Testimony of
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for the Town of North Stonington, Connecticut
Before the Subcommittee on Indian, Insular and
Alaska Native Affairs of the House Committee on Natural Resources

Hearing on H.R. 3764,
the "Tribal Recognition Act of 2015"

December 8, 2015

Mr. Chairman, Ranking Member Ruiz, and members of the Subcommittee, this testimony is submitted on behalf of the Town of North Stonington, Connecticut. I am Nicholas H. Mullane II, a Selectman for the Town, and I am accompanied by First Selectman Shawn P. Murphy. Together with our neighbors Ledyard and Preston, our Town of North Stonington has experienced virtually all of the problems addressed in H.R. 3764, the bill that is before this Subcommittee seeking to improve the tribal acknowledgment process. We greatly appreciate the opportunity to share with you the lessons that we have learned.

To set the stage, our three Towns are located in rural southeastern Connecticut and serve as the host communities for the Foxwoods Resort and the Mashantucket Pequot Reservation. We are located a few miles from the Mohegan Sun Resort and that Tribe's Reservation. The combined population of our three towns, approximately 25,000, is substantially less than the attendance at Foxwoods on an average day. We have participated extensively and at great expense in the review of two acknowledgment petitions backed by wealthy gaming investors. The history of our experiences is a perfect case study for this bill.

While we have had disputes with the Mashantucket Pequot Tribe over the years on issues such as off-reservation trust land expansion, taxation, and land use controls, we are proud of our track record of working constructively together for the mutual benefit of our local and tribal governments.

In 1983, Congress recognized the Mashantucket Pequot Tribe by statute without the benefit of factual review by the Department of the Interior. The Reagan Administration originally opposed that law, on the grounds that it would bypass the administrative acknowledgment process. Although the Administration ultimately supported the law based on the unique circumstances involved, the Department of the Interior testified that it could not categorically state that the Mashantucket Pequot petitioner would meet the criteria for Federal acknowledgment, and it warned that:

> the Department does not believe it can support any future legislation which would legislatively recognize a group of Indian descendants as a tribe *unless it has had an adequate opportunity to review the historical and current factual bases for the group's claim to tribal status through the Bureau's Federal Acknowledgement Office*. Such a review is necessary not only to ensure the equitable and uniform application of the special laws

> relating to Indians but also is mandated by fundamental fairness to those other Indian groups which have labored diligently to compile a comprehensive record in support of their claim to tribal status and waited patiently in turn for their petitions' active consideration.[1]

While we do not comment on whether the Tribe would have met the BIA acknowledgment criteria, we note that, ever since enactment of this law, questions have been raised about the political motivations of the Congressional process that led to the Tribe's recognition and establishment of its Reservation.

In 1998, our Towns began their role as interested parties in Interior's review of the acknowledgment process conducted under the Part 83 rules for the Eastern Pequot and Paucatuck Eastern Pequot groups. We saw a result-oriented Assistant Secretary take control of that review and turn what BIA technical staff saw as negative findings for both groups into a positive finding. The Assistant Secretary at that time, Kevin Gover, did so by means of two politically-motivated maneuvers -- 1) forcing the two groups into a single petitioner to cure their individual deficiencies under the criteria, 2) and ruling that State recognition equated with federal recognition. We ultimately reversed this highly political result thanks to the independent legal review conducted by the Interior Board of Indian Appeals (IBIA), which rejected the incorrect State recognition theory in 2005. Interior issued a negative determination on the combined Eastern Pequot petition in 2006. Subsequently, the Interior Inspector General issued a scathing review of the politicized decisions of Interior's acknowledgment process during that era.

Next, while we did not participate directly, we witnessed the process used to recognize the Mohegan Tribe. In that case, Interior conducted a review under Part 83 and, without political interference, issued a positive finding in 1994. Congress then effectively ratified that finding in the Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, which also approved the negotiated agreements between the Tribe and the State and the Town of Montville. There has been no subsequent litigation or controversy.

Finally, we participated recently in the rulemaking process to revise Part 83. Through this new rule, Interior has greatly weakened the criteria for acknowledgment, limited the participation rights of third parties like our Towns, eliminated the objective role of the IBIA, and provided petitioner groups with clear procedural advantages. The new rules even sought to reinstate the incorrect and politically-motivated state recognition rule and to allow previously denied groups, like the Eastern Pequots, to reapply. Fortunately, thanks to our diligent Congressional delegation, our Governor, and the oversight of this Committee, Interior dropped some of the most seriously flawed elements of the proposed Part 83 rules. But the end result is still very troubling and shows the effect of a partisan and political agenda at Interior to facilitate the recognition of new tribes.

These experiences point to the wisdom of H.R. 3764. This bill avoids the defects of tribal acknowledgment left solely to Congress, without the benefit of expert, detailed, historical and

[1] Sen. Rpt. 98-222, at 20 (Sept. 14, 1983) (Statement of John W. Fritz, Deputy Assistant Secretary for Indian Affairs, Department of the Interior) (emphasis added).

factual findings under the Part 83 criteria. It also avoids the pitfalls of leaving acknowledgment solely to Interior, where politically-motivated decision-makers not limited by any statutory standards can change the rules of the game to produce the desired result based on partisanship and politics.

While we believe some important changes should be made to H.R. 3764, it is a vast improvement over the status quo in four ways.

First, H.R. 3764 is based on the Constitutional principle that Congress has plenary authority over Indian affairs and has never delegated the power to acknowledge Tribes to Interior. The bill keeps Congress as the ultimate decision-maker, in keeping with the Legislative Branch's responsibilities, duties, and authority over Indian affairs.

Second, H.R. 3764 solves the problem that there are no statutory standards governing acknowledgment decisions. Interior is operating in an open field where it can make up whatever rules it wants, for partisan and political reasons, as demonstrated by the recently concluded rulemaking. Our Towns previously submitted extensive comments to the Department's proposed rulemaking, detailing numerous objections and recommendations to the proposed revisions, most of which remained unaddressed in the final rulemaking. Those objections remain relevant and the recommendations could easily be adapted to the process envisioned in H.R. 3764. Our comments included a detailed legal analysis of why the Secretary lacks the legal authority to recognize tribes under federal law, and that analysis is attached to our written testimony.

Third, H.R. 3764 solves the problem of the overly permissive standards for acknowledgment now in effect by returning to the time-tested and objective criteria that were in effect in 1994.

Fourth, it solves the problem of Congress acting without the benefit of expert technical advice and findings, by giving that role to Interior to make recommendations after the review of the evidence under appropriate criteria.

In short, H.R.3764 is based on firm Constitutional principles and relies on checks and balances that avoid the problems presented by a process conducted solely by Congress, or solely by Interior.

We commend the Committee for this bill, but we also recommend some important changes.

Our main recommendation is that H.R. 3764 could be improved by incorporating at least some of the procedural requirements from the previous regulations, especially the full participation of interested third parties and independent review by the IBIA. Our concern is that, without the discipline imposed by review of final agency action of tribal group petitions by an independent Board of Appeals, the Department's reports and recommendations to Congress could easily become mere rubberstamps. We have seen ideologically-motivated Assistant Secretaries bend and break the rules to achieve pre-determined outcomes based on partisanship and politics, even knowing they were subject to judicial scrutiny. It is not clear that a report and recommendation, even if required by statute, would be subject to judicial review, but full participation by interested third parties, and review by the IBIA, would help ensure that the

expert judgment of the historians, genealogists, and other professionals of the Office of Federal Acknowledgment would not be simply shunted aside by improper political considerations at the Assistant Secretary level.

We also suggest that one year may not be sufficient for the Office of Federal Acknowledgment to complete a detailed examination of the historical record, which in some cases will necessarily reach as far back as the earliest colonial era. Our experience is that the review process can be lengthy and burdensome, for both petitioners and interested third parties such as our Town, but that ultimately, if the process is to arrive at the truth, there is simply no substitute for a thorough, detailed, and rigorous examination of the evidence. A two-year deadline should be more than sufficient to allow the Department to complete its work, and such a deadline would address the primary reason the process under the previous acknowledgment regulations was seen by some as "broken."

To minimize ongoing uncertainty and to reach finality in this important process, we also suggest that reasonable deadlines to submit letters of intent and documented petitions are necessary so that all petitioner groups can be identified and resources budgeted accordingly, to the benefit of all interested parties, including federally-recognized tribes. We also support the new requirement in the regulations that all materials be made public on the Department's website. Transparency is essential in order to facilitate the participation of interested third parties, and we appreciate the new regulations in this one respect.

Finally, we emphasize that the requirement that Congress *affirmatively* recognize Indian tribes is essential. Any proposal or amendment that would allow the Department's recommendation to take effect after a specified period of time would be a tremendous step backwards, even compared to the Department's new regulations. Indeed, such a provision would undermine the benefits of this bill, and magnify the concern that the Department could merely rubberstamp affirmative recommendations for ideological and political reasons. The thrust of H.R. 3764 must be preserved: the Department should not retain the ability to make unilateral acknowledgment decisions that become effective by default. The bill as written appropriately places on Congress the responsibility and duty to acknowledge Indian tribes by an Act of Congress, not by default.

In closing, I refer you back to the Interior comment on the Mashantucket Pequot Indian Claims Settlement Act of 1983. In that statement, Interior did not object to Congressional recognition, but only to taking such action without a technical review of a petitioner's qualifications for tribal status. That is what H.R. 3764 calls for, and this two-tier process is exactly what is needed to comply with the Constitution and reduce the potential for politically motivated acknowledgment decisions. Even if some tribal advocates are correct that Interior has legal authority to recognize the tribes, H.R. 3764 is a vastly approved process that should be enacted.

Tribal acknowledgment is very important business, not only for petitioner groups, but also for states, local governments, existing Tribes, and all American citizens. Thank you for your serious effort to ensure objective and fair tribal acknowledgment decisions that abide by the rule of law. And thank you for the opportunity to submit this testimony.

ATTACHMENT

Excerpts of comments submitted by the Towns of Ledyard, North Stonington, and Preston, Connecticut on the Proposed Regulations on Federal Acknowledgment of American Indian Tribes, 79 Fed. Reg. 30,766 (May 29, 2014).

The Proposed Regulations Would Confirm That There Has Been No Valid Delegation of Acknowledgment Authority to the Secretary

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The essence of this argument is that Congress may delegate its legislative power to the Executive Branch, but only when the statute involved specifies the standards that the agency receiving the delegated power must meet. … Over the course of the acknowledgment program since 1978, the issue of the Secretary's authority has not arisen in a serious legal challenge because DOI has developed and consistently adhered to a reasonably rigorous set of acknowledgment criteria and procedures. The proposed regulations, however, cast virtually all of that precedent aside and, in doing so, reveal the potentially disastrous consequences of vesting unbridled discretion for such an important federal government determination in the Executive Branch. The current proposal invites legal challenges and confirms the underlying constitutional defect of allowing an agency subcabinet level political appointee like the AS-IA to wield great power (*i.e.*, establish a government-to-government relationship between the United States and tribes with sovereign status) without any expression delegation of power to do so or guiding principles or standards set by Congress. As discussed in this section, the U.S. Constitution prohibits implementation of the proposed regulations, and any subsequent determinations based upon them would be invalid.

Constitutional Standard

Article I, section 1, of the U.S. Constitution vests "All legislative Powers" in the "Congress of the United States." For that reason, as the U.S. Supreme Court noted in *Chrysler Corporation v. Brown*, 441 U.S. 281, 302 (1979): "[T]he exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *See also accord Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986) (reiterating that "[a]n agency may not confer power on itself"); *Lyng v. Payne*, 476 U.S. 926, 937 (1986) (reiterating that "an agency's power is no greater than that delegated to it by Congress").

The preamble in the final acknowledgment rule that was promulgated in 1978 contains the following provision that identifies the statutes that purportedly delegated the Deputy Assistant Secretary of the Interior for Indian Affairs authority to promulgate the rule: "AUTHORITY: 5 U.S.C. 301; and sections 463 and 465 of the revised statutes 25 U.S.C. 2 and 9; and 230 DM [Department of the Interior Manual] 1 and 2." *See* 43 Fed. Reg. 39362 (1978). However, none of those statutes grants such authority, and the Washburn Proposal tests the question of whether the quasi-legislative act of promulgating the Part 83 regulations passes Constitutional muster.

Congress may only delegate a portion of its legislative power to the Executive Branch if the text of the statute delegating that authority sets out an "intelligible principle to which the person or

body authorized to [exercise the delegated authority] is directed to conform . . . ." *J. W. Hampton, Jr. & Company v. United States*, 276 U.S. 394, 409 (1928). The U.S. Supreme Court elaborated on this standard in *Yakus v. United States*, 321 U.S. 414, 426 (1944), and stated that a statute that delegates legislative authority is invalid if its text contains "an absence of standards for the guidance of [Executive Branch action], so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed . . . ." *See also AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *In re NSA Telecomms. Record Litig.*, 671 F.3d 881 (9th Cir. 2011).

The U.S. Supreme Court invoked the nondelegation doctrine, as articulated in *J.W. Hampton*, in *Panama Refining Company v. Ryan* to strike down a provision of the National Industrial Act. 293 U.S. 388 (1934). Section 9(c) of Title I of the National Industrial Act delegated authority to prohibit the transportation of petroleum and petroleum products in interstate and foreign commerce to the President. Section 9(c) stated:

> The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State."

Id. at 407.

This delegation language sets minimal limits on the President's authority to prohibit the transportation of petroleum products. The Court found that, in enacting section 9(c), Congress "has declared no policy, has established no standard, has laid down no rule" for the President's exercise of the legislative power that the statute delegated, in violation of the nondelegation doctrine. *Id*. at 430.

Similar to the delegation provisions at issue in *Panama Refining*, the delegation provisions that the Department is relying on to issue the revised Part 83 regulations, described in more detail below, do not contain any standards constraining the legislative powers that Congress purportedly conferred upon the Department The delegation provisions that the Department is relying on are very broad and do not articulate any Congressional policy, standards, or rules that Interior must follow when acting under its delegated authority. Under the standards set forth in *J.W. Hampton* and *Yakus*, such a delegation violates the U.S. Constitution.

While the Federal courts have upheld broad delegations of legislative power that contain minimal standards and principles to guide the Executive Branch in exercising those powers, it is unlikely that a court would uphold a delegation of legislative power that contained *no* standards or principles to guide the Executive Branch. As discussed below, the delegation statutes that the Department is relying on as the basis for its authority to issue the Part 83 regulations impose *no* standards or principles to guide Interior in exercising this authority. As such, the unconstrained delegation of legislative power to the Department violates the nondelegation doctrine and the U.S. Constitution.

Statutory Authority Relied on By BIA for The Acknowledgment Process

As described below, the assertion that Congress intended 5 U.S.C. § 301 and 25 U.S.C. § 2 and § 9 to convey to the Secretary of the Interior (Secretary) the legislative authority that the Indian Commerce Clause grants to Congress to create new federally recognized tribes - *i.e.*, tribes in a political sense - is incorrect.[2]

5 U.S.C. § 301

The relevant provision of 5 U.S.C. § 301, which Congress enacted in 1966 - *see* Pub. L. No. 89-554, 80 Stat. 379 - provides:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

On its face, that statutory text does not delegate authority to the Secretary to acknowledge new federally recognized tribes in Congress's stead. In fact, this provision does not even mention Indians. And if Congress did intend the text to convey that legislative authority, the text contains "no standards for the guidance of [Executive Branch action], so that it would be possible in a proper proceeding [in which the Secretary by final agency action creates a new federally recognized tribe] to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 426. If this provision could serve as a Constitutionally-valid source of delegation, any agency could take any action without regard to Congressional limitations or standards.

25 U.S.C. § 2

Congress enacted 25 U.S.C. § 2 *182 years ago*. *See* ch. 174, sec. 1, 4 Stat. 564 (1832). As now codified, the text of the statute reads: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." If, in 1832, Congress intended that text to convey to the Commissioner of Indian Affairs (Commissioner) legislative authority to create new federally recognized tribes in Congress's stead, on its face the text contains no standards that control the Commissioner's exercise of that legislative authority.

[2] DOI sometimes relies upon the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 108 Stat. 4791, as proof that it has delegated authority for administrative recognition. The List Act does not serve as a source of delegation nor does it set any standards. Instead, Congress simply makes a finding that "Indian tribes presently may be recognized by Act of Congress: by the administrative procedures set forth in Part 83 of the Code of Federal Regulations; . . . or by a decision of a United States court." Pub. L. No. 103-454, § 103. In fact, the legislative history of the List Act takes issue with the authority of DOI to terminate tribes, noting that Congress "has never delegated that authority to the Department." H.R. Rep. 103-781, at 3 (1994). Recognizing the need for Congressional delegation to terminate, no such act has occurred to allow for acknowledgment of tribes either. Even if the List Act could be interpreted to be evidence of Congressional acquiescence in administrative acknowledgment, such acquiescence would at most apply to the regulations in effect at that time. Because the proposed regulations deviate significantly from those regulations, no acquiescence would be inferred from the Act.

In fact, however, Congress intended no such result. The circumstances existing in 1832 when Congress enacted this law confirm a very different intent.

In 1806 Congress created the office of Superintendent of Indian Trade inside the War Department to manage the Indian trading posts that Congress had authorized the President to operate on the frontier. *See* 2 Stat. 402 (1806). In 1816, President James Madison appointed Thomas McKenney as Superintendent. *See Herman J. Viola, Thomas L. McKenney, Architect of America's Early Indian Policy*: 1816-1830 4-5 (1974). In 1822, Congress enacted a statute that ordered the trading posts closed. *See* 3 Stat. 683 (1822). As a consequence, Superintendent McKenney no longer had any statutorily mandated duties. To fill the vacuum, in 1824 "Secretary of War [John C.] Calhoun, by his own order, and without special authorization from Congress, created in the War Department what he called the Bureau of Indian Affairs [BIA]. To head the office Calhoun appointed McKenney and assigned him two clerks as assistants . . . ." Francis P. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts*, 1790-1834 57 (1979).

Secretary Calhoun's decision to create the BIA may have been a sensible policy choice. But the Secretary's action was without congressional action. For that reason, with Secretary Calhoun's approval, in 1826 Thomas McKenney drafted a bill that he submitted to Congress and whose enactment would create the BIA. *Id.* 58-59. In 1832, Congress enacted the McKenney bill as ch. 174, sec. 1, 4 Stat. 564 (1832); today, 25 U.S.C. § 2.

By 1832 the Secretary of War was distributing annually more than $1 million in gratuities to Indians, operating 54 Indian schools, and as of 1830 had issued 98 licenses to traders doing business in Indian country. As Senator Hugh White of Tennessee, the chairman of the Committee on Indian Affairs, informed his colleagues when the bill that would be enacted as 25 U.S.C. § 2 reached the floor of the Senate, "To all these different branches the personal attention of the Secretary of War is now required. The creation, therefore, of such an officer [*i.e.*, the Commissioner of Indian Affairs] as is provided by the bill, be deemed to be indispensably necessary." *See* 8 Gales & Seaton's Register of Debates in Congress, at 988 (1832). Senator White's explanation in 1832 is the accurate description of the intent of Congress embodied in 25 U.S.C. § 2, and the extraordinary power of acknowledging the existence of Indian tribes in a government-to-government relationship with the United States is well outside the scope of that job description.

There is, therefore, no basis to conclude that, in 1832, Congress intended its enactment of 25 U.S.C. § 2 to delegate an employee of the War Department with unfettered authority to decide which groups would be designated as federally recognized tribes whose members henceforth would have a "government-to-government" relationship with the United States. That interpretation of Congress's intent stretches credulity past breaking.

25 U.S.C. § 9

Congress enacted 25 U.S.C. § 9 *180 years ago*. *See* ch. 162, sec. 17, 4 Stat. 738 (1834). As now codified, the text of the statute reads: "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." If, in 1834, Congress intended that text to

convey to the Commissioner legislative authority to recognize new federal tribes in Congress's stead, on its face the text contains no standards that control the Commissioner's exercise of that legislative authority.

Again, however, as with 25 U.S.C. § 2 and § 9, Congress intended no such result. The text of the statute only grants the President legislative authority to prescribe regulations to carry into effect the provisions of an "act relating to Indian affairs." It does not convey the authority to acknowledge Indian tribes, and it certainly does not prescribe any standards. Many Federal laws contain similar grants of rulemaking authority, but such power is conferred for purposes of carrying out the requirements of the contextual law, which serves as the standards to be applied. Section 9 has no such context, and can at best attach itself only to other Acts of Congress "relating to Indian Affairs." There is no Act of Congress on tribal acknowledgment; Congress has been silent on this subject. As a result, there are no standards to apply.

43 U.S.C. § 1457

In 1991, AS-IA Eddie Brown published for public comment a proposed rule whose promulgation would revise 25 C.F.R. Part 83 (as 25 C.F.R. 54.1 *et seq.* (1978), the original acknowledgment regulations, had been recodified) in a number of respects. *See* 56 Fed. Reg. 47320 (1991). As authority for the proposed rule, as had been the case in 1978, the rule cited 5 U.S.C. § 301 and 25 U.S.C. § § 2, 9. *See id.* 47324. However, in 1994 when AS-IA Ada Deer promulgated the final rule, *see* 59 Fed. Reg. 9280 (1994), without comment or explanation, she added 43 U.S.C. § 1457 to the list of authorities. *See id.* 9293.

The terms of 43 U.S.C. § 1457 charge the Secretary with responsibility for "the supervision of public business relating to" thirteen different subject areas. One of those subject areas is "Indians." That is the sum of the statute. Nothing in the text of 43 U.S.C. § 1457 delegates to the Secretary Congress's legislative authority to recognize new tribes under Federal law. If Congress did intend 43 U.S.C. § 1457 to delegate the Secretary that authority, the text does not contain any "intelligible principle" for the exercise of that authority with which the Secretary would have a nondiscretionary duty to comply.

Thus, as the preceding discussion confirms, Congress has never spoken on the tribal acknowledgment issue; it has not extended such power to the Secretary, and it has not articulated any standards on principles. As a result, the Washburn Proposal would be in direct violation of the Supreme Court's delegation doctrine.

The Department itself has acknowledged this problem, as it expressed in 1975 when the BIA's Chief of the Office of Tribal Relations informed the Huron Potawatomi Tribe:

> [F]ormer Secretary [of the Interior Rogers] Morton and Solicitor Kent Frizzell were not sufficiently convinced that the Secretary of the Interior does in fact have legal authority to extend recognition to Indian tribes absent clear Congressional action. Nor, even if such authority can be said to exist, does the law appear clear as to the applicable standards and procedures for recognition.

Letter from Leslie N. Gay, Jr., Chief, BIA Branch of Tribal Relations, to David Mackety, Huron Potawatomi Athens Indian Reservation (December 18, 1975).

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[O]n June 16, 1977, the Deputy Commissioner published for public comment a proposed rule whose promulgation would provide one year for Indian groups to petition the Secretary to acknowledge a group's status as a "federally recognized tribe" and for the Commissioner to approve or deny a petition, subject to review of that decision by the Secretary. *See* 42 Fed. Reg. 30647 (1977). On June 1, 1978 the AS-IA published, again for public comment, a revised version of the proposed rule whose text differed from the text of the original rule in various respects. *See* 43 Fed. Reg. 23743 (1978). … [3]

Two months after publication of the revised proposed rule, on August 10, 1978, the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs held a hearing on H.R. 13773 and related bills. *See Federal Recognition of Indian Tribes: Hearing on H.R. 13733 and Similar Bills Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. (1978).

One of the witnesses was Deputy AS-IA Rick Lavis who informed the Subcommittee that the Department opposed H.R. 13733 because "We believe the existing structure in the Bureau of Indian Affairs is competent and capable of carrying this [*i.e.*, the task of tribal recognition] out." *Id.* at 22. When Representative Teno Roncalio (D-WY), the chairman of the Subcommittee, asked, "You feel that you can make recognition for the tribes without statutory requirement of Congress?", Deputy Lavis answered: "We are operating on the assumption that the statutory authority already exists." *Id.*

When Chairman Roncalio then asked for a "quick citation" of that statutory authority, Deputy Lavis deferred to Scott Keep, an Assistant Solicitor, who responded: "Mr. Chairman, it is from a general interpretation of the various laws including the *Passamaquoddy* case … and also the Indian Reorganization Act and the way that has been implemented." Mr. Keep also informed the Chairman that "The Department also takes the position that sections such as 25 United States Code, sections 2 and 9, giving the Secretary and the Commissioner of Indian Affairs responsibility for Indian affairs gives him the authority to determine who is encompassed in that category." *Id.*

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Indeed, this very problem was noted as recently as the March 19, 2013 hearing on tribal acknowledgment in the House Subcommittee on Indian and Alaska Native Affairs. In that hearing, Chairman Don Young (R-AK) asked AS-IA Washburn where the Department had

[3] In addition, the 1977 proposal required a determination that "the petitioning group *has had* the status of a federally recognized Indian tribe and should continue to be dealt with as such by the United States." 42 Fed. Reg. 30647, 30648 (June 16, 1977) (emphasis added; proposed 25 C.F.R. § 54.8(a)). … Without any explanation, the second proposed rule in 1978 fundamentally changed this premise to an objective of "acknowledging the existence of those American Indian tribal groups which have maintained their political, ethnic and cultural integrity *despite the absence of any formal action by the Federal Government to acknowledge or implement a Federal relationship*." 43 Fed. Reg. at 23744 (emphasis added). The final rule in 1978 also did not include any explanation for this change of position or its legal basis.

received its authority to acknowledge tribes. He was given the same vague answer about general Indian responsibilities that has served as the Department's justification for Part 83 for 35 years.

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Case Law

Over the 36 years of the Federal acknowledgment program, the courts have often deferred to, or made reference to, the Department's role in acknowledging tribes under Federal law. Very few of these cases, however, have involved challenges to the Department's authority to take such action. And, of those cases, only one weakly-briefed and distinguishable case has addressed the delegation doctrine.

In a 2003 law review article, Solicitor's Office attorney and tribal acknowledgment expert Barbara Coen states, "[t]he United States Constitution, Article 1, Section 8, provides Congress with the power to regulate commerce with Indian tribes, and Congress delegated implementation of its statutes dealing with Indian affairs to the Department of the Interior. Pursuant to this statutory authority, the regulations governing the process were issued following notice and comment rulemaking under the Administrative Procedure Act (APA)." Barbara N. Coen, *The Role of Jurisdiction in the Quest for Sovereignty: Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 New. Eng. L. Rev. 491, 493 (2003). She asserts in a footnote that "[t]he Secretary of the Interior's authority to promulgate the regulations was upheld" in four cited cases. *Id.*, n.16. As discussed below, none of these cases confronts the delegation doctrine issue head on.

***James v. U.S. Department of Health and Human Services*, 824 F.2d 1132 (D.C. Cir. 1987)**

In this case, a faction of the Gay Head Wampanoag Tribe of Massachusetts brought suit against the Department seeking Federal recognition as a tribe. The Court rejected the tribal faction's petition and required it to exhaust administrative remedies provided by Part 83 before seeking judicial relief.

The Court acknowledged that the tribal faction was required to exhaust administrative remedies before seeking judicial relief "since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations." *Id.* at 1137. In making that statement, the Court cited 25 U.S.C. §§ 2, 9.

The Court also reasoned that "Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. Regulations establishing procedures for federal recognition of Indian tribes certainly come within the area of Indian affairs and relations." *Id.* at 1138. The Court never addressed the delegation doctrine, and this statement is, at most, mere dicta because in their amended complaint, and in the briefing at both the District and Circuit Courts, the plaintiff *did not challenge the validity of the regulations*. *See* Attachment 5. In fact, as made clear by their reply brief in the Court of Appeals, the plaintiffs accepted the 1978 regulations that defined the acknowledgment criteria; they simply argued "the 1978 process was intended to apply only to tribes which could not show prior federal

recognition." Reply Brief, at 4.[4] As a result, the decision in *James* has no bearing on the question of whether the Secretary has the delegated power to acknowledge tribes pursuant to intelligible principles.

***Miami Nation of Indians of Indiana, Inc. v. Babbit*, 887 F. Supp. 1158 (N.D. Ind. 1995)**

The Miami Nation of Indians in Indiana challenged the validity of the 1978 Federal acknowledgment regulations on the grounds that Congress did not delegate the authority to abrogate a treaty or terminate a previously recognized tribe. The Court examined whether, in promulgating the 1978 rules, the Department violated the limits that the APA places on Congressional delegations of authority to terminate tribes, not on whether the Department violated the limits that the Constitution places on such delegations of authority to grant acknowledgment.

Merely repeating the government's argument, the Court indicated that "[n]o statute explicitly authorized the Secretary of the Interior to promulgate regulations concerning the acknowledgment of Indian tribes" and noted that "the Secretary relied upon his general statutory authority contained in 25 U.S.C. §§ 2 and 9 when promulgating the acknowledgment regulations." *Id.* at 1163.

The Court also stated that '[a]lthough the Miamis assert that such authority is "tenuous," they do not contend that the Secretary is wholly unauthorized to promulgate any regulations concerning the acknowledgment of Indian tribes.' *Id.* at 1164. The Court cites the holding in *James* (discussed above) that upheld the Secretary's authority to promulgate the 1978 regulations under 25 U.S.C. §§ 2, 9. The Court in *Miami Nation*, like the court in *James*, did not confront the legal question whether Congress delegated the authority to acknowledge tribes under clear standards. Attachment 6.

***United Tribe of Shawnee Indians v. United States*, 253 F.3d 543 (10th Cir. 2001)**

The United Tribe of Shawnee Indians of Kansas brought action against the Department of the Interior and the Department of Defense seeking a declaration of its status as a federally recognized tribe and a declaration that a constructive trust in favor of the Tribe be placed on certain lands.

The Court's discussion focused on whether the Tribe's suit was barred by sovereign immunity and whether, if it was not barred by sovereign immunity, the Tribe was required to exhaust all administrative remedies before seeking judicial relief.

In its discussion of whether the *ultra vires* exception to the doctrine of sovereign immunity applied so as to allow the Tribe's claim to go forward, the Court noted that the doctrine only applies where the government officer *lacked* delegated power. *Id.* at 548. The Court rejected the *ultra vires* exception and found that the Secretary *did have* delegated power to decide the status of Indian tribes. *Id.* at 549. The Court stated, without elaborating, that the "BIA has been

[4] Later in their brief, plaintiffs stated they "are opposed to the federal acknowledgment process on limited grounds" not because it lacks underlying authority but "because they believe it does not and should not be applied to a tribe such as theirs which is already federally recognized." *Id.* at 10 (emphasis in original).

delegated the authority to determine whether recognized status should be accorded to previously unrecognized tribes." *Id.* at 549. As with the other cases, a claim was not made under the delegation doctrine, and the Court did not address the need for meaningful standards. Again, the plaintiff tribal group did not contest the Secretary's authority under Part 83; instead, it simply argued it had been previously recognized and did not need to comply with the acknowledgment rules. Attachment 7.

***Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213 (D. Haw. 2002)**

A group of Native Hawaiians brought a claim asking the Court to declare the Part 83 regulations unconstitutional because the regulations exclude Native Hawaiians from consideration for Federal acknowledgment as an Indian Tribe. The plaintiffs never challenged Part 83 on delegation grounds. Instead, they argued racial discrimination under the Fifth Amendment because they were precluded from applying for recognition as a result of the exclusion of Hawaii in 25 C.F.R. § 83.1. Attachment 8. The Court dismissed the Native Hawaiians' claim as a nonjusticiable political question.

The Court addressed the delegation issue in an overview of the Federal acknowledgment process but does not discuss the Constitutional issue. *Id.* at 1215. The Court's analysis in this case focused on the application of the political question doctrine to the Federal acknowledgment process, not on whether the delegation to the Department violated Constitutional principles.

***Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F. Supp. 2d 76 (D.D.C. 2002)**

The Burt Lake Band of Ottawa and Chippewa Indians of Michigan brought suit against the Department seeking Federal recognition as a Tribe. The Court dismissed the Tribe's claim for failure to exhaust administrative remedies. In relation to the delegation issue, the Court simply stated that "Congress authorized DOI and its Bureau of Indian Affairs ("BIA") to regulate and manage all matters relating to Indian affairs under the direction of the Executive Branch…Pursuant to this delegation of authority to DOI, BIA promulgated regulations establishing procedures for federal recognition of Indian groups as Indian tribes." *Id.* at 77. The court did not address the issue of whether proper standards had been used for that purported delegation. While the plaintiff made a vague delegation argument in its complaint, the narrow issue was whether DOI could deny acknowledgment to a tribe previously recognized by Congress. Attachment 9. The question of whether DOI could acknowledge tribes on its own accord was not addressed.

***Robinson v. Salazar*, 885 F. Supp. 2d 1002 (E.D.Cal. 2012)**

The only case to raise the delegation doctrine is *Robinson v. Salazar*, 885 F.Supp. 2d 1002, 1034 (E.D. Cal. 2012). In that case, the Kawaiisu Tribe of the Tejon of California brought suit against the Department seeking Federal recognition as a Tribe, title to certain lands in California, and relief from other alleged violations of common and statutory law. The Tribe directly raised the issue of whether Congress' broad delegation of authority to the Department under 25 U.S.C. §§ 2 and 9 violated the nondelegation doctrine. The Tribe argued that Congress' delegation of authority, as it relates to Interior's authority to issue the Part 83 regulations, violated the

nondelegation doctrine because Congress did not give the Department clear guidelines to follow for determining tribal status. *Id*. at 1036. In rejecting the nondelegation argument, the Court stated:

> This Court does not find that delegation to the DOI to determine tribal recognition violates the non-delegation doctrine. Plaintiffs' citations to generalized legal authorities are inapplicable in light of the vast statutory authority before this Court and including centuries of history and judicial opinions adjudicating and upholding the DOI regulations. Plaintiffs generalities do not demonstrate that Congress' delegation to the Executive, and thereby, the promulgation of regulations by DOI, violate the non-delegation doctrine.

Id. at 1037.

This decision is not dispositive of the delegation argument. It relies principally on *James*, which, as noted above, only addressed the issue in a gratuitous discussion not relevant to the claims in the case. Moreover, the issue is treated lightly in the pleadings, with a mere paragraph in plaintiffs third amended complaint, and a brief discussion in plaintiff's opposition brief, in both instances raised as an argument against the Federal defendant's affirmative defense that the Kawaiisu Tribe had failed to exhaust its administrative remedies by seeking acknowledgment under the Part 83 regulations. Attachment 10. The Court never points to the standards that it believes satisfy the delegation doctrine; it only assumes that they exist. The Court's decision suffers from the same "generalities" that it observed the plaintiff's argument suffered from.

Over many years, DOI has managed to avoid triggering a meaningful legal challenge to its acknowledgment program under the delegation doctrine because the Part 83 regulations have provided a generally accepted, rigorous, and objective process that has resulted in decisions that adhere to case law precedent and have been consistent with each other. While there is a clear legal infirmity in the absence of statutory basis for the authority to make these decisions, there has been no need to carry the argument forward in a legal challenge. The proposed regulations would, however, change all that. They would result in extreme results that are inconsistent with precedent. The criteria would be so far afield from current Part 83 standards as to illustrate the very problems that the delegation doctrine is designed to avoid -- Executive Branch action unfettered by controlling legal principles that results in wild swings in agency decision-making untethered by any guidance from Congress or the existence of enforceable standards.

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