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Cover Page Footnote

The author would like to thank her family Kawika, Kumakani, and Aukahiwai Riley, and Lorraine Mall for their never-ending support, as well as Professors Robert Williams and Melissa Tatum for their continued encouragement.

WHEN A TRIBAL ENTITY BECOMES A NATION: THE ROLE OF POLITICS IN THE SHIFTING FEDERAL RECOGNITION REGULATIONS

Lorinda Riley*

Abstract

Before a tribal entity can exercise the privileges and immunities of external sovereign status, they must first be recognized by the United States. For a variety of reasons, some legitimate tribal entities remain unrecognized today. The Department of the Interior has created a federal acknowledgement process under 25 C.F.R. Part 83, providing a procedure for a petitioning Indian entity to establish federal recognition. Reaching beyond a discussion of the overarching federal acknowledgment process this paper delves into the application of politics on the Department of the Interior's administrative actions.

This article explores how each presidential administration has both shaped and bent the federal recognition regulations to fulfill its political priorities. By merging a quantitative analysis of each administration's federal recognition record and the political realities that each administration faced, this study provides a rare inquiry into the political nature of the recognition process. First, this article examines the regulatory history of federal recognition, including a detailed discussion of various versions of the regulation and accompanying guidance published by the Department of the Interior (DOI). Then the article provides an overview of how politics play into the regulatory process and the implementation of regulation. Finally, the article re-visits each administration's actions related to federal recognition, and considers how each administration has utilized these regulations to serve its own political priorities.

Federal recognition of Native American tribes plays a critical role in Indian law. Federally recognized tribes are "acknowledged to have the immunities and privileges available to [them] by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes."¹

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1. Notice of Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748 (Jan. 29, 2014).

Special benefits of federal recognition of tribal sovereign status include the provision of health care for individual tribal members,² right to operate gaming enterprises,³ and the ability to convert fee land to trust status,⁴ among other things.⁵

For a variety of reasons, however, some tribes are not federally recognized. In the case of many tribes along the eastern seaboard, the tribes signed treaties with colonial governments prior to the formation of the United States, which resulted in the dissolution of their sovereign status as they are now state recognized rather than federally recognized.⁶ In other cases, such as with many of the California tribes, although the tribes signed treaties with a representative of the federal government, those treaties were never ratified by the United States Senate and the tribes' status as sovereign was never formally recognized by the United States.⁷ Still in other cases, tribes felt that the best survival strategy was to take their community underground, practicing their religion and social traditions in secret.⁸ Regardless of the reason, the U.S. government failed to recognize some legitimate tribal communities.

At present, there are 567 federally recognized tribes in the United States, and that number continues to grow.⁹ Obtaining federal recognition is often seen as the "golden ticket" for state recognized and unrecognized tribes, because without federal recognition, their ability to actuate self-determination and control over their citizen is minimal and difficult. However, in recent years the federal recognition process has become bogged down in a political battle, especially over gaming concerns by the general public.

There are several avenues available to tribes that seek federal recognition. One is to petition Congress to pass a bill recognizing the

2. *See* Indian Health Care Improvement Act, 25 U.S.C. § 1601 (2012).

3. *See* Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (2012).

4. *See* Indian Reorganization Act, 25 U.S.C. § 461 (2012).

5. *See, e.g.*, Synder Act, 25 U.S.C. § 13 (2012).

6. *See, e.g.*, Notice of Final Determination to Recognize the Historic Eastern Pequot Tribe, 67 Fed. Reg. 44,234 (July 1, 2002).

7. *See, e.g.*, CAROLE GOLDBERG & DUANE CHAMPAGNE, UCLA AM. INDIAN STUDS. CTR., A SECOND CENTURY OF DISHONOR: FEDERAL INEQUITIES AND CALIFORNIA TRIBES 120-41 (1996) (chapter 14, "Status and Needs of Unrecognized and Terminated California Indian Tribes"), available at <http://www.aisc.ucla.edu/ca/Tribes14.htm>.

8. *See, e.g.*, DUANE CHAMPAGNE, AMERICAN INDIAN SOCIETIES: STRATEGIES AND CONDITIONS OF POLITICAL AND CULTURAL SURVIVAL (2d ed. 1989).

9. *See* Notice of Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748 (Jan. 29, 2014).

sovereign status of the tribal entity.¹⁰ However, because the current political environment is ill-suited to a legislative approach, the most effective avenue to federal recognition is through the DOI's federal acknowledgement process (FAP), codified at 25 C.F.R. Part 83.¹¹ The intent of Part 83 is to "establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes."¹² Indian groups that can "establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present"¹³ may petition the DOI for recognition.¹⁴

The FAP was first implemented in 1978.¹⁵ Since then it has been revised only once.¹⁶ As each administration has taken office, it has attempted to make policy changes to the FAP. To avoid lengthy statutory requirements, recent administrations have adopted a strategy of issuing guidance documents instead of revising regulations through rulemaking. Thus, the current FAP consists of the regulatory text, multiple published guidance documents, a DOI precedent manual, and likely a variety of unpublished policy documents.

This article posits that due to the political nature of regulatory implementation, overlapping guidance documents have skewed the actual text of the regulation. Administrations use, and overuse, these guidance documents to circumvent the lengthy rulemaking process outlined in the Administrative Procedure Act (APA). The first part of this article provides a history of the evolution of the FAP, including a review of different DOI-issued guidance documents intended to clarify and interpret the FAP. The second part discusses the political nature of the implementation of the FAP.

10. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-49, IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS I (2001), available at <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-02-49/pdf/GAOREPORTS-GAO-02-49.pdf> (listing the twenty-five tribes that have been federally recognized since 1960 and how the tribes were recognized, including congressional recognition, administrative recognition, and Interior Solicitor's opinion).

11. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. § 83 (2015).

12. *Id.* § 83.2.

13. *Id.* § 83.3(a). It should be noted that the Obama Administration's proposed rule no longer uses the term Indian group because commenters felt that it was derogatory to petitioners. Federal Acknowledgment of Indian Tribes, 79 Fed. Reg. 30,766 (May 29, 2014).

14. 25 C.F.R. § 83.4.

15. *See* 43 Fed. Reg. 39361 (Sept. 5, 1978).

16. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280 (Feb. 25, 1994)

The final part builds upon the framework of the regulatory context laid out in the first part by revisiting each presidential administration's regulatory actions, interpretations, policies, and outcomes, highlighting how each administration left its unique mark on the federal recognition process, often without making any changes to the regulatory language. This dual chronological analysis is necessary in order to provide the appropriate context for the federal recognition regulation before moving into an in-depth analysis of each administration's implementation of the regulation.

I. History of the Regulation

The APA requires an agency to have appropriate statutory authority to issue government regulations. Most regulations, therefore, are tied to a congressional authorizing statute—statutes on substantive topics that delegate authority to the agency with jurisdiction to implement the statute through regulations.¹⁷ However, unlike most regulations, the DOI merely cited general administrative law delegation statutes as authority to issue the FAP.¹⁸ These statutes provide the DOI with the general authority to prescribe such regulations as necessary in the “performance of its business.”¹⁹

A. Summary of the Regulatory History

Using this general authority, in 1978 the DOI modeled the FAP after Felix Cohen's so-called Cohen Criteria.²⁰ In order to be considered a tribe under the Cohen Criteria, a group must show at least one of the following: the group entered into a treaty with the United States, was denominated a tribe by an act of Congress or Executive Order, had communal land or

17. See JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 13 (3d ed. 1998).

18. See 25 U.S.C. § 2 (2012); 43 U.S.C. § 1457 (2012); BIA, INDIAN AFFAIRS MANUAL pt. 3, ch. 1 (2009) (Delegations of Authority: General), available at <http://www.bia.gov/cs/groups/public/documents/text/idc-000325.pdf>; Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280 (Feb. 25, 1994) (codified at 25 C.F.R. § 83) (“This final revised rule is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.”).

19. 5 U.S.C. § 301 (2012), cited in 25 C.F.R. § 83.

20. The “Cohen Criteria” are given at FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 271 (Univ. of N.M. Press photo. reprint 1971) (1942) [hereinafter COHEN'S HANDBOOK]. Cohen served at the Department of the Interior's Office of the Solicitor from 1933-1947.

resource rights, was treated as a tribe by other recognized tribes, or exercised political authority over its members.²¹

Cohen developed these criteria based upon case law and past federal policies.²² In particular, Cohen drew from the Supreme Court case *Montoya v. United States*²³ in developing the criteria.²⁴ In that case, Montoya sued the Mescalero Apache Tribe for damages under the Indian Depredation Act of 1891, which provided reparations to claimants who had suffered losses due to Indian raids.²⁵ One of the key issues was whether the Victorio Band, which allegedly conducted the raid against Montoya's business, acted independently or as part of the Mescalero Apache Tribe.²⁶ The Court defined "tribe" as "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."²⁷

Similar to the Cohen Criteria, the 1978 FAP required a petitioner to submit sufficient proof of political, ethnological, and genealogical²⁸ continuity.²⁹ Upon request by the tribal entity, the DOI engaged in a case-by-case analysis to determine whether the entity met the criteria. However, in a departure from the flexible nature of the Cohen Criteria, the 1978 FAP consisted of seven mandatory criteria that *must* be met in order to receive recognition.³⁰ The onus fell on the petitioning entity to prove that it met

21. *See id.*

22. *Id.* at 271-72.

23. *Montoya v. United States*, 180 U.S. 261 (1901).

24. *See* COHEN'S HANDBOOK, *supra* note 20, at 270.

25. *Montoya*, 180 U.S. at 261-65.

26. *Id.* at 264-65.

27. *Id.* at 266.

28. Although the regulations did not require a specific blood quantum they did require that a substantial majority of the group prove descent from the historic Indian tribe. *See generally* Alexandra Harmon, *Tribal Enrollment Councils: Lessons on Law and Indian Identity*, 32 W. HIST. Q. 175 (2001); Paul Spruhan, *Indian as Race / Indian as Political Status: Implementation of the Half-Blood Requirement Under the Indian Reorganization Act, 1934-1945*, 8 RUTGERS RACE & L. REV. 27 (2006-07). Cohen felt that blood quantum was one of the distinguishing characteristics of Indians and that maintaining a high blood quantum was important to ensuring the continued existence of tribes.

29. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. § 83.7 (2015).

30. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe (Proposed Procedures for Establishing), 43 Fed. Reg. 23,743 (proposed June 1, 1978) (codified at 25 C.F.R. § 83 (formerly 25 C.F.R. § 54)).

each of the mandatory criteria.³¹ Thus, there was no ability to waive or weigh any of the factors under the 1978 FAP.

B. Interpretative and Policy Statements

In addition to regulations, the day-to-day operations of federal agencies are based largely on internal guidance and policy statements.³² Since the implementation of the 1978 FAP, the recognition process has been modified through the use of internal guidance documents. The primary source of internal guidance for the DOI is the Departmental Manual (DM), which interprets laws and regulations and sets out department-wide policy and protocols.³³

Next, departmental or agency handbooks (collectively, Handbooks) provide additional structure and detail to employees on how to implement the DM and statutes.³⁴ A final type of guidance is an Instruction Memorandum (IM), which lays out new policy or procedural instruction.³⁵ IMs expire after one year; however, most are incorporated into the Handbook prior to their expiration.³⁶ The Handbook and IMs provide a method of implementing the laws, regulations, and the DM.³⁷

In the case of the FAP, there have been four published guidance documents.³⁸ Additional guidance on the FAP may have been issued, but not published, as guidance documents on internal policy and protocols do not require publication.³⁹ However, by definition guidance documents

31. *Id.*

32. U.S. DEP'T OF THE INTERIOR, 011 DM, DEPARTMENTAL MANUAL 1 (2001).

33. *Id.*

34. *See Laws, Regulations, Policies, Court Decisions*, BUREAU OF LAND MGMT., <http://www.blm.gov/wo/st/en/info/regulations.html> (last visited Oct. 28, 2014) (providing examples of the Department Manual, Handbook, Instruction Memoranda, and Information Bulletins).

35. *Id.*

36. *Id.* Technically IMs expire in one year, but may be renewed indefinitely until they are placed in the Handbook. In practice even when these IMs are not renewed, agency employees tend to follow them until they are superseded by another IM.

37. *Id.*

38. *Changes in the Internal Processing of Federal Acknowledgment Petitions* (2000 Guidance), 65 Fed. Reg. 7052 (Feb. 11, 2000); *Office of Federal Acknowledgment; Reports and Guidance Documents; Availability, Etc.* (2005 Guidance), 70 Fed. Reg. 16,513 (Mar. 31, 2005); *Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures* (2008 Guidance), 73 Fed. Reg. 30,146 (May 23, 2008). *Requests for Administrative Acknowledgment of Federal Indian Tribes* (2015 Guidance), 80 Fed. Reg. 37,583 (July 1, 2015).

39. *See* LUBBERS, *supra* note 17, at 47-56.

should not alter the affect of the rule on the public or petitioning Indian entity.⁴⁰ Yet, in some cases administrations walk (and cross) this fine line and issue guidance documents that may change outcomes in the FAP. Therefore, in most cases, these documents should be published under the notice and comment procedures in the APA rather than as policy guidance.

C. The Creation of the FAP under the Carter Administration (1977-1981)

The FAP itself was born out of a political struggle between the separate branches of government as they each attempted to exert control over federal Indian law. While the evolution of the regulation is lengthy, a holistic review of the regulatory history is required before an in-depth analysis of the political nature of its implementation can be effectively undertaken. The original proposed rule was issued early in the Carter administration on June 16, 1977.⁴¹ The original proposed rule provided the Commissioner of Indian Affairs with great discretion on how to interpret the criteria. In essence, the proposed rule required a petitioning Indian group to show that: (1) it manifested a sense of social solidarity, (2) its members were principally of common ethnological origins, (3) it exercised political authority over its members, (4) it either presently or historically inhabited a specific area, (5) it was not subject to congressional termination legislation, and (6) its members were not members of any other Indian tribe.⁴²

In addition, under the proposed rule, an Indian group would also be required to show at least one of the following to be successful: (1) it was a party to a treaty with the United States or was a successor in interest to such a tribe; (2) it had been designated a tribe by an Act of Congress, Executive Order, or judicial decision; or (3) it was treated as a tribe by a state or federal government agency, or received services from a federal or state agency.⁴³ While the first six mandatory criteria have largely endured, the mandatory nature of the latter three criteria, which essentially require some type of prior federal acknowledgment, have not.

After receiving public feedback through the notice and comment period required under the APA, the Carter administration quickly issued a “Revised Proposed Regulation” that was more closely tied to the Cohen Criteria. The preamble to the Revised Proposed Regulation states that the

40. *Id.*

41. *See* Procedure Governing Determination that Indian Group Is a Federally Recognized Indian Tribe, 42 Fed. Reg. 30,647 (proposed June 16, 1977) (codified at 25 C.F.R. § 83 (formerly 25 C.F.R. § 54)).

42. *Id.*

43. *Id.*

DOI believed the revision was the soundest way to provide for acknowledgment of Indian tribes “despite the absence of any formal action by the Federal Government.”⁴⁴ The Carter administration recognized that prior acknowledgement was not necessary to determining whether a petitioner was a legitimate tribe.⁴⁵

The DOI reissued the changes as an amended proposed rule because the revisions were deemed “substantially different” from the original proposed rule, and republished the rule to allow for additional public comment.⁴⁶ When a proposed rule is altered so drastically that the final rule cannot be considered a “logical outgrowth” of the rulemaking proceeding, the issuing agency must re-issue the changes as an amended proposed rule to provide for effective notice and comment by the public.⁴⁷ This added step is among the many concerns that recent administrations have had about the rulemaking process, leading them to favor issuing guidance and interpretative documents over amending regulations.

The amended proposed rule included specific definitions for terms such as “historically” or “historical,” “member of an Indian tribe,” “member of an Indian group,” and “continuously,” which are scattered throughout the regulation.⁴⁸ It also required the DOI to contact all potential Indian groups

44. See Procedures for Establishing that an American Indian Group Exists as an Indian Tribe (Proposed Procedures for Establishing), 43 Fed. Reg. 23,743, 23,744 (proposed June 1, 1978) (codified at 25 C.F.R. § 83 (formerly 25 C.F.R. § 54)).

45. See *id.* at 23,743-44. Maintaining a requirement for former recognition would have made the regulation more of a reaffirmation process compared to a recognition process. Reaffirmation reaffirms a past state instead of recognizing a new state; see, e.g., Letter from D.W. Cranford, Vice President, No Casino in Plymouth, to Dirk Kempthorne, Secretary of the Interior (Oct. 27, 2008) (on file with author), available at <https://drive.google.com/folderview?id=0B9ewTfqrebhebVZCZkZ0eDBnb0E&usp=sharing#grid> (file number AR006726) (discussing reaffirmation versus recognition); see also Letter from Walter Dimmers, President, and Dueward W. Cranford II, Vice President, No Casino in Plymouth, to Clay Gregory, Regional Director, Bureau of Indian Affairs (Jan. 5, 2007) (on file with author), available at <https://drive.google.com/folderview?id=0B9ewTfqrebhebVZCZkZ0eDBnb0E&usp=sharing> (file number AR009367) (distinguishing reaffirmation from restoration of status as a recognized tribe as part of their preliminary comments on the Ione Miwok Fee to Trust application).

46. See Proposed Procedures for Establishing, 43 Fed. Reg. at 23,743.

47. Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 216-22 (1996); see also LUBBERS, *supra* note 17, at 192-94; accord U.S. Steelworkers v. Marshall, 647 F.2d 1189, 1222 (D.C. Cir. 1980); Taylor Diving & Salvage Co. v. U.S. Dep’t of Labor, 599 F.2d 622, 626 (5th Cir. 1979).

48. Proposed Procedures for Establishing, 43 Fed. Reg. at 23,743-46.

known to them and inform them of the regulations.⁴⁹ Furthermore, the rule required the DOI to engage in a technical consultation session with petitioning Indian groups to provide feedback on how to develop their petition for acknowledgement.⁵⁰ The rule also set specific timelines on communication with a petitioning Indian group.⁵¹ Finally, the rule set the requirements for determining recognition:

- 1) statement of fact establishing historical and continuous identification as American Indian,
- 2) evidence that a substantial portion of the petitioning group inhabits a specific region as a community,
- 3) facts establishing that the petitioning group has maintained historical and continuous political influence over its members,
- 4) copies of current governing documents, and
- 5) a membership list with evidence of descent from the tribe.⁵²

The final rule, issued on September 5, 1978, was largely the same as the amended proposed rule⁵³ with one significant change. The final rule provided for a process where “other parties” would be able to present evidence supporting or challenging the petitioning group’s evidence.⁵⁴ This addition was justified as a continuation of the policy of open and candid communication that existed in the proposed rule.⁵⁵ Although this addition may have had a benign effect on the federal recognition process when the FAP was first implemented, with the passage of the Indian Gaming Regulatory Act in 1988⁵⁶ and the increasingly controversial nature of many

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Compare* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe (Carter Procedures for Establishing), 43 Fed. Reg. 39,361 (Sept. 5, 1978), *with* Proposed Procedures for Establishing, 43 Fed. Reg. at 23,745.

54. Carter Procedures for Establishing, 43 Fed. Reg. at 39,363.

55. *Id.* at 39,361.

56. The rise of Indian gaming has had a strong effect on the ability of some tribes to engage in economic development and rise out of poverty, however, the general public has not always seen Indian gaming as good. *See* LEIGH GARDNER & KATHERINE SPILDE, HARNESING RESOURCES, CREATING PARTNERSHIP: INDIAN GAMING AND DIVERSIFICATION BY THE TULALIP TRIBES OF WASHINGTON (2004), *available at* <http://hpaied.org/sites/default/files/publications/NIGACaseStudyTulalip.pdf>.

Indian issues, this provision has opened the door to allowing competing tribes, states,⁵⁷ citizen groups,⁵⁸ and even congresspersons⁵⁹ to attempt to thwart a group's federal recognition petition.⁶⁰

D. Revising the FAP

1. The H.W. Bush Administration (1989-1993)

Two revisions of the FAP have been published since 1978. The first revision was proposed on September 18, 1991, by President George H.W. Bush, and published as final on February 25, 1994, by President Clinton.⁶¹ The rule purported to clarify the requirements of the acknowledgment process and more clearly define the standards of evidence.⁶² The proposed rule made several substantial changes including:

- 1) granting the Assistant Secretary of the Interior discretion to extend comment periods,

57. See, e.g., Fed. Acknowledgment of the Historical E. Pequot Tribe, 41 I.B.I.A. 1 (May 12, 2005), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001424.pdf>. The Eastern and Paucatuck Pequot positive Final Determination was challenged by the State of Connecticut to the Interior Board of Indian Appeals (IBIA), which remanded the decision to the Secretary for further consideration. *Id.* at 1-2. The IBIA agreed with the State of Connecticut's argument that the OFA relied too heavily on the fact that the petitioners were state recognized when analyzing criteria (b) and (c). *Id.* at 14-16. The decision was reversed and consequentially the Eastern and Paucatuck Pequots are not federally recognized. *Id.* at 29. The tribe does, however, continue to reside on a Connecticut State Reservation.

58. See, e.g., *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008) (providing an example of a citizens group that appealed a decision by the Department of the Interior involving Indian gaming).

59. Scott Ritter, *Tribe Gets OK to Re-Examine Denial Process*, DAY (New London, Conn.), Mar. 28, 2007, <http://www.theday.com/article/20070328/DAYARC/303289938>. Rep. Frank Wolf and Rep. Christopher Shays, both former congressmen from Connecticut, threatened former Secretary of the Department of the Interior Gale Norton regarding the Pequot Final Determination. In a meeting, they said that if she did not stop the Eastern Pequot recognition decision they would make sure that President Bush fired her. *Id.* The Eastern and Paucatuck Pequot petitioners received a positive Proposed Finding in 2000 and a positive Final Determination in 2002, but remain unrecognized today.

60. See RENEE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT 127-28 (2005).

61. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe (Clinton Procedures for Establishing), 59 Fed. Reg. 9280 (Feb. 25, 1994) (codified at 25 C.F.R. § 83); Procedures for Establishing that an American Indian Group Exists as an Indian Tribe (Bush Proposed Procedures for Establishing), 56 Fed. Reg. 47,320 (Sept. 18, 1991) (codified at 25 C.F.R. § 83).

62. Clinton Procedures for Establishing, 59 Fed. Reg. at 9281.

- 2) requiring petitions for federal acknowledgment to be certified by the petitioning group's governing entity,
- 3) requiring petitioning groups only to meet the criteria from first "sustained" contact, not initial contact,
- 4) to meet the requirements of criterion (b), distinct community, the petitioning group must show that it has influence or control over the behavior of the membership,
- 5) if a petitioning group could prove previous, unambiguous federal recognition, it only needed to show that it met the seven mandatory criteria from the last point of recognition to the present, and
- 6) petitioners who continuously occupied a specific area were no longer favored.⁶³

2. *The Clinton Administration (1993-2001)*

A little over a year after Clinton came into office, the H.W. Bush administration's proposed rule revising the FAP was finalized.⁶⁴ This final rule made three relatively substantial additions. First, it added language requiring the office within the DOI that handles federal recognition petitions, the Office of Federal Acknowledgment (OFA), to consider inherent limitations in the historical record when reviewing petitions.⁶⁵ Second, it provided a list of evidence which could be used to meet each of the mandatory criteria.⁶⁶ Third, it developed a standard:⁶⁷ A criterion would be "considered met if the petitioner meets the criteria by a reasonable likelihood of the validity of the facts relating to that criterion."⁶⁸ The Clinton administration claimed that "[n]one of the changes made in these final regulations will result in the acknowledgment of petitioners which

63. Bush Proposed Procedures for Establishing, 56 Fed. Reg. at 47,326-28; see 25 C.F.R. § 83 (2015). By privileging continuous occupancy the proposed regulation reinforces the idea that "real" Indians stayed on or very near their traditional homelands having little desire or incentive, whether external or internal, to move to urban areas. Several U.S. policies such as Termination and Relocation encouraged reservation Indians to assimilate and move to urban areas making this requirement especially disconcerting.

64. Clinton Procedures for Establishing, 59 Fed. Reg. at 9280.

65. *Id.* at 9295.

66. *Id.* at 9295-96.

67. *Id.* at 9295.

68. *Id.*; see also MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS 55 (2004).

would not have been acknowledged under the previously effective acknowledgment regulations.”⁶⁹

Although the administration argued that the addition of the standard did not constitute a substantial change, and therefore was not subject to additional notice and comment procedure, a more conservative approach would have been to republish the addition as an amended proposed rule.⁷⁰ Instead, the OFA justified finalizing the rule by arguing that the standard was already in use through internal policy decisions, and that several comments suggested the inclusion of a standard.⁷¹ However, the APA requires any change which the public could not anticipate through the proposed rule to go through a notice and comment period.⁷² It is doubtful that the public would have been able to anticipate the inclusion of this standard.

Nevertheless, the OFA likely felt little pressure to re-issue the regulation. The Chevron doctrine shelters an agency when it makes discretionary decisions under the APA, which leads to few repercussions when an agency departs from procedure.⁷³ The Chevron doctrine is a two-part test. First, the court determines whether Congress has directly spoken on the question at issue. If the statute is silent or ambiguous, the court continues to step two, and analyzes whether the agency’s action is based on a reasonable interpretation of the statute.⁷⁴ The result is that courts tend to grant broad deference to agencies in interpreting their authority to engage in rulemaking. Furthermore, the remedy for violating the notice and comment procedure is simply to require the rule to go through a notice and comment period.⁷⁵

In addition to revising the FAP regulation, the Clinton administration issued the first FAP guidance on February 11, 2000,⁷⁶ in an attempt to reduce the backlog of recognition petitions, which had been a constant struggle for the OFA.⁷⁷ Petitioners must wait as the petitions ahead of them

69. Clinton Procedures for Establishing, 59 Fed. Reg. at 9280.

70. *Id.*

71. *Id.* at 9280-82.

72. LUBBERS, *supra* note 17, at 193-94.

73. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984).

74. *Id.* at 842-43.

75. David Chaffin, Note, *Remedies for Noncompliance with Section 553 of the Administrative Procedure Act: A Critical Evaluation of U.S. Steel and Western Oil & Gas*, 1982 DUKE L.J. 461, 464-65.

76. Changes in the Internal Processing of Federal Acknowledgment Petitions (2000 Guidance), 65 Fed. Reg. 7052 (Feb. 11, 2000).

77. *Id.*

go through the slow review and appeal process. Currently, seven petitions are active, but awaiting a proposed finding; one is awaiting a final determination; three are currently being commented on; and one is in litigation.⁷⁸ These numbers are significantly reduced from 2008, when nine petitions were classified as ready and waiting review.⁷⁹ The 2000 guidance also directed the OFA to refrain from conducting additional research on petitions or considering additional research by the petitioner after analysis has begun for the proposed finding.⁸⁰ Instead, the additional information would be reviewed as either a comment to the petition or in the petitioner's response to the proposed finding.⁸¹ This provided the OFA with a date on which they could stop including additional information in the analysis and concentrate on the data in front of them.

The 2000 guidance also clarified that the acknowledgment decision is not intended to be a definitive scholarly study, but should be limited to what is necessary to establish whether the petitioner met its burden, by a reasonable likelihood of the validity of the facts, on all seven mandatory criteria.⁸² The guidance states that the "professional standards of BIA [Bureau of Indian Affairs] researchers will be applied to the review."⁸³ The OFA's team of reviewers consists of three individuals—an anthropologist, a historian, and a genealogist.⁸⁴ Under the guidance, the professional

78. See Office of Fed. Acknowledgment, U.S. Dep't of the Interior, *Acknowledgment Decision Compilation (ADC) List: Petitions on Active Consideration*, BIA.GOV, <http://www.bia.gov/WhoWeAre/AS-IA/OFA/ADCList/ActivePetitions/index.htm> (last visited Apr. 20, 2015).

79. R. Lee Fleming, Office of Fed. Acknowledgment, Status Summary of Acknowledgment Cases (Sept. 22, 2008) [hereinafter Fleming, Status Summary of Sept. 22, 2008] (on file with author).

80. 2000 Guidance, 65 Fed. Reg. at 7053.

81. *Id.*

82. *Id.*

83. *Id.*

84. BRANCH OF ACKNOWLEDGMENT & RESEARCH, U.S. DEP'T OF THE INTERIOR, THE OFFICIAL GUIDELINES TO THE FEDERAL ACKNOWLEDGMENT REGULATIONS, 25 CFR 83, at 14 (1997), available at <http://www.bia.gov/cs/groups/public/documents/text/idc-001214.pdf> (noting that the OFA (formerly BAR) uses anthropologists, genealogists and historians to review petitions); see, e.g., OFFICE OF FED. ACKNOWLEDGMENT, U.S. DEP'T OF THE INTERIOR, PROPOSED FINDING RAMAPOUGH MOUNTAIN INDIANS, INC. 2-4 (Dec. 8, 1993), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001500.pdf> (showing the organizational structure of the petition broken down into three separate reports – historical, anthropological, and genealogical); cf. Office of Fed. Acknowledgment, U.S. Dep't of the Interior, *List of OFA Staff with Their Credentials*, BIA.GOV, <http://www.bia.gov/cs/groups/public/documents/text/idc009020.pdf> (last visited Apr. 27, 2015).

standards of the anthropologist, historian, and genealogist are first applied to the evidence presented by the petitioner.⁸⁵ The professionals make a determination on whether the evidence is plausible using their particular professional standards.⁸⁶ Next, all academically plausible evidence is compiled, and the researchers apply their professional standard to the evidence. Finally, the researchers apply the “reasonable likelihood of the validity of the facts” standard found in the text of the FAP to the evidence.⁸⁷

However, the use of professional standards may violate the APA, which requires that any change in agency regulation which affects the rights of the public shall to be subjected to notice and comment.⁸⁸ The application of professional standards prior to the application of the standard announced in the FAP is neither written nor discussed in the FAP, and its implementation could result in a change of outcome for numerous petitions. Since the professional standards of historians, anthropologists, and genealogists are higher than the reasonable likelihood standard laid out in the regulation, many petitioners may be judged against a standard that was never noticed and commented on under the APA.⁸⁹

3. *W. Bush Administration (2001-2009)*

Although no formal regulatory changes were made to the FAP, under W. Bush’s administration, two sets of guidance documents were issued during his administration. The first guidance was issued in March, 2005. It superseded the 2000 guidance, although many concepts were repeated.⁹⁰ It clarified that if a petitioner submitted additional research after the deadline and the OFA was already reviewing the petition, then the OFA would hold

85. 2000 Guidance, 65 Fed. Reg. at 7053; *see, e.g.*, Elizabeth Shown Mills, *Working with Historical Evidence: Genealogical Principles and Standards*, 87 NAT’L GENEALOGICAL SOC’Y Q. 165 (1999) (providing information on genealogical standard).

86. Assistant Sec’y—Indian Affairs, Office of Fed. Acknowledgment, Juaneño Formal Technical Assistance on the Record 181–86 (Apr. 22, 2008) (on file with author) [hereinafter Juaneño Formal Technical Assistance].

87. 25 C.F.R. § 83.6(d)–(e) (2015); 2000 Guidance, 65 Fed. Reg. at 7053. The difference is that some professional standards require two sources of academically plausible evidence in order to meet their professional standards, which is counter to the reasonable likelihood standard.

88. 5 U.S.C. § 553 (2012). *See generally* LUBBERS, *supra* note 17.

89. *See, e.g.*, Mills, *supra* note 85 (providing a description of the professional standards of genealogists).

90. Office of Federal Acknowledgment; Reports and Guidance Documents; Availability, Etc. (2005 Guidance), 70 Fed. Reg. 16,513 (Mar. 31, 2005).

the additional information for analysis in the final determination.⁹¹ This guidance also reversed the 2000 guidance by granting OFA staff authority to conduct additional research to verify evidence and provide additional information about the petition.⁹² This effectively opened the door for OFA staff to conduct research in order to disprove the petition's validity.

The 2005 guidance also notes that the OFA staff is "expected to use its expertise and knowledge of sources to evaluate the accuracy and reliability of the submissions[.]"⁹³ This reinforced the 2000 guidance requiring the use of professional standards. The OFA began to not only interpret evidence, but also make assumptions about the type of evidence presented. For example, in reviewing the Sokoki Abenaki⁹⁴ petition, the OFA staff determined that the Abenaki would not have been able to afford the engraved pocket watch they submitted as evidence of community.⁹⁵ Instead, the OFA concluded that the watch more likely belonged to a separate non-Indian group impersonating the Abenaki.⁹⁶ While either scenario is plausible, the 2005 guidance allowed the OFA to make an assumption about the validity of submitted evidence instead of using the FAP's reasonable likelihood standard to accept the petitioner's explanation of the evidence.

While the 2000 guidance dictated the use of the professional standards of review prior to the application of the reasonable likelihood standard, the 2005 guidance provides that the reviewers can use their professional standards to make judgments on the validity of the documents.⁹⁷ Both the 2000 and 2005 guidance documents were published in the federal register, but neither were subjected to notice and comment procedures because the administrations stated that these documents were merely clarifying and

91. *Id.* at 16,514-15.

92. *Id.*

93. *Id.*

94. The Sokoki Abenaki are an Indian group from Northern New England/Southern Quebec area. MARGE BRUCHAC, *READING ABENAKI TRADITIONS AND EUROPEAN RECORDS OF ROGERS' RAID 2* (2006), available at http://www.vermontfolklifecenter.org/childrens-books/malians-song/additional_resources/rogers_raid_facts.pdf.

95. OFFICE OF FED. ACKNOWLEDGMENT, U.S. DEP'T OF THE INTERIOR, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR FINAL DETERMINATION AGAINST FEDERAL ACKNOWLEDGMENT OF THE ST. FRANCIS/SOKOKI BAND OF ABENAKIS OF VERMONT 16-17 (2007), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001527.pdf>.

96. *Id.*

97. 2005 Guidance, 70 Fed. Reg. at 16,513 (noting that acknowledgment staff are expected to use their knowledge and expertise to evaluate the accuracy and reliability of the submission).

interpreting the current FAP.⁹⁸ Arguably, both of these guidance documents made drastic changes to the FAP, which required the OFA to engage in a new rulemaking.⁹⁹ By not going through the notice and comment procedure, the OFA opened itself up to a legal challenge that the use of professional standards prior to the application of the standard announced in the regulation violates the APA.¹⁰⁰

Although agencies may change their interpretation of a regulation, they must also provide some type of notice to the public so that there is no “unfair surprise.”¹⁰¹ Even if the use of professional standards on top of the reasonable likelihood standard is an interpretation of the existing rule, and not a substantive change to the rule, the OFA needed to provide petitioners with notice of what the professional standards are so that the petitioners were not “unfair[ly] surprise[d]” by the application of the professional standard to their petition. To date, the OFA does not provide a document to petitioners describing the professional standards of their staff anthropologist, historian, or genealogist. A notice published in the Federal Register informing petitioners of this change without the appropriate underlying documents is not sufficient to address “unfair surprise.”

For example, OFA genealogists require two sources of solid documentation to prove descent.¹⁰² An historian’s professional standards require strict knowledge of the source of the document and under what conditions the document was created.¹⁰³ Under both a historian and a genealogist’s professional standards, evidence such as the California

98. *Id.* at 16,514-15. Notices frequently allow the public to comment; however, unlike proposed rules, the substance of the Notice is usually effective upon publication.

99. *Hocor v. U.S. Dep’t of Agric.*, 82 F.3d 165 (7th Cir. 1996) (holding that when an administrative document is intended to bind, and not merely be a tentative statement of agency’s view, such rule would be legislative rule, and subject to mandatory notice and comment procedures in Administrative Procedure Act).

100. 5 U.S.C. § 553(b)-(c) (2012) (setting out the situation when notice and comment was required).

101. *Long Island Care v. Coke*, 551 U.S. 158, 170 (2007); see LUBBERS, *supra* note 17, at 59; see also *Department of Interior’s Recently Released Guidance on Taking Land into Trust for Indian Tribes and Its Ramifications: Hearing Before the H. Comm. on Natural Res.*, 110th Cong. (2008) (statement of Alex Skibine, Professor of Law, University of Utah), available at <http://naturalresources.house.gov/uploadedfiles/skibinetestimony02.27.08.pdf> (arguing that the Department of Interior’s Guidance Document on the Fee to Trust process should have been a rulemaking with notice and comment provisions provided to the public).

102. Juaneño Formal Technical Assistance, *supra* note 86, at 181-86.

103. See generally MICHAEL LEMON, *THE DISCIPLINE OF HISTORY AND THE HISTORY OF THOUGHT* 124-38 (Taylor & Francis 2002) (1995); MARTHA HOWELL, *FROM RELIABLE SOURCES: AN INTRODUCTION TO HISTORICAL METHODS* (2001).

Judgment Rolls created by the DOI and the Department of Justice for use in a U.S. federal court case to disburse federal debts to Indians are not considered valid evidence of descent—either Indian descent or specific tribal descent.¹⁰⁴ However, if judged solely under the reasonable likelihood of the validity of the facts standard, this type of document would be evidence of descent. Utilizing these professional standards can potentially change the outcome for numerous petitions. Furthermore, by using professional standards to dismiss descendancy rolls, the OFA is effectively saying federally created documents used for federal purposes are not reliable evidence to meet the FAP criteria. This runs counter to other legal standards, such as that found in the federal rules of evidence—the federal records authenticity standard.

The new standard also affects the volume of evidence required in order to submit a successful petition, since the petitioner's evidence must now meet a higher standard.¹⁰⁵ According to James Keedy, Executive Director of the Michigan Indian Legal Services, the first successful federal recognition petition he worked on consisted of one three-ring binder, whereas the submission in his most recent case included numerous banker boxes.¹⁰⁶ Petitioners must expend additional time, money, and resources in order to prove the validity of the documents submitted, provide corroborating support for oral testimony, and include two genealogical sources for all evidence related to descent.¹⁰⁷

The most recent set of published guidance was issued on May 23, 2008.¹⁰⁸ The 2008 guidance does not purport to supersede any prior

104. OFFICE OF FED. ACKNOWLEDGMENT, U.S. DEP'T OF THE INTERIOR, PROPOSED FINDING AGAINST ACKNOWLEDGMENT OF JUANEÑO BAND OF MISSION INDIANS 38 (2007) [hereinafter JUANEÑO PROPOSED FINDING], available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001626.pdf> visited (citing OFFICE OF FED. ACKNOWLEDGMENT, U.S. DEP'T OF THE INTERIOR, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR FINAL DETERMINATION AGAINST FEDERAL ACKNOWLEDGMENT OF THE MUWEKMA OHLONE TRIBE 24 (2002), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001654.pdf> (“[T]he available evidence of the application forms that were approved after the Act of 1928, and the 1933 census roll and later judgment rolls that included individual ancestors, is not sufficient to meet the requirements of criterion (a)”).

105. *Hearing on H.R. 2837 Before the H. Comm. on Natural Res.*, 110th Cong. 70-80 (2007) [hereinafter *Hearing on H.R. 2837*] (statement of James Keedy, Executive Director, Michigan Indian Legal Services), available at http://naturalresources.house.gov/uploaded_files/keedytestimony10.03.07.pdf.

106. *Id.*

107. See generally CRAMER, *supra* note 60, at 51-56.

108. Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures (2008 Guidance), 73 Fed. Reg. 30,146 (May 23, 2008).

guidance; it applies in conjunction with the 2005 guidance. The purpose of the 2008 guidance is to alleviate recurring administrative and technical problems in processing petitions.¹⁰⁹ This guidance makes changes which some consider sufficient enough to require the guidance to go through the rulemaking process.¹¹⁰

First, the 2008 guidance states that if a petitioner on the “ready waiting list” splits or develops into a splinter group, the OFA has the discretion to refuse to move the splinter group to the “active” category.¹¹¹ A splinter occurs when some of the petitioner’s membership recognizes a different leader.¹¹² When a tribe splinters, there is a chance that neither segment will successfully go through the FAP procedure, even when together they may have. The OFA may also opt to review both segments of the splintered group simultaneously,¹¹³ meaning that the splintered (or newly formed) group is not given the same opportunity to conduct research and develop their petition. Finally, the guidance clarifies that the DOI will not acknowledge segments of a tribe.¹¹⁴

The federal recognition process takes, on average, thirty years to complete, which frequently strains internal tribal relations.¹¹⁵ In addition, the extensive costs of research creates a financial barrier to filing a petition, which has forced many petitioning Indian groups to seek the financial backing of third parties.¹¹⁶ Third parties financiers seek a portion of the profits of a future tribal development, usually gaming, in exchange for financing the petition. These agreements can be structured in numerous ways, but most frequently the financier takes a loss if the petition is

109. Office of Federal Acknowledgment; Reports and Guidance Documents; Availability, Etc. (2005 Guidance), 70 Fed. Reg. 16,513, 16,516 (Mar. 31, 2005).

110. *Hearing on H.R. 2837, supra* note 105, at 54-61 (statement of Arlinda Locklear, Attorney), available at <http://naturalresources.house.gov/uploadedfiles/lockleartestimony10.03.07.pdf>.

111. 2008 Guidance, 73 Fed. Reg. at 30,146.

112. *Id.*

113. *Id.* at 30,147.

114. *Id.* at 30,146-47.

115. *See, e.g.,* R. Lee Fleming, Status Summary of Acknowledgment Cases (Nov. 12, 2013) [hereinafter Fleming, Status Summary of Nov. 12, 2013], available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024435.pdf> (showing that the Juaneño petition was originally filed in 1984 and are still in the appeals process).

116. CRAMER, *supra* note 60, at 81; Donald L. Barlett & James B. Steele, *Indian Casinos: Who Gets the Money?*, TIME, Dec. 16, 2002, available at <http://content.time.com/time/magazine/article/0,9171,1003869,00.html>.

unsuccessful.¹¹⁷ However, if the petitioning Indian tribe is successful, the tribe must pay back the funds that the financier fronted.¹¹⁸

Non-Indians have pushed for more analysis and stronger justifications to prove tribal legitimacy, which has politicized and modified the system so much that petitioners must increase their research efforts, employ expensive experts, and use other costly strategies in order to be successful. This all but necessitates the use of financial backers and results in petitioners being forced to agree to engage in gaming, if recognized, when they may not have been interested in gaming as a revenue source before. The influx of outside money creates an environment ripe for internal conflict as some individuals may be more likely to pursue splinter groups in order to gain power and control over decisionmaking.

In response to criticisms of the length of time required to render a decision, the DOI suggested that its perceived “stalling” was actually due to some petitioning groups’ non-responsiveness.¹¹⁹ In order to address this, the 2008 guidance provides that if a petitioning group does not respond to the OFA’s technical assistance offer in a timely manner, they may be moved to the “inactive” category.¹²⁰ This largely affects the external metrics highlighted by the OFA’s Status Summary list that details the number of federal recognition petitions that are active, inactive, pending, under appeal, etc.¹²¹ The OFA argues that this change allows for a true analysis of their progress, since a non-responsive petitioner can be removed from the OFA’s list rather than linger under the Status Summary category when the OFA

117. See, e.g., Third Amended and Restated Management Agreement Between the Nottawaseppi Huron Band of Potawatomi Indians, Firekeepers Development Authority, and Gaming Entertainment (Michigan), LLC (Apr. 11, 2008), available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/apprvdmgmtcont/Huron%20redacted%20approved%20mgmt%20contract%20042108.pdf> (providing some information on the financial agreement). This, along with a financing contract, encompasses the entire agreement. However, financing contracts are generally not disclosed to the public.

118. See, e.g., *id.*

119. *Recommendations for Improving the Federal Acknowledgment Process: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 44-45 (2008) (statement of Patty Ferguson-Bohnee, Professor of Law, Ariz. State Univ.), available at <http://www.indian.senate.gov/sites/default/files/upload/files/April242008.pdf>.

120. Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures (2008 Guidance), 73 Fed. Reg. 30,146 (May 23, 2008).

121. The OFA often uses these numbers in testimony before Congress. See, *Oversight Hearing on the Federal Recognition of Indian Tribes*, 109th Cong. 19 (2005) (statement of Lee Fleming, Director Office of Federal Acknowledgment), available at <http://www.indian.senate.gov/sites/default/files/upload/files/May112005.pdf>.

has little to no control over the petitioner's level of engagement.¹²² With this change, the percentage of active cases before the OFA is considerably smaller, instantaneously improving its perceived efficiency. In fact, from 2008 to 2014, the Ready Waiting list has gone from nine petitioners to one.¹²³

The 2008 guidance also reduces the time period for which the petitioner must submit evidence.¹²⁴ Petitioners now only need to submit evidence from the date the U.S. Constitution was ratified—March 4, 1789.¹²⁵ Under the former interpretation, many tribes, especially those on the East Coast, were required to provide evidence of continuous social or political influence from “first sustained contact,” which could be as early as 1492.¹²⁶ A similar situation occurs in California, where Spanish colonizers came into contact with tribes several centuries before sustained contact with Americans.¹²⁷

Finally, the 2008 guidance states that if the OFA determines that a petitioning group cannot meet one of the seven mandatory criteria, it may issue a proposed finding or final determination without analyzing the remaining criteria.¹²⁸ While it is easy to see how this improves efficiency, it would be difficult to make a full and accurate determination without analyzing all of the evidence. For example, evidence of social continuity can be found in genealogical evidence—such as when there is a high percentage of the group engaged in patterned god-parenting of each other's children.¹²⁹ Thus, the W. Bush administration was fairly active in altering and influencing the FAP through issuing guidance documents rather than engaging in a rulemaking process that involved the public.

122. *Recommendations for Improving the Federal Acknowledgment Process: Hearing Before the S. Comm. on Indian Affairs*, *supra* note 119, at 44-45.

123. Compare Fleming, Status Summary of Sept. 22, 2008, *supra* note 79, with Fleming, Status Summary of Nov. 12, 2013, *supra* note 115.

124. 2008 Guidance, 73 Fed. Reg. at 30,147.

125. *Id.*

126. See, e.g., OFFICE OF FED. ACKNOWLEDGMENT, U.S. DEP'T OF THE INTERIOR, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR FINAL DETERMINATION FOR THE MASHPEE WAMPANOAG INDIAN TRIBAL COUNCIL, INC. 11 (2007), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001338.pdf> visited (noting that first sustained contact occurred in the 1620s).

127. See, e.g., JUANENO PROPOSED FINDING, *supra* note 104, at 5 (noting that first sustained contact occurred by Spaniards in 1776).

128. 2008 Guidance, 73 Fed. Reg. at 30,147-48.

129. See, e.g., JUANENO PROPOSED FINDING, *supra* note 104, at 57-58.

4. Obama Administration (2009 – present)

The FAP has continued to evolve as the Obama administration has taken on the challenge of reforming the FAP. On June 21, 2013, the DOI issued a draft regulation,¹³⁰ which was distributed for purposes of tribal consultation. This draft regulation acts similarly to an advanced notice of proposed rulemaking. Often, when a regulation is deemed controversial, an agency will use an advanced notice of proposed rulemakings to provide some insight into the agency's intentions while posing questions to the public.¹³¹ The questions are supposed to provide the federal government with insight, as early as possible, as to what the public and affected industries believe would be best. Similarly, the draft regulation provides an opportunity for tribal nations and other interested parties to share ideas with the agency in order to shape the development of the proposed rule.

Under Executive Order (EO) 13175, agencies are required to consult with federally recognized tribes on issues that have tribal implications prior to the issuance of federal rules.¹³² Arguably, if an agency waits until the proposed rule is published before consulting affected parties, it has already run afoul of EO 13175. Once a proposed rule is published, the agency has, to some extent, already taken action. If the agency consulted with tribes after the publication of the proposed rule and determined that the proposed rule was fundamentally misaligned with tribal interests, the agency would not be able to issue a final rule.¹³³ This is because the changes would “differ substantially,” and, therefore, not be a “logical outgrowth” of the proposed rule.¹³⁴ Instead, it would have to issue an amended proposed rule. Thus, by issuing draft regulations, the agency is meaningfully engaging in consultation with tribal nations while ensuring that the agency's regulatory goals are being addressed in a timely and efficient manner.

The Department followed up on the draft by publishing a proposed rule on May 29, 2014 suggesting several significant changes to the FAP.¹³⁵ The

130. Letter from Kevin Washburn, Assistant Sec'y—Indian Affairs, to Tribal Leaders (June 21, 2013), *available at* <http://www.bia.gov/cs/groups/public/documents/text/idc1-022125.pdf> (announcing tribal consultation to discuss draft federal recognition regulations).

131. Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 633-37 (2002) (providing a summary of when agencies use advance notice of proposed rulemakings).

132. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

133. *See generally* Kannan, *supra* note 47, at 216-22 (discussing the final-rule in-depth and notice requirements under the Administrative Procedure Act).

134. *See id.*

135. Federal Acknowledgment of American Indian Tribes, 79 Fed. Reg. 30,766 (May 29,

most notable change is the creation of a new method of reviewing petitions. First, all petitions must pass an expedited negative review showing that they meet criterion (e), descent from a historic tribe.¹³⁶ Next, if the petitioner has currently resided on a state reservation since 1934 or has land held in trust by the United States, its petition moves into an expedited favorable review and is automatically approved.¹³⁷ If a petition fails to meet the bar for an expanded expedited favorable decision, then the OFA must engage in a review of the remaining criteria (b) and (c), distinct community and political continuity, respectively.¹³⁸ This process aims to increase efficiency in reviewing petitions. Many petitioners ultimately stumble on criterion (e). Requiring petitions to meet this bar before they can move to a full-review makes bureaucratic sense.

The final rule, issued on June 29, 2015, maintained the general framework of this phased review process, but made some changes. First, the Phase I review added in a review of criteria (d), (f), and (g), requiring the petitioner to have a governing document, consist of a unique membership, and not be subject to prior legislation terminating the tribe.¹³⁹ In the proposed rule Phase I consisted of two parts. The proposed rule called for an exclusive analysis of criterion (e).¹⁴⁰

Procedurally, the proposed rule also altered the terminology of review. Instead of issuing “expedited negative” and “favorable” decisions, the OFA instead instituted a “phased” review process. The term “phased review” seems much more innocuous because an expedited negative which implies disparate treatment rather than a mere descriptor of the review process.

Two large-scale changes were proposed in the proposed rule, but were ultimately not accepted in the final rule. First, the proposed rule eliminated criterion (a), which requires outside identification of the tribal entity.¹⁴¹ Instead, petitioners were required to describe their existence as an Indian

2014) (to be codified at 25 C.F.R. § 83).

136. BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, RED LINED DISCUSSION DRAFT VERSION – 25 CFR PART 83 PROCEDURES FOR ESTABLISHING THAT AN AMERICAN INDIAN GROUP EXISTS AS AN INDIAN TRIBE 15 (2013) [hereinafter RED LINED DISCUSSION DRAFT VERSION], available at <http://www.bia.gov/cs/groups/public/documents/text/idc1-022123.pdf>.

137. *Id.* at 15-16 (noting that this would be under 83.10(f)).

138. *Id.* (noting that this would be under 83.10(g)).

139. Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37,862 (June 29, 2015) (to be codified at 25 C.F.R. § 83).

140. *Id.* at 30,778-79.

141. Federal Acknowledgment of American Indian Tribes, 79 Fed. Reg. 30,766 (May 29, 2014) (to be codified at 25 C.F.R. § 83).

tribe at any one point in time during the historic period (defined as prior to 1900).¹⁴² The OFA acknowledged that outside identification is not a signifier of legitimacy, especially since many tribes went underground in order to survive.¹⁴³

However, numerous commenters raised concerns about eliminating this criterion citing the fact that no petitioner was denied solely because of their inability to meet the external identification criterion.¹⁴⁴ The administration ultimately decided to take the middle ground by keeping the current criterion (a) with the modification to “accept identifications by the petitioners in the same manner as we would accept identifications by external sources.”¹⁴⁵ Some commenters were skeptical of allowing self-identifications, but the Department dismissed these concerns as “not compelling.”¹⁴⁶ The Department reiterated that no petitioner to date was denied solely because of criterion (a), which makes this change a small compromise.¹⁴⁷

Second, the proposed rule changed the evaluation of criteria (b) and (c), requiring the petitioner to show distinct community and political continuity, from “historical times to the present” to “from 1934 to the present.”¹⁴⁸ The year 1934 coincides with the passage of the Indian Reorganization Act (IRA), which created an opportunity for all tribes to reorganize politically. This date recognizes that the IRA was a signal of a shift in federal policy supporting tribal governments, and that prior to 1934 tribes were not encouraged to document their political existence.¹⁴⁹

The publication of the final rule noted that they “received more comments on the proposed starting date” for criterion (b) and (c) “than any other part of the rule.”¹⁵⁰ Numerous commenters suggested that moving the date forward to 1934 would weaken the criteria. Other commenters suggested that moving the date to 1900 would be consistent with the current definition of “historical.” Ultimately, the Department chose to exercise

142. *Id.* at 30,775

143. *Id.* at 30,769.

144. 80 Fed. Reg. at 37,866.

145. *Id.*

146. *Id.*

147. *Id.*

148. 79 Fed. Reg. at 30,775.

149. *Id.* at 30,768.

150. 80 Fed. Reg. at 37,868.

caution and use 1900 as the starting date to evaluation criteria (b) and (c).¹⁵¹

An additional change in the proposed rule that was not included in the final rule regarded the ability of a previously denied petitioner to re-petition by proving by a preponderance of the evidence that the reasonable likelihood standard was improperly applied to their final determination.¹⁵² Former petitioners had to obtain the approval of all interested parties, which was a huge burden since in many cases one of the opposing interested parties is the state in which the petitioner resides.¹⁵³ States often vehemently oppose recognizing any additional tribes within their state due to concerns over governance and gaming. The final rule ultimately eliminated the ability for previously denied petitioners to re-petition noting that it was unfair to pending petitioners to focus on re-petitions and that including re-petitioning would hinder the goals of increasing efficiency and timeliness by imposing additional workload demands on the Department.¹⁵⁴

The draft regulation requested comments on how to handle these appeals in order to gain insight into how the community felt appeals should be handled.¹⁵⁵ Normally when an agency asks for input in the pre-rulemaking process, it incorporates the comments into the proposed rule. However, the proposed rule did not elaborate on this appeals process, other than removing it from the Interior Board of Indian Appeals and placing it in the Office of Hearing and Appeals.¹⁵⁶ The final rule clarifies that the appeals would be guided by 43 CFR Pt 4, which provides Departmental Hearing and Appeals Procedures.¹⁵⁷

Also, even though the proposed rule now hinges on criterion (e), it does little to address the problems with substantive interpretation of the criterion. To ease the burden on petitioners, the proposed rule states that the OFA will assume any roll prepared by the DOI or directed by Congress is accurate.¹⁵⁸ But this does little to address the problems associated with identifying a

151. *Id.* at 37,890

152. 79 Fed. Reg. at 30,774.

153. Letter from Patty Ferguson-Bohnee, Professor of Law, Ariz. State Univ. et al. to Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action, U.S. Dep't of the Interior (Sept. 30, 2014), available at <https://turtletalk.files.wordpress.com/2014/10/law-professor-letter-fap-reform.pdf> (suggesting through the notice-and-comment process that the final rule abandon the third party veto in the re-petition process).

154. 80 Fed. Reg. at 37,888-89. 37,864-65.

155. *Id.* at 30,768.

156. *See* 79 Fed. Reg. at 30,780.

157. 80 Fed. Reg. at 37,880-81; 43 C.F.R. Pt. 4.

158. 79 Fed. Reg. at 30,781.

historic tribe. While the proposed rule states that the petitioner may satisfy criterion (e) with the most recent evidence available for the historic time period, there is no additional detail provided to assist the petitioner in determining what type of evidence will be accepted.¹⁵⁹

The final rule actually further highlights the problems with criterion (e). By removing the one concrete addition in the proposed rule to criterion (e), which required 80% of the petitioners membership to be descend from the historical Indian tribe, the final rule effectively gutted the reform of this requirement.¹⁶⁰ The Department noted that many recognized tribes felt that any number less than 100% was unacceptable. Because of comments that suggested that the 80% requirement changed the standard, the Department decided to remove this marker.¹⁶¹

Finally, the overarching problem with the FAP has not been resolved with the final rule. Prior administrations have used guidance documents that purportedly “interpret” and/or “clarify” the FAP to achieve different goals. In fact, some scholars have argued that recent administrations have used these guidance documents in place of going through a lengthy rulemaking process.¹⁶² While, these older guidance documents would not apply to new regulatory language, the final rule failed to sufficiently clarify the regulatory standard of reasonable likelihood of the validity of the facts, or clarify how the OFA should interpret each criterion.

The proposed rule defined “reasonable likelihood” and “substantial interruption” to remove the possibility for inconsistent application of the rule to petitioners. However, “in light of commenter’s concerns that the proposed rule changed the standard of proof, the final rule retains the current standard of proof and discards the proposed interpreting language.”¹⁶³ This is disappointing because the inconsistent application of the standard was a recognized problem and the most appropriate way to address this problem is to clarify the standard in the rule.

159. *Id.*

160. 80 Fed. Reg. at 37,890-91.

161. *Id.* at 37,866-67.

162. See e.g., *Department of Interior’s Recently Released Guidance on Taking Land into Trust for Indian Tribes and Its Ramifications: Hearing Before the H. Comm. on Natural Res.*, 110th Cong. (2008) (statement of Alex Skibine, Professor of Law, University of Utah), available at <http://naturalresources.house.gov/uploadedfiles/skibinetestimony02.27.08.pdf> (arguing that the Department of Interior’s Guidance Document on the Fee to Trust process should have been a rulemaking with notice and comment provisions provided to the public).

163. *Id.* at 37,865.

The Department explanatory language stated “if there is a prior decision finding that evidence of methodology was sufficient to satisfy any particular criterion in a previous petition, the Department will find that evidence of methodology sufficient to satisfy the criterion for a present petitioner.”¹⁶⁴ Thus, the Department now acknowledges that prior positive decisions have precedential value. However, since the prior determinations used an analysis that was altered by guidance documents that arguably raised the standard, then the body of current evidence that petitioners can cite to will be higher than the standard of “reasonably likelihood of the validity of the facts.”¹⁶⁵ Thus, without addressing the standard many of the same problems will continue to plague the FAP.

On the same day that the Department released the final rule they also released a policy statement that “any group within the contiguous 48 states seeking Federal acknowledgement as an Indian tribe administratively must petition under 25 CFR part 83 from this date forward.”¹⁶⁶ This effectively closes out the ability for tribes to request re-affirmation of federal recognition, including tribes that were previously denied under the FAP and are now barred from re-petitioning under the final rule.

The companion guidance is especially interesting because it includes self-rescinding language. An administrative rule or policy may have a sunset date, which is known at the time of the rulemaking and included for transparency and clarity. However, it is rare to see a policy statement assert that the rule is “contingent on the Department’s ability to implement Part 83, as reformed. If, in the future, the newly reformed Part 83 process is not in effect and being implemented, this policy guidance is deemed rescinded.”¹⁶⁷

This language lends itself to numerous questions: Who “deems” the guidance rescinded? What is the threshold for implementation of the reformed Part 83? Does this provide a cause of action to petitioners? The language clearly exists to ensure that future administrations cannot hide

164. *Id.* at 37,865.

165. Letter from Patty Ferguson-Bohnee, Professor of Law, Ariz. State Univ. et al. to Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action, U.S. Dep’t of the Interior (Sept. 30, 2014), available at <https://turtletalk.files.wordpress.com/2014/10/law-professor-letter-fap-reform.pdf> (suggesting through the notice-and-comment process that the final rule abandon the third party veto in the re-petition process); see also Lorinda Riley, *Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Regulations*, 37 N.Y.U. REV. L. & SOC. CHANGE 629, 636, 658-62 (2013).

166. Requests for Administrative Acknowledgement of Federal Indian Tribes, 80 Fed. Reg. 37538, 37539 (June 26, 2015).

167. *Id.*

behind this policy statement if they are also not implementing the reformed regulations. As with most contentious reform processes there will likely be a period of uncertainty that may include litigation, before we begin to see the true effects on the process.

II. *The Politics of Implementing Regulations*

A. *The Political Nature of Regulation*

Issuing, implementing, and amending regulations can be politically charged. However, regulations are more easily amended than statutes. Only one agency is needed to change a regulation, and an agency is, at any given time, controlled by only one political party. Statutes, on the other hand, require that a bill be introduced into Congress, approved in identical final form by both the House and the Senate, and survive veto by the Executive, who may be of a different political party than the majority of Congress.¹⁶⁸

Although amending a regulation is, in the abstract, easier to accomplish politically than amending a statute, it is still no simple task. Agencies often prefer to handle changes in the form of guidance and policy statements to avoid the cumbersome notice and comment procedures under the APA.¹⁶⁹ Agencies frequently self-police any proposed change so that it fits within the constructs of an “internal agency action,” which does not require notice and comment.¹⁷⁰ This may mean that the agency knowingly sacrifices the ideal implementation of its goals in favor of quick movement.¹⁷¹ On average, a non-controversial rule takes two years to be finalized.¹⁷² When an agency does undertake a new rulemaking, it focuses on following the correct process to avoid an APA challenge, which would require it to go through the rulemaking process a second time.¹⁷³

Agencies are headed by political appointees who lead in a manner consistent with the President’s political philosophy and priorities.¹⁷⁴ However, individual programs within an agency are almost always run by

168. See generally H.R. Con. Res. 190, 110th Cong. (2007) (enacted).

169. See Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012). But see Jason Webb Yackee & Susan Webb Yackee, *Is Agency Rulemaking ‘Ossified?’ Testing Congressional, Presidential, and Judicial Procedural Constraints*, 20 J. PUB. ADMIN. RES. THEORY 261 (2008).

170. See LUBBERS, *supra* note 17, at 60.

171. See *id.*

172. See Pierce, *supra* note 169. But see Yackee & Yackee, *supra* note 169.

173. See Chaffin, *supra* note 75, at 79.

174. JOEL D. ABERBACK & MARK A. PETERSON, *THE EXECUTIVE BRANCH* 525 (2006).

career-appointed federal employees with their own interests in seeing their programs prosper.¹⁷⁵ Thus, a natural tension exists when issuing regulations of a political or controversial nature.¹⁷⁶ However, both political appointees and career officials can harmoniously move forward when an external threat to a program exists. Both the head of an agency as well as program leaders want to maintain power and control over their programs. It should come as no surprise, then, that the impetus for the initial federal recognition regulations was due to a threat against agency and program control.¹⁷⁷

B. How Politics Play In

There are natural lulls in an administration when work on regulations comes to a grinding halt. The most notable of such is the first year of a newly elected President's term.¹⁷⁸ During this time, political staff (except the secretary of the department) generally have not been appointed or confirmed. Once these officials are appointed and confirmed, they must be brought up to speed on the agency's activities. Until then, these officials are unable to adequately review new, proposed, or final regulations.¹⁷⁹ Therefore, until an agency is fully staffed, no large or controversial regulations are typically issued.¹⁸⁰

Another time there is a lull in the regulatory process is during the peak of the campaign cycle.¹⁸¹ At this time, the President may be distracted by campaigning for reelection and is not usually able to give direction to the

175. *Id.*

176. *Id.*

177. See *Hearing on S. 2375 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 17-18 (1978) (statement of George Goodwin, Deputy Assistant Sec'y of the Interior-Indian Affairs), available at <http://babel.hathitrust.org/cgi/pt?id=pur1.32754070367291;view=1up;seq=1>.

178. JACQUELINE VAUGHN & ERIC OTENYO, *MANAGERIAL DISCRETION IN GOVERNMENT DECISION MAKING: BEYOND THE STREET LEVEL* (2007) (describing the effect of the presidential timeline on regulation making); see also *Midnight Rulemaking: Shedding Some Light: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 236 (2009) (statement of Michael Abramowicz, Professor of Law, George Washington University), available at http://judiciary.house.gov/_files/hearings/printers/111th/111-2_47033.pdf.

179. L. ELAINE HALCHIN, *CONG. RESEARCH SERV.*, RL 34722, *PRESIDENTIAL TRANSITIONS: ISSUES INVOLVING OUTGOING AND INCOMING ADMINISTRATIONS* 4 (2008).

180. *Id.*

181. *Id.* at 2; see also Anthony Davies & Veronia de Ruyg, *Midnight Regulations: An Update*, Figure 1, (Mercatus Center, Working Paper No. 08-06, 2008), available at http://mercatus.org/uploadedFiles/Mercatus/Publications/WP0806_RSP_Midnight%20Regulations.pdf.

members of his Cabinet and other administrative officials.¹⁸² Without this type of direction, it is unlikely that an agency will propose or finalize any significant regulations. However, it will consider non-controversial and mundane topics for regulatory change.¹⁸³

On the flip side, there is a period where the regulatory process operates in overdrive. A lame duck President often takes the last several months of his final term to push through all of the changes that he hoped to accomplish during his presidency.¹⁸⁴ Thus, regulations that are personally important to the President or which are controversial to the point where it is not in the President's best interest to issue them in the midst of his presidential tenure will be moved through the process at lightning speed when he is about to leave office.¹⁸⁵

Each President has his own priorities, strategies, and issues that he hopes to address during his administration. A review of the historical and political context of each administration, guided by a quantitative analysis of recognition decisions during each administration, provides insight into the federal recognition policy.¹⁸⁶

III. Implementation of Regulations by Administration

The political context cannot be divorced from each administration's overarching policy on federal recognition. While each recognition decision on its own provides little guidance on an administration's policy, an analysis of the entire administration's decisions provides sufficient content to determine its philosophy. Finally, because regulatory actions open an agency to public scrutiny, each of these actions or publications can provide strong clues to the administration's policies and goals, since publication highlights what an administration values enough to vocalize, justify, and fight for. Revisiting each administration's regulatory actions and analyzing

182. HALCHIN, *supra* note 179.

183. *See generally* VAUGHN & OTENYO, *supra* note 178 (describing the effect of the presidential timeline on regulation making).

184. Christopher Carlberg, *Early to Bed for Federal Regulations: A New Attempt to Avoid "Midnight Regulations" and Its Effects on Political Accountability*, 77 GEO. WASH. L. REV. 992, 1000 (2009); *see also* HALCHIN, *supra* note 179 (describing the effect of the presidential timeline on regulation making).

185. Carlberg, *supra* note 184. *See generally* VAUGHN & OTENYO, *supra* note 178 (describing the effect of the presidential timeline on regulation making).

186. *See infra* tbl. A. Note that Table A includes congressionally recognized tribes in addition to those recognized by the administrative process under Part 83.

them through a political lens allows one to see that the FAP is actually a patchwork quilt of different administrations' priorities.

A. Carter Administration (1977-1981)

The Carter administration proposed the initial rule for the "Procedures Governing Determination that [an] Indian Group is a Federally Recognized Indian Tribe" during the first year of President Carter's term on June 16, 1977.¹⁸⁷ The proposed rule was very broad in nature, requiring some type of explicit or implicit acknowledgement by a federal, state, or local government to show that the petitioning group was an Indian tribe.¹⁸⁸ Although comments on the proposed rule were received, they were not addressed because the administration chose to issue revised proposed rule instead.¹⁸⁹ It is unusual for an administration to issue regulations of a new and controversial nature during its first year; most likely, the Carter administration accepted draft rules that were in the development stage during the Ford administration.¹⁹⁰ Regardless, the Carter administration issued the "Revised Proposed Rules for Procedures for Establishing that an American Indian Group Exists as an Indian Tribe" on June 1, 1978—one year after the initial proposed rules were published.¹⁹¹

The political context in which the Carter administration operated allows one to make several conclusions about the administration's federal recognition policy. In 1977, Senator James Abourezk sought to establish congressionally mandated procedures for recognizing tribes.¹⁹² His proposed legislation was far more inclusive than the 1978 FAP. The proposed legislation would have established an independent office within the DOI in order to avoid conflicts of interest with the Bureau of Indian

187. Procedure Governing Determination that Indian Group Is a Federally Recognized Indian Tribe, 42 Fed. Reg. 30,647 (June 16, 1977) (codified at 25 C.F.R. § 83 (formerly 25 C.F.R. § 54)).

188. *Id.*

189. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe (Proposed Procedures for Establishing), 43 Fed. Reg. 23,743 (proposed June 1, 1978) (codified at 25 C.F.R. § 83 (formerly 25 C.F.R. § 54)).

190. 1 AM. INDIAN POL'Y REV. COMM'N, FINAL REPORT TO CONGRESS 477 (1977), available at <https://archive.org/stream/finalreport01unit#page/476/mode/2up> (providing a description of a proposed federal recognition policy by the Ford Administration). See generally ABERBACK & PETERSON, *supra* note 174.

191. Proposed Procedures for Establishing, 43 Fed. Reg. at 23,743.

192. See *Hearing on S. 2375 Before the S. Select Comm. on Indian Affairs*, *supra* note 177.

Affairs (BIA).¹⁹³ It also placed the burden of proof on the DOI to show that a petitioning tribe failed to meet a set of criteria.¹⁹⁴ This bill was proposed based on the recommendation of the American Indian Policy Review Commission Report in 1977.¹⁹⁵

Interestingly, the National Congress of American Indians (NCAI) opposed the legislation, stating that they “believe[d] that any criteria must be both strict and comprehensive.”¹⁹⁶ The NCAI continues to struggle with the issue of federal recognition. In fact, the NCAI supported a 2008 referendum attempting to rescind all past referenda in support of petitioning tribes.¹⁹⁷ Given that the NCAI’s primary constituents are federally recognized tribes who pay a hefty fee for voting status in this democratic institution, an unbiased review of the issue by the NCAI may be difficult to come by.

This legislative threat, along with several federal court cases, urged the DOI to act. In 1974, the Ninth Circuit Court of Appeals held that Indian tribes who descend from tribal signatories to certain federal treaties were entitled to half of the commercial fish harvest of the state of Washington.¹⁹⁸ The decision went on to find that the Stillaguamish and Upper Skagit tribes, which were not federally recognized but maintained an organized political structure, were also entitled to federal treaty rights.¹⁹⁹ In *Passamaquoddy v. Morton*, the Passamaquoddy successfully argued that the federal government failed to act on their behalf when Maine initiated a treaty with them in violation of the Intercourse Act of 1790.²⁰⁰ These two cases appeared to bring unrecognized tribes existing as modern communities under the realm of federal Indian law. These cases hinted that unless the

193. *See id.*

194. *Id.*

195. AM. INDIAN POL’Y REV. COMM’N, *supra* note 190, at 476-83.

196. *Hearing on Federal Recognition Before the Subcomm. on Indian Affairs of the H. Comm. on the Interior*, 95th Cong. (1978). Some recognized tribes want to limit the amount of newly recognized tribes because they fear a reduction in their proportional share of BIA resources.

197. NAT’L CONG. OF THE AM. INDIAN, RESOLUTION PHX-08-055, NCAI POLICY OF FEDERAL RECOGNITION OF INDIAN TRIBES (2008), available at http://www.ncai.org/attachments/Resolution_hpCJPjvaesslmclZHfXwrakhSOtTZuswTMuQNhzaElzRwIkweyG_PHX-08-055FINAL.pdf.

198. *United States v. Washington*, 520 F.2d 676, 688 (9th Cir. 1975).

199. *Id.* at 692-93.

200. *Passamaquoddy v. Morton*, 528 F.2d 370, 379-80 (1st Cir. 1975).

DOI provided a process for recognizing tribes, the courts would provide tribes with rights to resources and land as they saw fit.²⁰¹

Furthermore, in *Mashpee Tribe v. New Seabury Corp.*, after a lengthy discussion of the primary jurisdiction doctrine, which allows the court to “determine that the initial decision-making responsibility should be performed by the relevant agency rather than the courts,”²⁰² the court noted that because the DOI “[did] not yet have prescribed procedures” and because such procedures for recognition did not appear imminent, the court must decide whether the Mashpee constituted a tribe.²⁰³ Faced with these federal court decisions, as well as other pending cases,²⁰⁴ the DOI decided to preempt potential federal legislation or federal court decisions by instituting a procedure for recognizing tribes.²⁰⁵

The most striking aspect of the Carter administration regulations is the speed at which they were finalized. The revised proposed regulations provided for a thirty-day public comment period instead of the normal sixty-day period, which under the APA requires “good cause.”²⁰⁶ The DOI then analyzed comments and incorporated necessary changes in approximately sixty days. This indicates that the Carter administration felt pressure to finalize this recognition regulation.

The final regulations were published in September, 1978.²⁰⁷ Because the program was in the initial stages requiring outreach to potential petitioners, solicitation of petitions, and other preliminary activities, only one federal recognition decision was rendered during the Carter administration. The first tribe to be acknowledged under the FAP was the Grand Traverse Band of Ottawa and Chippewa Tribe.²⁰⁸ The Carter administration’s legacy in federal recognition ensured that the DOI maintained control over the federal recognition process.

201. MILLER, *supra* note 68, at 35-38.

202. Roberto Iraola, *The Administrative Tribal Recognition Process and the Courts*, 38 AKRON L. REV. 867, 886 (2005) (citing *Syntek Semiconductor Co., LTD. v. Microchip Tech., Inc.*, 307 F.3d 775, 780 (9th Cir. 2002) (providing a description of the primary jurisdiction doctrine)).

203. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 581 (1st Cir. 1979).

204. *See, e.g., id.*

205. *See, e.g., id.*

206. Administrative Procedure Act, 5 U.S.C. § 553 (2012).

207. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe (Carter Procedures for Establishing), 43 Fed. Reg. 39,361 (Sept. 5, 1978).

208. Determination for Federal Acknowledgment of Grand Traverse Band of Ottawa and Chippewa Indians as an Indian Tribe, 45 Fed. Reg. 19,321 (Mar. 25, 1980).

B. Reagan Administration (1981-1989)

The Reagan administration saw the beginning of the Indian gaming revolution that spread across Indian Country since *California v. Cabazon Band of Mission Indians* was handed down in 1980. *Cabazon* held that Indian tribes have the inherent authority to pass tribal ordinances authorizing the operation of for-profit bingo halls and card clubs, so long as that type of gaming was not prohibited under state law.²⁰⁹ Soon thereafter, Congress passed the Indian Gaming Regulatory Act (IGRA) in 1988, which codified the *Cabazon* decision and required tribes to enter into a compact agreement with the state in which the tribe was located before engaging in certain gaming activities.²¹⁰ Senators McCain and Inouye both remarked during several hearings before the Senate Committee on Indian Affairs that at the time IGRA was passed, they did not think Indian gaming would be very successful.²¹¹ Thus, it is safe to say that while Indian gaming and federal recognition co-existed in the past, they were not as intertwined during the Reagan administration as they are today.

During the Reagan administration, most litigation involving Indians revolved around hunting and fishing rights, jurisdiction over reservation lands, and large water settlements.²¹² Little first hand information exists on Reagan's views on Indian policy. However, according to some scholars, President Reagan reportedly said that it was a mistake to "humor" Native Americans with treaties and special status.²¹³ Reagan's Secretary of the Interior, James Watt, allegedly stated that Indians suffered from a range of

209. *California v. Cabazon*, 480 U.S. 202, 221-22 (1987).

210. Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (2012).

211. *Oversight Hearing on the Regulation of Indian Gaming Before the S. Comm. on Indian Affairs*, 109th Cong. 14 (2005) (statement of Sen. John McCain) (stating that when IGRA was written, the Committee, including Senator Inouye and himself, had no idea that Indian gaming would turn into a \$19.5 billion a year business).

212. *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 492 U.S. 406 (1989) (holding that the reserved water doctrine does not extend to ground water); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) (holding that the Indian Mineral Leasing Act of 1938 did not allow states to tax tribal royalty income generated by leases issued pursuant to that Act); *United States v. Adair*, 467 U.S. 1252 (1984) (discussing that federal water rights for lands that tribes have occupied since time immemorial are accorded a priority date of time immemorial and are known as aboriginal water rights); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (upholding the pre-emption of State hunting and fishing laws in favor of exclusive tribal jurisdiction); see also Paige Graening, *Judicial Failure to Recognize a Reserved Groundwater Right for the Wind River Indian Reservation, Wyoming*, 27 TULSA L.J. 1 (1991).

213. MILLER, *supra* note 68, at 73.

social problems due to their socialistic governments, and expressed confusion that federal officials encouraged this behavior.²¹⁴

President Reagan had strong views on state's rights and balancing the budget; people have even coined the term "Reagonomics" to describe his brand of fiscal politics.²¹⁵ Under the Reagan administration, income taxes were cut, gross domestic product recovered from the 1982 recession, and inflation decreased.²¹⁶ The Reagan administration significantly cut numerous federal programs, such as Medicaid, food stamps, and the EPA, while maintaining entitlement programs such as Medicare and Social Security.²¹⁷ The BIA budget did not fare well during Reagan's tenure, supposedly because of his apparent views about "humoring" Native Americans with special status and his dislike of welfare programs.²¹⁸ Some scholars have even argued that President Reagan's policy towards Indians was termination through budget cuts.²¹⁹ However, given Reagan's state's rights philosophy and desire to reduce social welfare programs, it is safe to assume that he was supportive of the format and goals of the IGRA.

The Reagan administration provided no regulatory action on federal recognition. However, the OFA considered seventeen recognition petitions, granting six of them. Thus, under the Reagan administration 35.3% of recognition petitions were granted.²²⁰ The Jamestown Clallam, Tunica-Biloxi, Death Valley Timisha Shoshone, Narragansett, Poarch Creek Band of Choctaw, and Wampanoag Gay Head tribes were all recognized.²²¹ Since becoming federally recognized, each of these tribes have been increasingly politically active. All of the petitioners that were denied during the Reagan administration were unable to meet criteria (a), (b), (c), and (e), with the exception of the Principal Creek and Tchinouk, who met criterion (e), but not (a), (b), or (c).²²² Each of the petitioners that were denied had

214. *Id.*

215. See generally WILLIAM NISKANEN, *REAGANOMICS: AN INSIDER'S ACCOUNT OF THE POLICIES AND THE PEOPLE* (1988).

216. *Id.* at 75-79.

217. *Id.* at 40-41.

218. Samuel Cook, *Ronald Reagan's Indian Policy in Retrospect: Economic Crisis and Political Irony*, 24 POL'Y STUDY J. 24 (1996).

219. *Id.*

220. See *infra* tbl. A.

221. Office of Fed. Acknowledgment, U.S. Dep't of the Interior, *Acknowledgment Decision Compilation (ADC) List: Petitions Resolved by DOI*, BIA.GOV, <http://www.bia.gov/WhoWeAre/AS-IA/OFA/ADCList/PetitionsResolved/index.htm> (last visited Apr. 21, 2015) [hereinafter *Petitions Resolved by DOI*].

222. See *id.*

substantial difficulties meeting criteria (b) and (c), which can be indirectly attributed to a lack of geographic continuity since a significant segment of their membership moved to urban areas, making social and political continuity difficult to show.

The Reagan administration's recognition decisions were relatively evenly spread through the duration of his administration. This cannot be said of other administrations. The W. Bush administration, for example, issued multiple negative findings in clusters. Tribes were not yet strong political players during the Reagan administration, as gaming was in its infancy, and the administration had little to fear from tribes or from citizens who opposed tribal interests.²²³

Reagan's administration was also the first to experience congressional recognition of tribes coinciding with the implementation of the FAP. The Cow Creek Umpqua, Western Mashantucket Pequot, Confederated Coos Lower Umpqua, and the Lac Vieux Desert Chippewa were all recognized by Congress under Reagan's administration.²²⁴ Both the Cow Creek and Confederated Coos Lower Umpqua were terminated in 1954, placing them beyond the scope of the FAP.²²⁵ Both tribes successfully engineered a land claim before the U.S. Court of Claims.²²⁶ As a consequence of their litigation, the tribes were able to use the settlement as leverage for congressional reinstatement in 1982 and 1984, respectively.²²⁷

Similarly, the Mashantucket Pequot Indian Land Claims Settlement Act was born out of a land claim. With the aid of Connecticut, the tribe was able to secure the passage of the Mashantucket Pequot Indian Land Claims

223. Frank Newport, Jeffery M. Jones & Lydia Saad, *Ronald Reagan from the People's Perspective: A Gallup Poll Review*, GALLUP (June 7, 2004), <http://www.gallup.com/poll/11887/ronald-reagan-from-peoples-perspective-gallup-poll-review.aspx> (noting the extent of Reagan's popularity making him nearly impenetrable to pressure from interest groups such as non-Indian tribal gaming opponents and tribal nations).

224. Coos, Lower Umpqua, and Suislaw Restoration Act, Pub. L. No. 98-481, 98 Stat. 2250 (1984); Cow Creek Band Umpqua Tribe of Indians Recognition Act, Pub. L. No. 97-391, 96 Stat. 1960 (1982).

225. 25 C.F.R. § 83.7(g) (2015).

226. See David R.M. Beck, "Standing Out Here in the Surf:" *The Termination and Restoration of the Coos, Lower Umpqua and Siuslaw Indians of Western Oregon, 1954-1984*, 110 OR. HIST. Q. 6, 12 (2009); see also Harvey D. Rosenthal, *Indian Claims and the American Conscience, A Brief History of the Indian Claims Commission*, in IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS 35-70 (Imre Sutton ed., 1985).

227. Coos, Lower Umpqua, and Suislaw Restoration Act, Pub. L. No. 98-481, 98 Stat. 2250 (1984); Cow Creek Band Umpqua Tribe of Indians Recognition Act of 1982, Pub. L. No. 97-391, 96 Stat. 1960 (1982).

Settlement Act in 1983, which granted the tribe federal recognition and funds to purchase additional lands.²²⁸

The final tribe that was congressionally recognized were precluded from the FAP process. The Lac Vieux Desert Chippewa were administratively combined with the Keweenaw Bay Indians until 1988, when Congress officially restored the Tribe as a separate entity.²²⁹ However, because the OFA does not claim the authority to recognize part of a tribe the Lac Vieux Desert Chippewa had to seek congressional recognition.²³⁰

Two trends emerged during the Reagan administration. First, all of the tribes that Congress recognized during the Reagan years were previously recognized. Most were signatories to at least one treaty with the U.S. government, and all but one fell outside the scope of the FAP. Second, with the exception of the Lac Vieux Chippewa, all of the congressional actions were predicated by litigation with potentially huge damage awards, providing Congress with a strong incentive to step in and restore the equilibrium. While the Reagan administration cannot be characterized as friendly towards Indians, there does not seem to be any evidence of a bias against federal recognition petitioners either.

C. H.W. Bush Administration (1989-1993)

The H.W. Bush administration was short lived compared to most modern administrations.²³¹ H.W. Bush served only one term as President, during which time the OFA finalized only two petitions.²³² Given that little policy is actually accomplished during the first year of a President's term and that H.W. Bush had a tough reelection campaign, which probably took his attention off domestic policy during the last year and a half of his term, H.W. Bush had only a year and a half to implement his Indian policy. It was in that year and a half window that the DOI issued a proposed regulation for "Procedures for Establishing that an American Indian Group Exists as an

228. Mashantucket Pequot Settlement Fund, 25 U.S.C. §§ 1754-1758 (2012).

229. Lac Vieux Band of Desert Band of Lake Superior Chippewa Indian Act, Pub. L. No. 100-420, 102 Stat. 1577 (1988); LAC VIEUX DESERT TRIBE, *A Brief History of the Lac Vieux Desert Tribe*, <http://www.lvdtribal.com/history.html> (last visited Apr. 20, 2015).

230. Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures (2008 Guidance), 73 Fed. Reg. 30,146, 30,147 (May 23, 2008).

231. All Presidents since the 1970s, with the exception of Presidents Carter and H.W. Bush, served for two terms.

232. See *Petitions Resolved by DOI*, *supra* note 221.

Indian Tribe.”²³³ These proposed revisions purported to clarify the existing regulations and add definitions to aid in implementation.²³⁴

The proposed revisions made no changes to the basic criteria for acknowledgment.²³⁵ In fact, it is doubtful that these proposed revisions had a strong impact on the process for petitioners. The regulations did, however, provide more detailed definitions that explained exactly what types of evidence the OFA sought, and aided in providing procedural transparency.

Under the H.W. Bush administration, two petitions were completed—the San Juan Southern Paiute Tribe was recognized, and the Miami Tribe of Indiana was denied recognition.²³⁶ The Miami failed to meet criteria (b) and (c) requiring social and political continuity from 1940 to the present.²³⁷ In addition, there was one congressional recognition—the Aroostook Micmac were recognized in 1991 as a tribe that was omitted from the Maine Indian Claims Settlement Act.²³⁸

Little data exists to be able to make an accurate judgment about H.W. Bush’s Indian Policy, but one would be remiss not to note that under H.W. Bush, several important cultural statutes were passed, such as the Native American Graves Protection and Repatriation Act and the Indian Arts and Crafts Act.²³⁹ It is important to note that while H.W. Bush may have signed these bills into law, they originated in Congress, which was controlled by the Democratic Party for his entire presidency. Furthermore, under the H.W. Bush administration, there were no recorded attempts to weaken the federal recognition process through publishing negative guidance that appears to alter the regulatory intent²⁴⁰ or by issuing a substantial number of denials. H.W. Bush’s policy towards federal recognition was one that can be characterized as providing little interest in large-scale changes, likely

233. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe (Bush Proposed Procedures for Establishing), 56 Fed. Reg. 47,320 (Sept. 18, 1991) (codified at 25 C.F.R. § 83).

234. *Id.*

235. 25 C.F.R. § 83.7 (2015).

236. *See Petitions Resolved by DOI, supra* note 221.

237. OFFICE OF FED. ACKNOWLEDGMENT, U.S. DEP’T OF THE INTERIOR, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR FINAL DETERMINATION AGAINST FEDERAL ACKNOWLEDGMENT OF THE MIAMI NATION OF INDIANS OF THE STATE OF INDIANA, INC. 2 (1992), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001516.pdf>.

238. Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, 105 Stat. 1143 (1991).

239. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 (2012); Indian Arts and Crafts Act, 25 U.S.C. § 305 (2012).

240. Riley, *supra* note 165.

because he recognized that he did not have the political clout to accomplish big changes.

D. Clinton Administration (1993-2001)

President Clinton, a Democrat, campaigned on being a “moderate.”²⁴¹ Two years after taking office, he faced a hostile Republican-majority Congress, which created a need to develop a sound legislative and policy strategy. Clinton’s strategy was called “triangulation,” which characterized a large part of the Clinton administration’s action on Indian issues.²⁴²

The first axis of the triangulation strategy assumes that Democratic policies are liberal and Republican policies are conservative, and that individual Democrats and Republicans exist somewhere on this sliding scale.²⁴³ Thus, in order for President Clinton to implement policies in a Republican Congress, he and his staff issued moderate to conservative policies and chose to pursue liberal policies sparingly.

The second axis of the triangulation analysis is the amount of policies issued by an individual.²⁴⁴ Thus, President Clinton’s strategy was to be prolific in his proposed policies. As a result, President Clinton was surprisingly successful in implementing his proposed policies in a Republican Congress because he offered up large quantities of moderate to conservative policies that still fit his larger policy objectives. Thus, when analyzing Clinton-era policies, one notices that they tend to be on the conservative side. Yet, given the political climate, Clinton was able to achieve a significant amount of his goals. This strategy trickled down to his regulatory agenda, including the FAP.

The Clinton administration passed tough child support laws, raised taxes on the wealthy, and prioritized the environment.²⁴⁵ His administration produced a federal budget surplus of \$127 billion.²⁴⁶ During the Clinton administration, the Mashantucket Pequot opened Foxwoods Casino,²⁴⁷ and Eloise Cobell filed her infamous suit that slowed action at the DOI and the

241. JAMES MACGREGOR BURNS & GEORGIA J. SORENSON, *DEAD CENTER: CLINTON-GORE LEADERSHIP AND THE PERILS OF MODERNIZATION* 63 (1999).

242. PHILIP DAVIES & BRUCE NEWMAN, *TRIANGULATION: WINNING ELECTIONS WITH POLITICAL MARKETING* 16 (Newman 2006).

243. *Id.*

244. *Id.*

245. *See generally* PETER LEVY, *ENCYCLOPEDIA OF THE CLINTON PRESIDENCY* (2002).

246. *Id.*

247. Foxwoods Resort Casino opened in 1992. *Tribal History*, MASHANTUCKET PEQUOT TRIBAL NATION, <http://www.mptn-nsn.gov/tribalhistory.aspx> (last visited Apr. 21, 2015).

BIA.²⁴⁸ A year after taking office, the Clinton administration took the proposed revised rule from the H.W. Bush administration and published it as a final rule with several key additions. The most important addition is the elucidation of a standard for interpreting evidence—the “reasonable likelihood of the validity of the facts” standard.²⁴⁹ This change in the proposed rule was seen as petitioner-friendly since there was now a standard that the petitioner could point to when challenging the OFA’s decision. Clinton likely received little opposition from Republicans because this rule was so similar to H.W. Bush’s rule.

The Clinton administration also issued a guidance document through the publication of a notice: “Changes in the Internal Processing of Federal Acknowledgment Petitions.”²⁵⁰ This guidance created several changes in policy that had a significant effect on the review of petitions, including applying the professional standards of the reviewers to evaluate the evidence when reviewing petitions and providing that the OFA would no longer consider evidence submitted after the deadline for a petition. These changes were intended to allow the OFA staff to more efficiently process the petitions. While this may be true of most of the changes in the guidance, the use of professional standards does not aid in the efficiency of processing petitions nor is it a liberal interpretation of the regulation. This is especially true when the regulation does not specify that the petition be reviewed by a specific profession.

However, during the Clinton administration, quite a few tribes were recognized, including five through congressional recognition, and one through Secretarial recognition. Those passed by congressional recognitions were passed in two bundles. The first three included the Pokagon Potawatomi, Little Traverse Odawa, and Little River Ottawa in 1994.²⁵¹ In 1994, the Pokagon Potawatomi were successful in petitioning Congress.²⁵² The Little Traverse Odawa and Little River Ottawa were also successful in

248. The Cobell case was filed in 1996. *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 28 (D.D.C. 1998).

249. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe (Clinton Procedures for Establishing), 59 Fed. Reg. 9280, 9295 (Feb. 25, 1994) (codified at 25 C.F.R. § 83).

250. Changes in the Internal Processing of Federal Acknowledgment Petitions (2000 Guidance), 65 Fed. Reg. 7052 (Feb. 11, 2000).

251. 25 U.S.C. §§ 1300j-1300k (2012).

252. *Id.* § 1300j.

achieving federal recognition through a joint bill that restored their recognition status in 1994.²⁵³

The Federated Indians of Graton Rancheria, a California tribe formerly known as the Federated Coastal Miwok, was recognized through Congress in 2000.²⁵⁴ Graton Rancheria was terminated under the California Rancheria Termination Act in 1958.²⁵⁵ In 2000, Secretary of the Interior Kevin Gover testified before the House Natural Resources Committee that he supported congressional restoration of the Graton Rancheria.²⁵⁶ That same year, Congress passed a bill recognizing the Graton Rancheria.²⁵⁷

The final congressional recognition of the Clinton years was of the Loyal Shawnee, who were displaced from Kansas in the early 1860s and were granted Cherokee citizenship through an agreement with the Cherokee Nation.²⁵⁸ Similar to the trend under Reagan of reserving congressional recognition for previously recognized tribes, the Clinton administration's congressional recognition record consisted entirely of tribes that could not go through the FAP. Since 2000, no tribes have been congressionally recognized; however, many tribes are the subject of federal recognition bills, some of which have passed at least one chamber of Congress.²⁵⁹

The Ione Band of Miwok Indians also obtained recognition through Secretarial action in 1994. The Ione have an intricate history regarding their path to recognition. In 1916, the BIA sought to purchase forty acres of land for the Ione, and moved the tribe to that land. This constituted recognition since the United States provided a "service" to the Ione.²⁶⁰ However, the

253. *Id.* § 1300k.

254. *Id.* § 1300n.

255. California Rancheria Termination Act, Pub L. No. 85-671, 72 Stat. 619 (1958).

256. *Hearing on H.R. 946, H.R. 2671 and H.R. 4148 Before the H. Comm. on Natural Res.*, 106th Cong. 105 (2000) (statement of Kevin Gover, Assistant Sec'y–Indian Affairs).

257. Graton Rancheria Restoration Act, 25 U.S.C. § 1300n (2012).

258. Shawnee Tribe Status, 25 U.S.C. § 1041 (2012).

259. As of Feb. 19, 2014, there were several recognition bills pending before the 113th Congress. Lumbee Recognition Act, House Bill 1803 and Senate Bill 1132; Duwamish Tribal Recognition Act, House Bill 2442; Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2013, House Bill 2190 and Senate Bill 1074 (representing the Chickahominy Indian Tribe, Chickahominy Indian Tribe – Eastern Division, Upper Mattaponi Tribe, Rappahannock Tribe, Monacan Indian Nation, and Nansemond Indian Tribe); Muscogee Nation of Florida, House Bill 323; Little Shell Tribe of Chippewa Indians Restoration Act of 2013, House Bill 2991 and Senate Bill 161.

260. Memorandum from Carl Artman, Assoc. Solicitor, to James Cason, Assoc. Deputy Sec'y of the U.S. Dep't of the Interior (Sept. 19, 2006), available at <http://www.nigc.gov/LinkClick.aspx?link=NIGC%20Uploads/indianlands/091906ionebandlanddetermltr.pdf> (explaining

acquisition was never finalized, and there was little mention of the tribe in the BIA administrative record until the early 1970s. In 1974, Commissioner of Indian Affairs Louis Bruce offered to accept the forty acres of land in trust if the tribe could obtain clear title to the land.²⁶¹ He also opined that the original offer to obtain land for the tribe effectively extended federal recognition to the tribe.²⁶² In 1994, Assistant Secretary of the Interior Ada Deer wrote a letter reaffirming federal recognition to the tribe.²⁶³ The Assistant Secretary argued that the tribe was recognized in 1916 when the government attempted to purchase land for the tribe, but that the tribe was terminated by inaction for a period of time; she reaffirmed their prior status as a federally recognized tribe with her letter.²⁶⁴

The OFA reviewed a total of nine petitions under the FAP during the Clinton administration, six of which were granted. The Clinton administration has the highest percentage of granted petitions at 66.7%.²⁶⁵ Under the Clinton administration, the Mohegan, Jena Choctaw, Huron Potawatomi, Samish, Match-E-be-Nash-She-Wish, and Snoqualamie tribes were all recognized.²⁶⁶ Petitions for the Rampanough, MOWA Band of Choctaw, and Yuchi/Euchee were denied.²⁶⁷

Of these three tribes, the Rampanough—a tribe from Virginia—may not have had a fair chance of success.²⁶⁸ Between 1924 and 1967, the Commonwealth of Virginia systematically altered or destroyed records of

in detail the process for recognizing the Ione Band of Miwok Indians and providing an Indian lands determination).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* This series of events (i.e., recognition, termination, restoration) becomes important when a tribe petitions to place fee land in trust status with the intent to conduct gaming on that land. The Indian Gaming Regulatory Act prohibits gaming on lands acquired after October 1988 unless they are part of a settlement act, a tribe's initial reservation, or restored lands. Qualifying for the restored lands exception requires that a tribe be recognized, terminated, and restored and that the land acquired be historically significant to the tribe. *Id.*

265. *See infra* tbl. A.

266. *See Petitions Resolved by DOI, supra* note 221.

267. *See id.*

268. *See* OFFICE OF FED. ACKNOWLEDGMENT, U.S. DEP'T OF THE INTERIOR, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR FINAL DETERMINATION AGAINST FEDERAL ACKNOWLEDGMENT OF THE RAMAPOUGH MOUNTAIN INDIANS, INC. 29-33 (1996), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001496.pdf>; Warren Fiske, *The Black-and-White World of Walter Ashby Plecker*, VIRGINIAN-PILOT (Aug. 18, 2004), <http://hamptonroads.com/2004/08/blackandwhite-world-walter-ashby-plecker>.

Virginia's tribes, reclassifying native Indian populations as "colored" under the Racial Integrity Act, making it nearly impossible for Virginia tribes to meet criterion (e), descent from the historic tribe.²⁶⁹ Recall that at this time the OFA started its analysis by determining which individual Indians made up the historic tribe. From there they would analyze whether the petitioners descended from this group, whether this group and its descendants maintained political continuity, etc. For Virginia tribes it is impossible to find a historical tribe and a pool of Indian individuals because their vital records were altered to classify them as colored or white. Consequentially, it is nearly impossible to show that the petitioner descended from the historic tribe and created a distinct community of Indians. At the very least, the OFA staff genealogist must make allowances under their professional standards to verify lineages, which the OFA has, until recently, been unwilling to consider.²⁷⁰

During the Clinton administration's lame-duck session, it pushed through numerous controversial decisions. One of these was to issue a positive final determination for the Eastern Pequot and Paucatuck Pequot.²⁷¹ The final determination recognized one Pequot tribe, even though during the review process the tribe had splintered into the Eastern Pequot and Paucatuck Pequot petitions. However, with the rise of Indian gaming, the recognition of this tribe and others became politically charged.

The Pequot tribe is located in Connecticut, where two of the largest Indian casinos already exist—Foxwoods Casino (operated by the Mashantucket Western Pequot) and Mohegan Sun Casino (operated by the Mohegan).²⁷² Connecticut's congressional delegation, citizens groups, and state politicians all put extensive pressure on federal officials to reverse the

269. *Loving v. Virginia*, 388 U.S. 1, 13 n.4 (1967) (noting that the Virginia Racial Integrity Act of 1924 reclassified Indians as "Colored" on all official state documents).

270. Recently the Obama Administration issued a Proposed Finding in favor of recognizing the Paumunkey Tribe, a state recognized Virginia tribe. Under criterion (e) the OFA determined the historic Indian tribe using a tax list and church list based on the tribe's reservation. Notice of Proposed Finding for Federal Acknowledgment of the Pamunkey Indian Tribe, 79 Fed. Reg. 3860 (Jan. 23, 2014). The use of this type of documentation to determine whether a group has Indian ancestry is not common. Needless to say, tribes that were not state recognized or have not maintained a defined geographic area would not be able to provide this evidence.

271. Notice of Final Determination to Acknowledge the Historical Eastern Pequot Tribe, 67 Fed. Reg. 44,234 (July 1, 2002).

272. Mashantucket Pequot Indian Land Claims Settlement Act, 25 U.S.C. § 1754 (2012); Final Determination that the Mohegan Indian Tribe of Connecticut, Inc., Does Exist as an Indian Tribe, 59 Fed. Reg. 12,140 (Mar. 15, 1994).

positive proposed finding and final determination.²⁷³ Connecticut filed an appeal before the Interior Board of Indian Appeals arguing that the OFA misused evidence of state recognition to assist the petitioners in meeting criteria (a), (b), and (c).²⁷⁴ The Clinton administration refused to reverse the decision during its last days. Ultimately, however, the W. Bush administration reversed the Clinton administration's decision to acknowledge the tribe.²⁷⁵ This decision and its fallout mark a turning point for federal recognition petitions; increased research and documentation are now required because of the politics present in decisions concerning federal recognition.

One additional layer must be added to the Clinton administration: the initiation of the Cobell litigation. Eloise Cobell charged the BIA and the DOI with mismanaging Indian trust lands.²⁷⁶ The plaintiffs requested that the DOI produce an accounting of trust assets, which the DOI was unable to do.²⁷⁷ The ramifications of this case are still felt today, as BIA programs were offline for nearly seven years, and only started returning online in 2008.²⁷⁸ The efficiency and effectiveness of the administration also suffered due to this and other lawsuits that changed how the DOI handles Indian issues.

273. Paul Zielbauer, *Officials Question U.S. Tribal Recognition Process*, N.Y. TIMES, July 28, 2000, <http://www.nytimes.com/2000/07/28/nyregion/officials-question-us-tribal-recognition-process.html>.

274. Fed. Acknowledgment of the Historical E. Pequot Tribe, 41 I.B.I.A. 1 (May 12, 2005), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001424.pdf>. The Final Determination can be appealed to the Interior Board of Indian Affairs who can either approve the decision or remand the decision to the Secretary of the Interior. Upon either the Board's approval or the Secretary's final decision the resulting decision becomes the final agency action appealable to the U.S. Circuit Court.

275. See OFFICE OF FED. ACKNOWLEDGMENT, U.S. DEP'T OF THE INTERIOR, SUMMARY OF THE EVALUATION UNDER THE CRITERIA AND OF THE EVIDENCE FOR RECONSIDERED FINAL DETERMINATION DENYING FEDERAL ACKNOWLEDGMENT TO THE EASTERN PEQUOT INDIANS OF CONNECTICUT AND THE PAUCATUCK EASTERN PEQUOT INDIANS OF CONNECTICUT 1-3 (2005), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001432.pdf>. The petitioner petitioned the IBIA to reconsider the Reconsidered FD, but was unsuccessful. Fed. Acknowledgment of the E. Pequot Indians of Conn. & the Paucatuck E. Pequot Indians of Conn., 42 I.B.I.A. 133 (Jan. 13, 2006).

276. Cobell v. Babbitt, 30 F. Supp. 2d 24 (D.D.C. 1998).

277. *Id.*

278. See Rob Capriccioso, *BIA to Go Back Online*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 19, 2008), <https://indiancountrytodaymedianetwork.com/2008/05/19/bia-go-back-online-79573>.

What is most interesting about the Clinton administration is that its policy actions were fairly conservative and narrow, but the implementation of these actions was quite liberal. This reinforces the theory that the FAP regulatory text is not necessarily being followed. The implementation of the FAP has led to very incongruent results under the Clinton administration and the W. Bush administration, suggesting that each administration used guidance documents and policy statements to impact the outcomes of the FAP.

E. W. Bush Administration (2001-2009)

The W. Bush administration can be characterized by one singularly important event in modern American history—9/11. The 9/11 attack occurred near the beginning of President W. Bush's first term and required immediate and consistent attention. W. Bush's administration launched the War on Terror, engaged in two foreign wars, and established the Department of Homeland Security to protect Americans from terrorists.²⁷⁹ A new realm of intelligence and information sharing guidance was issued and Guantanamo Bay became functional.²⁸⁰

The W. Bush administration engaged in some proactive tribal policy development. For example, W. Bush issued an Executive Memorandum on the Government-to-Government Relationship with Tribal Governments on Sept 23, 2004, that recommitted the U.S. government to working with federally recognized tribes.²⁸¹ However noble his intentions were, W. Bush had very little understanding of Indian issues. At a public event W. Bush was asked about tribal sovereignty by a reporter, and responded that tribal

279. *Text: President Bush Addresses the Nation*, WASH. POST, Sept. 20, 2011, http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html; Andrew Glass, *Bush Announces Launch of Operation Iraqi Freedom*, POLITICO (Mar. 19, 2003), <http://www.politico.com/news/stories/0310/34646.html>; *Operation Enduring Freedom Fast Facts*, CNN, <http://www.cnn.com/2013/10/28/world/operation-enduring-freedom-fast-facts/> (last visited Apr. 21, 2015); Homeland Security Act, 6 U.S.C. § 111 (2012) (establishing the Department of Homeland Security).

280. *See, e.g.*, Intelligence Reform and Terrorism Prevention Act, 50 U.S.C. § 401 (2012); Exec. Order No. 13,356, 69 Fed. Reg. 53,599 (Aug. 27, 2004) (discussing the policy of sharing terrorism information); Presidential Memorandum on Guidelines and Requirements in Support of the Information Sharing Environment 41 WEEKLY COMP. PRES. DOC. 1874 (Dec. 16, 2005); Alyssa Fetini, *A Brief History of Gitmo*, TIME, Nov. 12, 2012, available at <http://content.time.com/time/nation/article/0,8599,1858364,00.html>.

281. Presidential Memorandum on Government-to-Government Relationship with Tribal Governments, 40 WEEKLY COMP. PRES. DOC. 2106 (Sept. 23, 2004).

nations were “given sovereignty and viewed as a sovereign entity.”²⁸² This comment reveals his lack of understanding of the concept of tribal sovereignty since sovereignty is inherent and not bestowed upon tribes by the federal government.

The W. Bush administration published two federal recognition guidance documents. The first was: “Office of Federal Acknowledgment: Reports and Guidance Documents; Availability, etc.,” issued in 2005, which superseded the 2000 Clinton administration guidance.²⁸³ However, it reiterated many of the same policies. The 2005 guidance highlighted that the DOI was not responsible for conducting research for the petitioner, allowed DOI officials to conduct independent research on the validity of a petitioner’s evidence, and reiterated that the professional standards of the reviewer will be applied to the evidence prior to the implementation of the reasonable likelihood standard.²⁸⁴

The second W. Bush administration guidance, titled: “Office of Federal Acknowledgment: Guidance and Direction Regarding Internal Procedures,” was issued in 2008.²⁸⁵ This guidance announced a policy regarding splinter groups, expedited negative reviews, and a reduction in the timeline necessary to prove acknowledgment.²⁸⁶ The purpose of the guidance was to set a policy for the handling of recurring administrative problems in processing recognition petitions.²⁸⁷

Splinter groups became a problem at the end of the Clinton administration. The first major case of splinter groups occurred in the Eastern and Paucatuck Pequot decision. In the Eastern and Paucatuck Pequot case, the DOI issued a positive final determination that recognized

282. Remarks to the UNITY: Journalists of Color Convention and a Question-and-Answer Session, 40 WEEKLY COMP. PRES. DOC. 1477 (Aug. 6, 2004).

283. Office of Federal Acknowledgment; Reports and Guidance Documents; Availability, Etc. (2005 Guidance), 70 Fed. Reg. 16,513 (Mar. 31, 2005).

284. *Id.* at 16,514.

285. Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures (2008 Guidance), 73 Fed. Reg. 30,146, 30,148 (May 23, 2008).

286. *Id.* at 30,146 (noting that if the petitioner was an Indian tribe at the time the Constitution was ratified, its prior colonial history need not be reviewed). However, while the guidelines do not limit this statement to specific criterion, it makes sense that it only apply to criterion (b) and (c), social and political continuity because criterion (a), identification as an Indian entity, already has a time period of 1900 to the present associated with it and criterion (e) requires that a historic tribe be determined prior to conducting a genealogical analysis. A historic tribe can still theoretically be found to exist prior to 1789. In that case, it is unclear how OFA would analyze criterion (e) under the Guidance.

287. *Id.*

an Eastern Pequot tribe, but did not say which splinter was the rightful leader.²⁸⁸ Other petitioners that splintered included the United Houma Nation, which split into over four separate groups, and the Juaneno.²⁸⁹ The 2008 guidance stated that the OFA had the discretion to abstain from reviewing petitions if the petitioner splintered.²⁹⁰

The 2008 guidance also stated that petitioners would no longer have to provide proof that they met criteria (b), (c), and (e) from sustained contact, which could be as early as the 1700s.²⁹¹ Instead, the OFA would only analyze whether the petitioner met the criterion from March 4, 1789, to the present.²⁹² Finally, the 2008 guidance allowed the OFA to issue a negative proposed finding or final determination if it was clear that the petitioner would not be able to meet any one of the seven mandatory criteria.²⁹³ The desired effect of the 2008 guidance was to streamline the petitioning process.

The W. Bush administration reviewed more federal recognition petitions than any other administration, despite the fact that the volume of material per petition had quadrupled compared to the earliest petitions.²⁹⁴ Under the W. Bush administration, sixteen petitions were reviewed and only two were granted, giving the W. Bush administration the lowest rate of recognizing tribes through the FAP at 12.5%.²⁹⁵ Unfortunately for petitioners, the W. Bush administration was the most prolific, producing a little under one-third of the total recognition decisions since the inception of the OFA.²⁹⁶ The two successful petitioners were the Cowlitz and the Mashpee

288. *Id.*; OFFICE OF FED. ACKNOWLEDGMENT, U.S. DEP'T OF THE INTERIOR, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING EASTERN PEQUOT INDIANS OF CONNECTICUT 46-47 (2002), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001430.pdf>.

289. *See, e.g.*, JUANEÑO PROPOSED FINDING, *supra* note 104, at 52. *See generally* OFFICE OF FED. ACKNOWLEDGMENT, U.S. DEP'T OF THE INTERIOR, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING AGAINST FEDERAL ACKNOWLEDGMENT OF THE UNITED HOUMA NATION, INC. (1994), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001465.pdf>.

290. 2008 Guidance, 73 Fed. Reg. at 30,147.

291. *Id.* at 30,147; *see, e.g.*, JUANEÑO PROPOSED FINDING, *supra* note 104, at 5 (noting first sustained contact at around 1776).

292. 2008 Guidance, 73 Fed. Reg. at 30,146.

293. *Id.* at 30,148.

294. *Hearing on H.R. 2837, supra* note 105 (statement of James Keedy, Executive Director, Michigan Indian Legal Services) (recounting how much more evidence is required in recent Administration even though the regulatory text is the same).

295. *See infra* tbl. A.

296. *See infra* tbl. A.

Wampanoag tribes.²⁹⁷ The Cowlitz had previously received a positive proposed finding under the Clinton administration in 1997. It is unlikely that the W. Bush administration would rescind two Clinton era decisions due to public relations concerns.²⁹⁸ The other successful petitioner, the Mashpee Wampanoag, had an incredibly strong case since they had been state recognized at one time, lived on a state reservation, and controlled their city council for most of their history.²⁹⁹

The negative decisions coming out of the W. Bush administration strain the FAP in spirit and in letter. Additionally, non-published requirements were placed on petitioners, such as requiring the Duwamish to show that when outsiders identified the Duwamish, they were including both the reservation Duwamish and the non-reservation Duwamish.³⁰⁰ Although the W. Bush administration decisions were some of the most stringent decisions, it reviewed these cases in a political environment where Indian gaming was booming and political pressure to control Indian gaming was rampant.³⁰¹ In addition, the W. Bush administration inherited a dysfunctional DOI engaged in massive litigation. The Eastern Pequot appeal was finalized in 2006, during the last year of President W. Bush's first term.³⁰² Moreover, the Cobell litigation was still pending, with several failed attempts at congressional settlement.³⁰³

297. See, e.g., *Petitions Resolved by DOI*, *supra* note 221.

298. The W. Bush Administration already reversed the Eastern Pequot and Paucatuck Eastern Pequot Final Determination. OFFICE OF FED. ACKNOWLEDGMENT, U.S. DEP'T OF THE INTERIOR, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR FINAL DETERMINATION IN REGARD TO FEDERAL ACKNOWLEDGMENT OF THE EASTERN PEQUOT INDIANS OF CONNECTICUT AS A PORTION OF THE HISTORICAL EASTERN PEQUOT TRIBE (2002), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001426.pdf>.

299. Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007-09 (Feb. 22, 2007).

300. OFFICE OF FED. ACKNOWLEDGMENT, U.S. DEP'T OF THE INTERIOR, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING AGAINST ACKNOWLEDGMENT OF THE DUWAMISH TRIBAL ORGANIZATION 5 (1996), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001381.pdf>.

301. Barlett & Steele, *supra* note 116.

302. Fed. Acknowledgment of E. Pequot Indians of Conn. & the Paucatuck E. Pequot Indians of Conn., 42 I.B.I.A. 133 (Jan. 13, 2006); see also OFFICE OF FED. ACKNOWLEDGMENT, U.S. DEP'T OF THE INTERIOR, FINAL DETERMINATION IN REGARD TO FEDERAL ACKNOWLEDGMENT OF EASTERN PEQUOT INDIANS OF CONNECTICUT AS A PORTION OF THE HISTORICAL EASTERN PEQUOT TRIBE (2002), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001426.pdf>.

303. *Oversight Hearing on Indian Trust Reform Before the S. Comm. on Indian Affairs*, 109th Cong. 1-2 (Mar. 9, 2005) (statement of Sen. John McCain, stating that Indian trust

Further, the Abramoff scandal proliferated a lack of trust.³⁰⁴ Jack Abramoff and Michael Scanlon, Abramoff's partner, used their connections to extract large amounts of money from tribal clients. They focused on tribes that were either already engaged in gaming, or were newly recognized tribes hoping to engage in gaming. These lobbyists did little more than take money from tribes to give to senior Republican politicians by creating false threats to their Indian clients' interests.³⁰⁵ Officials in the DOI were under investigation throughout the W. Bush administration; the last indictment came in 2012.³⁰⁶ The Abramoff scandal and the rise of Indian gaming clearly show that Indian tribes were now players in the political arena.

In addition, the W. Bush administration had to address the issue of Indian gaming and show its constituents that it would not allow illegitimate Indian entities to gain federal recognition amid concerns that newly recognized tribes would open casinos. As a result, the W. Bush administration denied the petitions of the Duwamish, Chinook, Muwekma, Snohomish, Golden Hill Paugussett, Eastern Pequot, Paucatuck Eastern Pequot, Schaghticoke, Burt Lake Band of Ottawa and Chippewa, St. Francis/Sokoki Band of Abenakis, Nipmuc Hassanamisco, Webster/Dudley Nipmuc, and Steilacoom.³⁰⁷

F. Obama Administration (2009-Present)

Barack Obama's presidential campaign made a strategic effort to reach out to Indian Country. In addition to having a First Americans Vote operation, Obama visited several Indian reservations and communities.³⁰⁸

reform was one of his top priorities this session), available at <http://www.indian.senate.gov/sites/default/files/upload/files/March92005.pdf>.

304. Susan Schmidt & James V. Grimaldi, *Ex-Official at Interior Hid His Ties to Abramoff*, WASH. POST, Mar. 24, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/23/AR2007032300581.html>. Department of Justice, Press Release: Former Abramoff Business Partner Michael Scanlon Sentenced to 20 Months in Prison for Role in Public Corruption and Fraud Schemes, <http://www.justice.gov/opa/pr/former-abramoff-business-partner-michael-scanlon-sentenced-20-months-prison-role-public> (Feb. 11, 2011).

305. Suzanne Gamboa, *Texas Tribe Names Abramoff, Reed in Suit*, WASH. POST, July 12, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/12/AR2006071200927.html>.

306. U.S. v. Fraser Verrusio, No. 11-3080 (Aug. 12, 2014).

307. See *Petitions Resolved by DOI*, *supra* note 221.

308. Rob Capriccioso, *Obama's First Americans Vote Director Assesses Election '08*, INDIAN COUNTRY TODAY MEDIA NETWORK (Sept. 26, 2008), <http://indiancountrytodaymedia.network.com/2008/09/26/obamas-first-americans-vote-director-assesses-election-08-80855>.

Much was made of his adoption by a Crow couple who gave him the name of Black Eagle.³⁰⁹ Upon election, President Obama pledged to consult with tribal nations and focus on tribal issues. Early in his first term, Obama issued a presidential memorandum that required all federal agencies to develop a tribal consultation policy that included designating a high level official in each agency as the Tribal Liaison.³¹⁰ He also instituted a White-House-level tribal leaders meeting where department heads engaged in consultation with tribal leaders in order to understand tribal priorities.³¹¹ This focus on tribal consultation mirrors many of Obama's national initiatives on transparency and public engagement.³¹²

Almost immediately after taking office, Obama faced an economic crisis. The resolution of this economic crisis is still ongoing. However, Obama's involvement and focus was directed entirely on this issue for most of the first year of his presidency.³¹³ In addition, one of Obama's top priorities was health care reform. Obama used a large portion of his political capital to push the Affordable Care Act through Congress.³¹⁴ Even after the legislation passed, the administration has undertaken significant fire from certain segments of the public that want this law repealed.³¹⁵

Many Obama supporters voiced their disappointment during his reelection campaign that he had not followed through on some of his campaign promises, which pushed him to focus on issues such as repealing the Don't-Ask-Don't-Tell policy, phasing out Guantanamo Bay, and

309. See, e.g., Jeff Zeleny, *Obama Adopted by Native Americans*, N.Y. TIMES, May 19, 2008, <http://thecaucus.blogs.nytimes.com/2008/05/19/obama-adopted-by-native-americans/>.

310. Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 9, 2009).

311. Charlie Galbraith & Jodi Gillette, *President Obama to Host the 2013 White House Tribal Nations Conference*, WHITE HOUSE BLOG (Nov. 12, 2013, 11:21 AM), <http://www.whitehouse.gov/blog/2013/11/12/president-obama-host-2013-white-house-tribal-nations-conference>.

312. See generally Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009).

313. *End of Term Report: The President's Record is Better than the Woes of America's Economy Suggests*, ECONOMIST (Sept. 1, 2012), <http://www.economist.com/node/21561909>; accord Kathy Kiely & Martha T. Moore, *Obama Prepares to Face Economic Crisis*, USA TODAY, Nov. 7, 2008, http://usatoday30.usatoday.com/news/politics/election2008/2008-11-06-Obama-Thursday_N.htm.

314. Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2012).

315. Jonathon Chaite, *Republicans Begin Planning to Nuke Filibuster and Repeal Obama Care*, NEW YORKER (June 29, 2015), <http://nymag.com/daily/intelligencer/2015/06/republicans-plan-to-nuke-filibuster-obamacare.html>.

passing the Violence Against Women Act.³¹⁶ Finally, the struggling Obama administration received several boosts in public ratings upon the death of Osama Bin Laden and the government shutdown, which was largely blamed on Republican obfuscation.³¹⁷

The Obama administration has lived up to its campaign promises to focus on tribal issues. The administration passed the Tribal Law and Order Act, which significantly expanded the ability of tribes to protect their citizens from outsiders while maintaining high civil rights and civil liberties protections.³¹⁸ The administration also focused on creating a more efficient FAP. The OFA focused on issuing expedited reviews and changed the format of negative proposed findings and final determinations such that they only discussed the criterion that the petitioner failed to meet.

Keeping in line with the administration's focus on tribal consultation, the administration issued draft regulations and engaged in tribal consultation to change the federal recognition regulations.³¹⁹ Executive Order 13175 ensures that tribal nations are consulted prior to the issuance of proposed rules. The final rule ultimately scaled back the reforms suggested by the draft regulation and proposed rule. However, significant procedural changes have been institutionalized, including clarified expedited negative and positive finds, the date from which a petitioner must prove they meet criteria (b) and (c), distinct community and political continuity, and a new administrative appeal process.

The Department received approximately 350 comments on the proposed rule to reform the FAP.³²⁰ The administration appears to have considered the comments and in many cases incorporated their commenters concerns in the revisions. Several of the changes that appeared in the proposed rule, such as additional clarifying language on the standard of review, reasonable

316. 10 U.S.C. § 654 (2012); Josh Gerstein, *Obama Renews Push to Close Guantanamo Bay Prison*, POLITICO (Jan. 28, 2014), <http://www.politico.com/story/2014/01/state-of-the-union-guantanamo-bay-prison-102765.html>; Violence Against Women Reauthorization Act, Pub. L. No. 113-113, 127 Stat. 54 (2013).

317. CNN Staff, *Bin Laden's Death: How the Story Unfolded*, CNN (May 1, 2013), <http://www.cnn.com/2013/05/01/world/bin-laden-recap/>; Alexander Burns, *GOP Blame Game: Who Lost the Government Shutdown?*, POLITICO (Oct. 17, 2013), <http://www.politico.com/story/2013/10/government-shutdown-republicans-who-lost-98426.html>; see also Calvin Woodward, *Poll: Republicans Getting Majority Of the Blame for Government Shutdown*, BUSINESS INSIDER (Oct. 9, 2013), <http://www.businessinsider.com/poll-republicans-democrats-blame-for-government-shutdown-debt-ceiling-2013-10>.

318. Tribal Law and Order Act, 25 U.S.C. § 2801 (2012).

319. RED LINED DISCUSSION DRAFT VERSION, *supra* note 136, at 15.

320. 80 Fed Reg. 36865.

likelihood of the validity of the facts; utilization of 1934 as the starting date for analysis of criteria (b) and (c); removal of criterion (a), requiring outside identification as an Indian entity; and the ability of Indian entities denied under prior version of the rule to re-petition under certain circumstances, were significantly diminished in terms of the effect that they will have on the process.

During the Obama administration, nine recognition decisions and one secretarial decision were issued. Assistant Secretary of the Interior for Indian Affairs Larry Echo Hawk reaffirmed the Tejon Indian Tribe of California.³²¹ Five final determinations were issued for tribes that received a proposed finding under the W. Bush administration. The Shinnecock Nation was acknowledged, while the Juaneno Petitioners A and B,³²² the Brothertown Indian Nation,³²³ and the Duwamish Indian Tribe were each denied recognition. One final determination, Pamunkey Tribe, was issued based on a positive proposed finding made during President Obama's second term.

The Obama administration also quietly resolved three petitions by issuing both the proposed findings and final determinations denying recognition to the Choctaw of Florida, the Central Band of Cherokee of Lawrenceburg, and the Tolowa Nation.³²⁴ The first two petitioners failed to meet criterion (e) requiring descent from a historic tribe, and the

321. Memorandum from Larry Echo-Hawk, Assistant Sec'y-Indian Affairs, to Regional Director of the Pacific Region and Deputy Director of the Office of Indian Services (Apr. 24, 2012), *available at* <http://www.bia.gov/cs/groups/xregpacific/documents/document/idc1-021735.pdf> (reaffirming the U.S. government's federal relationship with the Tejon Indian Tribe); *see also* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF THE INTERIOR, INVESTIGATIVE REPORT OF THE TEJON INDIAN TRIBE (Jan. 9, 2013), *available at* http://www.doi.gov/oig/reports/upload/Tejon_ROI_FINAL_PUBLIC.pdf.

322. The Juaneño petitioners split during the recognition process into two petitions. Much of the materials provided were the same and the analysis and outcomes match almost exactly. However, because the petitions were denied separately, I have counted them separately.

323. The Brothertown Indian Nation failed to meet criterion (g), which requires that the petitioner not be subject of legislation that expressly prohibits a government-to-government relationship. The OFA determined that the Brothertown Indian Nation was a terminated tribe and did not qualify for consideration under the Part 83 regulations. Thus, Brothertown Indian Nation's sole recourse is through the congressional process.

324. Final Determination Against Federal Acknowledgment of the Tolowa Nation, 79 Fed. Reg. 4953 (Jan. 30, 2014); Final Determination Against Federal Acknowledgment of the Central Band of Cherokee, 77 Fed. Reg. 19,315 (Mar. 30, 2012); Final Determination Against Federal Acknowledgment of the Choctaw Nation of Florida, 76 Fed. Reg. 23,621 (Apr. 27, 2011).

administration issued an expedited negative finding without moving on to review the other six criteria.³²⁵ For these two petitions, the administration managed to finalize the decision in less than one year.³²⁶ In contrast, the Tolowa Nation met criterion (e), but failed to meet criterion (b), requiring that the petitioner maintain a distinct community from historic times to the present.³²⁷ This petition took a little over two years, but compared to past administrations, it was reviewed at lightning speed.³²⁸

In addition, the Obama administration issued two proposed findings. The first was a negative proposed finding for the Meherrin Indian Tribe. No final determination has yet been made. According to the OFA, the Meherrin petitioner, who is one of eight state recognized tribes in North Carolina, was unable to meet criterion (e) and an expedited negative finding was issued.³²⁹

The second was a positive proposed finding and final determination for the Pamunkey Indian Tribe.³³⁰ The Pamunkey reside on a state recognized reservation in Virginia. While the Pamunkey were subject to the Racial Integrity Act, they successfully argued for the use of alternative documents to show descent from a historic Indian tribe.³³¹ Their argument relied upon a section in the regulation requiring the OFA to consider gaps in the historical record and also required the OFA genealogist to make exceptions in their professional standards, showing that the Obama administration interprets these regulations liberally. Only two commenters submitted

325. Final Determination Against Federal Acknowledgment of the Central Band of Cherokee, 77 Fed. Reg. at 19,315; Final Determination Against Federal Acknowledgment of the Choctaw Nation of Florida, 76 Fed. Reg. at 23,621.

326. The Choctaw of Florida Proposed Finding was issued in July 2010 and the Final Determination issued in April 2011, whereas the Central Band of Cherokee of Lawrenceburg Proposed Finding was issued in August 2010 and Final Determination was issued in March 2011.

327. Final Determination Against Federal Acknowledgment of the Tolowa Nation, 79 Fed. Reg. at 4953.

328. The Tolowa Proposed Finding was issued on November 18, 2010, and the Final Determination was issued on January 30, 2014.

329. Proposed Finding Against Acknowledgment of the Meherrin Indian Tribe, 79 Fed. Reg. 3859 (Jan. 23, 2014).

330. Notice of Proposed Finding for Federal Acknowledgment of the Pamunkey Indian Tribe, 79 Fed. Reg. 3860 (Jan. 23, 2014); Final Determination for Federal Acknowledgment of the Pamunkey Indian Tribe, 80 Fed. Reg. 39144 (July 8, 2015), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-07-08/pdf/2015-16711.pdf>.

331. Proposed Finding Against Acknowledgment of the Meherrin Indian Tribe, 79 Fed. Reg. at 3859 (noting the use of Virginia tax lists, petitions to the Virginia legislature, and church records to develop the historic tribe).

comments in time using the appropriate format and while they raised certain concerns, the OFA found that they did not alter the analysis and, in fact, provided additional evidence that the Pamunkey were a legitimate tribal entity.³³²

Without including the pending petitions, the Obama administration has a recognition percentage of only 22.2%.³³³ Up until the Pamunkey proposed finding, the Obama administration has been unwilling to soften the professional standards burden of criterion (e), requiring a showing of descent from a historic tribe. As a result, the vast majority of the final determinations issued by his administration failed. Interestingly, while Obama has made an effort to loosen the burdens associated with the FAP in his draft regulation, he has chosen not to address the most troublesome characteristic—criterion (e). This may be because most of the political pressure exerted by non-Indians has focused on the legitimacy of petitioners, and descent (often using phenotype as a heuristic for descent) plays a large factor in how individuals view tribal legitimacy.

As the Obama administration winds down its final term, it remains to be seen whether the reformed FAP will have the impact that the administration desires. Unfortunately, it is unlikely that we will see any petitions decided under the new regulation in the Obama administration. If we were to see such a decision, it would provide great insight into how this administration handles federal recognition petitions. Because the Obama administration chose the lengthy path of rulemaking, no superficial changes to the FAP were made using guidance. Thus, the only way judge his administration's federal recognition policy is based upon the FAP reform process, which started out idealistically, but fizzled slightly due to the many comments received.

Conclusion

Ultimately, each administration puts its mark on important policies through regulatory change and the implementation of regulations. Recent administrations have used guidance documents as a way to avoid having to go through the tedious rulemaking process. The overuse of guidance documents has served to reduce transparency in the FAP since the implementation of the FAP becomes confounded with multiple layers of policy documents.

332. Final Determination for Federal Acknowledgement of the Pamunkey Indian Tribe, 80 Fed. Reg. at 39144-45.

333. See *infra* tbl. A.

The Obama administration is attempting to resolve this by reforming the FAP. The final rule would effectively supersede much of the current published guidance and give OFA a clean slate. However, any guidance that is not linked to specific regulatory language may still apply, and in the interest of clarity the Obama administration should issue a policy statement that addresses how the final rule should be read given the current guidance documents. Further, the Obama administration has not tackled some of the more challenging issues within the FAP, such as how to handle criterion (e) and how to ensure that the standard of reasonable likelihood is followed despite the professional standards of the reviewers.

The fact that the Obama administration decided to focus on procedural changes rather than merely issuing interpretive guidance while pushing through petitions highlights the administration's commitment to real reform. However, it remains to be seen whether the Obama administration's changes will be effective and long-lasting. In order for FAP reform to be successful future administrations must implement the regulation in a transparent manner devoid of heavy-handed politics, and resist the urge to push their agenda by issuing guidance documents rather than engaging in rulemaking.

TABLE A

Table of Acknowledgment by Administration

President	Acknowledged	Denied	Acknowledged Through Congress	Acknowledged Through Other Means	Total Acknowledgments	Percent Acknowledged
					Total Under Part 83	Percent Under Part 83
Carter	1	0	0		1/1	100
					1/1	100
Reagan	6	11	4	1 merge	11/22	50
					6/17	35.3
H.W. Bush	1	1	1		2/3	66.7
					1/3	50
Clinton	6	3	5	1 Sec.	12/15	73.3
					6/9	66.7
W. Bush	2	14	0		2/16	12.5
					2/16	12.5
Obama	2	7	0	1 Sec.	3/10	30.0
					2/9	22.2
Total	17	36	10	3	31/66	47.0
					18/54	33.3