United South and Eastern Tribes, Inc.

Nashville, TN Office:
711 Stewarts Ferry Pike, Suite 100
Nashville, TN 37214
Phone: (615) 872-7900
Fax: (615) 872-7417

Washington, DC Office:
400 North Capitol Street, Suite 585
Washington, D.C., 20001
Phone: (202) 624-3550
Fax: (202) 393-5218

November 12, 2015

United South and Eastern Tribes, Inc.
Written Testimony
For the Hearing of the
House Subcommittee on Indian, Insular and Alaska Native Affairs
On H.R. 3764

October 28, 2015

Independent Authority of Executive Branch to Recognize Tribal Nations

---

On behalf of United South and Eastern Tribes (USET), we submit the following written testimony for inclusion in record of the House Natural Resources Committee Subcommittee on Indian, Insular, and Alaska Native Affairs' legislative hearing on H.R. 3764, *The Tribal Recognition Act of 2015*. USET is a non-profit, inter-tribal organization representing 26 federally recognized Tribal Nations from Texas to Florida and up to Maine.[1]. USET is dedicated to enhancing the development of federally recognized Indian Tribes, to improving the capabilities of Tribal governments, and assisting USET Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people. This includes ensuring each branch of the federal government works to fulfill solemn obligations to Tribal Nations in execution of the federal trust responsibility.

Although Congress has properly delegated authority to the Executive Branch to make a determination regarding the federal recognition of Tribal Nations, the Executive Branch also has independent recognition authority granted by the Constitution. If Congress now attempts to restrict the Executive Branch's recognition authority through H.R. 3764, which would provide that only Congress may recognize Tribal Nations, that legislation would likely be deemed unconstitutional.

There are currently 566 federally recognized Tribal Nations included on the list the Department of the Interior maintains at the direction of Congress.[2] Federal recognition marks the beginning of a government-to-government relationship, and it is predicated on the entity possessing sovereign tribal government status for purposes of federal law.[3] Congress has authority to initiate a government-to-government relationship, but most

---

[1] USET member Tribes include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

[2] 25 U.S.C. § 479a-1 (requiring Department to maintain and publish list); 80 Fed. Reg. 1,942 (Jan. 14, 2015) (listing federally recognized Tribal Nations). The Department has since issued a positive final determination recognizing one additional Tribal Nation. 80 Fed. Reg. 39,144 (July 8, 2015).

[3] H.R. REP. NO. 103-781 (1994) (stating recognition is formal political act that establishes government-to-government relationship); 140 CONG. REC. S6145 (May 19, 1994) (Sen. McCain) ("The recognition of an Indian tribe by the Federal Government is just that—the recognition that there is a sovereign entity with governmental authority which predates the U.S. Constitution and with which the Federal

Tribal Nations did not receive federal recognition in this manner. Instead, many Tribal Nations received federal recognition from the Executive Branch.[4] The standards the Executive Branch uses for determining whether an entity possesses sovereign tribal government status for purposes of federal law grew out of case law,[5] drawing from cases that articulate where Tribal Nations' inherent sovereignty originated,[6] how they maintain that sovereignty over time,[7] and what their political governing structure must entail.[8]

Although you have been fully briefed on the matter, we reiterate that Congress has properly delegated authority to the Executive Branch to recognize Tribal Nations through 25 U.S.C. § 2, 25 U.S.C. § 9, and 43 U.S.C. § 1457. Like Congress's constitutional grant of recognition authority through the Indian Commerce Clause,[9] the statutes delegating recognition authority to the Executive Branch do so in broad terms. Many courts have recognized Congress's proper delegation of recognition authority through these broad statutes.[10] Congress when it enacted the 1994 Federally Recognized Indian Tribe List Act reiterated its past delegation of recognition authority to the Executive Branch.[11]

Separate from congressional delegation, the Executive Branch has independent constitutional authority to recognize Tribal Nations. The Constitution grants the Executive Branch authority to undertake diplomatic and administrative actions consistent with federal recognition.[12] This authority is most clearly granted through the

---

Government has established formal relations."); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 134 (Nell Jessup Newton et al. eds., 2012 ed.).

[4] *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004) ("Federal recognition may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity.") (quoting William C. Canby, Jr., *AMERICAN INDIAN LAW IN A NUTSHELL* 4 (4th ed. 2004)); 140 CONG. REC. S6145 (May 19, 1994) ("Over the years, the Federal Government has extended recognition to Indian tribes through treaties, executive orders, a course of dealing, decisions of the Federal courts, acts of Congress and administrative action.") (Sen. McCain); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 134 (Nell Jessup Newton et al. eds., 2012 ed.) ("Tribes recognized by treaty, statute, administrative process, or other intercourse with the United States are known as federally recognized tribes."). Some Tribal Nations, including those involved in the *Tillie Hardwick* litigation, received recognition after a court made a judicial determination that a past attempt to terminate the Tribal Nation's federal recognition failed and thus remained.

[5] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 138–39 (Nell Jessup Newton et al. eds., 2012 ed.).

[6] *See Worcester v. Georgia*, 31 U.S. 515 (1832).

[7] *See United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

[8] *See Morton v. Mancari*, 417 U.S. 535 (1974).

[9] U.S. CONST., art. I, § 8, cl. 3 (granting Congress power to "regulate Commerce with . . . the Indian Tribes"); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 136 (Nell Jessup Newton et al. eds., 2012 ed.).

[10] *Muwekma Oholne Tribe v. Salazar*, 708 F.3d 209, 211 (D.C. Cir. 2013) (citing § 2 and § 9); *Samish Indian Nation v. United States*, 419 F.3d 1355, 1370 (Fed. Cir. 2005) (citing § 2 and § 9); *Miami Nation of Indians of Indiana, Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342, 345 (7th Cir. 2001) (citing § 2 and § 9); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59–60 (2nd Cir.1994) (citing § 9); *James v. U.S. Dept. of Health and Human Services*, 824 F.2d 1132, 1137 (D.C. Cir. 1987) (citing § 2 and § 9); *Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1024–25 (E.D. Cal. 2012) (citing § 2 and § 9); *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 77 (D.D.C. 2002) (citing § 2 and § 1457); *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1219 (D. Haw. 2002) (citing § 2, § 9, and § 1457); *Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 887 F. Supp. 1158, 1163 (N.D. Ind. 1995) (citing § 2 and § 9); *see also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549 (10th Cir. 2001); *W. Shoshone Bus. Council For & on Behalf of W. Shoshone Tribe of Duck Valley Reservation v. Babbitt*, 1 F.3d 1052, 1057–58 (10th Cir. 1993); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 136 (Nell Jessup Newton et al. eds., 2012 ed.) (citing § 2 and § 9).

[11] Pub L. No. 103–454, § 103, 108 Stat 4791 (1994) (stating Tribal Nations may be recognized "by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe'") (codified at 25 U.S.C. § 479a findings); *Cherokee Nation Of Oklahoma v. Norton*, 389 F.3d 1074, 1076 (10th Cir. 2004), *as amended on denial of reh'g* (2005); *United States v. Livingston*, No. CR-F-09-273-LJO, 2010 WL 3463887, *14 (E.D. Cal. Sept. 1, 2010); *see also* 25 U.S.C. § 479a(2) (defining "Indian tribe" to mean "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe").

[12] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 136 (Nell Jessup Newton et al. eds., 2012 ed.); *see also* Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271, 272 (2001) ("In theory, the President could unilaterally recognize a tribe by taking action consistent with recognizing a foreign government, such as making a proclamation of recognition,

Constitution's Treaty Clause.[13] The Constitution also grants the Executive Branch the authority to receive and provide ambassadors.[14]

The Executive Branch has exercised its congressionally granted recognition authority in various ways. Long before Congress delegated recognition authority to the Executive Branch, and even before the United States was formed, the Executive Branch engaged in treaty negotiations with Tribal Nations.[15] President George Washington entered into and then worked with the Senate to ratify the first treaties in 1789, thereby establishing that treaties with Tribal Nations would utilize the same process treaties with foreign nations must go through.[16] Before the treaty making era ended in 1871, most Tribal Nations had entered into a treaty with the United States.[17] Although the Senate was involved in ratifying these treaties, the Executive Branch utilized its constitutional treaty making authority and was therefore the governmental branch responsible for treaty making with Tribal Nations.[18]

Courts have acknowledged that the Executive Branch has independent constitutional authority to recognize Tribal Nations, although they have gone on to discuss Congress's proper delegation of authority as a sufficient grant of power. The Seventh Circuit in *Miami Nation of Indians of Indian, Inc. v. Dep't of the Interior*, the seminal case finding that Congress properly delegated recognition authority to the Executive Branch, made an important and telling reference to separate Executive Branch recognition authority.[19] The court there stated it is not "clear that [recognition] *has* to be authorized by Congress."[20] Instead, the court explained: "Recognition is, as we have pointed out, traditionally an executive function. When done by treaty it requires the Senate's consent, but it never *requires* legislative action, whatever power Congress may have to legislate in the area."[21] The next year, the United States District Court for the District of Hawaii noted of its own volition that the court in *Miami* had suggested the Executive Branch has independent recognition authority.[22]

When the Executive Branch exercises its recognition authority, courts have deferred to its decision as a political question not subject to review.[23] The Tenth Circuit in *Western Shoshone Business Council for and on*

---

establishing regular dealings with the tribe, or applying existing law to the tribe. Power to undertake certain diplomatic and administrative actions consistent with federal recognition of tribes is constitutionally and statutorily committed to the executive branch.").

[13] U.S. CONST., art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

[14] U.S. CONST., art. II, § 2, cl. 2 ("[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . .).

[15] *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876) ("From the commencement of its existence, the United States has negotiated with the Indians in their tribal condition as nations, dependent, it is true, but still capable of making treaties. This was only following the practice of Great Britain before the Revolution."); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 31–32 (Nell Jessup Newton et al. eds., 2012 ed.); Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271, 272 (2001).

[16] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 31–32 (Nell Jessup Newton et al. eds., 2012 ed.); *see also United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 197 (1876) ("Besides, the power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations."); *Worcester v. Georgia* , 31 U.S. 515, 519 (1832).

[17] *Marks v. United States*, 161 U.S. 297, 302 (1896); William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 339 (1990) (stating 372 Tribal Nations recognized through treaties).

[18] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 25, 393 (Nell Jessup Newton et al. eds., 2012 ed.); Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 33–34, 274 (1942).

[19] 255 F.3d 342 (7th Cir. 2011).

[20] *Miami Nation of Indians of Indian, Inc. v. Dep't of the Interior*, 255 F.3d 342, 346–47 (7th Cir. 2001).

[21] *Miami Nation of Indians of Indian, Inc. v. Dep't of the Interior*, 255 F.3d 342, 346–47 (7th Cir. 2001).

[22] *Kahawaiolaa v. Norton*, 222 F.Supp.2d 1213, 1218 n.6 (D. Haw. 2002).

[23] *United States v. Holliday*, 70 U.S. 407, 419 (1865) ("In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs."); *Miami*

Behalf of Western Shoshone Tribe of Duck Valley Reservation v. Babbitt explained that judicial deference to the Executive Branch's determinations of tribal recognition is "grounded in the executive's exclusive power to govern relations with foreign nations."[24] Thus, deference stems from the Executive Branch's exercise of its independent constitutional powers.

Courts have found that the Executive Branch's treaty negotiations with Tribal Nations constitute federal recognition.[25] The Department of the Interior in making determinations regarding whether a Tribal Nation is federally recognized has also treated treaty negotiations as indicative of federal recognition.[26] Also evidencing federal recognition, and often resulting from treaties, is a federal reservation created for a Tribal Nation.[27] In fact, in defining "tribe" in the Indian Reorganization Act, Congress acknowledged that "Indians residing on one reservation" possess sovereign tribal government status.[28]

Since the treaty making era ended, the Executive Branch has legally federally recognized Tribal Nations through other means. For example, the Executive Branch replaced treaties with executive orders immediately after treaty making ended.[29] When Congress enacted the Indian Reorganization Act in 1934, the Department of the Interior conducted sovereign tribal government status examinations to determine which tribal entities were eligible for benefits under the Act, thus resulting in their recognition.[30] In 1978, the Department of the Interior promulgated the federal recognition regulations in order to create a more consistent process for federal recognition,[31] and it published its first comprehensive list of federally recognized Tribal Nations in 1979.[32]

Although Congress has properly delegated authority to the Executive Branch to federally recognized Tribal Nations, the Executive Branch also has independent recognition authority granted by the Constitution. If Congress now attempts to restrict the Executive Branch's recognition authority, it risks a finding that its legislation is unconstitutional.

Nation of Indians of Indiana, Inc. v. U.S. Dep't of the Interior, 255 F.3d 342, 347–48 (7th Cir. 2001); *United States v. Washington*, 384 F. Supp. 312, 400 (W.D. Wash. 1974) ("The recognition of a tribe as a treaty party or the political successor in interest to a treaty party is a federal political question on which state authorities and federal courts must follow the determination by the legislative or executive branch of the Federal Government.").

[24] 1 F.3d 1052, 1057 (10th Cir. 1993); *see also* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 33–34, 274 (1942) ("[T]he question of tribal existence and congressional power has been classed as a 'political question' along with the recognition of foreign governments and other issues of international relations.").

[25] *The Kansas Indians*, 72 U.S. 737, 738 (1866) (holding state not permitted to apply laws to Indians where "the tribal organization of Indian bands is recognized by the political department of the National government as existing; that is to say, if the National government makes treaties with, and has its Indian agent among them, paying annuities, and dealing otherwise with 'head men' in its behalf").

[26] *See, e.g.,* 25 C.F.R. § 83.12(a)(1) (listing treaty relations as one method for demonstrating previous federal recognition for purpose of regulatory recognition process); 25 C.F.R. § 292.8(a) (listing treaty negotiations as method for demonstrating past recognition for purposes of Indian Gaming Regulatory Act); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 146 (Nell Jessup Newton et al. eds., 2012 ed.); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 269, 271 (1942).

[27] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 141 (Nell Jessup Newton et al. eds., 2012 ed.) ("Normally a group will be treated as a tribe or a recognized tribe if Congress or the executive has created a reservation for the group by treaty, agreement, statute, executive order, or valid administrative action and the United States has had some continuing political relationship with the group.")

[28] 25 U.S.C. § 479; FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 33–34, 270 n.22 (1942).

[29] *See Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 211 (D.C. Cir. 2013); *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008).

[30] *Muwekma Oholne Tribe v. Salazar*, 708 F.3d 209, 211 (D.C. Cir. 2013); 59 Fed. Reg. 9,280 (Feb. 25, 1994) (stating Tribal Nations recognized on case-by-case basis before Department of Interior promulgated federal recognition regulations in 1978); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 146 (Nell Jessup Newton et al. eds., 2012 ed.); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 33–34, 270 (1942); William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 357 (1990).

[31] *See* 25 C.F.R. Part 83; *Muwekma Oholne Tribe v. Salazar*, 708 F.3d 209, 211 (D.C. Cir. 2013).

[32] 44 Fed. Reg. 7,235 (Feb. 6, 1979).

USET urges that you reconsider this proposed legislation and instead work directly with Tribal Nations to address any changes that Congress might appropriately adopt to improve this important process. USET believes strongly that all branches of government share equally in the federal trust responsibility and opposes any effort that fails to fully recognize the obligations and authorities of each. We look forward to working with you to ensure that this is upheld. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET Director of Policy and Legislative Affairs, at 202-624-3550 or Lmalerba@usetinc.org.

"Because there is strength in Unity"