards Oklahoma); WE ARE STILL HERE!, *supra* note 222, at 37.

225. Unalachtigo Band of the Nanticoke Lenni Lenape Nation v. Corzine, 606 F.3d 126, 127 (3d Cir. 2010). Note—the tribe that serves as plaintiff in this case has no affiliation with the Nanticoke Lenni-Lenape Tribal Nation; however, the historical record developed by the court in this case is accurate to the tribe's history. *See* Unalachtigo Band of the Nanticoke-Lenni Lenape Nation v. State, 867 A.2d 1222, 1225 n.3 (N.J. Super. Ct. App. Div. 2005) (noting that this band had been sued by the Nanticoke Lenni-Lenape Indians of New Jersey (precursor title to "Tribal Nation") for "damage to the reputation and good will" of the tribe).

226. *Corzine*, 606 F.3d at 127; WE ARE STILL HERE!, *supra* note 222, at 13.

227. *Mission & Tribal History*, BROTHERTON DEL. NATION OF INDIANS, http://brotherton-delaware.us/missiontribalhistory.html (last visited Apr. 9, 2012).

colonists who often "confused" friendly Indians with combatants.[228] However, because relocation to Brotherton was voluntary, many New Jersey American Indians chose not to live there,[229] with only about 100-200 members of the tribe living on the reservation.[230]

Remaining in their tribal homelands, just as they had in the early 1700s, some Lenape declined an invitation[231] to move westward with the Mohican Indians on the New Stockbridge reservation when Brotherton was ultimately abandoned[232] and disbanded in 1801.[233] Evidence that a portion of the Lenape chose to stay in New Jersey and Delaware emerged from churches and schools run by the tribe in the 1800s.[234] While many Nanticoke and Lenape converted to Christianity during this period, the groups retained their tribal spiritual values and control over their communities through tribal congregations.[235] Surviving the "Termination Era"[236] of the early 1900s,[237] the tribe began to open up to the public during the 1960s

228. *See* DAVID J. SILVERMAN, RED BRETHREN: THE BROTHERTOWN AND STOCKBRIDGE INDIANS AND THE PROBLEM OF RACE IN EARLY AMERICA 77 (2010) (highlighting that the Brotherton Reservation was formed in order to prevent attacks from Delaware Indians in Pennsylvania on New Jersey colonials as well as to protect the Lenapes who were interested in remaining in New Jersey).

229. WE ARE STILL HERE!, *supra* note 222 at 13 (mentioning that many of the Lenape families refused to live within the boundaries of the Brotherton reservation).

230. *Nanticoke-Lenni Lenape Nation*, 867 A.2d at 1224.

231. WE ARE STILL HERE!, *supra* note 222, at 13.

232. Unalachtigo Band of the Nanticoke Lenni Lenape Nation v. Corzine, 606 F.3d 126, 127 (3d Cir. 2010) (noting that at the close of the French and Indian War, "New Jersey grew less concerned about the welfare of the Brotherton Indians. Government financial assistance was withdrawn, and in 1801 the poverty-stricken tribe asked the State of New Jersey to sell its reservation").

233. *Id.*

234. *Hidden in Plain Sight*, NANTICOKE AND LENAPE CONFEDERATION LEARNING CTR. AND MUSEUM (May 4, 2010), http://nanticokelenapemuseum.org/museum/hidden-in-plain-sight/.

235. In an 1892 article published in a Philadelphia newspaper, a tribal elder of Kent County, Delaware, explained how Nanticoke churches were managed:

> We have our own church buildings and government . . . . Others may come as often as they choose and are quite welcome and a good many do come, but no strangers are admitted to membership or can have any voice in the management. A number of years ago the Methodist Conference succeeded in taking one of our churches from us, down in Sussex, but our people immediately built another for themselves and connected themselves with the Methodist Protestants. That is why we want no strangers to join our church here; that occurrence was a lesson to us.

Id. (quoting John Sanders, *Kent County's Moors*, TIMES OF PHILADELPHIA, May 19, 1892, *available at* http://nativeamericansofdelawarestate.com/MoorsOfDelaware/moor4.html).

236. Termination Era refers to a period when the federal government attempted to terminate its obligations to American Indian tribes. *Termination Era 1950s, supra* note 38.

237. WILLIAM H. GILBERT JR., SURVIVING INDIAN GROUPS OF THE EASTERN UNITED

and 1970s,[238] electing a tribal government that functioned outside its traditional "family-clan style" churches.[239]

Today, the Nanticoke Lenni-Lenape, headquartered in Bridgeton, New Jersey, is governed by a tribal government consisting of "executive, legislative, and judicial branches."[240] The tribe asserts that it "is a sovereign American Indian Nation" consisting of "enrolled tribal citizens who have met the mandatory documented descent and blood quantum requirements from the historic core tribal families as set by tribal law."[241] In Article I, Section 3 of the Nanticoke Lenni-Lenape Constitution, the tribe is very clear that though the BIA has not yet recognized the group for the federal rolls, its "tribal sovereignty was granted by the almighty Creator to [its] ancestors, was never surrendered by [its] tribal leadership to any other authority, and has continued from ancient times to the present."[242] The tribe declares that it "shall exercise such authority as is inherent in any sovereign American Indian Nation."[243]

The Nanticoke Lenni-Lenape began its pursuit for federal acknowledgment in 1982,[244] predating the enactment of the Indian Gaming Regulatory Act by six years.[245] The tribe was recognized by the State of New Jersey through a state statute and a state senate resolution that called on the United States Congress to federally recognize the tribe.[246] The Nanticoke Lenni-Lenape "is an active

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STATES, ANNUAL REPORT OF THE SMITHSONIAN INSTITUTE 415-16 (1948) (noting the names of American Indian families in a report for the Smithsonian Institute, complete with a map of where each tribal group resided).

238. "Prior to the 1970s, we survived by keeping to ourselves. Not being a target." Norwood Interview, *supra* note 1.

239. *About Us*, NANTICOKE LENNI-LENAPE TRIBAL NATION, http://nanticoke-lenapetribalnation.org/about/ (last visited Apr. 9, 2012).

240. *Id.*

241. WE ARE STILL HERE!, *supra* note 222, at 7. Blood quantum standard is currently set at one-quarter. *See Tribal Citizenship*, NANTICOKE LENNI-LENAPE TRIBAL NATION, http://nanticoke-lenapetribalnation.org/tribal-council/tribal-citizenship/ (last visited Apr. 9, 2012) (discussing the membership standards used by the Nanticoke Lenni-Lenape).

242. *Our Constitution*, NANTICOKE LENNI-LENAPE TRIBAL NATION, http://nanticoke-lenapetribalnation.org/tribal-council/our-constitution/ (last visited Apr. 9, 2012).

243. *Id.*

244. Norwood Interview, *supra* note 1.

245. Indian Gaming Regulatory Act, 25 U.S.C. § 2710 (2006). Opponents to federally acknowledged tribes often claim that the only goal for a tribe seeking acknowledgment is the benefits granted by the IGRA. *See Native American Gaming*, NAT'L GAMBLING IMPACT STUDY COMM'N, http://govinfo.library.unt.edu/ngisc/research/nagaming.html (last visited Apr. 9, 2012) (mentioning that opponents of IGRA think it is a means to increase state and federal government presence in the reservation).

246. *See* WE ARE STILL HERE!, *supra* note 222, at 18-19; *We Are a Tribal Community*, NANTICOKE LENNI-LENAPE AN AMERICAN TRIBE, http://www.nanticoke-lenape.info/community.htm (last visited Apr. 9, 2012).

voting member of the Confederation of Sovereign Nentego-Lenape Tribes, the National Congress of American Indians, and the New Jersey State Commission on American Indian Affairs."[247] Though not recognized by the BIA, officials from the tribe "have had audience at the White House, with foreign dignitaries and royalty, led in the ceremonial opening of the Embassy of Sweden, and have been the special guests of the President of the General Assembly of the United Nations."[248] Recently, the tribe formed an intertribal union with the Lenape Indian Tribe of Delaware to "promot[e] tribal interests, preserv[e] tribal culture, and protect[] tribal sovereignty."[249]

B. Challenges Facing the Nanticoke Lenni-Lenape Today

As part of preserving its petition for federal acknowledgment, the biggest struggle for the Nanticoke Lenni-Lenape is maintaining tribalism.[250] In its early history, members of the tribe intermarried among different native communities and remained close in geography.[251] Today, many members are spreading farther apart, providing a challenge to the continuity of the tribe.[252] As part of its initiative to satisfy the BIA criteria for historical documentation, the Nanticoke Lenni-Lenape is working to preserve its tribal history through intertribal education programs, as well as an online museum[253] with member-only areas to teach language and spiritual beliefs.[254] The tribe conducts annual gatherings for its members on tribal lands and a public "Pow-Wow" cultural display open to the public to educate others on tribal customs.[255] Many eastern tribes are not surrounded by populations that are familiar with American Indian groups, and the Nanticoke Lenni-Lenape believe that interacting with its community is essential to dispel ongoing

247. WE ARE STILL HERE!, *supra* note 222, at 20.

248. *Id.*; *Native Pride*, NANTICOKE AND LENAPE CONFEDERATION LEARNING CTR. AND MUSEUM (Apr. 11, 2010), http://nanticokelenapemuseum.org/museum/418/native-pride/.

249. *Native Pride*, NANTICOKE LENNI-LENAPE CONFEDERATION LEARNING CTR. AND MUSEUM (Apr. 11, 2010), http://nanticokelenapemuseum.org/museum/418/native-pride/.

250. Norwood Interview, *supra* note 1.

251. *Id.* The majority of these marriages were between the three interrelated Native communities of Nanticoke and Lenape found in New Jersey and Delaware—Bridgeton, New Jersey; Cheswolde, Delaware; and Millsboro, Delaware. *Id.*

252. *Id.*

253. NANTICOKE AND LENAPE CONFEDERATION LEARNING CTR. AND MUSEUM, http://nanticokelenapemuseum.org (last visited Apr. 9, 2012).

254. Norwood Interview, *supra* note 1.

255. *Tribal Calendar*, NANTICOKE LENNI-LENAPE TRIBAL NATION, http://nanticoke-lenapetribalnation.org/tribal-calendar-2/ (last visited Apr. 9, 2012) (click on "Gathering" and "Pow Wow" hyperlinks on the right-hand side, below "Tribal Calendar").

stereotypes and fears.[256]

Other challenges for the tribe include environmental preservation initiatives and defending the Lenape name against copycat organizations. From 2001 to 2005, the Nanticoke Lenni-Lenape led a successful campaign to preserve Black Creek, the site of a former Lenape village located in Vernon, New Jersey.[257] Incidents involving copycat groups included a tribal "band," unrecognized and separate from the Nanticoke Lenni-Lenape, which opened an office on the same street as the current Nanticoke Lenni-Lenape cultural center.[258] Because the band also called itself "Nanticoke Lenni-Lenape," local banks, the U.S. Postal Service, and many patrons misidentified the two groups, assuming they were the same.[259] After complaints by the original tribe, the band changed its name to "Unalachtigo Band of the Nanticoke Lenni Lenape Nation" and has been trying to assert land claims over the former Brotherton reservation property since 2005.[260]

Since the *Unalachtigo* litigation began, many tribes have tried to raise Brotherton claims—each with a different background, trying to dispel the other claimants, while calling themselves "Lenape."[261] The Nanticoke Lenni-Lenape tribe fears that these copycat groups raising frivolous land claims could cause confusion and backlash against its tribe by the BIA, the State of New Jersey, the federal government, or the general public. The Nanticoke Lenni-Lenape have asserted that they have no connection to these groups and will continue to assert their tribal independence.[262]

Further, the tribe fears that its proximity to Atlantic City, New Jersey, would draw more detractors toward its federal recognition petition as a result of the Indian Gaming Regulatory Act.[263] Because the tribe decided that casino gaming is against tribal values and that to show receiving federal recognition is more important to the tribe than building a casino, the Nanticoke Lenni-Lenape passed a tribal

256. Norwood Interview, *supra* note 1.

257. WE ARE STILL HERE!, *supra* note 222, at 20.

258. Interview with Harry Jackson, Jr., Nanticoke Lenni-Lenape Tribal Councilman, in Bridgeton, N.J. (Mar. 16, 2011).

259. *Id.*

260. *See* Unalachtigo Band of the Nanticoke-Lenni Lenape Nation v. State, 867 A.2d 1222, 1223-24 (N.J. Super. Ct. App. Div. 2005).

261. *See, e.g.*, *id.*; N.J. Sand Hill Band of Lenape & Cherokee Indians v. Corzine, CA No. 09-683(KSG), 2010 WL 2674565, at *1-4 (D.N.J. June 30, 2010).

262. *Non-Gaming Policy*, NANTICOKE LENNI-LENAPE TRIBAL NATION, http://nanticoke-lenapetribalnation.org/about/non-gaming-policy/ (last visited Apr. 9, 2012).

263. Indian Gaming Regulatory Act, 25 U.S.C. § 2710 (2006). This fear is based on other tribes that have had their entire federal recognition decisions derailed or denied because of plans to pursue casino gambling. *See supra* text accompanying notes 9-10.

ban on gambling[264] and offered to enter into a compact with the State of New Jersey to affirm that it would not pursue gaming ventures in the future.[265] The tribe is still awaiting a response from the State.[266]

C. Applying the Montoya Standard to the Nanticoke Lenni-Lenape

At common law, the *Montoya* standard defined a tribe as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[267] By applying this test to the Nanticoke Lenni-Lenape, one could see that it is clearly a tribe under common law. With its wealth of historical documentation showing its existence in the Southern New Jersey/Delaware region from the 1600s to present day,[268] the Nanticoke and Lenape have maintained a distinct race, traceable through its core families.[269] Transitioning from "family-clans" to a written constitution in the 1970s, the tribe's style of self-governance remained in place to keep the tribe together during the "Termination Era."[270] Documentation also shows that despite multiple westward migrations by relatives within the tribe and invitations to join other tribes, the Nanticoke Lenni-Lenape retained sovereign and independent status and remained settled in the Delaware Valley and surrounding regions.[271] Therefore, it is easy to see that the Nanticoke Lenni-Lenape "plainly fits" within the common law *Montoya* criteria of a tribe.[272]

Establishing that the Nanticoke Lenni-Lenape is a recognized tribe under federal common law opens the door for the tribe to assert its tribal sovereign immunity in court. In recent cases, courts have held that groups may enjoy their sovereign immunity if "[they] ha[ve] been federally recognized by Congress or the BIA," or if they meet the *Montoya* standard.[273] In *Gristede's Foods, Inc. v. Unkechauge Nation*,

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264. *See Non-Gaming Policy*, *supra* note 262.

265. Norwood Interview, *supra* note 1.

266. *Id.*

267. Montoya v. United States, 180 U.S. 261, 266 (1901).

268. *See supra* Part IV.A.

269. The history of the Nanticoke Lenni-Lenape is littered with documentation describing contact with researchers, white settlers, and the government of New Jersey. *See generally* WE ARE STILL HERE!, *supra* note 222, at 35-53 (providing an overview of tribal history).

270. *See About Us*, *supra* note 223.

271. Aside from being known as the "grandfathers" and "ancient ones," the Lenni-Lenape tribe members have also established a reputation for stubbornness. *See* Interview with Harry Jackson Jr., *supra* note 258.

272. *See* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 n.8 (1st Cir. 1975).

273. Gristede's Foods, Inc. v. Unkechuage Nation, 660 F. Supp. 2d 442, 465 (E.D.N.Y. 2009); *see also* United States v. Sandoval, 231 U.S. 28, 47 (1913) (discussing

the court held that a tribe could assert its sovereign immunity from a lawsuit if it meets the *Montoya* criteria.[274] Though the tribe had not been federally recognized and was not actively pursuing the FAP, the court stated that it would determine issues of tribal status "when necessary to decide an issue presented in the litigation."[275] Although the holding of the case may be limited to tribes that have yet to undergo the FAP, the Eastern District of New York was willing to make a determination on tribal status in light of the judicial history of deferral to the BIA. This decision could encourage tribes to assert their inherent sovereignty with or without BIA recognition.

Gristede's Foods contained an interesting observation about the *Montoya* test. The court criticized applying a test to determine the existence of a sovereign entity when the members of that sovereign entity did not create the test.[276] The Nanticoke Lenni-Lenape provide their own definition for the term "tribe" adopting some of the language of the *Montoya* test: "A continuous community of interrelated descendants of a historic American Indian Tribe or tribes that has maintained internal governance and tribal identity in some manner that can be documented from at least the 19th century or earlier."[277] Using its definition, the Nanticoke Lenni-Lenape would also "plainly fit" within the definition of an American Indian tribe.

V. IMPROVING THE CURRENT FEDERAL ACKNOWLEDGMENT PROCESS

During the 2010 Annual Conference of the National Congress of American Indians ("NCAI"), the BIA recognized that "*72% of . . . currently recognized federal tribes could not successfully go through the [Federal Acknowledgment] process as it is being administered today*."[278] Given the extreme barrier the FAP has become, the BIA has reviewed proposed changes to the current process and recognized a need to streamline the requirements.[279]

Beyond the difficulties posed by the BIA, state or unrecognized

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the standard by which Congress may bring a body of people within the bounds of its power); Native Vill. of Tyonek v. Puckett, 957 F.2d 631, 635 (9th Cir. 1992) (discussing the circumstances under which an Indian community is considered a tribe and can thus enjoy sovereign immunity).

274. *Gristede's Foods*, 660 F. Supp. 2d at 476-78.

275. *Id.* at 468.

276. *Id.* at 470 (noting that "[i]f an essential right of a sovereign entity is to determine the bounds of its own citizenship, it is conceptually inconsistent for the court to determine the group identity of that sovereign without reference to the group's self-defined criteria").

277. *What is a Tribe?*, NANTICOKE AND LENAPE CONFEDERATION LEARNING CTR. AND MUSEUM (May 13, 2010), http://nanticokelenapemuseum.org/learning-center/common-misconceptions/852/what-is-a-tribe/.

278. REVEREND JOHN NORWOOD, DELEGATE'S REPORT, THE NATIONAL CONGRESS OF AMERICAN INDIANS ANNUAL CONFERENCE 1 (2010)(emphasis in original).

279. *Id.*

tribes face challenges due to a growing anti-recognition movement led by federally recognized tribes.[280] This movement encourages the notion of "equating tribal validity with federal recognition," which raises the fear of "placing the issue of tribal sovereignty wholly in the hands of the federal government instead of as an inherent characteristic of indigenous nations."[281] Rather than stand united with one voice, the current FAP, and specifically the limited benefits rewarded through this process, encourages infighting among tribal nations rather than unity and cooperation.

A. Policy Changes Currently Under Review by the BIA

During the NCAI Conference, the Assistant Secretary of the BIA requested a dialogue with "tribes that would be directly impacted by policy changes."[282] The policy changes under review included:

- "Remov[ing] the letter of intent requirement";[283]
- "Eliminat[ing the] technical assistance review letters";[284]
- "Limit[ing] the discretion on extending the applicant review process";[285]
- "Shorten[ing] the time line with specified time limits for each" step of the process;[286]
- "Ensur[ing] that after 60 days the [Assistant S]ecretary's findings become automatic";[287]
- Changing "the 'proposed finding' to a 'finding of facts' by the [O]ffice of Federal [A]cknowledgement";[288]
- Reforming the ability of "petitioning and interested parties . . .

280. During the 2010 Annual Conference of National Congress of American Indians, members of the Cherokee Nation of Oklahoma (a federally recognized tribe) passed out materials denouncing the legitimacy of state-recognized tribes. *Id.* at 2. Though these tribes are members of the NCAI, the Cherokee, supported by other federally recognized factions, publically refused to accept these tribes as legitimate and tried to use the conference as an opportunity to sway other federal tribal leaders to adopt its beliefs. *Id.* These actions led to a protest by the targeted tribes to the General Assembly during the Conference, and the General Assembly affirmed "that all member tribes were to be protected from such harassment." *Id.* Several federal tribal leaders "verbal[ly] rebuke[d]" the antistate recognition groups, as these actions would only hurt American Indian nations as a whole. *Id.* Aside from showing weakness among the American Indian governing body, the antistate recognition effort displays the fallacy of "equating tribal validity with federal recognition." *Id.*

281. *Id.*

282. *Id.* at 1.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

to impact a final determination";[289]

- "Simplify[ing] the process for groups [that were] previously acknowledged . . . [to have] a relationship with the federal government and can prove that they are the same group . . . in some documented form";[290] and
- "Allow[ing] some form of reapplication for those previously denied if they can prove that . . . the denial was unjustified."[291]

Improving the FAP will be a difficult, yet necessary ordeal. The BIA must balance strict policy guidelines with the reality that many genuine tribes are excluded under the current system. Current policy changes under review are a start, "but not a fix."[292]

B. Recommendations to the Executive Branch and BIA

On September 13, 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples.[293] The goal of the resolution was to have "a positive impact on the protection of [indigenous] victims and, in this context, urge[] States to take all necessary measures to implement the rights of indigenous peoples in accordance with international human rights instruments without discrimination."[294] A total of 144 nations voted in favor of the act, and the United States was not one of them.[295] The Declaration condemned the historic treatment of the indigenous people at the hands of the colonial powers.[296] Many of the articles of the Declaration expressly refute, negate, or overrule ideologies like the "discovery doctrine" that still operate as good law in the United States today.[297]

Further, it does not differentiate between tribes that are defined by common law, the legislative branch, executive agencies, or

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289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

294. *Declaration on the Rights of Indigenous Peoples*, U.N. PERMANENT FORUM ON INDIGENOUS ISSUES (quoting U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, Outcome Document of the Durban Review Conference, para. 73 (Apr. 24, 2009)) (quotation marks omitted), http://social.un.org/index/indigenousPeoples/DeclarationontheRightsofindigenouspeoples.aspx (last visited Apr. 9, 2012).

295. *Declaration on the Rights of Indigenous Peoples*, *supra* note 294 (noting the United States as one of four countries that voted against the Act).

296. Declaration on the Rights of Indigenous Peoples, *supra* note 293.

297. *Id.*; *see, e.g.*, Seneca Nation of Indians v. New York, 206 F. Supp. 2d 448, 502-03 (W.D.N.Y. 2002), *aff'd*, 382 F.3d 245 (2d Cir. 2004) (explaining the discovery doctrine "forms the basis of the well-established law of Indian land tenure" and restricts tribal authority to convey title).

courts.[298] The Declaration simply applies to "indigenous people" as a whole.[299] Therefore, to be a signatory to this Declaration, the United States must be prepared for the shifting responsibilities and added protections that the Declaration would bestow upon all American Indian tribes, federally recognized or not. As of this writing, the President expressed interest in changing his position and signing the Declaration, but the United States still has yet to sign.[300] American Indians continue to urge the current executive administration to sign this Declaration and join the rest of the United Nations in recognizing the human rights of indigenous people.

By opening itself up for revision by the National Congress of American Indians and the Task Force of Federal Acknowledgment, the BIA has admitted that there is a problem with the current process and has shown a willingness to correct the problem.[301] The BIA must establish fair criteria by reducing burdens on tribes. In recent decisions, the BIA required tribes to show documentation proving their continual existence for every decade back into the 1800s, without gaps or reasonable inference.[302] One particular case required a tribe to produce phone records to show that the tribal members had been calling each other regularly.[303]

The enormous financial burdens due to the investigative sleuthing required to complete a BIA petition lead many tribes to pursue casino gaming.[304] If the BIA hopes to divorce American Indians from outside investors and to dispel their reliance on the casino industry, the process must be equitable and affordable.[305] Under the current system, tribes drive themselves into bankruptcy after hiring attorneys, researchers, anthropologists, political

298. Declaration on the Rights of Indigenous Peoples, *supra* note 293.

299. *Id.*

300. Norwood Interview, *supra* note 1 (noting that the Obama Administration expressed interest in signing the Declaration in December 2010, but no decision has yet been made).

301. *See* NORWOOD, *supra* note 278, at 1 (indicating the BIA is actively seeking policy revisions).

302. The Shinnecock Tribe in New York faced "the Problem of the Tunnel." The tribe had documentation that recorded family names, tribal living area, tribal identification, and activities leading up to 1830. From 1830 to 1860, the Shinnecock enter "the tunnel," and there were no records of the tribe. After 1860, the tribe's record trail continued with documents containing names and tribal identification that was in congruence with the 1830s records. The BIA decided that it could not make a decision until the Shinnecock accounted for the thirty-year "tunnel" gap. The Shinnecock spent $2 million hiring experts, genealogists, and historians to "poke holes" in the tunnel. After finding evidence that corroborated that the Shinnecock of 1860 were the descendents of the 1830 group, the BIA determined that they satisfied their historical requirements. Norwood Interview, *supra* note 1.

303. *Id.*

304. *Id.*

305. *Id.*

scientists, ethnologists, historians, and genealogists to bolster their applications.[306] Tribes cannot rely on ordinary fundraising techniques to fund petitions that cost between $5 million to $7 million dollars.[307] By lowering the burden of proof to reasonable likelihood and making inferences where applicable, the BIA would lower these costs substantially.

The agency must acknowledge that from 1871 to 1934, there was no recognition process for American Indian tribes. Unrecognized tribes had no reason to keep records because there was no foreseeable criteria of proving one's existence. Tribes that were left off the rolls of the Indian Reorganization Act of 1934 also had no guidelines to follow to assert their status, as tribes were recognized on a case-by-case basis during this era. Therefore, the BIA should ease the burden on tribes who cannot show documentation for this time period. The BIA should also acknowledge the "Termination Era" and other historical periods when many American Indians stopped keeping records and went into hiding to maintain their tribal lifestyle. Historical data shows that some tribes were misidentified by early census takers who labeled them as "mixed" race or "mulatto."[308] Without the BIA to protect them, many tribes slipped through the cracks during these periods or stopped keeping records so they would not be made a target for relocation or dissolution. Finally, providing counsel for a tribe, similar to a public defender, would allow a tribe to assert its rights throughout the FAP without turning to outside interests.

Allowing the community to halt the FAP as a "concerned party" undermines the inherent sovereignty of American Indians. Under the current system, any individual from the community has standing to present a claim against a tribe, which could halt the group's FAP determination for years. Many tribes predate the community, and community complaints often arise from fear of an imminent casino. Rather than force tribes to satisfy enormous burdens to prove their identity, the "beyond a shadow of a doubt" standard[309] should be shifted to concerned party complaints. These outside interests should be forced to show irrefutable proof that a tribe is suspect before they can derail a federal acknowledgement process. Also, the outside interests should be limited to an entity with some relation to the tribe, or an entity that does not have a vested interest or a history of hostility. While this Note does not suggest that the BIA should eliminate the concerned parties requirement, the agency should reconsider the high burden stacked against the tribe under review.

306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*

The BIA should also adopt the unreasonable delay standard used in federal court. If a decision has not been reached within a reasonable time, the BIA or a court should make an administrative decision under the common law standard set forth by *Montoya*. Also, an affirmative decision by the BIA should not be refutable. Once a tribe is federally recognized by the United States Government as sovereign, and a government-to-government relationship is established, the BIA should not be allowed to reopen the file and revoke a tribe's status as a sovereign entity.[310] Finally, a tribe's struggle with the FAP should not have a negative impact on its identity. The denial of a tribe under the FAP has a devastating impact on a tribe,[311] as the general public, other tribes, and courts wrongfully equate federal acknowledgment with tribal legitimacy. This fallacy places the inherent sovereignty of American Indians in the hands of the United States Government and furthers the damaging idea of tribes as "dependent/wards" of the state.

C. Recommendations to the Judiciary

With the recent decisions in *Shinnecock* and *Gristede's Foods*, many tribes demand to know why they cannot be federally recognized by meeting the common law criteria of a "tribe." The courts raise a valid concern that opening the process to include *Montoya* decisions could open the floodgates where tribes could use the judiciary as a way of bypassing the FAP.[312] Until Congress clarifies its findings in the List Act of 1994, however, the courts must realize that they play an equal role in federal acknowledgment decisions, along with the BIA and the Congress. Courts are slowly beginning to concede that deferral to the BIA is no longer a viable option, as many have ruled that the agency commits unreasonable delay in reaching acknowledgment determinations. These delayed decisions show that the BIA process is broken, and courts should use established precedent to aid tribes that have been stuck in limbo for decades.

Decisions like *Gristede's Foods* reinforce the concept that American Indian sovereignty is not dependent on the FAP.[313] However, recognizing a group as a "tribe" for purposes of sovereign immunity, but later deferring a decision to recognize a tribe for federal acknowledgment is unjustifiable in the eyes of American Indians. Furthermore, for a tribe to assert its sovereign status and receive consideration of its status by a court, American Indian groups

310. *See supra* Part I.

311. Following the BIA ruling reversing the decision to recognize the Eastern Pequot tribe, the tribe grew despondent, and representatives stopped attending the National Congress of the American Indians. Green & Hamilton, *supra* note 2.

312. *See supra* Part III.

313. *See supra* Part IV.C.

must be sued as the defendants in every case. If a tribe asserted its sovereignty affirmatively by bringing suit against a government body, the tribe would likely lose its case for lack of standing. The judiciary should recognize that under the current precedent, tribes are encouraged to take drastic measures to assert their sovereignty, such as clearing land for a casino as in *Shinnecock*,[314] in order to expedite their federal acknowledgment decision.

Every day courts make determinations based on complicated fact patterns, applying voluminous records to established case law. Yet, when it comes to American Indian determinations, many courts decide that the record is too complex to make an informed decision. The judiciary should look to the decisions that were made prior to the formation of the FAP in 1978, and it should embrace established precedent and congressional findings allowing courts to settle federal acknowledgment claims. Tribes like the Nanticoke Lenni-Lenape, who clearly fit the common law defintion of "a tribe" by *Montoya* but have been waiting for federal acknowledgment since 1982, would greatly benefit from a more active judiciary.[315]

Courts should also acknowledge and overturn precedent that was established at a time when American Indians were considered enemy combatants of the young America. Doctrines such as Marshall's discovery doctrine or the "political question" doctrine have no place in current American Indian law. These harmful and outdated policies hamper the FAP for American Indians and have been denounced by other nations in the United Nations Declaration on the Rights of Indigenous Peoples.

The Indian Wars have not ceased. Many tribes have taken steps to educate themselves on the legal process and the laws of agency delay. These tribes are working to fix an incomplete loom by replacing broken threads in an unfinished design by streamlining the flawed federal acknowledgment system. As these groups wait generations for their federal acknowledgment petitions, they are also learning how to improve the process. Through education, unification, and determination—American Indians will continue to fight to complete the unfinished loom.

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314. *See supra* Part III.D.

315. *See supra* Part IV.A.