Committee on Natural Resources Hearing on H.R. 5023

Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act ("*RESPECT Act*")
July 28, 2010

Statement of Robert A. Williams, Jr.
Professor of Law and Director of the Indigenous Peoples Law and Policy Program
The University of Arizona Rogers College of Law

Good Morning Chairman Rahall and members of the Committee, and thank you for this opportunity to testify on H. R. 5023, "*Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act*" ("*the RESPECT Act*"). As Director of the Indigenous Peoples Law and Policy (IPLP) Program at the University of Arizona, I have worked with American Indian tribes and their leaders on issues of tribal self-governance, community and economic development and protection of tribal treaty rights for thirty years. As a law professor and legal scholar, my teaching and research have focused on the legal history of the Federal-tribal relationship, dating back to the Founding era of the United States. In my testimony this morning, I hope to show that the type of effective, agency-wide consultation process that would be enacted into law by passage of H.R. 5023, the RESPECT Act, is something that Indian tribes and their leaders have been seeking in their government-to-government relationship with the United States for a very long time.

This landmark legislation would establish for the first time in our nation's history clear and precise procedures for effective consultation and coordination by all Federal agencies regarding their activities that impact tribal lands and interests. Just as important, and as I hope to show by my testimony, passage of this legislation would restore Congress to its rightful, specified role intended by the Framers of our Constitution as the coordinate branch of our national government assigned with the primary responsibility for managing Indian affairs.

History shows that Indian tribes have been seeking effective consultations with the Federal Government on matters of vital concern to their lands and interests going back to the time of the Revolutionary War. The Founding Fathers who negotiated and signed the United States' very first Indian treaties recognized and acted upon the principle that meaningful consultation with tribes was not only a wise and prudent approach to Indian policy; it was a basic right belonging to all self-governing peoples, and that included Indians. The Founders, recall, had just fought their war for independence from Great Britain over grievances mainly arising from King George III's failure to adequately consult with them on issues of taxation, government regulations, quartering of soldiers, and other rights they regarded as basic and inalienable. The Founders' own experiences and views on consensual government convinced them of the need for effective consultations, on-going communications, frequent inter-actions and close coordination with the Indian tribes of the United States. Let me add that all of these consultative processes are expressly encouraged and supported by the RESPECT Act.

The wisdom and example of the Founders are both highly instructive in recognizing how the right to effective consultation is part of the very fabric of the government-to-government relationship and the trust responsibility growing out of that relationship that has existed between Indian tribes and the United States since the first days of the Republic. The Founders' earliest legislative acts and policies in the field of Indian affairs explicitly recognized the basic right to consultation belonging to Indian tribes in their dealings with the Federal Government. Congress' role as the primary policy-making branch of government with respect to the Federal Government's duty of consultation with tribes, as well, is clearly recognized and embodied in the text of the Constitution.

As Chief Justice John Marshall, a leading member of the Founding Generation who helped to secure Virginia's ratification of the Constitution, emphasized in the leading Indian law case of *Worcester v. Georgia,* 31 U.S. 515 (1832); "That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes.* These powers comprehend all that is required for the regulation of our intercourse with the Indians." Given this clear constitutional mandate and the Framers' clearly stated intentions as to which branch of the Federal Government was primarily responsible for regulating this country's government-to-government relations with Indian tribes, the Founding Fathers would not only approve of H.R. 5023; they would want to know what took Congress so long to do it!

The Federal Government's early Indian policies closely followed British colonial-era precedents, which placed Indian affairs and the negotiation of treaties under the sovereign authority of the Crown. Under this authority, close consultation and coordination between tribes and the Crown's colonial representatives and agents were commonplace and customary. Treaties and agreements were negotiated after extensive discussions with tribal leaders. The chiefs of the tribe would meet with colonial officials in their own villages or travel personally to Richmond, Philadelphia, Albany, Boston and other colonial capitals to engage in extensive consultations, voice their grievances, and discuss important issues such as regulation of trade and military alliances. As the respected historian, Alden T. Vaughan, has documented in his book, *Transatlantic Encounters: American Indians in Britain, 1500-1776* (2006), it was not uncommon, as well, for tribal leaders to travel to England to meet personally with the King in order to make their feelings, wishes and grievances known to the government. History records a number of instances where the King's ministers and representatives would be instructed and even admonished in the strongest of terms to accommodate tribal requests and address the concerns that were voiced during these formal consultation sessions.

The Founders were not only familiar with this long-established history and custom of close and meaningful consultation with Indian tribes, many of them had been active participants in the treaty negotiations, talks and embassies of the colonial period. George Washington, Benjamin Franklin, and James Wilson, for example, were all signers of the Declaration of Independence and also major participants in the Constitutional Convention held in Philadelphia

in 1787. They provide the most prominent examples of noted members of the Founding Generation who helped to frame the Constitution and who had extensive experience in dealing with Indian tribes according to this tradition of close and meaningful consultation that had developed in the colonies prior to the Revolutionary War.

Throughout the Revolutionary War period, the Founders made it a point to engage in effective and meaningful consultations with the tribes whose support was vital to the success of their war efforts against the British. For example, the first Indian treaty negotiated by the United States was in 1778 with the Delaware Nation. That historic agreement provided for the Delawares and other friendly tribes that might join them "to form a state whereof the Delaware nation shall be the head, and have representation in Congress." It would be hard to imagine a more explicit example of the Founders' recognition of a right to consultation belonging to Indian tribes than this offer to the Delawares of a representative voice in the Congress of the United States.

In the 1785 Treaty of Hopewell with the Cherokees, one of the first treaties ratified by Congress following the Revolutionary War, the tribe's right to effective consultation was secured by Article XII; "That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress." It is worth noting that the most prominent member of the congressionally appointed negotiating team for this treaty was Benjamin Hawkins. His resume as a member of the Founding Generation includes his service as a colonel on George Washington's staff in the Continental Army. Elected to the North Carolina House of Representatives in 1778, he was chosen as a delegate to the North Carolina convention that ratified the United States Constitution.

It is also worth noting that the same basic offer to the Cherokees of sending a delegate to Congress was renewed by the United States half a century later in 1835, in the Treaty of New Echota. The important point to recognize is that the right of consultation belonging to Indian tribes was well-established at the founding of our nation, and can be found embraced as precedent by the United States in the early decades of our national experience.

Under the authority of the new Constitution ratified in 1789, President George Washington and other leading figures of the Founding Generation continued to recognize and act upon the basic right of consultation belonging to the tribes as the best policy for guaranteeing good relations, peace and amity under the treaty relationship. As Father Francis Paul Prucha, the dean of American historians when it comes to early United States Indian policy, has documented in *American Indian Treaties: The History of a Political Anomaly* (1994), tribal delegations and embassies frequently visited the nation's capital to meet with the "Great Father" (several of the tribes' term of formal greeting for the President of the United States). Federal Indian agents and appointed treaty negotiators in the field assured a steady flow of communications and exchange of information with the tribes, and Congress closely monitored these consultations and negotiations in the years immediately following ratification of the Constitution.

The first major piece of legislation passed by Congress under the new Constitution, for example, was the 1790 Trade and Intercourse Act, a law that is still on the books today. It would be difficult to cite a more convincing example of the Framers' intent with respect to the importance of the right to consultation belonging to Indian tribes under our Constitution than that provided by President George Washington's talk to the chiefs and counselors of the Seneca Nation in 1790, shortly after passage of that historic Act. The Senecas and their chief, Cornplanter, had come to speak with the President of the United States personally about the threats they perceived to their rights and interest in their lands, guaranteed by the Treaty of Fort Stanwix negotiated with the Seneca Nation by the United States immediately following the Revolutionary War. The mutual exchange of views, the evidence of close listening by the President, and the utmost respect shown for the Seneca Indians as human beings entitled to be meaningfully consulted by the President of the United States is instructive of the Founding Fathers' own example when it comes to this country's early dealings with Indian tribes.

> I have received your Speech with satisfaction, as a proof of your confidence in the justice of the United States, and I have attentively examined the several objects which you have laid before me, whether delivered by your Chiefs at Tioga point in the last month to Colonel Pickering, or laid before me in the present month by the Cornplanter and the other Seneca Chiefs now in Philadelphia. …
>
> Here then is the security for the remainder of your lands. No State nor person can purchase your lands, unless at some public treaty held under the authority of the United States. The general government will never consent to your being defrauded. But it will protect you in all your just rights."

Unfortunately and tragically, the wisdom and experience of President Washington and his Founding Generation respecting the basic right of effective and meaningful consultation belonging to Indian tribes on important matters affecting their lands and interests was too often ignored or forgotten in our nation's subsequent history. Congress, the Executive Branch and the nation itself have been less than consistent in listening seriously and responsively to tribal views and concerns and showing respect for this founding principle of our democratic, consensual form of government.

Indian tribes are still plagued today, for instance, by the problems of fractionated land interests, checker-boarded reservations, and the loss of billions of dollars in lease revenues under the failed laws and policies implemented by the Allotment Acts of the late 19th century. The Allotment Acts were passed over strenuous tribal objections and resistance and without any meaningful form of tribal consultation. The Termination policy of the 1950s provides another example of the fateful consequences of the Federal Government's failures to adequately consult with tribes. Following World War II, again over significant tribal objections and little in the way of meaningful efforts at consultation, Congress enacted the Termination policy and accompanying legislation that ended the federal trust relationship with dozens of tribes. Termination was strongly resisted by tribes, fought, and finally reversed after being recognized

as a dismal failure by Congress and the Executive Branch within a decade of its attempted implementation. Many tribes that were restored to the federal-tribal trust relationship following their termination are still struggling with the long-term effects and problems caused by that failed policy.

The lessons of our history are clear, as I have tried to show in my brief testimony. As Chairman Rahall stated in 2008 in introducing legislation that was similar to this present bill, but which only sought to require specified Federal Agencies to establish an effective and accountable consultation process with Indian tribes; "Throughout history when Indian policy has been made without tribal input, the results have been failure after failure. When Indian tribes are consulted and a part of the process up front, the results are successful policies." I couldn't agree more.

It is significant that in more recent decades, Congress, acting on the lessons of the past, has enacted several important laws that require varying levels of consultation with tribes on specific issues and agency actions. The most significant of these include:

- The American Indian Religious Freedom Act (AIRFA) (16 U.S.C. 1996), which establishes the policy of the federal government "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise" their traditional religions and spiritual beliefs;

- The Archeological Resources Protection Act of 1979. (ARPA) (16 U.S.C. 470aa-mm), which requires federal agencies to consult with tribal authorities before permitting archeological excavations on tribal lands (16 U.S.C. 470cc(c));

- The National Historic Preservation Act (NHPA) (16 U.S.C. 470 et seq.), which requires Federal agencies to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to sites covered under section 106 of the Act;

- The Native American Graves Protection and Repatriation Act (25 U.S.C. 3001, et. seq.); which requires consultations with Indian tribes and traditional religious leaders and regarding the treatment and disposition of specific kinds of human remains, funerary objects, sacred objects and other items.

A number of Federal agencies in recent years have complimented these statutory requirements with specific regulations requiring consultation with tribes. Important examples of such regulations include:

- The Native American Graves Protection and Repatriation Act (NAGPRA) Implementing Regulations (43 CFR 10);
- The National Environmental Policy Act (NEPA) Implementing Regulations 40 CFR Part 1500, requiring agencies to contact Indian tribes and provide them with opportunities to participate at various stages in the preparation of an environmental assessment (EA) or environmental impact statement (EIS);

- National Historic Preservation Act (NHPA) Regulations Implementing Section 106 (36 CFR Part 800), requiring consultation with Indian tribes throughout the historic preservation review process. Federal agencies are required to consult with Indian tribes on a government-to-government basis, in a manner that is respectful of tribal sovereignty. The regulations require federal agencies to acknowledge the special expertise of Indian tribes in determining which historic properties are of religious and cultural significance to them.

In addition to these important legislative and regulatory initiatives and reforms, Executive Orders and Memoranda requiring consultation with tribes on a government-wide basis have been issued by recent Presidential Administrations. Notable examples include:

- EO 13175: Consultation and Coordination with Indian Tribal Governments (Nov.6, 2000)
- EO 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (February 11, 1994).

Most recently, President Obama's "Consultation and Coordination with Tribal Governments" policy requires that Federal agencies have an accountable process for meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. The new Administration policy also requires a written statement by the agencies as to why they did not follow recommendations that may have been proposed or suggested by the concerned tribe.

As the current United States Ambassador to the United Nations, Dr. Susan Elizabeth Rice, recently stated; "[T]he level of tribal consultation is now at historic levels-marking a new era in the United States' relationship with tribal governments." But this statement relates only part of the story that tribal leaders tell. As the testimony of tribal leaders before this Committee on Chairman Rahall's 2008 bill, the *Consultation and Coordination With Indian Tribal Governments Act* (H.R. 5608), demonstrated, and as my own experience in working with and listening to tribes served by the IPLP Program in Arizona and throughout the United States confirms, the levels of consultation and coordination between tribes and the myriad number of Federal Agencies they must deal with on numerous types of issues and concerns are highly inconsistent across agencies, departments and programs.

In some cases, as tribal leaders have testified, consultation is non-existent, or simply a *pro-forma* exercise in box-checking. "Yes we consulted with you," tribes are told, but only after the decision had been effectively made, and certainly without *listening* to tribal concerns. In point of fact, the goal of institutionalizing meaningful and effective consultation with tribes by all agencies of the Federal Government is far from being achieved. The key elements missing from the equation, as tribal leaders have consistently explained, are *accountability* and *definite and certain procedures* applying to all the agencies that make decisions affecting tribal rights and interests under the Federal Government's trust responsibility.

This is why passage of H.R. 5023, The RESPECT Act, is so important, timely and necessary. The bill restores Congress' historic role, established at our nation's founding in the Constitution, as the coordinate branch of our system of government with primary responsibility

for the management of Indian affairs with the Federal Government. The RESPECT Act expresses the sense of Congress that consultation with Indian tribes constitutes more than simply notifying an Indian tribe about a planned undertaking that some agency bureaucrats have already made up their minds about, regardless of what the tribes might have to say. Under H.R. 5023, every Federal agency, as required by act of Congress, will be accountable for establishing a process of consultation that seeks out, seriously discusses, and meaningfully considers the views of tribes, and, where feasible, seeks agreement with them regarding proposed activities and other matters that affect tribal lands and interest. Most significantly in terms of ensuring accountability and follow-through, the RESPECT Act puts the force of law behind what had previously been left to agency discretion under the recent Executive Orders I've mentioned. Under this legislation, for the first time, Indian tribes would be permitted to bring a civil action in a U.S. district court if the tribe believes that the requirements of this Act have not been met.

In my own view, the right to judicial review included in this legislation represents the most important and indispensable element of H.R. 5021. Agencies like the Department of Health and Human Services, for example, have mandated that all its operating divisions develop their own policies on tribal consultation, but, as tribal leaders have testified, many failed to follow-up in a timely manner on these mandates. The RESPECT Act will require them to follow-up, with definite set guidelines to follow. Executive Orders and Memorandums, as tribes know, do not carry the full force of the law. This bill will have that force behind it. By passing this legislation, Congress will reassert its constitutionally specified role of primary responsibility for management and oversight of the government-to-government relationship between tribes and the Federal Government under the trust responsibility.

This bill will be highly cost-effective. Tribal leaders have testified that where agency consultation has been done in an effective manner in the past, citing the example of the Indian Health Service's consultation process on the Indian Health Care Act and its special diabetes program for Indians, the outcomes have been successful in terms of good public policy and improved health care delivery in Indian country. The RESPECT Act will institutionalize these types of best practices throughout the Federal Government.

This bill will also improve and actually work to speed-up in many instances the regulatory process as it affects Indian tribes and their lands. Tribal leaders have said repeatedly that the failure to provide proper consultation is what really leads to delay in implementing new regulations. Oftentimes they feel they have no recourse except to bring costly and time-consuming legal challenges to agency actions that might otherwise be avoided under an effective consultation process. The RESPECT Act will work to achieve significant cost-savings for the government and tribes in bringing needed legislative and administrative reforms to Indian country.

Let me point to what Justice Louis Brandeis memorably once called "the laboratory of the states" to show that it is not only possible, but good public policy to implement this type of comprehensive, government-wide approach to tribal consultation. New Mexico, a state with a large number of federally recognized Indian tribes, passed a bill in 2009 designed to promote cooperation between state government and Indian tribes. The measure requires every cabinet-level state agency to designate a tribal liaison to report directly to the head of the agency. It also

orders state agencies to develop policies promoting better communication and culturally appropriate delivery of services. One of the most respected tribal leaders in Indian country, Joe Garcia, Chairman of the All Indian Pueblo Council, stated that the signing of this bill marked a new era in state-tribal relations, and put New Mexico on the map as a guiding light for the rest of the country, including Congress, to follow.

Let me close by noting that there is an important opportunity for the United States and this Congress, in particular, to not only follow, but lead here as well. I recently returned from the July 2010 meeting of the United Nations Expert Mechanism on the Rights of Indigenous Peoples, held in Geneva. The Expert Mechanism provides expertise and guidance on the rights of indigenous peoples to the United Nations Human Rights Council. At its July meeting, the UN Expert Mechanism reviewed its "*Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making*." The report takes special note of the critical importance of promoting "the full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspects of their lives, considering the principle of free, prior and informed consent." The report can be found at *Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples Third Session, Progress report on the study on indigenous peoples and the right to participate in decision-making*, A/HRC/EMRIP/2010/2, 17 May 2010, at para. 1.

Throughout much of the twentieth century, the United States of America was at the forefront of many of the most important advances in the protection and promotion of indigenous peoples' human rights, achieved through its domestic Indian legislation and policies promoting tribal self-determination. Without question, it has been Congress that has been primarily responsible for this influential leadership role and its salutary effects on the development of customary international law norms and international human rights standard-setting activities applied to indigenous peoples around the world. Landmark congressional legislation passed during the latter part of the twentieth century such the American Indian Religious Freedom Act, the Indian Self-Determination and Education Assistance Act, and the Indian Child Welfare Act, are routinely cited within the United Nations and Organization of American States human rights systems as worthy examples of best practices that other countries should strive to emulate. Without question, congressional passage of H.R. 5023, the RESPECT Act, would reassert the United States' global leadership role in the protection and promotion of indigenous peoples' fundamental political freedoms and human rights in the twenty-first century.

In closing, I would emphasize that H.R. 5023 does not in any way represent some sort of radical departure from the past practices and precedents of the United States and this Congress in its dealings with Indian tribes. Rather, passage of this bill would represent a long-overdue return to the true principles upon which this nation was founded. As I've tried to show in my testimony, the Framers of our Constitution clearly intended that the Federal Government respect the right to meaningful consultation belonging to Indian tribes in their dealings with the United States. The

RESPECT Act will not only honor those founding intentions; it will, at long last, enact them into the law of the land.

Thank you and I am happy to answer any questions the Committee would like to ask.