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GLOBAL INDIGENOUS DIASPORA: AN INTERNATIONAL COMPARISON OF NATION-BASED RECOGNITION, TRIBAL MEMBERSHIP, AND ABORIGINAL RIGHTS

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JEREMY OTIS
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GLOBAL INDIGENOUS DIASPORA: AN INTERNATIONAL COMPARISON OF NATION-BASED RECOGNITION, TRIBAL MEMBERSHIP, AND ABORIGINAL RIGHTS

A THESIS APPROVED FOR THE
DEPARTMENT OF NATIVE AMERICAN STUDIES

BY

_____
Dr. Amanda Cobb-Greetham, Chair

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Dr. Lindsay Robertson

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Dr. Heather Shotton

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Dedicated to Grammy. Thank you for making me go to law school. Dedicated to Mom, Dad, and Devin. Thank you for putting up with me when Grammy made me go to law school. Dedicated to Reba and Jax. Thank you for giving me all of your love when Grammy made me go to law school.

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Abstract

Nation-states often tell their Native populations who can and cannot be considered Indigenous. Two important tools of sovereignty are now, and have been for some time, Federal Recognition and Tribal Membership. Federal Recognition has taken various forms, depending on the Nation. No matter the country, however, Federal Recognition has a direct impact on Tribal Membership and individual perceptions of self. When one's identity is legally denied by the federal government, it inspires a kind of cultural diaspora for Indigenous peoples across the globe.

Introduction

Culture and politics may seem—to the untrained eye—like mutually exclusive terms, and in a lot of ways, they are—or at least they ought to be. In actuality, both concepts depend a great deal on one another. The lives of Indigenous/Aboriginal/Native/First Nations peoples are often characterized by culture and tradition, but are more often guided, determined, or even dictated, ultimately, by politics. Not an Indigenous system of politics, mind you. Instead, the lives of Indigenous peoples are too often categorized by, and for, the political systems of their *colonizers*, their *oppressors*. Nation-states tell Native inhabitants where to live; when to hunt; what benefits, if any, they are entitled to; etc. Even stranger, these nation-states frequently tell their Native populations who can and cannot be considered Indian.

Background

There is an inherent curse, it seems, to colonization; what can only be described as an extreme, all-encompassing disconnect between the *colonizer* and the *colonized*. This disconnect has, unfortunately, resulted in various misappropriations, misunderstandings, and mischaracterizations. Nation-states, across the globe, tend to be socially and politically ignorant to the cultures, religions, and economies of their Native populations. Accurate perceptions of Indigenous history, politics and identity are frequently lost on, and erased by, dominant political powers, but more specifically, by those powerful individuals who stand to benefit from said erasure. Perhaps this ignorance is a natural result of colonization. Perhaps these dominant powers and dominant peoples simply

don't give a damn. Regardless, the lives of Indigenous peoples have become quite complex in the hands of colonizing nation-states. For this reason, the concepts of sovereignty, recognition, and membership have all become incredibly important issues for both nation-states and the Indigenous peoples living within them.

How, then, do Indigenous peoples express and achieve sovereignty…or at least some semblance of sovereignty? I argue that two very important tools of tribal sovereignty are now, and have been, nation-based recognition and tribal membership. Depending on the country, these tools may be utilized by the nation-state, by the Indigenous population, or by both. For the most part, these two tools involve the way(s) that Native populations choose to define themselves but, unfortunately for Indigenous peoples, they also involve the way(s) that nation-states have chosen to define their Native populations.

Statement of the Problem/Purpose

I argue here, in this paper, that federal recognition for Indigenous people is an incredibly strange concept, with serious implications. Federal recognition simply means that, based on the policies and regulations of various nation-states, there are some self-identified Indigenous peoples who qualify as Indigenous, and there are some that do not. In the U.S., for example, it is a struggle experienced on the tribal level, with the power of tribal definition stemming from the Commerce Clause of the Constitution.[1] In other countries, like Canada, it is primarily limited to discussions regarding the individual—specifically, through the Canadian Indian Act's regulation of "Indian Status."[2] In other

countries, like Australia, it is an issue that primarily affects land claims—specifically, an indigenous group's relationship to property.[3] Every nation defines who is, and what it means to be, Indigenous. Usually, it is a futile attempt to define and explain an ethnic group that the government knows very little about.

This concept—of a non-Indigenous government telling Indigenous peoples how to be Indigenous—could be considered laughable, if it were not so culturally and socially dangerous, for both Native tribes as a whole and their individual members. Imagine the U.S. government telling African and Asian American citizens, for instance, how to qualify as African or Asian American. Indeed, this dynamic may seem ridiculous to some, but it is the norm for Native peoples in the United States. Why might this hypothetical feel so unacceptable for some ethnic groups when it is the reality for Native Americans?

Perhaps it is because Indigenous peoples, in the U.S., are not defined solely as an ethnic group. According to the U.S. government, Native Americans are actually a political group.[4] Meaning, American Indians are those Indians who are members of a federally recognized tribe, an entity that has qualified to have its own special relationship with the federal government. Some tribes prefer this distinction, as opposed to pure self-identification, because it allows them the opportunity to define indigeneity for themselves.[5] These definitions are used to determine each tribe's membership rules, based on the tribe's own terms and on the tribe's own unique cultural standards. However, some would argue that these membership guidelines are not completely self-imposed. The U.S.

government still has the indirect ability to regulate the membership rules of federally recognized tribes through a complicated system of legislative and administrative law.

Although undoubtedly strange, federal recognition remains a fairly straight-forward concept. The clarity of this issue must not distract from its potential for disaster. It can have, and has had, detrimental repercussions on Native peoples around the world. At the end of the day, the imposition of Indigenous standards and definitions on Native peoples by a Non-Indigenous government is inherently problematic, no matter the justification. How, then, do these settler-colonial definitions of Indigeneity affect Indigenous communities and individuals on a political, social, and/or legal level?

Significance

These racial/ethnic definitions are obviously very important, affecting much more than just the world's general perception of *indigeneity*. Those definitions given to Indigenous peoples are significant in terms of economics, politics, and socio-cultural understanding. In the U.S. for instance, those tribes who qualify under the federal government's definition(s) of "Indian," are allowed certain powers, and receive certain benefits, that other tribes will be refused in the absence of formal recognition by the government. These tribes are afforded, in an arguably limited sense, the right to determine their own perceptions of civil rights, criminal/civil jurisdiction, taxation, etc.[6] Tribes have even been encouraged, whether it can be interpreted as assimilationist or not, to draft their own tribal constitutions—another perk of being federally recognized.[7]

I would argue, and do argue, however, that the most significant impact that recognition and membership can have on Indigenous peoples is on individual definitions of self.

When a country inaccurately defines its native populations as a whole, it has the potential to mutate the psyche of any individual Native person left in this mischaracterization's wake.[8] Imagine going through that kind of cultural trauma. Your loved ones, your community, and your history all tell you that *you are something*—you're unique, you're native—but the government, on the other hand, continues to tell you that *you're nothing*. The effects are not just annoying; they can be culturally debilitating. It is, essentially, an attack on an individual's perception of self, the results of which are far more dire than the government would have you believe.

As you will see, this is not merely a conversation about who gets benefits and who doesn't. Those individuals struggling with this particular kind of cultural diaspora are often burdened with various forms of social/mental limitations, including but not limited to: poverty, ill-health, educational failure, family violence, etc.[9] Do not be mistaken. The issue of federal recognition is absolutely a matter of life and death.

Recognition and membership can vary from country to country. Specifically, I attempt to compare and contrast federal recognition and tribal membership in the U.S., Canada, and Australia. By and through my research into this topic, I have found that the U.S.'s system of recognition is intensely unique in comparison to the rest of the world. Be warned: this is not a

compliment to my home country. Quite the contrary, actually. Whereas countries like Australia tackle issues of recognition mainly through avenues of land ownership, the U.S.'s system of recognition is, fortunately or unfortunately, much more institutionalized, or bureaucratic. In other words, while Australia is making its Native populations prove indigeneity as a matter of title to land, the U.S. is making its Native populations prove their indigeneity in order to receive any/all governmental benefits whatsoever.

Reflexivity

White scholars have been writing about (and screwing up) Native American issues for decades. No doubt, in the name of academia, our scholarly predecessors have seriously muddied the waters. In fact, Native American Studies, as its own discipline, was in itself a reaction to those first scholars' mistakes.[10] In Anthropology, we have begun, as a practice, to celebrate the use of reflexivity—a concept first adopted by *cinema verite* documentary filmmakers—in our collective scholarship.[11] Reflexivity is, ultimately, a celebration of all things transparent. We believe—us *Reflexivists*—that absolute objectivity may only be accomplished through absolute subjectivity. It is important, therefore, for authors of scholarly articles to submit to their readers an open and honest summary of self. So, for the sake of reflexivity and transparency, I think it is important to share some information about myself.

First and foremost, I am not Native American. This is probably the most important detail I can share about myself, at least while I attempt to author a scholarly paper about Native American Issues and Federal Indian Law. As a

dual degree student, having studied the law, Anthropology, and Native American Studies, I must admit that I find it much more interesting, and frankly more useful, to present legal concepts while simultaneously introducing a social perspective. However, the perspective I provide is always that of an outsider.

Unfortunately, no matter how many papers I write concerning Federal Indian Law and no matter how many Native American Studies classes I enroll in, the interpretation I present to readers can never be a Native one. Anything and everything I write, in relation to the Indigenous plight, will be skewed by my white heritage, upbringing, and bias. I cannot, and will not, escape it. I am a Scottish-Irish, middle-class, white man that was raised in the Southern Baptist church, and there is no way for me to change that.

My interests are intensely tied, for whatever reason, to Native American Studies. However, as I have said, even the most passionate advocacy in this paper, or any others, will not transform me into a Native American myself. I urge you to take my words with a grain of salt, and with a healthy sense of skepticism. Hopefully, even with all my inherent bias, this paper will remain at least somewhat informative.

"American Exceptionalism": The United States' System of Recognition and Membership

The English brand of colonization we learn about in American schools seems relatively tame, or at least subdued, but only when compared to the previous colonizing efforts of the Spanish. "Spain's imperial expansion into the 16th-century Americas was simultaneously an invasion, a colonization effort, a social experiment, a religious crusade, and highly structured economic

enterprise."[12] It is a history lesson we all hear multiple times in reference to Federal Indian Law, Native American Studies, and the like. Whereas the English *colonized* North America, the Spanish *conquered* South America.[13] The Spanish ruled by force, wielding a brutal army and a callous collection of missionaries.[14] These Spaniards laid waste to South America's original inhabitants with zero mercy and zero exceptions. As they moved across the continent, native peoples were forced into an absolutely subservient role, as literal slaves in various contexts.[15] In contrast, the English proactively ruled through negotiation. More accurately, history shows that the English ruled and expanded its territories, throughout the world, via lies and deceit.

The colonial period in North America, specifically in regards to Native Americans, has been characterized by these on-going negotiations, by treaty-making, and by extension, reserved rights.[16] Over 500 treaties were negotiated during the 17th and 18th centuries, which were signed by leaders of both English colonies and local Indian tribes.[17] These treaties described and officiated land rights, trading routes, common easements, boundaries, etc. This period in American history, with the signing of the last treaty occurring in 1871, is referenced, of course, as the "Treaty-Making Period." Native American history, in North America, is often chronologically described by the use of such periods and/or eras. i.e., colonial era, allotment era, removal era, termination period, etc.[18] As described below, these treaties, some of which were drafted before America was even in its early infancy, have had an intense impact on

recognition and membership policies, which have affected indigenous peoples through history and up into the modern day.

Do not misinterpret this history for something that it isn't. No, the English did not rule with an iron-fist like the Spanish…but they still *ruled* their colonies…indeed, the U.S. still reigns supreme over its states and territories in the present day. The negotiations typical to the treaty-making era were not at all the arms-length contractual agreements that are enforced by law today. These treaties were often innately unequal. For instance, the treaty documents themselves were almost always drafted in English, and were hardly ever translated into Native languages.[19] Naturally, English-Native interpreters were quite hard to come by in the 17th century, so the majority of these treaties were signed by Native peoples who most likely had little to no knowledge about what they were actually agreeing to.[20] As well, the contents of these treaties were described using western legal ideals and concepts, so even if the documents were ultimately translated, the Native peoples signing the treaties still would not have fully understood what they were getting themselves into.

If all of this weren't discouraging enough, only a few of these treaties were actually adhered to by the English or the subsequent U.S. government.[21] The history of North America has been plagued by the lies of the first American colonies. It is clear that when most colonialists drafted legal documents for Indians to sign, those colonialists had no intention of adhering to the legal promises they themselves proffered.

Federal recognition and tribal membership are not issues specific to the modern day. It is an ongoing struggle, stretching over the span of literal centuries. The issue, itself, is even older than the United States. In terms of this country's history, however, the early 19th century (Jim Crow Era) can be described as one of the most complicated times for Indian tribes to assert their collective identities.[22] The country had been proactively split into a white-black dichotomy, and the Indian's plight only further complicated this polarizing environment.

At the time, the white majority made it a priority to question the legitimacy of tribal status. Tribes, especially in the Southeast, were dismissed, by both laymen and scholars, as "tri-racial isolates" or "racial orphans."[23] Even then, it was hard for white people to reconcile with the reality that was racial/ethnic interbreeding. It is much easier to dismiss a group with ethnic complexity than it is to acknowledge the existence of an ethnic evolution. At the end of the day, many Indian individuals and groups were simply "pushed…into the 'black' or 'colored' category."[24] As well, those individuals with lighter skin tones often felt social pressure to abandon any semblance of Indian identity and instead naturally opted out of the entire system in order to take on the privileged status of white.[25]

American Indians were forcefully pushed into a defensive mode. In an effort to defend their collective identities, Native groups themselves were often proactive in distinguishing a higher social status over African Americans, or at the very least, a social status totally different from African Americans.[26]

Eventually, defense turned to offense. This social unrest ultimately led to the creation of what were called "Blood Committees," which were created "to ensure that no blacks gained admittance" to the tribe.[27] Later in history, around the mid twentieth century, Indian groups from all over the country were vocal in opposing nation-wide desegregation movements.[28] For the sake of self-preservation, activist Indians of the time were sure to distance themselves from the protests of any/all other ethnic groups.

Post World War II can also be described as a vital time period for tribal recognition efforts. In acknowledgment of Native American veterans' service in the war, the Indian Claims Commission was created "to settle outstanding claims by tribes against the U.S. Government.[29] These various land claims had mixed results, to say the least. For some Indian groups, the Commission catalyzed the perception of Indians as lame-duck dependents, who only wanted to be Indian "for the check in the mail."[30] For others, however, the Commission was the perfect opportunity to revitalize and recapture a necessary relationship with the federal government, and ultimately, a federally recognized status as Indian.[31] Regardless of the result, the Indian Claims Commission was indeed a stepping stone for the federal recognition process in the modern day.

Today, the U.S. government has explicitly taken control of Native American affairs. The country assumes this control by way of, and through, the United States' Constitution. In fact, "Native Americans are the only racial-ethnic minority that is explicitly mentioned in the U.S. Constitution."[32] Specifically, the relationship between the U.S. federal government and the recognized tribes

within its borders is most similar to that of a trustee and beneficiary, or a guardian and its ward.[33] This sentiment is explicitly adopted by the U.S. Supreme Court in *Cherokee Nation v. Georgia*, which determined that the U.S. Government, indeed, has a self-imposed protective duty over the Indian tribes, as domestic dependent nations, within its borders. The Bureau of Indian Affairs (BIA) was created by the U.S. government in order to safeguard this guardian/ward relationship, and in order to further administrate the benefits of this relationship. However, in order to administer these benefits, the BIA chose, in 1978, to create a process by which some American Indian tribes could achieve official recognition under the administrative scrutiny of the BIA's Branch of Acknowledgment and Research.[34] Of course, logically, where some tribes may qualify, some will not. Over 200 petitioning tribes have been denied recognition by the U.S. government since the creation of this process.[35]

The Bureau of Indian Affair's federal acknowledgment process (FAP) has been described, *from within*, as "objective, expert, and nonpolitical." However, *from the outside*, it can just as equally be described as biased, ignorant, and intensely political. As is true of most bureaucratic processes, it's a matter of perspective. On its surface, the process is portrayed to be quite academic. In fact, the FAP team has been mandated to be comprised of an ethnohistorian, an anthropologist, and a genealogist. This "scholarly" team works close with the lawyers from the Interior Department's Solicitor's Office to evaluate each tribe's pending petition for federal acknowledgment or recognition.[36]

As of July 1, 2015, the Bureau of Indian Affairs had, finally, revised the rules of federal recognition in order to "make the process and criteria [of recognition] more transparent, to promote consistent implementation, and to increase timeliness and efficiency, while maintaining the integrity and substantive rigor of the process."[37] The Bureau of Indian Affairs did this by: (1) establishing additional opportunities for hearing, (2) redefining terms, and (3) by making evidence more publicly available all the way through the acknowledgment process.[38] Before these 2015 revisions, however, the process had been overtly criticized, and rightly so, by various Native and Non-Native sources, as inherently broken.

In order to better understand the federal acknowledgment process as it stands today, it is first important to comprehend the previous defects of the process, defects which the 2015 revisions aimed to fix. Prior to these revisions, there were seven (7) ambiguous requirements used by the Branch of Acknowledgment and Research when evaluating each tribe's petition.[39] The seven requirements of the acknowledgment process were:

> a) the petitioner has been identified historically and continuously until the present as "American Indian";
> b) a substantial portion of the group inhabits a specific region or lives in a community viewed as American Indian, distinct from other populations, and that its members are descendants of an Indian tribe that historically inhabited a particular area;
> c) the petitioner has maintained historical and essentially continuous tribal political influence or other authority over its members;
> d) furnish a copy of the group's present governing document,
> e) possess a membership list of individuals who could establish descent from a tribe that existed historically, and prove that
> f) the membership of the group is composed principally of persons who are not members of any other Indian tribe;

> g) the petitioner is not subject to congressional legislation that has terminated or forbidden the federal relationship.[40]

This Native American "try-out," as it were, required petitioning tribes to emphasize the most stereotypical and/or racist aspects of their collective identities.[41] The gist of this whole process was: the more Indian the government *thinks you are*, the more likely recognition is for you and your tribe. Therefore, the true requirements for achieving federal recognition actually were: visibly darker skin color, proven institutionalized poverty, and a historical dependence on the United States. The Bureau of Indian Affairs, and by extension the U.S. government, preferred tribes with central or static locations, western-style governmental systems (mirrored to match the U.S. government), primarily "pure-blooded" members, and narrowly defined standards of membership. In contrast; characteristics such as diversity, affluence, and modernity were all the most common traits of those 34 tribes who, sadly, never achieved federal recognition.

There was a strict cultural and historical standard imposed by these requirements. The tribe's history must have, somehow, over the span of literally thousands of years, been fully accounted for, in writing.[42] "Like all legalistic forums, the Branch of Acknowledgment (BAR), within the BIA, discounted oral history as akin to hearsay and rejected the petitioner's own oral traditions concerning its origins and ancestry in favor of government-produced documents…"[43] No gaps in the group's oral history were allowed by the BAR. Specifically, the ethnohistorian on the

team was tasked with researching whether or not the group existed "at the time of first contact with the whites."[44]

In addition, the tribe was required to express itself, culturally, in the exact same way it would have expressed itself from time immemorial. This requirement obviously ignored the evolutionary nature of culture and society, which was especially surprising considering the research team was almost always made up of multiple anthropologists, a field that is no stranger to the scholarship of cultural evolution. It required the American Indians of today to mirror those Indian peoples of the past. Essentially, petitioning tribes were required to reproduce an ongoing parody of their histories, without acknowledging their current states of modernity or forward progression.

As well, Indians were required to be centrally located.[45] The more members who had moved away, the less chance of becoming recognized as a group. This too was a characterization built on ignorance, especially since forced removal was already such a seminal part of collective Native American history.

These requirements were meant to determine formal federal recognition, but you can see how they could become determinative of tribal membership, no matter the group. The federal acknowledgment process basically dictated a tribe's membership codes for it. Members were to be full blooded Indians with little to no legal or familial ties to any other tribes.

Tribes, today, have been cautious—but maybe not cautious enough—to safeguard the legitimacy of the tribe's identity through the utilization of rigid membership rules. Meaning, because of intermarriage outside the tribe, the percentage of Indians who can identify as full-blooded, or pure-blooded, has continued to go down.[46] Tribes have worried that this trend would eventually leave them with no choice but to let members in who have very little biological ties to the Native group.[47] Non-natives argue that this rise in multi-race identification, or biological assimilation, will eventually lead to better socioeconomic statuses for Indigenous peoples in the U.S.[48] In a way, this process, and the membership codes it has inspired, required that the tribe's members interbreed with one another. The government had essentially made itself a breeder, celebrating and rewarding only the purest breeds of Native Americans while simultaneously dismissing those tribes condone racial mixing.

The Federal Acknowledgment Process, under its pre-2015 standards, was a long and slow one.[49] Any governmental process that is slow, is also usually expensive. The process, ultimately, resembled the following: (1) the unrecognized group submits a petition to the BIA's Bureau of Acknowledgment and Research (BAR), the branch of the BIA charged with evaluating each and every petitioning tribe's application for federal recognition; (2) if the BAR finds that the unrecognized group lacks relevant traits, based on the BIA standards listed above, the BAR will then

send the petitioning group an "obvious deficiency letter," which will state the various reasons for the finding of deficiency, or at least the different requirements of the process that they did not meet; (3) the petitioner may then submit additional data, further making their case for federal recognition; (4) the BAR will conduct additional research based on this additional data; (5) the BAR will then conduct a 1 to 2-week field visit to the unrecognized community's relative physical location in order to better analyze the tribe's communal existence and culture; (6) the BAR uses the data collected from this additional research and from its field visit to draft a proposed finding on the tribe's legitimacy; (7) usually, there is a comment period that follows, during which the tribe itself, and anyone else, may submit an opinion for or against the tribe's recognition; (8) then, there is a final legal review; and (9) lastly, the BAR issues a Final Determination on the petitioning group, either allowing or denying official federal recognition on behalf of the U.S. government.[50] This process was estimated to take around two-and-a-half years by the Bureau of Indian Affairs. However, in actuality, the process could have taken as long as four years to complete, no matter the outcome.

As mentioned previously, § 83.11 of the Procedures for Federal Acknowledgment of Indian Tribes was revised in 2015 to address the consistent, and passionate, critiques the process had received since its creation. With these 2015 revisions, the mandatory criteria for federal recognition became:

a) The petitioner demonstrates that it has been identified as an American Indian entity on a substantially continuous basis since 1900;
b) The petitioner demonstrates that it comprises a distinct community and existed as a community from 1900 until the present;
c) The petitioner demonstrates that it has maintained political influence or authority over its members as an autonomous entity from 1900 until the present;
d) The petitioner provided a copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures;
e) The petitioner demonstrates that its membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity;
f) The petitioner demonstrates that the membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe;
g) The Department demonstrates that neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.[51]

Actually, these revisions demonstrate a significant effort, by the Federal Government, to address the inherent difficulties faced by petitioning tribes entering into the Federal Acknowledgment Process. The Department of Interior defends each and every revision in Volume 80, No. 126, of the Federal Register, with pages and pages of policy. In sum, the Department acknowledges that the historical critiques of the federal acknowledgment process are merited. It makes these revisions in the pursuit of "consistency, transparency, predictability and fairness."

The most notable change is the "1900 criterion" for its various acknowledgment requirements. No longer must tribes prove their

existence from time immemorial. They need only prove that they have been a Native tribe since 1900. Obviously, this is a much more realistic requirement, especially if a tribe is to rely on documentation. These revisions are, indeed, a step in the right direction.

There is no doubt that the federal acknowledgment process has affected the recognition processes of the individual states. Unfortunately, some of these states had already adopted the previous system of recognition, before the 2015 revisions, and have yet to make revisions of their own.[52] Since the beginning of the FAP, state-based recognition has often been considered a vital factor in determining which tribes are to be considered legitimate and which are not. Obviously, local governments should be more accustomed with the tribes that are located within their jurisdictions. Therefore, local governments are far more capable of spotting "wannabe tribes." However, when a state government merely mirrors the requirements of the federal government, it abandons its autonomy and flexibility in acknowledging petitioning tribes. Although, as many tribes will tell you, state recognition remains completely inferior to federal recognition. It is important for states to come up with their own, unique processes for determining tribal status.[53]

The worst thing about the U.S. government's current system of recognition is that the process has, either accidentally or even proactively, created quite a bit of competition between and among tribes. Tribes that have already been recognized by the U.S. government frequently turn their

backs on, and even speak out against, those tribes attempting to achieve federal recognition status. The political polarization of the nation at large has absolutely affected the way tribes interact with one another. There are conservative tribes and there are liberal tribes, republican tribes and democrat tribes.[54] All of these tribes are competing against each other for recognition, which is not at all what the process is meant to be. In his book, *Claiming Tribal Identity: The Five Tribes and the Politics of Federal Acknowledgment*, Mark Edwin Miller argues that these larger, recognized tribes are often the most passionate proponents AGAINST the procurement of recognition by smaller petitioning tribes, which are negatively referred to as "wannabe tribes."[55] He refers to this phenomenon as "recognition politics." The logic of the larger, already recognized tribes is two-fold: 1) the more tribes that are able to achieve recognition, the less benefits there are to be distributed amongst the collective group, or pool; and 2) the federal recognition of petitioning tribes, which larger tribes tend to characterize as "less authentically Indian," would do nothing but de-legitimize the current statuses of already federally recognized tribes in the U.S.[56]

Between Sovereignty and Dependence: First Nations, Recognition, and Membership

Canada's history of colonization is, like the United States, characterized by consistent treaty-making and frequent treaty-breaking. In Canada, these treaties are usually segregated by time period and/or region, bearing extravagant colloquial titles like "the Big Ten," "the Numbered

Treaties," etc.[57] Beginning in 1871, around 500 treaties were negotiated between English settlers and First Nations peoples.[58] Just like the treaties negotiated below the border in the U.S., these treaties were incredibly self-serving. They were tools of colonization. The treaties were almost always drafted in either English or French and were, of course, drafted using those legal terms and concepts native to Western Europe, as opposed to those concepts most familiar to Indigenous peoples. Sometimes, these treaty negotiations were settled on nothing more than a mere handshake.[59] As a student studying outside of Canada, it is easy, yet naïve, to assume that Canada is a utopia of sorts, at least in terms of Indian Law. However, Canada has experienced its own special brand of problems: lack of access to clean or safe drinking water on reservations, murders and disappearances of First Nations women, unequal access to quality healthcare, etc.[60]

Recognition and membership in Canada are intensely tied to, and determined by, one statute in particular: The Canadian Indian Act. On an individual level, the effects of the Indian Act are relatively straight-forward. The asserted goal, for First Nations peoples, is something the Canadian government calls, "Indian Status."[61] The statute governs the ways in which First Nations people qualify to receive special treatment and benefits from the Canadian government.[62]

> An individual recognized by the federal government as being registered under the *Indian Act* is referred to as a Registered Indian (commonly referred to as a Status Indian). Status Indians are entitled to a wide range of

> programs and services offered by federal agencies and provincial governments.[63]

According to this highly contested document, it seems as though not all Indians are created equal, or at least, aren't considered equal in the eyes of the Canadian government. Receiving special treatment in Canada, as an Indian, is a formal application process. In fact, there are multiple applications one may or may not have to fill out. There's one for adults, there's one for children, there's one for registration of Indian Status, and there's another just to receive a certificate of Indian Status.[64] Like the U.S., then, First Nations peoples must "try-out" with the federal government to formally represent themselves as Indigenous.

The Indian Act set up a formal process for individuals to apply for, and achieve, Indian Status. As a result, the Canadian government has unabashedly crowned itself with the responsibility of regulating and adjudicating Indian identity in general.[65] Probably the most upsetting result of the Canadian Indian Act is the Indian Register.

> The Indian Register is the official record identifying all Registered Indians in Canada…The Indian Register contains the names of all Status Indians. It also has information such as dates of birth, death, marriage and divorce, as well as records of persons transferring from one band (or First Nation community) to another.[66]

This is literally just a giant list of Indians in Canada. Honestly, it raises a couple of WWII-themed red flags. Seriously, when has a country-wide registration of ethnic minorities ever been a good thing? The Canadian Indian Register is one of the greatest examples of why federal

recognition is an odd concept. It is one thing for the government to have a collective list of groups, whether they be recognized or not. However, to have a list of individuals, who are only included on said list because of their ethnicity, should be considered a suspect practice, to say the least.

Even worse than having a national registration of Indians, the Canadian government actually allows its citizens, Indigenous or not, to protest the Indian Status of those individuals listed on the Indian Register. Specifically, one may protest the "removal, omission or an addition of a name to the Indian Register."[67] Like I said, anyone may make a protest. The only requirement is that "[p]rotests must be submitted to the Registrar in writing within three years from the date of the Registrar's decision."[68] Like the system of recognition in the United States, this protest process has the potential to create an unhealthy environment among and between First Nations peoples and communities. It ultimately inspires ethnic competition in Canada.

Somehow, the Indian Act used to be even worse. Prior to 1985, an individual's Indian Status could actually be lost, or more accurately, it could be taken from them.[69] Women and children, specifically, were far more likely to lose their Indian Status than any of their fellow tribal members. For example, if a First Nations woman were to marry a non-Indian man, according to the original interpretation of the Indian Act, not only did that woman lose her status, all of her children lost their Indian Status as well.[70] In 1985, Bill C-31 was introduced, passed, and enacted

to fix this intensely sexist problem.[71] However, Bill C-31 did not automatically restore the statuses of those individuals who had previously lost it. It merely opened up yet another application process to restore Indian Status—formally, the application process is for a "reinstitution" of Indian Status.[72]

As you might expect, Canada's federal legislation, primarily through the Canadian Indian Act, has absolutely impacted the membership codes of First Nations tribes. In her book, *Mohawk Interruptus: Political Life Across the Borders of Settler States*, Audra Simpson describes the relationship between the Canadian Indian Act and the various membership codes of *Kahnewa:ke*, a Mohawk reservation in Quebec. It is a politically significant anecdote because many tribes, not just the Mohawks, throughout Canada have experienced a similar relationship.

Specifically, Simpson describes the enactment, by *Kahnewa:ke* leaders, of the "1981 Mohawk Moratorium on Mixed-Marriages" and the "1984 Mohawk Law on Membership."[73] The Mohawk Moratorium of 1981 destroyed membership upon marriage to a non-Indian, which was obviously a sentiment adapted from the original Indian Act.[74] As well, the 1984 Mohawk Law on Membership instituted a requirement of 50% blood quantum for all of its members.[75] These prohibitions, against marriage to a non-Indian man and against having a personal blood quantum of less than 50%, are both completely dependent on the language of the Indian

Act and have survived into the present-day despite being completely atypical to Mohawk culture and tradition.[76]

On an individual level, there is absolutely a rigid system of federal recognition in place in Canada, but does an equivalent system exist on the collective, community, level? Does Canada regulate which tribes qualify as Indian and which don't? It might be surprising to hear that the answer is actually "sort of." First Nations in Canada have established collectives, referred to as Tribal Councils, which are essentially umbrella organizations for smaller bands. However, this elective system does not originate in First Nations culture. Like everything else relating to the First Nations in Canada, this "elective band council" system traces its roots back to—where else—the Indian Act.[77] Although in theory, these tribal councils are at the mercy of their member bands, these councils, and the leaders appointed to serve on their boards, vote and/or decide on the bands that will be allowed under the umbrella of their tribal affiliations.[78] In this regard, as opposed to those systems in the U.S., First Nations tribes have re-appropriated the ability to define recognition, or communal Indian status, for themselves. However, with the concept of band/tribal councils being a colonialist concept in and of itself, this is hardly an exercise of pure self-determination.

The U.S. government has, throughout history, unabashedly and proactively determined the federal recognition status of those Indian tribes that exist within its "physical" political boundaries. The Canadian

government has, for the most part, followed suit, but in slightly different ways. In general, the Indian Act is the supreme law of the land. The Act contributes to—and ultimately dictates—the Canadian First Nations struggle as a whole. This nation-wide struggle translates into the modern-day application process of Indian Status and Indian Registration in Canada.

My Land: Australia, Recognition and Native Title

Recognition systems, nation to nation, are usually created in the name of self-governance. This is obviously a pretty ironic result, since systems of federal recognition are nothing more than a nation-state's exertion of authority over Native tribes and individuals. The Federal Acknowledgment Process in the U.S. and Indian Status registration in Canada were both created for this reason. Australia shares a common history—of Indigenous dispossession and forced assimilation by the federal government—with the U.S., Canada, and New Zealand. Australian Aboriginal peoples also suffer from the same struggles of Indigenous groups all over the world: higher mortality rates, alcoholism, unemployment, etc.[79] However, in Australia— unlike in the U.S. and Canada—the Australian Supreme Court has never once acknowledged a right to self-governance for Australia's Aboriginal populations.[80] Little by little, hectare by hectare, the Aboriginal peoples of Australia are striving to achieve some semblance of self-governance, which has thus far materialized primarily on the local level.

At this point, Australian Aborigines are only afforded an opportunity to seek out self-governance and self-determination by way of local land claims. The Native Title Act of 1993 does indeed allow for Indigenous peoples to make claims to the Australian Federal Government.[81] Although the federal government has not explicitly recognized the legitimacy of individuals or groups as Indigenous, through these land claim determinations, that seems to be the ultimate result. This Act has created a process for Aboriginal peoples (individuals and groups) to ascertain land rights and land claims.

The Native Title Act requires that the claimant prove a physical connection to the land in question, based on the traditional laws and customs of the Aboriginal group.[82] The physical connection is proven through the research of experts in various fields such as Anthropology, Archaeology, Linguistics, Genealogy, etc.[83] The findings of this research is contained within what are called, "connection reports."[84] These connection reports are not a statutory requirement of the Native Title Act but they are indeed vital to the process, and the eventual determination of cultural connection.[85] Any period in which the traditional laws and customs of the Aboriginal individual or group are not used, this constitutes an "interruption" in Native Title.

Another requirement of Native Title is the existence of an identifiable normative society, which existed on the piece of land prior to colonization and which has been recognized, on a cultural and traditional level, through the common law of Australia.[86] Herein lies the primary frustration that claimants have with the Native Title process. Proving these requirements, especially the

latter, is a costly and incredibly tedious process.[87] Further, these requirements can only be proven using empirical methods that have proven difficult to utilize by those Aboriginal peoples making a claim.[88]

There is another piece of legislation in Australia that involves the indirect federal recognition of Indigenous peoples. Under the Corporations (Aboriginal and Torres Strait Islanders) Act of 2006 (CATSI Act), new and existing corporations may apply for registration as Aboriginal and Torres Strait Islander Corporations.[89] A corporation may choose to do this because:

1. Members can choose not to be liable for the debts of the corporation.
2. The corporation's rule book can take into account Aboriginal and Torres Strait Islander customs and traditions.
3. It is a free registration.
4. The corporation may be exempted from annual reports.
5. If its rule book allows, the profits of these corporations may be distributed pro rata to its members.
6. Access to various benefits via the Registrar of Indigenous Corporations.[90]

However, there is an "Indigeneity requirement," which can be found in Section 29-5 of the Act, for corporations that wish to do so.[91] Under this requirement, corporations with five or more members must have a staff made up of at least 51% self-identified Aboriginal or Torres Strait employees.[92] Corporations with 5 or less members must have 100% of their staffs made up of Aboriginal or Torres Strait Islander employees.[93] Both Indigenous and non-indigenous members are required to sign a form, confirming that this percentage is correct.[94] The Indigeneity Requirement must be met even beyond the moment of registration. Meaning, this requirement survives as long as the corporation continues to exist.[95] Unless the corporation says otherwise, all directors must be

Indigenous.[96] However, the corporation may choose to have non-indigenous directors if and only if the majority of the directors are Indigenous.[97] The Australian courts have come up with a tripartite test to determine whether an individual may be considered Indigenous:

1. The individual is of Aboriginal or Torres Strait Islander descent.
2. The person identifies as Aboriginal or Torres Strait Islander.
3. The community recognizes the individual as Aboriginal or Torres Strait Islander.[98]

Australia's manipulation of federal recognition is obviously limited to the most formal of situations: land rights and corporations. It seems as though, for this reason, that recognition is a much more limited concept for Australian Aborigines.

Conclusion

Recognition and membership share an intensely close relationship. I have only just now, upon completion of this paper, begun to scratch the surface. My conclusion is as simple as my thesis: it seems as though the more rigid/restrictive a country's system of recognition, the more rigid/restrictive the tribal rules and regulations for membership. At the same time, the less restrictive the system of recognition, the less benefits the government will provide to its Indigenous population.

In my opinion, the U.S. has adopted the most rigid system of federal recognition: the BIA's Federal Acknowledgment Process. Petitioning tribes invest a great deal of time, energy, and expenses (sometimes to the point of depletion) into this process. Even worse, these tribes are required to emphasize traits that may or may not still be relevant to their cultural identities. In a way,

the FAP traps these tribes within a system that forces them to be racist against themselves. For this reason, I would argue that the U.S.'s system of recognition is, by far, the most destructive.

It seems almost fitting, that Canada would be the mildest country in the bunch. In a way, Canadian First Nations tribes have recaptured their ability to define themselves, by and through the formation of Tribal Councils. These Councils have the sole responsibility of segregating the legitimate tribal bands from the imposters. However, even the Tribal Councils were created via colonialist sentiments. The Canadian Indian Act is responsible for both these Tribal Councils and the application process for Indian Status. In this way, Canada has monopolized Federal Indian Law, while also conceding some semblance of self-governance to its First Nations peoples. So, when Canada oppresses you, at least they're polite about it.

Australia lags far behind the rest, at least in terms of Indigenous self-governance. The only forms of federal recognition the country utilizes are in reference to land claims and corporations. It is unclear, from my limited research, whether or not Australia is moving forward towards other forms of formal recognition. The country's Aboriginal population is quite the passionate group. If a greater variety of benefits is a goal of the community, there is every indication that they will make it happen.

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