

# POLITICS, HISTORY, AND SEMANTICS: THE FEDERAL RECOGNITION OF INDIAN TRIBES

RENÉE ANN CRAMER,<sup>†</sup> CASH, COLOR, AND COLONIALISM:  
THE POLITICS OF TRIBAL ACKNOWLEDGMENT  
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MARK EDWIN MILLER,<sup>‡</sup> FORGOTTEN TRIBES:  
UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS  
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*Once, in a story, I wrote that Indians are everywhere.  
Goddamn right.<sup>1</sup>*

—Simon J. Ortiz

Tribal histories often begin long before there were humans walking on the earth. According to the creation story of the Anishinabeg,<sup>2</sup> for example, the Great Mystery, Kitché Manitou, created the world free from human habitation.<sup>3</sup> But disaster befell the world and it became covered in water, the animals staying close to the surface of the water, clinging to life.<sup>4</sup> Sky Woman, Geezhigo-Kwe, a spirit who lived high in the sky, conceived a

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1. SIMON J. ORTIZ, *Travels in the South*, in GOING FOR THE RAIN 34, 35 (1976).

2. The Anishinabeg, or Anishinabek, are the Odawa (Ottawa), the Ojibwe (Chippewa), and Bodewadimi (Potawatomi) people of the Great Lakes, known as the “Three Fires” in Michigan. See generally EDWARD BENTON BENAI, THE MISHOMIS BOOK: THE VOICE OF THE OJIBWAY (1979); CHARLES E. CLELAND, RITES OF CONQUEST: THE HISTORY AND CULTURE OF MICHIGAN’S NATIVE AMERICANS (1992); JAMES A. CLIFTON, GEORGE L. CORNELL, & JAMES M. MCCLURKEN, PEOPLE OF THE THREE FIRES: THE OTTAWA, POTAWATOMI AND OJIBWAY OF MICHIGAN (1986).

3. See BASIL JOHNSTON, THE MANITOUS: THE SPIRITUAL WORLD OF THE OJIBWAY xv (1995); BASIL JOHNSTON, OJIBWAY HERITAGE 12-13 (1976) (University of Nebraska Press 1990). For a slightly different version of the Anishinaabe creation story, see BENAI, THE MISHOMIS BOOK, *supra* note 2, at 2-4.

4. See JOHNSTON, THE MANITOUS, *supra* note 3, at xv; JOHNSTON, OJIBWAY HERITAGE, *supra* note 3, at 13.

child and grew large.<sup>5</sup> The animals remaining on the surface asked the Great Turtle to offer his back for Sky Woman to rest.<sup>6</sup> Sky Woman thanked the animals for offering a place of rest and asked one of them to bring her soil from the earth.<sup>7</sup> The only animal capable of diving deep enough, and holding its breath long enough to retrieve the soil, was the muskrat, “the least of the water creatures.”<sup>8</sup> Sky Woman used the soil to paint the Great Turtle’s back, and used her life-giving powers to create an island out the soil—the island we now know as Mackinac Island.<sup>9</sup> Eventually, as the waters receded, Sky Woman gave birth to twins, “whose descendants took the name Anishinaubek, meaning the Good Beings.”<sup>10</sup> In many ways, for the Anishinabeg, this story of the weakest, most disrespected animal performing the greatest feat of strength, courage, and selflessness for the benefit of all is an allegory of the story of the modern Anishinabe nations.

In 1976, Simon Ortiz published *Travels in the South*, a poem describing his journeys meeting Indians in the most unlikely places.<sup>11</sup> In that poem, he described meeting Alabama-Coushatta Indians and Caddo Indians in East Texas and Creeks in Pensacola, Florida.<sup>12</sup> It is the Indians of the southeast Simon Ortiz met, perhaps the same Indians that would organize, file land claims,<sup>13</sup> and seek and receive federal recognition (Cramer 66). But when he met them in the 1960s and 1970s, these Indians lived on the peripheries, practically underground, and non-Indians knew little or nothing about them. They thought that these Indians did not exist anymore, but they were wrong.

Non-Indians see history in a different way than the Indians who lived in the peripheries. Many non-Indians are still surprised to this day when they meet an Indian; surprised to interact with a different culture, surprised that the Indians are just like everyone else, and even surprised that there still are Indians. Non-Indians view history, like all cultures, from a self-centered, exclusive point of view—and non-Indians view the history of Indian and non-Indian relations from the same perch. As N. Scott

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5. See JOHNSTON, *THE MANITOUS*, *supra* note 3, at xv; JOHNSTON, *OJIBWAY HERITAGE*, *supra* note 3, at 13.

6. See JOHNSTON, *THE MANITOUS*, *supra* note 3, at xv; JOHNSTON, *OJIBWAY HERITAGE*, *supra* note 3, at 14.

7. See JOHNSTON, *THE MANITOUS*, *supra* note 3, at xv; JOHNSTON, *OJIBWAY HERITAGE*, *supra* note 3, at 14.

8. JOHNSTON, *OJIBWAY HERITAGE*, *supra* note 3, at 14.

9. *See id.*

10. JOHNSTON, *THE MANITOUS*, *supra* note 3, at xvi.

11. *See* ORTIZ, *supra* note 1, at 34.

12. *See id.* at 34-35.

13. *See* Alabama-Coushatta Tribe of Texas v. United States, Cong. Ref. No. 3-83, 2000 WL 1013532 (Fed. Cl., June 19, 2000).

Momaday wrote, non-Indians, such as Christopher Columbus, “knew a good deal about the past, the past that was peculiarly theirs, for it had been recorded in writing.”<sup>14</sup> In a long-deserved critique of history textbooks, James Loewen wrote, “When textbooks celebrate this process, they imply that taking the land and dominating the Indians was inevitable if not natural.”<sup>15</sup> The history of Indians, as told from the point of view of the “winners,” as Vine Deloria would say, is written to “recast events to show themselves in a favorable light . . .”<sup>16</sup> He argues that history “resembles nothing so much as an apology for their shortcomings.”<sup>17</sup>

Americans with a sense of history are aware that the lives and cultures of indigenous peoples of the western hemisphere, including the Anishinabeg,<sup>18</sup> took a horrible turn for the worse after First Contact. Professor David Stannard, for example, described in great detail the extermination of the indigenous peoples, describing it as “[t]he worst human holocaust the world had ever witnessed, roaring across two continents non-stop for four centuries and consuming the lives of countless tens of millions of people, [leveling off only when t]here was, at last, almost no one left to kill.”<sup>19</sup> Professor Alvin Josephy asserts that as many as seventy-five million Indians lived in the Americas in 1492, of which about six million lived in the continental United States.<sup>20</sup> And, according to Professor Russell Thornton, only about 250,000 Indians remained in the last decade of the nineteenth century.<sup>21</sup>

But for most Americans, especially those unfamiliar with Indians and Indian tribes, tribal histories begin with what we now refer to as “federal recognition.” Federal recognition is that magical status that most Indian tribes try to achieve because, as Professor Renée Ann Cramer reports, federally recognized Indian tribes benefit from the trust relationship

14. N. Scott Momaday, *The Becoming of the Native: Man in America before Columbus, in AMERICA IN 1492: THE WORLD OF THE INDIAN PEOPLES BEFORE THE ARRIVAL OF COLUMBUS* 13, 14 (Alvin M. Josephy, Jr., ed., 1991).

15. JAMES W. LOEWEN, *LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG* 35 (1995).

16. Vine Deloria, Jr., *Afterword, in AMERICA IN 1492, supra* note 14, at 429, 429.

17. *Id.*

18. See JAMES M. MCCLURKEN, *GAH-BAEH-JHAGWAH-BUK: THE WAY IT HAPPENED* xiii (1991) (“Between 1812 and 1855, the Odawa of Michigan experienced a loss of political autonomy, nearly complete dispossession of their lands, and intense pressures to restructure the very foundations of their culture.”).

19. DAVID STANNARD, *AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD* 146 (1992).

20. See Alvin M. Josephy, Jr., *Introduction: The Center of the Universe, in AMERICA IN 1492, supra* note 14, at 3, 6.

21. See RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492*, at 159 (1987).

between the federal government and Indian tribes (Cramer 5-6).<sup>22</sup> These tribes, and their members or citizens, may benefit from: (1) a favorable tax position in relation to federal, state, and local governments;<sup>23</sup> (2) from federal services provided by the Bureau of Indian Affairs,<sup>24</sup> the Indian Health Service,<sup>25</sup> the Department of Housing and Urban Development,<sup>26</sup> and other federal agencies;<sup>27</sup> (3) from the exercise of treaty rights;<sup>28</sup> and (4) from numerous other advantages (Cramer 6).

Vine Deloria wrote that popular American-Indian history is a whitewash of the “shortcomings” of the “winners”—the conquering culture—and an attempt at “apology” for those shortcomings.<sup>29</sup> Perhaps federal recognition is another rewrite of history that attempts to whitewash the shortcomings of the conquering culture. From the point of view of non-Indians, perhaps, federal recognition is a look back at history, a look back that allows the politicians of the conquering culture to acknowledge that there were Indian tribes at the time of First Contact, or in 1871,<sup>30</sup> or in 1900,<sup>31</sup> or whatever arbitrary time. Federal recognition is an attempt to recreate an idyllic past history that, in all reality and fairness, can never be recreated. Federal recognition is the conquering culture’s modest, even weak, attempt at apology.

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22. The “trust relationship”—or alternatively the “trust responsibility” or “guardian-ward relationship”—is loosely defined as the political relationship between federally recognized Indian tribes and their members and the federal government. *See generally* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1108-09 (2005); Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 802-03 (2001); Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49, 74 (2002).

23. *E.g.*, *In re Kansas Indians*, 72 U.S. 737 (1966); *Keweenaw Bay Indian Cmty. v. Naftaly*, 370 F. Supp. 2d 620 (W.D. Mich. 2005), *aff’d*, 452 F.3d 514 (6th Cir. 2006).

24. *E.g.*, 25 U.S.C. § 450 (2000) (Indian Education Assistance and Self-Determination Act).

25. *E.g.*, 25 U.S.C. §§ 1601-1683 (2000) (Indian Health Care).

26. *E.g.*, 25 U.S.C. §§ 4101-4243 (2000) (Native American Housing Assistance and Self-Determination Act).

27. *E.g.*, American Indian Religious Freedom Act, S.J. Res. 102, Aug. 11, 1978, Pub. L. No. 95-341, 92 Stat. 469 (codified in part at 42 U.S.C. § 1996 (2000)) (announcing that the policy of the United States was to “protect and preserve” the rights of American Indians, Alaskan Natives, and Native Hawaiians “to believe, express, and exercise” their “traditional religions”).

28. *E.g.*, *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1976).

29. Deloria, *supra* note 14, at 429.

30. Congress discontinued the practice of allowing the President to negotiate treaties with Indian tribes in 1871. *See* Act of March 3, 1871, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71); FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 66-67 (1942) (University of New Mexico Press 1971).

31. *See* 25 C.F.R. § 83.7(a) (2005).

Currently, 562 Indian tribes and Alaskan Native nations enjoy recognition as such by the federal government.<sup>32</sup> The federal government has recognized only twenty-six tribes since the Grand Traverse Band of Ottawa and Chippewa Indians became recognized in 1980 (Cramer 41, 44),<sup>33</sup> though dozens, perhaps hundreds, of Indian tribes—many of them state recognized<sup>34</sup>—remain off the list of federally recognized tribes. Are they fake Indian tribes undeserving of federal recognition? Are they so poorly organized that the federal officials cannot find anyone in authority with whom to deal? Are they simply and sadly extinct? No. According to Professor Cramer, it is appearing more and more likely that national, state, and local politics either now block or will block the federal recognition of Indian tribes that otherwise meet the administrative criteria (Cramer 103, 146). Professor Miller appears to argue that a more fundamental problem exists within the Bureau of Acknowledgement and Research (BAR) criteria preventing the efficient and useful operation of the Federal Acknowledgement Procedure/Process (FAP) (Miller 2, 4, 5, 8, 17).

Federal recognition prior to 1978, the year of the creation of BAR and promulgation of the original version of the regulations that govern FAP (Cramer 37),<sup>35</sup> could be achieved through numerous formal political processes, bureaucratic paper shuffling, and often-accidental events.<sup>36</sup> As the American Indian Policy Review Commission found in 1977, hundreds of Indian tribes had been left out of the federal trust relationship because of the lack of a single, formal acknowledgement process, not to mention the arbitrary and capricious actions and omissions of the federal bureaucracy.<sup>37</sup> The BAR regulations,<sup>38</sup> first promulgated in 1978<sup>39</sup> and most recently

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32. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 70 FED. REG. 71,194 (Nov. 25, 2005).

33. See Determination for Federal Acknowledgment of the Grand Traverse Band of Ottawa and Chippewa Indians as an Indian Tribe, 45 FED. REG. 19,321 (March 25, 1980).

34. For a listing of state-recognized tribes by the state in which they are located, such as the Burt Lake Band of Ottawa and Chippewa Indians, the Golden Hill Paugussett Tribe, and the Monacan Tribe, see STEVEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 391-411 (3rd ed. 2002).

35. Now codified at 25 C.F.R. pt. 83 (2005).

36. See U.S. GEN. ACCOUNTING OFFICE, GAO-02-49, *IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS* 25-26 (Nov. 2001) (listing the twenty-five tribes that have been federally recognized since 1960 and how the tribes were recognized, including methods ranging from Congressional recognition, administrative recognition, Interior Solicitor's opinion, intervention by the United States Attorney's Office in lawsuit on behalf of unrecognized tribe).

37. See 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, *FINAL REPORT* 462 (May 17, 1977); see generally TASK FORCE TEN: *TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS*, *FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION* (October 1976).

38. Federal acknowledgment of Indian tribes has received a fair amount of scholarly attention. E.g., Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on*

amended in 1997,<sup>40</sup> established seven criteria for the recognition of Indian tribes.<sup>41</sup> First, a petitioning group must show continuous existence since 1900.<sup>42</sup> Second, a predominant portion of the membership must come from a distinct community.<sup>43</sup> Third, a tribal leadership has maintained political influence over the community.<sup>44</sup> Fourth, the petitioning group must develop membership criteria.<sup>45</sup> Fifth, the membership of the petitioning group must show that they descend from a historical tribe and functioned as a “single autonomous political entity.”<sup>46</sup> Sixth, the membership is not also a member of a federally recognized Indian tribe.<sup>47</sup> Last, the petitioning group must not have been terminated by an Act of Congress.<sup>48</sup>

Professors Renée Ann Cramer and Mark Edwin Miller have written two books detailing the history and the process of federal recognition since the late 1970s. In addition, Professor Cramer isolates the Indian tribes in two states, Alabama and Connecticut, to analyze their respective

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*Acknowledgment*, 37 NEW ENG. L. REV. 491 (2003); Christopher A. Ford, *Executive Prerogatives in Federal Indian Jurisprudence: The Constitutional Law of Federal Recognition*, 73 DEN. U. L. REV. 141 (1995); Dan Gunter, *The Technology of Tribalism: The Lemhi Indians, Federal Recognition, and the Creation of Tribal Identity*, 35 IDAHO L. REV. 85 (1998); Meredith Hatfield, *Will the “Increasing Weight of History” Crush the Vermont Abenaki’s Chances for Federal Recognition?*, 23 VT. L. REV. 649 (1999); Robert Iraola, *The Administrative Tribal Recognition Process and the Courts*, 38 AKRON L. REV. 867 (2005); Marisa Katz, *Staying Afloat: How Federal Recognition as a Native American Tribe Will Save the Isle de Jean Charles, Louisiana*, 4 LOY. J. PUB. INT. L. 1 (2003); Jackie J. Kim, *The Indian Federal Recognition Administrative Procedures Act of 1995: A Congressional Solution to an Administrative Morass*, 9 ADMIN L.J. AM. U. 899 (1995); Alva C. Mather, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. PA. L. REV. 1827 (2003); Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL’Y REV. 271 (2001); Racheal Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209 (1991); William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and* 25 C.F.R. § 83, 17 AM. INDIAN L. REV. 37 (1992); William W. Quinn, Jr., *Federal Acknowledgment of Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331 (1990); John W. Ragsdale, Jr., *The United Tribe of Shawnee Indians: The Battle for Recognition*, 69 UMKC L. REV. 311 (2000); Henry Sockbeson, *Reflections on a Flawed System*, 37 NEW ENG. L. REV. 483 (2003); Rosemary Sweeney, *Federal Acknowledgment of Indian Tribes: Current BIA Interpretations of the Federal Criteria for Acknowledgment with Respect to Several Northwest Tribes*, 26 AM. INDIAN L. REV. 203 (2001/2002); L.R. Weatherhead, *What is an “Indian Tribe”?—The Question of Tribal Existence*, 8 AM. INDIAN L. REV. 1 (1980).

39. See Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 FED. REG. 23,743 (June 1, 1978) (codified at 25 C.F.R. pt. 54).

40. See 25 C.F.R. pt. 83.

41. See *Id.* § 83.7.

42. See *Id.* § 83.7(a).

43. See *Id.* § 83.7(b).

44. See *Id.* § 83.7(c).

45. See *Id.* § 83.7(d).

46. See *Id.* § 83.7(e).

47. See *Id.* § 83.7(f).

48. See *Id.* § 83.7(g).

experiences with the federal recognition process. Professor Miller writes four case studies of Indian tribes that succeeded in their attempts to achieve federal recognition. While this commentary critiques both pieces on several issues, they are both excellent and balanced books well worth reading for both scholars and practitioners of Indian law and politics.

Part I of this essay summarizes and critiques Professor Cramer's book, *Cash, Color, and Colonialism: The Politics of Tribal Acknowledgment*.<sup>49</sup> Professor Cramer's work is a useful and useable report of the political discourse relating to the issues surrounding federal recognition of Indian tribes. While this work suffers from its focus on Alabama and Connecticut, it offers a great deal of insight into the politics of federal recognition. Unfortunately, even though Professor Cramer's area of scholarship is political science, her work suffers from an insufficient emphasis and focus on the political elements of the process of federal recognition. Part II explores and criticizes Professor Miller's book, *Forgotten Tribes: Unrecognized Indians and the Federal Acknowledgment Process*.<sup>50</sup> Professor Miller, a historian, goes into much more detail about the history concerning the four tribes discussed. Neither author proposes a systematic reform of the FAP, though Miller argues that an independent commission would do a better job. Neither author is effective in analyzing the political relationship between Indian tribes and the federal government, or identifying that this political relationship informs every federal recognition decision.

Part III performs a case study on a class of tribes in Michigan that had been victims of a process known as "administrative termination" and were later recognized through different channels in the 1980s and 1990s. These tribes included the Grand Traverse Band of Ottawa and Chippewa Indians, the Little Traverse Bay Bands of Odawa Indians, the Little River Band of Ottawa Indians, and the Pokagon Band of Potawatomi Indians, listed here in rough chronological order of recognition. The stories of other Michigan Indian tribes, namely the Nottawaseppi Huron Band of Potawatomi Indians and the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, also subject to administrative termination, will be left to another day.

Part IV of this commentary delves into the murky waters of the political relationship between Indians, Indian tribes, and the federal government. Federal recognition is an inherently political question, as opposed to

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49. RENÉE ANN CRAMER, *CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT* (2005).

50. MARK EDWIN MILLER, *FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS* (2004).

a racial or ethnic question. The racial, anthropological, and ethnohistorical analysis required under the FAP fails to account for the political relationship between Indian tribes and the federal government.<sup>51</sup> Indeed, the FAP serves to foreclose recognition for tribes with legitimate political status and organization. On a superficial level, since historians, anthropologists, and other BAR staff have no training in political science, it appears that they would misinterpret the evidence. The BAR should disregard the criteria promulgated by the Bureau of Indian Affairs relating to the political status and organization of unrecognized tribes, and rely upon the precedents of Congressional recognition in this area.

Reducing the BAR staff's authority to judge political questions only begs another—how should Indian gaming and land claims questions figure into the political process? Both Professors Cramer and Miller are persuasive in arguing that the political focus on Indian gaming and land claims is misplaced, deceiving, and possibly racist. Despite these findings, it is clear that these political issues, like most others, are temporary. Part IV argues that an effective federal court review of evidence of political status and organization of Indian tribes would serve to keep the national and regional temporary politics out of the decision-making process.

## I. CASH, COLOR, AND COLONIALISM

Professor Cramer's book is an engaging and relatively short read, moving from a brief introduction in Chapter One to the legal concept of federal recognition of Indian tribes and then into the political issues surrounding federal recognition. As a political scientist, Professor Cramer's work focuses on political perceptions held by Indians and non-Indians alike that arise in the context of this public debate. The heart of the book is contained in Chapters Five and Six, titled "Perceptions in the Process I" and "Perceptions of the Process II." Chapter Five relates to the "Cash" portion of the title of the work and focuses on the impact of Indian gaming on the process of federal recognition, which, as Professors Steve Light and

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51. In fact, there is a serious problem treating federal recognition as a purely political question as well. The federal Indian policy on this subject fluctuates. *Compare* *United States v. Rogers*, 45 U.S. 567 (1846) (holding that a Caucasian male adopted into the Cherokee Nation remained subject to federal laws based on his racial characteristics and rejecting the political argument) *with* Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 449 (2002) ("A case in point is the controversy between several Oklahoma tribes and the United States over the legitimacy of membership and voting rights for descendants of freedmen-freed black slaves who lived with the tribe. The position of the United States is that federal law, namely post-Civil War treaties made with these tribes, affords the freedmen and their descendants rights that the tribes may not deny.").

Kathryn Rand have asserted, is “dramatic[.]”<sup>52</sup> Chapter Six relates to the “Color” portion of the work and discusses the impact that racial and ethnic identification and stereotyping have had on the process. Professor Cramer’s work focuses on the politics of federal recognition in two states—Alabama and Connecticut.

*Cash, Color, and Colonialism* does an outstanding job of bringing to life the national political debate surrounding tribal acknowledgment. Noting the “gross oversimplification about acknowledgment” by mainstream media outlets, Professor Cramer reports that one television station in Connecticut referred to federal recognition as a “gambling permit” (Cramer 97). This “gross oversimplification” contributes to false fears about increasing crime near tribal casinos (Cramer 100) and the perception that Indians are the “economic elites of their region” (Cramer 102). As Professors Light and Rand have reported, the most recent and comprehensive study showed “that the presence of a casino in or near a community did not significantly increase crime. To the contrary, it appeared that crime rates were reduced, ‘but not in an overwhelming way.’”<sup>53</sup> In fact, as Light and Rand report, a recent Harvard Project on American Economic Development study “found a substantial net decline in auto theft and robbery associated with a community’s proximity to a tribal casino.”<sup>54</sup> Professor Cramer also shoots down the misconception that tribal casinos are making all Indians rich by noting that “[g]aming often has the effect of bringing tribal members into the lower-middle class . . .” (Cramer 102).

Professor Cramer also details the amazing variety of racism, bigotry, and stereotyping that go into the federal recognition debate. Alabama newspapers in the 1960s described Alabama Creek Indians as showing “few signs of Indian heritage but all claimed Creek blood and a share in the wampum” (Cramer 106). The book also features how Alabama legislators, *in 1996*, when asked by the Mowa Choctaw Tribe for authority for tribal police to patrol the Mowa reservation, “engaged in a round of ‘war whooping’ and stomping.” (Cramer 122). Both Connecticut and Alabama tribes have had difficulty in obtaining federal recognition, in part, because local officials labeled them “Mulatto” on official documents (Cramer 116, 153). BAR staffers assumed that this classification was evidence that the petitioners were not Indians (Cramer 124, 153).

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52. STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE* 63 (2005).

53. *Id.* at 97 (footnote omitted).

54. *Id.* (footnote omitted).

Another strength of *Cash, Color, and Colonialism* is Professor Cramer's reporting of the political discourse, particularly in Connecticut, relating to federal recognition of Indian tribes. The political discourse is a "confluence of racial hysteria and gaming growth" (Cramer 141). The discourse begins at the local level. One element that often divides an Indian and non-Indian community is a perception that Indian and local leaders engage in "secret dealings" (Cramer 139). Non-Indian communities often feel a sense of powerlessness in these issues, as if gaming and Indians had been forced down their throats. The leaders of the Poarch Band of Creeks, in order to avoid succumbing to the political backlash generated by these "rumor mills," would place details of business dealings in the local paper (Cramer 132). But rumors of illegal Class III gaming<sup>55</sup> at the Poarch Band casino persist (Cramer 135).

State and national political discourse about Indian gaming is often informed by media reports that include blatantly wrong information, such as the television report mentioned earlier that described federal recognition as a "gambling permit" (Cramer 97). The major national program *60 Minutes* stated that proving membership in gaming tribes such as the Mashantucket Pequot Tribal Nation is easy, a claim, according to Professor Cramer, "made as flippantly as if the proof were as simple as showing that your grandmother was a woman" (Cramer 141). Politicians are not above asserting "gross oversimplifications" to make their points against federal recognition. Professor Cramer singles out Connecticut Attorney General Richard Blumenthal as an example. Blumenthal has alleged that Indian tribes that file land claims are holding "hostage thousands of innocent landowners" (Cramer 160-61), a claim disputed in fact and law by Indian legal advocates that specialize in these claims.<sup>56</sup> Blumenthal also

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55. In order to be legal under the Indian Gaming Regulatory Act, which classifies Vegas-style gaming as "Class III," 25 U.S.C. §§ 2703(8), 2710(d), an Indian tribe must have entered into a gaming compact with the state, *see* 25 U.S.C. § 2710(d)(1)(C), and the state in which the tribe wishes to game must permit Class III gaming by any person or entity. *See* 25 U.S.C. § 2710(d)(1)(B).

56. *See, e.g.,* Arlinda Locklear, *Morality and Justice 200 Years After the Fact*, 37 NEW ENG. L. REV. 593, 596 (2003).

Good Peter, who had been a leader of the Oneidas at the time, actually went to Governor Clinton [in 1788] and said, "We thank you. The Oneida people thank you for restoring our land to us because until you came and did this the bad white people among us attempted to take it away." The Oneidas actually believed that the Governor had said to them: "We will protect your land, and we will not allow non-Indians to take it from you." That is what they believed. The very next year the Governor said, "No, you misunderstood. We purchased your land. It is now ours. It belongs to the State."

*Id.*

distributes factually baseless press releases that attack the BAR for succumbing to the “influences of money and politics” (Cramer 161). Blumenthal, according to Professor Cramer, has “exasperated” BAR staffers with his incessant denials of certain accepted facts in his objections to tribal recognition efforts (Cramer 146).

The “Colonialism” portions of *Cash, Color, and Colonialism* are a little on the sparse side. Professor Cramer discusses some of the work of Russel Barsh, Ward Churchill, and Robert Porter, who have criticized Indian tribes for being too accepting of the process of federal recognition; she criticizes the very notion of federal recognition and the “assimilation” caused by Indian gaming (Cramer 61-63, 94). Unlike the “Cash” and “Color” portions of the book, Cramer does not develop the discussion of “Colonialism.”

While the book is intensely researched, Professor Cramer’s work does suffer from a few limitations. One of these limitations is the focus on only two states. Of course, perhaps this is understandable given that a comprehensive study of federal recognition since 1978 might be an impossible and thankless task. But much of the broader analysis in Cramer’s book of the national politics, and reality of the federal recognition process, is grounded in only these two states, distorting the national picture.

Another criticism of this book is the dearth of deeper analysis into the connection of American politics—tribal, state, and federal—and the status of Indian tribes in that three-sovereign political system.<sup>57</sup> Professor Cramer’s purposes for writing the book include “seriously investigat[ing] the claim of some tribal officials that acknowledgment is a route to sovereignty” (Cramer 5). This is not a controversial question; it seems obvious that federally recognized Indian tribes may exercise a form of sovereignty given that Chief Justice Marshall had long ago labeled Indian tribes as “domestic, dependant nations.”<sup>58</sup> Professor Cramer’s juxtaposition of the comparative lack of governmental power of the unrecognized tribes in Alabama and Connecticut and the governmental successes of the Poarch Band of Creeks (Cramer 130-36) and the Mashantucket Pequot Tribal

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However, we are not at all embarrassed to include those who now occupy the land as defendants as well. First of all, they are not innocent in any sense of the word. They are trespassers. They have been sued because they are sitting on, taking advantage of, and enjoying the benefit of land that belongs to the Iroquois people. Second, even had they not been aware of that fact 100 years ago, if I had to venture a guess, I would say that a good 75% of them had personal knowledge of that fact when they acquired the land.

*Id.* at 598.

57. See Hon. Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1 (1997).

58. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

Nation (Cramer 154-62) provides the empirical evidence of this fact. But the anatomy of federal recognition is much more than this. And the author understands that. In the concluding chapter, Professor Cramer criticizes proposed legislation that would serve to isolate the federal recognition process from politics stating, “It is not helpful to try to avoid ‘politics’ in acknowledgment law” (Cramer 167). She is right, but she offers little further analysis.

Professor Cramer provides much of the research needed to reach the heart of the political mess that is federal recognition of Indian tribes, but *Cash, Color, and Colonialism* only brings us part of the way.

## II. FORGOTTEN TRIBES

Professor Miller’s book is an in-depth historical treatment of the stories of the federal recognition of three Indian tribes and the denial of a fourth. The recognized tribes are the Pascua Yaqui Tribe of Arizona (Miller 79-122); the Death Valley Timbisha Shoshones of California (Miller 123-55); and the Tigua Indians of El Paso, Texas (Miller 209-55). The unrecognized tribe is the United Houma Nation (Miller 156-208). Miller’s research is impressive, replete with references to Record Group 75 in the National Archives, the BAR files on seven tribal petitions for federal recognition, the personal papers of over a dozen politicians and academics involved in these petitions, and nearly three dozen personal interviews with federal recognition experts and players (Miller 323-26).

Miller’s thesis is that the FAP fails, on virtually every level, to reach fair and just decisions based in fact. In fact, it appears that some legitimate Indian tribes acquired federal recognition, in large part, because they were lucky while other legitimate tribes unlucky. He writes:

It is my contention that the concepts rolled up into the process are so ambiguous and contested that the success of the groups is often reliant upon their ability to hire experts and secure political allies, or their ability to find scraps of paper or documents pointing to continuous historical existence—records that are often the result of good fortune or the accidents of history (Miller 17).

Miller concludes that there “is no historical or rational reason why some indigenous groups have federal status and others do not” (Miller 20).

A historian, Professor Miller identifies the deep and disturbing inconsistencies in the scholarly work performed by the BAR staff, people who are historians and anthropologists, mostly lacking doctorates and “lack[ing] specific training in unacknowledged Indian peoples” (Miller 51). Why, Miller asks, would the BAR staff, lacking comparative scholarly

credentials and reputation, so stridently attack the work of noted anthropologist John Reed Swanton in the United Houma Nation's petition, but "did not scrutinize his work in the petitions of smaller groups such as the Tunica-Biloxis" (Miller 203, 204)? Miller also alleges that BAR personnel take challenges to their work personally, perceiving them as "direct attacks on their scholarship" (Miller 66), supporting his conclusion that the FAP is becoming "increasingly . . . adversarial" (Miller 258).

But it is the federal acknowledgement criteria and the FAP that receive the brunt of Miller's criticism. He alleges that "subjectivity is at the bedrock of the [FAP]" (Miller 8). Miller quotes Vine Deloria, Jr. for a restatement of this position: "The current FAP shows no sign of intelligence whatsoever; it is certainly unjust to require these Indian nations to perform documentary acrobatics for a slothful bureaucracy" (Miller 57). It is the "rigorous, glacial, and document-driven labyrinth" (Miller 16) that is intended to make the FAP appear "uniform and objective" (Miller 40, 45). Miller's triumph is showing how the process fails to be uniform and objective on every level. The documentary demands of the FAP, driven by legal challenges to both denials and acknowledgments, "taxed petitioners to the breaking point" (Miller 54, 55). Recent petitions included 700 pages and 6700 pages of supplementary documents (Miller 67). In contrast, the Death Valley Timbisha Shoshones' petition in 1978 totaled twenty-two pages (Miller 130). Some classes of petitioners, such as the eastern tribes, "literally faced death if they were recognized" and cannot now show, relying on "outside sources," that they have always been a viable Indian political entity (Miller 58). Miller does show that the BAR has caught a few obvious non-Indian petitioners, such as the "Moorish Science Temple" and the Southeastern Cherokee Confederacy, a recruitment organization (Miller 49, 52). But as one BAR staffer said, "[F]airness is not our 8th criterion" (Miller 78). Miller concludes that the FAP is "increasingly legalistic, detail-oriented, and adversarial toward petitioners" (Miller 258)—in other words, a terrible failure.

Miller's reliance on anecdotal evidence allows for an effective retelling of the surrealism of the politics of federal recognition of Indian tribes. Professor Miller writes about how the Shinnecocks and the Poosepatucks had been declined because they were "too intermarried with blacks" (Miller 30). He also shows that non-Indians used skull measurements to "prove" that Lumbees were actually "half-breeds," and, therefore, non-Indians (Miller 30). One Congressman from Washington state, John Cunningham, an opponent to the Pascua Yaqui Tribe's bid for Congressional recognition, asked the legislation's sponsor Morris Udall for assurance that the Yaquis "have ceased their revolutionary activities" (Miller 120). Congressman

Udall also represented to Congressman Cunningham that the membership of the tribe amounted only to 400 individuals, when it appears that it actually amounted to over 5,000 members (Miller 120).<sup>59</sup> Miller also quotes a letter from a constituent and lawyer, A. Turney Smith, a seemingly fake name, to Morris Udall opposing setting aside land for the Pascua Yaqui Tribe on the basis that the reservation would be “worse” than setting up a “leprosy colony” (Miller 94). Miller recalls how federal officials threatened to deny housing permits to Timbisha Shoshone people if they contacted Congress about acquiring federal trust property for tribal use (Miller 129). Miller describes how one Houma woman was classified by Census takers as “M” for Mulatto in 1850; “Ind” for Indian in 1860; ignored in 1870; and “W” for white in 1880 (Miller 171). Finally, Miller illustrates how the National Congress of American Indians President, Wendell Chino, the Jicarilla Apache Chairman, asked the Tigua people of El Paso to dance and sing in order to prove their Indianness (Miller 226). They then had to dance and sing before the Texas state legislature (Miller 228-29). They agreed to shave their “Mexican-type” mustaches in order to appear more Indian to Texas legislators (Miller 229). They even agreed to dress up in “war paint and feathers” (Miller 229). Miller ends the book with perhaps the most stunning irony of this pitiful and degrading American policy, quoting a Mountain Maidu elder named Clara LeCompte: “Nobody asked me to prove I was Indian when I was kidnapped from my home at age five and taken across state lines to the Stewart Indian Boarding School in Carson City, Nevada—and now I have to prove it? That’s disgusting to me” (Miller 266).

The issue where Professor Miller’s analysis appears most weak is the question of intertribal disputes. Miller alleges that a scarce and limited amount of federal resources forced recognized tribes to oppose the efforts of nonrecognized tribes (Miller 42, 70, 107). Miller also asserts that recognized tribes will oppose the recognition efforts of other tribes in order to preserve gaming markets, as the MOWA Choctaws in Alabama alleged in reference to the Poarch Band of Creeks (Miller 248). Miller provides some limited justification for these allegations, but his bigger argument is that the BAR criteria contain an inherent bias toward “reservation tribes” (Miller 56), “reflecting the wishes of groups already recognized by the federal government” (Miller 16). Though it does not necessarily undermine

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59. In 2005, the membership of the Pasqua Yaqui Tribe numbered over 14,000. See Pascua Yaqui Membership Services, *Pascua Yaqui Tribe Population Growth*, available at <http://www.pascuayaqui-nsn.gov/departments/memberservices/enrollment/pdf/demographics.pdf> (last visited October 3, 2005).

the validity of Miller's assertion here, his allegation is disproved by the fact that "[s]uccessful groups generally were small entities with ties to a centralized locale and with ancestors who had previous and lasting relations with Euro-American officials" (Miller 54). Miller looks to anecdotal evidence to support the allegation that large, reservation-based tribes supported the BAR criteria. He quotes former National Congress of American Indians President Veronica Murdock as saying, "I think we cannot get caught up in, say, the long lost relative concept, because we do not know you[;] we do not know you[,] so you must let us know who you are. From my reservation we know who we are" (Miller 42).

And it is that "knowing" that cuts to the heart of Indianness. Ultimately, being Indian is political. Vine Deloria, Jr. famously testified at the trial in *Mashpee Tribe v. New Seabury Corp.*,<sup>60</sup> that an Indian tribe is "a group of people living pretty much in the same place who know who their relatives are."<sup>61</sup> Miller's book notes again and again that Indians "know" each other—or they do not. Miller quotes Veronica Murdock as saying, "We don't know you" (Miller 42). Miller quotes Yaqui leader Anselmo Valencia as saying, "Any Yaqui knows who is a Yaqui" (Miller 92). How does one get to be "known" as an Indian? Participation in the tribal community, often through participation in tribal ceremonies, is the best way (Miller 103, 221). Miller decries the appearance that "local reservation tribes . . . often serve as arbiters of Indianness" (Miller 117), but likely does not realize that the recognition of being Indian by other Indians, right or wrong, is fundamentally what being Indian is about. "Indianness" is subjective, too.

What is objective (now) is whether an Indian tribe is federally recognized. A tribe either is or it is not; it either appears on the list of federally recognized tribes or it does not.<sup>62</sup> Getting on that list is, for an unrecognized tribe, extremely difficult. The next Part provides an overview of the struggles of the unrecognized Michigan Anishinaabeg tribes to be recognized.

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60. 427 F. Supp. 899 (Mass. 1977).

61. Trial Transcript at 17:127-28, *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977) (No. 76-3190) (quoted in JACK CAMPISI, *THE MASHPEE INDIANS: TRIBE ON TRIAL* 32 (1991)).

62. See *Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs*, 68 FED. REG. 68,180 (Dec. 5, 2003). *E.g.*, *W. Shoshone Business Council ex rel. W. Shoshone Tribe of the Duck Valley Reservation v. Babbitt*, 1 F.3d 1052, 1058 (10th Cir. 1993) (finding dispositive that "the Western Shoshones do not appear on the Department of Interior's list of recognized tribes").

### III. THE ADMINISTRATIVE TERMINATION AND RECOGNITION OF THE LOWER PENINSULA MICHIGAN ANISHINAABE TRIBES

A short history of the federal recognition of the three Michigan Ottawa tribes and the Pokagon Band of Potawatomi Indians, all of them located in the Lower Peninsula of Michigan, provides an interesting view of the strengths and weaknesses of the federal recognition process in general, the BAR, and the FAP criteria. In particular, the administrative recognition of the Grand Traverse Band of Ottawa and Chippewa Indians in 1980 is an excellent example of how the FAP should work. The Congressional recognition of the Little Traverse Bay Bands of Odawa Indians, the Little River Band of Ottawa Indians, and the Pokagon Band allows for an examination of the weaknesses of the FAP.

The three Michigan Ottawa tribes were all signatories to the 1836 Treaty of Washington<sup>63</sup> and the 1855 Treaty of Detroit.<sup>64</sup> The other signatories are now known as the Bay Mills Indian Community and the Sault St. Marie Tribe of Chippewa Indians, both of which are Ojibwe tribes located in the Upper Peninsula of Michigan. The 1836 treaty referred to “[t]he Ottawa and Chippewa nations of Indians . . .” as the signatory,<sup>65</sup> despite the fact that the treaty referenced at least six Ottawa locations, in addition to the Chippewa locations, with each location representing at least one band.<sup>66</sup> The 1855 treaty similarly referred to the 1836 treaty signatories as “the Ott[a]wa and Chippewa Indians of Michigan. . .”<sup>67</sup> and continued to refer to the 1855 signatories as “the Ott[a]wa and Chippewa Indians of Michigan . . .”<sup>68</sup> The 1855 treaty mentioned far more bands—six near Sault St. Marie,<sup>69</sup> at least six Little Traverse Odawa bands,<sup>70</sup> a number of Grand Traverse Bay bands,<sup>71</sup> a number of the Grand River/Little River bands,<sup>72</sup> the Cheboygan/Burt Lake Band,<sup>73</sup> and the Thunder Bay band.<sup>74</sup>

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63. Mar. 28, 1836, 7 Stat. 491 [hereinafter Treaty of Washington].

64. July 31, 1855, 11 Stat. 621 [hereinafter Treaty of Detroit].

65. Treaty of Washington, art. I, Mar. 28, 1836, 7 Stat. at 491.

66. *See id.* at 491, art. II (reserving lands for the Ottawa bands at Little Traverse Bay, Grand Traverse Bay, Peire Marquette River, Cheboigan River, and Thunder Bay River); *id.* at 491, art. III (reserving lands for the Chippewa bands in the Upper Peninsula and the predominantly Ottawa band at Beaver Island).

67. Treaty of Detroit, 11 Stat. at 621 (preamble).

68. *Id.* (title).

69. *Id.* at 621, art. I, cl. 1.

70. *Id.* at 621, art. I, cl. 4.

71. *Id.* at 621, art. I, cl. 5.

72. *Id.* at 622, art. I, cl. 6.

73. *Id.* at 622, art. I, cl. 7.

74. *Id.* at 622, art. I, cl. 8.

The purpose for combining the various disparate and discrete bands was to allow the American negotiators to bind all the Ottawa and Chippewa bands at one time—and to manipulate the negotiations in a divide and conquer strategy.<sup>75</sup> As Dr. James M. McClurken wrote:

At the Treaty of 1836, and again at the 1855 Treaty of Detroit, United States' commissioners had insisted in linking the Ottawa/Odawa and the Chippewa in a legal fiction called the Ottawa and Chippewa Tribe. . . . When the Ottawa refused to negotiate on individual points, the commissioners simply turned to the Chippewa who willingly conceded the properties that U.S. officials demanded.<sup>76</sup>

At the conclusion of the 1855 treaty, the parties agreed that “[t]he tribal organization of said Ottawa and Chippewa Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this agreement, is hereby dissolved.”<sup>77</sup> This clause was the source of much confusion and torment for the Lower Peninsula Anishinaabeg. Secretary of Interior Columbus Delano interpreted the language in 1872 as terminating the Michigan Ottawa tribes:

Ignoring the historical context of the treaty language, Secretary Delano interpreted the 1855 treaty as providing for the dissolution of the tribes once the annuity payments it called for were completed in the spring of 1872, and hence decreed that upon finalization of those payments “tribal relations will be terminated.” . . . Beginning in that year, the Department of the Interior, believing that the federal government no longer had any trust obligations to the tribes, ceased to recognize the tribes either jointly or separately.<sup>78</sup>

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75. See *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att’y W. Dist. of Mich.*, 369 F.3d 960, 961 n.2 (6th Cir. 2004) (“Henry Schoolcraft, who negotiated the 1836 Treaty of Washington on behalf of the United States, combined the Ottawa and Chippewa nations into a joint political unit solely for purposes of facilitating the negotiation of that treaty.”)

76. *Michigan Indian Recognition, Hearing before the Subcomm. on Native American Affairs of the Comm. on Natural Resources*, 103rd Cong., 1st Sess. 125 (Sept. 17, 1993) [hereinafter *Michigan Indian Recognition*] (prepared statement of Dr. James M. McClurken) .

77. Treaty of Detroit, 11 Stat. 621, 624, art. V.

78. *Grand Traverse Band*, 369 F.3d at 961-62, 962 n. 2 (citing Letter from Secretary of the Interior Delano to Comm’n of Indian Affairs, at 3 (Mar. 27, 1872)).

Years later, when the Burt Lake Band of Ottawa Indians sought to restore their land base through a land claim in federal court, it was dismissed, in part, because the court interpreted the treaty language the same way.<sup>79</sup>

The legal effect of this clause is now clear—Article V was not intended to terminate the Michigan Ottawa tribes. Judge Fox summed up the analysis in *United States v. Michigan*<sup>80</sup>:

Article Five of the Treaty of 1855 ended an artificial construction, the Ottawa and Chippewa Nation, which the United States had created in order to obtain the cession of 1836. It did not result in any change in the way in which the Indians of the treaty area functioned politically or in the way in which they were dealt with by the federal Indian agents, save one: they were never again convened or dealt with as one entity, not even to assent to the Senate amendments to the treaty. To the Indians the article meant only that they would not be considered a single entity. The termination of this entity, not the termination of the Ottawa and Chippewa tribes or bands, was all that was accomplished by this Article.<sup>81</sup>

#### A. ADMINISTRATIVE ACKNOWLEDGEMENT OF THE GRAND TRAVERSE BAND

Because of Secretary Delano's misinterpretation of the 1855 treaty, the Grand Traverse Band ceased being federally recognized in 1872 and would not be recognized again for 108 years. The letter from Columbus Delano, stating the position of the federal government that Article V dissolved the Ottawa and Chippewa tribes, appeared to be based more on the federal disinterest in expending money on their behalf than on treaty language construction.<sup>82</sup> The Secretary had no problem continuing to recognize the Bay Mills Indian Community, an Ojibwe community located in the Upper Peninsula and co-signatories with the Ottawa tribes, after 1872.<sup>83</sup> Additionally, the federal government negotiated a new treaty in 1864 with

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79. See Complaint for Equitable and Declaratory Relief at 8-9, *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F. Supp. 2d 76 (D. D.C. 2002) (No. 01-703) (citing *United States v. Sheppard*, Equity No. 94 (E.D. Mich., May 31, 1917)).

80. 471 F. Supp. 192 (W.D. Mich. 1979).

81. *Id.* at 280; see also *Grand Traverse Band*, 369 F.3d at 961 (“In 1872, then-Secretary of the Interior, Columbus Delano, improperly severed the government-to-government relationship between the Band and the United States, ceasing to treat the Band as a federally recognized tribe. This occurred because the Secretary had misread the 1855 Treaty of Detroit, [11 Stat. 621].”)

82. See Petition of the Grand Traverse Band of Ottawa and Chippewa Indians to the Secretary of the Interior for Acknowledgment of Recognition as an Indian Tribe, at 8 (May 19, 1978).

83. See *id.* 8-9.

the Saginaw Swan Creek and Black River bands of Chippewa Indians, now known as the Saginaw Chippewa Indian Tribe.<sup>84</sup> Federal treaty negotiators intended to negotiate another treaty with the Ottawas first, but the treaty commissioners failed to meet in time to reach the northern portion of lower Michigan by October and the coming of the winter storms.<sup>85</sup> The federal government was satisfied with reaching an agreement solely with the Saginaw Chippewa Tribe because their votes “may be of great importance to us at the approaching election. They reside in the closest Congressional District in the State & hence, anything fair and honorable that we can do to put them in good humor, & to favorably dispose them toward the Government we wish to do.”<sup>86</sup> The Ottawa tribes had missed their chance for a new treaty.

The political organization of the Michigan Ottawas never dissolved in actuality, and even the federal government continued to acknowledge tribal leadership after 1872, but only when it suited their purposes. In 1873, Indian agents met with “Chiefs of the Grand Traverse Bands” and not with “individual band members.”<sup>87</sup> In 1907, the 1836 treaty signatories sued the United States for failure to pay annuities in accordance with Article IV of that treaty.<sup>88</sup> After winning that suit, federal agents relied upon the Grand Traverse Band ogemuk<sup>89</sup>—and not the individual band members—to prepare a new annuity roll.<sup>90</sup> In 1934, after the enactment of the Indian Reorganization Act,<sup>91</sup> which allowed for tribes to reorganize into a new federal template for tribal governments,<sup>92</sup> the Grand Traverse Band petitioned the Commissioner of Indian Affairs, John Collier, for “help.”<sup>93</sup> The federal government refused to allow the Grand Traverse Band to

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84. *See id.* at 5.

85. *See id.*

86. *Id.* (quoting Letter from Indian Agent Leach to Commissioner of Indian Affairs (Oct. 4, 1864)).

87. *Id.* at 10.

88. *See Ottawa and Chippewa Indians of Mich. v. United States*, No. 27, 107 WL 888, at \*1-2 (Ct. Cl. Mar. 4, 1907) (citing Treaty of Washington, 7 Stat. 491, 492, art. IV (Mar. 28, 1836)); MCCLURKEN, GAH-BAEH-JHAGWAH-BUK, *supra* note 18, at 82 (referencing the case as “*Petoskey, Abraham, Kawakendo, et al. v. The U.S.*”); Michigan Indian Recognition, *supra* note 76, at 127 (prepared statement of Dr. James M. McClurken).

89. Omeguks means “leaders.” MCCLURKEN, GAH-BAEH-JHAGWAH-BUK, *supra* note 18, at 125.

90. *See* Petition of the Grand Traverse Band of Ottawa and Chippewa Indians to the Secretary of the Interior for Acknowledgment of Recognition as an Indian Tribe 11-12 (May 19, 1978).

91. 25 U.S.C. § 461 (2000).

92. *See id.* at § 476.

93. Petition of the Grand Traverse Band of Ottawa and Chippewa Indians to the Secretary of the Interior for Acknowledgment of Recognition as an Indian Tribe 13 (May 19, 1978) (quoting Petition to John Collier (Aug. 22, 1934)).

reorganize due to “Congress’ [sic] failure to appropriate enough money to meet the needs of this and other groups.”<sup>94</sup> In 1943, the Band petitioned the federal government for help in securing the last remaining acreage of the 1855 treaty allotments in Peshawbestown, a call answered not by the federal government, but by Leelanau County.<sup>95</sup> The Band created a Michigan non-profit organization called Leelanau Indians, Inc. in 1971 in order to seek federal and state grants and maintain the remaining acreage.<sup>96</sup> In 1978, the Band petitioned for federal recognition under the original version of the BAR criteria.<sup>97</sup>

Following publication of a notice of proposed findings in favor of federal recognition in 1979,<sup>98</sup> the BAR formally recognized the Grand Traverse Band in 1980.<sup>99</sup> As noted above, much of the Grand Traverse Band’s petition’s supporting documents involved direct contact between the ogemuk and federal officials, evidenced by letters between the federal government and the Band and between federal officials. In the BAR’s recommendation to acknowledge the Grand Traverse Band, the BAR relied upon the fact that the Band’s ancestors had signed the 1836 and 1855 treaties, participated in the creation of the 1908 and 1910 annuity rolls, and made at least two efforts to seek federal recognition under the Indian Reorganization Act.<sup>100</sup> The anthropological report accompanying the proposed finding mirrored the Band’s petition, with no serious objection to any of the Band’s assertions. The successful petition of the Grand Traverse Band, the first in the BAR’s history,<sup>101</sup> appeared to fit Professor Miller’s characterization that successful petitioners were “small entities with ties to a centralized locale and with ancestors who had previous and lasting relations with Euro-American officials” (Miller 54).

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94. *Id.* at 14.

95. *See id.* at 19-20.

96. *See id.* at 20. *See generally* Leelanau Indians, Inc. v. United States Dept. of Housing and Urban Dev., 502 F. Supp. 741 (W.D. Mich. 1980); Raphael v. Grand Traverse Band of Ottawa and Chippewa Indians, No. 90-01-001, at 7-8 (Grand Traverse Band Tribal Court, April 16, 1996) (citing Grand Traverse Band of Ottawa and Chippewa Indians v. Leelanau Indians, Inc. and Leelanau County, No. G83-834 (W.D. Mich.)).

97. *See* Petition of the Grand Traverse Band of Ottawa and Chippewa Indians to the Secretary of the Interior for Acknowledgment of Recognition as an Indian Tribe v-vi (May 19, 1978) (reproducing Resolution of Leelanau Indians, Inc. indicating intent to seek federal recognition).

98. *See* Proposed Findings for Federal Acknowledgment of Grand Traverse Band of Ottawa and Chippewa Indians as an Indian Tribe, 44 FED. REG. 60,171 (Oct. 18, 1979).

99. *See* Determination for Federal Acknowledgment of the Grand Traverse Band of Ottawa and Chippewa Indians as an Indian Tribe, 45 FED. REG. 19,321 (Mar. 25, 1980).

100. *See* Theodore G. Krenzke, Memorandum from Acting Deputy Commission, Tribal Government Services, to Assistant Secretary, Bureau of Indian Affairs 4 (Oct. 3, 1979).

101. *See* Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att’y W. Dist. of Mich., 369 F.3d 960, 962 (6th Cir. 2004).

Members of the Grand Traverse Band at the time of federal recognition were poor, under educated, and desperate. Members of the Grand Traverse Band community, as well other Michigan Anishinaabe communities with which the federal government stopped dealing, who were one-half blood, received federal services in accordance with the Snyder Act and the Indian Reorganization Act.<sup>102</sup> The American Indian Policy Review Commission classified Michigan Indians who were members of nonrecognized tribes as members of the “Unaffiliated One-Half Blood Class.”<sup>103</sup> But Michigan Indians were, in no sense, receiving the same benefits as members of federally recognized tribes. Former Grand Traverse Band Chair and Leelanau Indians, Inc. Chair, Dodie Chambers, testified in 2002:

Back in the 1950s and 60s, there may have been ten homes, maybe 20 people. [Peshawbestown] was quite prosperous—or larger, I’ll say, not prosperous but larger at one time, but because people moving away and houses burning down and no economic opportunity, people left. . . . At least once a month for I’m going to say a couple years seemed like at least once a month there was a house burning down in the village because of the wood stoves, the chimney fires, the newspapers that were used for insulation and other things. And Sutton’s [sic] Bay was the closest village, but it was five miles south of us and responded, I guess, the best they could, but our homes burned.<sup>104</sup>

One of the first tribal government employees brought in to establish the Grand Traverse Band’s government operations, Ben Burt, testified that “one of the worst case situations, one that we talk about, was an older fellow that was literally living out of a root cellar. There were several gentlemen that [were] homeless. They literally had several poles in the ground that they have plastic draped over and some canvas.”<sup>105</sup> Lack of federal recognition had all but devastated the Band and its people. Ms. Chambers testified exactly how she learned the meaning of federal recognition:

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102. 25 U.S.C. §§ 13, 479 (2000).

103. AMERICAN INDIAN POLICY REVIEW COMM’N, TASK FORCE NINE, TASK FORCE ON LAW CONSOLATION, REVISION, AND CODIFICATION 110 (1970); see Carole E. Goldberg, *American Indians and “Preferential Treatment,”* 49 UCLA L. REV. 943, 970 n.153 (2002).

104. Transcript, Vol. 1, at 70-71, *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att’y W. Dist. of Mich.*, 198 F. Supp. 2d 920 (W.D. Mich. 2002) (testimony of Ardith “Dodie” Chambers) [hereinafter Transcript, *quoted in* Matthew L.M. Fletcher, *Stick Houses in Peshawbestown*, 2 CARDOZO PUB. L., POL’Y, & ETHICS J. 189, 195 n.12 (2004).

105. Transcript, Vol. 1, *supra* note 104, at 97 (testimony of Barry Burt), *quoted in* Fletcher, *supra* note 104, at 235 n.110.

Well, coming from Peshawbestown, I didn't realize . . . that we were considered poor. I mean so what, we went without this and that, but to us we weren't poor. But when I met the other kids from the other tribes and even within Michigan from Mt. Pleasant and Baraga, they had better housing. They had running water in their house, and our tribal people didn't. I didn't know how our village and the other villages in the area could not have that. So in talking to the kids during and after school, I had asked, "Well, why is it your people—your tribe has water? Why do you have these septic and bathrooms and not modern houses but definitely better homes than we had?" And they simply said, "Well, our tribe gets money from the government." And I said, "What are you talking about, you get money from the government?" And the kids all stated, "Well, we're federally recognized by the government, and we get services from Indian health. We get services from HUD. We get services from the Bureau of Indian Affairs because we're acknowledged, federally acknowledged by the government."<sup>106</sup>

As Professor Miller alleges, perhaps "motives matter: the more a group's Indian identity is viewed as a conscious choice . . . , the more the claimant can expect to be scoffed at and questioned" (Miller 14). No one could scoff at the Grand Traverse Band's identity.

#### B. CONGRESSIONAL RESTORATION OF THE POKAGON BAND OF POTAWATOMI INDIANS

The history of the Pokagon Band of Potawatomi Indians is different in that the Band signed different treaties than the Michigan Ottawas, but the legal effect of the decision of the federal government to deny the tribe the right to reorganize under the Indian Reorganization Act was exactly the same. And, like the Little Traverse Odawas and the Little River Ottawas, Congress had to step in and reaffirm the Pokagon Band.<sup>107</sup>

That the Pokagon Band's political organization, even compared to that of the Michigan Ottawa tribes, remained intact, while completely surrounded by non-Indians in the southwest corner of Michigan, is an amazing feat. The Band was party to treaties as far back as 1795, where one-fourth of the Indian signatories on the Treaty of Greenville were

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106. Transcript, Vol. 1, *supra* note 104, at 77-78, *quoted in* Fletcher, *supra* note 104, at 236 n.113 (testimony of Ardith "Dodie" Chambers).

107. Pokagon Band of Potawatomi Indians Act, Pub. L. No. 103-323 (Sept. 21, 1994) (codified at 25 U.S.C. § 1300j).

Potawatomi.<sup>108</sup> The most critical treaty for the Pokagon Band was the 1833 Treaty of Chicago.<sup>109</sup> Federal negotiators hoped to “purchase all remaining Potawatomi land in the Great Lakes and move all members of this tribe to Kansas. . . . All but one band, the Pokagons, agreed to move west.”<sup>110</sup> At first, the Pokagon leader, Leopold Pokagon, “refused to sign.”<sup>111</sup> Mike Daughtery testified:

According to legend, the Government agents were angry with Pokagon and one of them said[,] “Everyone else has signed but you.” The agent is quoted as saying further[,] “You did not bring any warriors. We have you in here and we could kill you.” To which Pokagon said, “Yes, but I have you and I can kill you.”<sup>112</sup>

Eventually, Pokagon negotiated an agreement whereby the Pokagon Band would be excepted from removal.<sup>113</sup> Despite this exception, in 1840, the Secretary of War ordered his generals to “round up all the Michigan Potawatomi, including the Pokagons, and move them to Kansas.”<sup>114</sup> Leopold Pokagon secured a legal opinion from a sitting Michigan Supreme Court Justice, Epaphroditus Ransom, “saying that the 1833 treaty gave the Pokagons the right to remain in Michigan and that no federal force had the right to move them.”<sup>115</sup> The military backed off at that point, but the Band remained “landless.”<sup>116</sup> The United States failed to deliver any of the annuities promised in the 1833 treaty<sup>117</sup> until 1843, and then only a “portion.”<sup>118</sup> The Band “lobb[ie]d congressmen and sen[t] delegates to Washington, to pursue the Band’s interests” and “won back-payment of

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108. See Treaty of Greenville, Aug. 3, 1795, 7 Stat. 49, 54; JAMES A. CLIFTON, THE POKAGONS, 1683-1983: CATHOLIC POTAWATOMI INDIANS OF THE ST. JOSEPH RIVER VALLEY 35 (1984).

109. See 7 Stat. 74 (June 7, 1803).

110. Michigan Indian Recognition, *supra* note 76, at 158 (prepared statement of Dr. James M. McClurken).

111. *Id.* at 148 (prepared statement of Richard “Mike” Daughtery, Tribal Historian, Potawatomi Indian Nation, Inc.).

112. *Id.*

113. Treaty of Chicago, *supp. art.*, Sept. 27, 1833, *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 412, 413 (Charles J. Kappler ed., 1904).

114. Michigan Indian Recognition, *supra* note 76, at 159 (prepared statement of Dr. James M. McClurken).

115. *Id.*; see CLIFTON, *supra* note 108, at 72; James A. Clifton, *Potawatomi*, in PEOPLE OF THE THREE FIRES, *supra* note 2, at 39, 66.

116. Michigan Indian Recognition, *supra* note 76, at 159 (prepared statement of Dr. James M. McClurken).

117. See 7 Stat. 51, art. IV, ¶ 3, cl. 7.

118. Michigan Indian Recognition, *supra* note 76, at 159 (prepared statement of Dr. James M. McClurken).

their annuities” in 1866.<sup>119</sup> The Band again sent representatives to Congress in 1882 and in the years that followed.<sup>120</sup> The Band even kept “meticulous hand written minutes from the 1890s’s, 1900’s, 1910’s, and 1920’s [sic] concerning elections of chiefs and chairmen, problems with membership questions and sanctions for unacceptable behavior.”<sup>121</sup> But, following the federal government’s pattern, the Bureau of Indian Affairs refused to allow the Band to organize under the Indian Reorganization Act.<sup>122</sup>

The Band maintained its political organization and even increased its activism in the following decades. “They filed claims with the Indian Claims Commission, cases which they pursued throughout the 1940’s, 1950’s, and into the 1960’s [sic].”<sup>123</sup> The Band incorporated under Michigan law in 1952 in order to “hold property on behalf of its members, devise and fund tribal development programs, and provide[] access to social programs that were available to them.”<sup>124</sup> With the help of the Michigan Indian Legal Services attorneys, the Band filed its petition for federal recognition with the BAR in 1982.<sup>125</sup>

The Band filed its petition a mere four years after the Grand Traverse Band, and completed its submission in 1988; but even in that short period of time, the FAP had become “glacial” (Miller 16). Mike Daughtery testified, “We were promised that we would be put on active consideration in 1991. We were not put on active consideration. We had our documentation in long before the other people had their documentation in . . . . This is the fourth time we have been bumped.”<sup>126</sup> The Band’s legal counsel, Jim Keedy, testified that it would take “10 or 20 years before review of the Pokagon Band petition is completed.”<sup>127</sup> Mr. Keedy argued that the FAP “does not work for treaty tribes.”<sup>128</sup>

Congress “restored”<sup>129</sup> and “affirmed”<sup>130</sup> the federal recognition of the Pokagon Band in 1994 as part of the same legislative package as the act reaffirming the recognition of the Little Traverse Odawa and Little River

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119. *Id.*

120. *See id.* at 159-60.

121. *Id.* at 322 (prepared statement of James A. Keedy, Michigan Indian Legal Services).

122. *See id.* at 160 (prepared statement of Dr. James M. McClurken).

123. *Id.*

124. *Id.*

125. *See id.* at 161.

126. *Id.* at 162 (statement of Richard “Mike” Daughtery).

127. *Id.* at 327 (prepared statement of James A. Keedy, Michigan Indian Legal Services).

128. *Id.*

129. Restoring Federal Services to the Pokagon Band of Potawatomi Indians, S. REP. NO. 103-255, at 1 (1994).

130. 25 U.S.C. § 1300j-1.

Ottawa.<sup>131</sup> The Senate Report accompanying the statute followed the same pattern as the BAR's proposed findings for the Grand Traverse Band. The Senate relied upon the extensive evidence of the political organization and activities of the Pokagon Band, including tribal-federal communication,<sup>132</sup> the Band's repeated attempts at securing annuities and lands through litigation,<sup>133</sup> the failed attempt at reorganization,<sup>134</sup> and the modern political activities of the Band.<sup>135</sup> The Senate's concluding statement was that the Band "has been continuously recognized as a viable tribal political entity."<sup>136</sup>

As the Band's advocates testified, however, the FAP failed the Band completely. The question remains—in the face of evidence overwhelming enough to convince Congress in 1994, why did the BAR lag behind? Why did more than a decade pass before the BAR would actively consider the Pokagon Band's petition? Considering the similarity of their case to the Grand Traverse Band's case, why didn't precedent hold more sway? To be fair, the BAR issued a letter not opposing the Congressional recognition of the Pokagon Band, asserting that it would reach the merits of the petition later that summer and that it appeared the Band would meet the criteria. But why the delay? What had changed at the BAR?

### C. CONGRESSIONAL REAFFIRMATION OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS AND LITTLE RIVER BAND OF OTTAWA INDIANS

Like the Grand Traverse Band and the Pokagon Band, the federal government ceased its dealings with the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians due to the misinterpretation of Article V of the 1855 Treaty of Detroit. According to Bill Brooks, an attorney for Michigan Indian Legal Services that assisted the Bands in seeking federal recognition, "[T]he only legal basis the Federal government has cited for not continuing to recognize their obligations to

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131. See Pokagon Band of Potawatomi Indians Act, Pub. L. No. 103-323 (Sept. 21, 1994) (codified at 25 U.S.C. § 1300j).

132. See Restoring Federal Services to the Pokagon Band of Potawatomi Indians, S. REP. 103-255, at 3 (1994) (noting Secretarial approval of an attorney for the Band in 1888).

133. See *id.* at 2 (citing *Potawatamie Indians v. United States*, 27 Ct. Cl. 403 (1892); *Pam-to-pee v. United States*, 148 U.S. 691 (1893)); *id.* at 3 (citing *Williams v. City of Chi.*, 242 U.S. 435 (1917)); *id.* at 4 (noting the Band's claims in the Indian Claims Commission).

134. See *id.* at 3-4.

135. See *id.* at 4 (reporting the Band's negotiations with the University of Notre Dame and the Band's recognition by the Michigan Commission on Indian Affairs as the "official certifier of blood quantum").

136. *Id.* at 6.

these tribes is a erroneous interpretation of Article 5 of the 1855 Treaty of Detroit as terminating the band governments of these tribes.”<sup>137</sup>

And, like the Grand Traverse Band and the Pokagon Band, the political organizations of these Bands remained intact and functioning during their legal interregnum. In the case of Little Traverse, tribal leaders traveled to Washington, D.C., in the 1870s to seek assistance in protecting the Odawa communities from the fraudulent dispossession of tribal lands.<sup>138</sup> Even an 1886 report by the Commissioner of Indian Affairs recognized that the Michigan Ottawas “annually elect certain of their number, who they call chiefs or headmen, whose duty it is to transact all business with the government or the Indian agent [and] sign all papers and stipulations which they consider as binding upon their band.”<sup>139</sup> The Bureau of Indian Affairs even purchased “restricted fee and other trust lands for tribal members as recently as 1930 . . . .”<sup>140</sup>

After the 1907 judgment in *Ottawa and Chippewa Indians of the State of Michigan v. United States*,<sup>141</sup> Michigan Ottawas formed the Michigan Indian Organization “to work for the welfare of Odawa people and to pursue solutions to old problems.”<sup>142</sup> In the 1930s, the Little Traverse and Little River Ottawas, like the Grand Traverse Band, petitioned for the right to form a tribal government under the Indian Reorganization Act, but were denied.<sup>143</sup> One federal official even “secured options to purchase 7,000 acres of land in Emmet County to reestablish a land base to be held in trust,” but Congress never appropriated the money necessary to purchase the land.<sup>144</sup> In 1948, Michigan Ottawas formed the Northern Michigan

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137. Michigan Indian Recognition, *supra* note 76, at 74 (statement of William J. Brooks).

138. *See id.* at 29 (prepared statement of Frank Ettawageshik, Chairman, Little Traverse Bay Bands of Odawa Indians) (“[Paul Ettawageshik’s] cousin Margaret Blackbird Ogabegijigokwe took a trip to Washington in the 1870s to attempt to convince President Grant to help our people keep our lands. [A] January 7th, 1877 letter is housed at the National Archives. This letter describes a long and arduous trip she made to Washington to convince the President to protect our reservation from squatters.”). *See generally* MCCLURKEN, GAH-BAEH-JHAGWAH-BUK, *supra* note 18, at 77-81 (describing the dispossession of the lands of the Little Traverse Odawas and Burt Lake Ottawas); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21 (2005).

139. Michigan Indian Recognition, *supra* note 76, at 79 (prepared statement of James A. Bransky and William J. Brooks, Michigan Indian Legal Services, Inc.) (quoting Report on Indians Taxed and Indians Not Taxed in the United States at the Eleventh Census: 1890 Dept. of Interior (1894)).

140. *Id.* at 77.

141. No. 27537, 1907 WL 888, at \*1 (Ct. Cl. Mar. 4, 1907); *see* MCCLURKEN, GAH-BAEH-JHAGWAH-BUK, *supra* note 18, at 82; S. REP. 103-260, at 3 (May 16, 1994).

142. MCCLURKEN, GAH-BAEH-JHAGWAH-BUK, *supra* note 18, at 83.

143. *See id.* at 83.

144. Michigan Indian Recognition, *supra* note 76, at 129 (prepared statement of Dr. James M. McClurken).

Ottawa Association (NMOA) “to pursue claims under the Indian Claims Commission.”<sup>145</sup> “By 1950, federal officials began take notice of the NMOA and to treat it as the representative government of Odawa people throughout Michigan.”<sup>146</sup> But the NMOA was not a federally recognized Indian tribal organization, and when the Indian Claims Commission issued a judgment in favor of the 1836 Treaty of Washington signatory tribes, the Bureau of Indian Affairs refused to deal with the NMOA.<sup>147</sup>

Congress reaffirmed the status of the Little Traverse Odawas and the Little River Ottawas in 1994.<sup>148</sup> Advocates for the Bands went to great lengths to assert that:

These tribes are for all intents and purposes already acknowledged by the federal government. The Federal Acknowledgment Procedure (FAP) was promulgated and enacted to deal with tribes that the BIA has little or no previous knowledge. The administrative process is for tribes that either have no treaty relations with the federal government or are remnants of treaty tribes that were moved to other parts of the country. The Little Traverse [Bay] Bands of Odawa Indians and the Little River Band of Ottawa Indians are treaty tribes that remain in the exact same geographical locations where they were during treaty times. During the 1930’s [sic] the BIA initially found them eligible to come under the provisions of the IRA. The political existence and authority of [the] tribes’ governing bodies were again recognized by the BIA . . . as recently as the late-1970s.

\*\*\* Legally and factually, the tribes have a government-to-government relationship with the United States. They are simply the victims of neglect and unlawful contradictory positions taken by the BIA with respect to Michigan tribes.<sup>149</sup>

As a result, Congress “reaffirmed” the federal recognition of these two Bands.<sup>150</sup> The Senate Report accompanying the Acts<sup>151</sup> appears to be

145. *Id.* at 133 (prepared statement of Dr. James M. McClurken). Michigan Ottawas also formed the Michigan Indian Defense Association, a group that actually opposed reorganization, in 1934. See MCCLURKEN, GAH-BAEH-JHAGWAH-BUK, *supra* note 18, at 84-95.

146. *Id.* at 86.

147. See *id.* at 86; Michigan Indian Recognition, *supra* note 76, at 134 (prepared statement of Dr. James M. McClurken).

148. Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians Act, Pub. L. No. 103-324 (Sept. 21, 1994) (codified at 25 U.S.C. § 1300k-k7 (2000)).

149. Michigan Indian Recognition, *supra* note 76, at 79-80 (prepared statements of James A. Bransky and William J. Brooks, Michigan Indian Legal Services, Inc.).

150. 25 U.S.C. § 1300k-2(a) (2000).

151. See generally S. REP. 103-260 (1994).

similar to the proposed findings in the case of the Grand Traverse Band. Like the BAR in the Grand Traverse Band petition, the Senate's report focuses on the tribal-federal relationship as evidenced by written communications between 1872 and the time of reaffirmation. The report noted the 1886 acknowledgement by the Commissioner of Indian Affairs of "continuing political activities of and the authority of Ottawa/Odawa bands, but den[ying] the existence of a political relationship with the Ottawa/Odawa."<sup>152</sup> The report also mentioned a 1919 letter by Franklin Lane, the Secretary of the Interior, approving of a bill to authorize the Bands to file land claims.<sup>153</sup> The report reacted favorably to the 1930s petitions for reorganization, the NMOA, and the resolutions of support from state agencies, local governments, and other tribes.<sup>154</sup>

Given that Congress analyzed the history and political status of the Little Traverse Odawas and the Little River Ottawas in a manner similar to the way the BAR analyzed the Grand Traverse Band's petition, it begs asking why the BAR did not recognize these Bands.<sup>155</sup> One aspect of the answer is apparent from a reading of the work of Professors Cramer and Miller. Professor Cramer reports that, unlike the quick two-year process enjoyed by the Grand Traverse Band in 1978-1980, current petitioners "spend[] six to ten years collecting and transcribing oral histories, drawing maps, and researching county records as it documents its claims. The BAR staff spend[] another six to ten years, on average, evaluating a petition and moving it through bureaucratic channels" (Cramer 51). Professor Miller, calling it an "ugly process" (Miller 4), argues that "the BAR was charged with a virtually impossible task of dividing the essence of tribalism and ascribing fixity to a form that had historically eluded such efforts" (Miller 55).

What seems certain is that Little Traverse and Little River would have spent another ten years or more proving to the BAR what the Grand Traverse Band proved in two years, but Professor Miller's theory that the FAP is an impossible process does not hold water in the cases of these two Bands. The Senate report identified numerous and clear instances where the federal government stated that the Bands should be recognized, but were not for arbitrary reasons, so much so that Congress did not merely recognize the Bands, but "reaffirmed" their proper status as recognized tribes.

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152. *Id.* at 2.

153. *Id.* at 3.

154. *See id.* at 3-5.

155. Again, to be fair to the BAR, these two Bands had chosen not to proceed very far with the FAP, apparently believing the process to be close to futile, time-consuming, and resource-intensive.

Had the BAR changed the rules to the detriment of these Bands? One possible answer rests in a colloquy between Bill Brooks and the Congressman Bill Richardson:

Mr. RICHARDSON: Counselor, why is, in your knowledge, the Federal acknowledgment process deficient?

Mr. BROOKS: I think the main problem with the process at this time is that the BAR has been very inconsistent in their application of the different criteria. . . . I think one of the problems is that the focus of the BAR's application of those criteria has gone away from looking at evidence of continuing political relationship to looking at ethnographic data which I think is a term which talks about social relations, things like that.

I think a perfect example of that change in focus has been the Little Traverse Bay Bands have a picture book history which Dr. McClurken prepared on their tribal history. Members of the tribe and Dr. McClurken were in the offices of the BAR and went through that book to show them what evidence they had at that point.

They were showing one of the BAR people a photograph of a meeting which contained hundreds of people voting on political decisions. Rather than looking at that political process the BAR person's comment was, what are these women in the back talking about? That is what they are interested in, social relations and things like that rather than the tribal political existence.<sup>156</sup>

Has historical gossip taken over the focus of the BAR? Despite the fact that "Indian people throughout Michigan have always recognized the legitimacy of the political authority of the Little Traverse [Bay] Bands of Odawa Indians and the Little River Band of Ottawa Indians,"<sup>157</sup> the BAR was unwilling or unable to do so.

#### IV. POLITICS AND RECOGNITION OF INDIAN TRIBES

In a letter written to the House Subcommittee on Native American Affairs to support the recognition efforts of the Little Traverse, Little River, and Pokagon Bands, Vine Deloria, Jr. saved a few choice words for the

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156. Michigan Indian Recognition, *supra* note 76, at 138 (statement of William J. Brooks).

157. Pokagon Band of Potawatomi Indians Act and the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indian Act, Hearing before the S. Comm. on Indian Affairs, 103rd Cong. 58 (1994) (prepared statement of Michael D. Petoskey, Chief Judge, Grand Traverse Band of Ottawa and Chippewa Indians).

federal bureaucrats, who acted to administratively terminate the Michigan Anishinaabe tribes, and for the BAR staff of the 1990s:

Never has there been such a clear case of malfeasance and misadministration in the dealings of the United States with Indian nations. . . . Their representatives were present at numerous treaty negotiations held by the Chippewa, Odawa, and Potawatomi—the famous “Three Fires” confederacy. Indeed it was the presence of these Indian nations that inspired the classic phrasing in the Ordinance of 1787 wherein the United States promised to exercise the “utmost good faith” in dealing with the Indian nations.

Sadly that promise has not been kept and to the great embarrassment of Indian historians and legal scholars the Bureau of Indian Affairs has been placed in the position of demanding that two bands of Indians having indisputable proof of federal recognition in formally ratified treaties of 1836 and 1855 now come forward and prove that they are Indians. This situation is not simply an injustice if major proportions, it is a travesty of logic that boggles the rational mind.

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\*\*\* The Odawa “lost” their federal rights to service simply because low level bureaucrats refused to carry out their responsibilities. This injustice has been compounded recently by the requirement that the Odawa satisfy the curiosity of another generation of federal bureaucrats who spend their time unnecessarily compounding the complexities which they have themselves devised in order to perpetuate the office of Federal Recognition.

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The actions of the federal bureaucracy in denying immediate recognition to these bands of Odawa . . . have placed Congress in the embarrassing position of allowing low level federal employees to negate deliberate acts of previous Congresses. . . . [I]f low level bureaucrats can deny recognition to treaty signatories, the whole edifice of treaty and trust relationships depends on the emotional state of clerks in a minor federal bureaucracy and there is no law except the personal whims of the bureaucracy.<sup>158</sup>

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158. Letter from Vine Deloria, Jr., Professor of Law, Political Science, History, and Religious Studies, University of Colorado, to Hon. William Richardson, Chairman, Subcomm. on

Professor Deloria raised a number of important points as to the current state of the FAP and the acknowledgment criteria. First, he emphasized the failure of the BAR to respect the objective evidence of tribal political status and activity. Second, he alleged that the FAP had changed from a realistic application of the acknowledgment criteria to an academic study intended only to satisfy the curiosity of BAR staff. Third, he noted that the BAR staff, like the federal officials that illegally and improperly terminated the Michigan Anishinaabe tribes, have acquired too much unaccountable discretion and power. Fourth, Professor Deloria argued that the BAR process is simply unjust.

The respective works of Professors Cramer and Miller go a long way toward proving the allegations made by Professor Deloria in terms of the failure of the FAP. Both argue that to ignore the politics of federal recognition by sequestering the FAP away in a tight basement, supposedly far away from national, state, and tribal politics, is folly (Cramer 167; Miller 4, 44).<sup>159</sup> In fact, Professor Miller adopts the recommendations of many unrecognized tribes in calling for an independent panel, accepting the political consequences (Miller 77, 258). Given the ineptitude of the BAR staff—and perhaps their lack of interest—in the political issues raised by federal recognition, such a notion appears attractive. But a political commission would have its own limitations; namely, that it might be able to judge the evidence of political organization, activities, and status better than the BAR staff, but its members would be hopelessly incompetent to deal with much of the anthropological, historical, and sociological evidence.

Perhaps there are simple amendments to the FAP that would alleviate much of the difficulties raised by Professor Deloria. One would be to remove the authority and discretion of the BAR staff—remember, they are anthropologists and ethnohistorians, not political scientists—to make decisions on the political organizations and activities of the tribal petitioners. Another would be to allow for a limited federal court review of the historical and anthropological findings of fact made by the BAR experts,<sup>160</sup> while allowing a *de novo* review of the political evidence based on objective standards developed by Congress.<sup>161</sup> It appears that the BAR's

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Native American Affairs, H. Comm. on Natural Resources 1-2 (Sept. 14, 1993), *reprinted in* Michigan Indian Recognition, *supra* note 76, at 424-25.

159. Professor Miller also cited Marc Block and Claude Lévi Strauss for the proposition that “the historian’s search for pure origins and beginnings [i]s folly.” MILLER, *supra* note 50, at 165.

160. *See* Ramapough Mountain Indians v. Norton, No. 00-5464, 25 F. App’x 2 (D.C. Cir. Dec. 11, 2001).

161. *See* United Houma Nation v. Babbitt, No. 96-2095, 1997 WL 403425, at \*8 (D.C., July 8, 1997) (holding that because Congress has not spoken as to the standards of federal recognition, the court will grant the agency’s determination under the *Chevron* deference standard). *But see*

failings, particularly with the Pokagon Band, the Little Traverse Band, the Little River Band, the United Houma Nation, and the Miami Nation, stem from its emphasis on satisfying its curiosities about historical gossip.

One final point. Professor Miller reports that no member of a federally recognized Indian tribe has been or likely ever will be a member of the BAR staff due to the apparent conflict of interest (Miller 51, 65). He also points out on numerous occasions that the entire Bureau of Indian Affairs has a conflict as well (Miller 5, 51), but that is immaterial here. What is important is that Indians know who they are, and no matter how much studying and research a BAR staffer conducts, they will never know for sure one way or the other. The Anishinaabe children who are right now listening to stories about Sky-Woman and the Great Turtle; or the Anishinaabe elders who are recalling their boarding school experiences; or the Anishinaabe tribal leaders who strive to make fair and just decisions regarding tribal land, the environment, reservation health care, law enforcement and public safety, gaming, and thousands of other decisions—these people know who they are. In the long and intertwined tendrils of history, federal recognition is not worth the paper it is printed on because Indian people don't need anyone else telling them who they are.

Migwetch.

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Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of Interior, 255 F.3d 324, 346 (7th Cir. 2001) (looking for "meaningful governmental functions" during an unrecognized tribes interregnum without a standard), *cert. denied*, 534 U.S. 1129 (2002).