

By Whatever Means Necessary: The U.S. Government's Ongoing Attempts to Remove Indigenous Peoples During an Era of Self-(De)termination

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Abstract

Since first contact with Europeans, Indigenous peoples have been in the way. In the United States, the federal government has enacted policies to further the goal of removing them. Initially, the most expedient way to clear the land was physical annihilation. Massacres, Indian wars, starvation, and disease reduced the Indigenous population significantly but not enough to satisfy the federal government or its citizens. Subsequent policies were considered necessary. They had different names and stated goals, but they served only one purpose: eliminate Indians. They can be assimilated into non-Indian culture until their Indianness is unrecognizable. They can be defined out of existence by a government that has taken control of the definitions of "Indian" and "tribe" in a way that excludes many Indigenous peoples. The actions by the U.S. government may have changed over the years, but the result is the same: fewer and fewer Indigenous peoples in the U.S.

Keywords: American Indians, federal acknowledgment, Bureau of Indian Affairs, identity, indigeneity, genocide, federal Indian policy, assimilation, settler colonialism, violence

Introduction

The Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, marks the rise and fall of our democratic faith (Cohen 1953: 390).

Several hundred tribes, bands, and confederations, distinguished by their different, but often overlapping, cultures, traditions, and locations are forever bound together by a moment in time when everything changed: 1492. That was the year they became "in the way." They were in the way of invasion, settlement, expansion, and Europeans immigrants, also known as "progress." Europeans did not move to this land to assimilate

to any Indigenous culture. They had no intention of leaving their own languages, religions, dress, and customs behind. Europeans would not give Indigenous peoples the same choice. Alcohol and smallpox would arrive just as customs and religions, with no signature needed for delivery. Europeans also did not move here with the goal of co-existing peacefully and respectfully with the Indigenous peoples, but they continued to arrive in droves, trampling over everyone and everything that stood in their way. Indigenous peoples and their cultures were expendable.

The Doctrine of Discovery and federal Indian policies, regardless of the name or time period assigned, support the invaders overarching and ongoing goal: destroy to replace (Wolfe 2006). Initially, colonial then federal Indian policies included wars, massacres, and bounties

on scalps, an especially frightening prospect, because “scalping is annihilation; the soul ceases to exist” (Ralph Smith cited in Anderson 2013: 73-74; Pérez 2012). Still, scalping and disarticulation of human remains continued, as Indians and colonists traded many things, from cooking utensils to scalps, hands, and heads (Lipman 2008: 3). As Christine DeLucia noted, “King Philip’s War shaped the Northeast in three years, destroying English settlements and decimating or dispersing diverse native peoples from ancestral homelands, areas already affected by decades of colonial settlement and disease. Like the Civil War in the U.S. South or the Holocaust in Europe, the conflict has lingered in collective remembrance because it forces confrontations with fundamental pieces of identity” (2012: 975). Physical destruction was followed by policies that began with congressional debate before being enacted into federal law.

Over the years, there have been many methods employed to eliminate Indians, with various names being assigned to the policies. These names can be a distraction, giving the impression of progress or of changing times, but their goal remained the same. While colonial governments dealt with Indians as needed, the British government tried to maintain consistency and keep the peace. This became increasingly difficult as the population grew and their need for land increased. The Royal Proclamation of 1763 forbade settlement and land speculation west of the Appalachian Mountains (Holton 1994). After the formation of the new United States, the federal government would quickly take control of all issues relating to American Indians. The former colonists quickly learned the importance of having one Indian policy at a time. Indians were a national problem that required a national solution.

After outright extermination of countless Indigenous peoples, assimilation became the main objective of Indian policy (Walch 1983: 1182). Forced assimilation removes what makes one a particular ethnicity or culture: language, land, religion, dress, customs, food, etc. (McNickle 1957). The smallpox-infested blanket

mindset (Ranlet 2000) eventually changed their tactics from direct violence (physical violence) to less obvious structural violence (Galtung 1990; Farmer 2004).¹ Still, the ultimate goal remained the same: get rid of Indians and their tribes.² The government wanted Indians that remained to forsake their Indianness or at least dress, act, speak, and worship like Europeans.

The federal government would serve up assimilation under a variety of names, goals, and effects. Assimilation would bring Indians into mainstream culture until they were no longer distinct and recognizable in the melting pot. They could practice Christianity, farm the land or move to the city, speak English, and give up their tribal lifestyle and affiliation. Assimilation makes Indians invisible. It veils their Indianness, their survivance, in the same way mischaracterizing American history veils their past and erases them from the landscape³ (Vizenor 1998:15).

Today, the federal government is spearheading assimilation in a way that is arguably insidious. The government has taken control of the definitions of “Indian” and “tribe.” This decreases the number of people the government considers Indian and the number of tribes considered legitimate and worthy of a government-to-government relationship. Definitional violence

¹ In 1763, during Pontiac’s Rebellion, British General Jeffrey Amherst wrote to Colonel Henry Bouquet proposing he use blankets contaminated with smallpox to kill Indians. While many historians doubted the result of his proposal for many years, in 1955 a researcher located evidence of an official attempt to infect Indians. Fort Pitt’s commander, Captain Ecuyer, approved an expense from Trent’s trading firm: “To Sundries got to Replace in kind those which were taken from people in the Hospital to Convey the Small-pox to the Indians Vizt. 2 Blankets 1 Silk Handkerchief and 1 linnen” (Ranlet 2000).

² Here, the idea of structural violence is being drawn from Galtung’s idea of systemic sociopolitical inequality that is legitimized by the State, along with Farmer’s concept of “structural violence” and Scheper-Hughes’s ideas of “everyday violence.”

³ Vizenor coined the term “survance” to describe “more than survival, more than endurance or mere response; the stories of survivance are an active presence” (Vizenor 1998: 15).

(Miller 1994) is at the heart of structural violence. Rooted in a multigenerational sociopolitical ideology, the goal of this type of violence is to suppress the rights of individuals and tribes through a system of structures that by their very nature are designed to prevent them from achieving agency and their full potential as a society. While each of these types of violence falls along a spectrum of actions, the generative schemes have been consistent: decrease the number of American Indians.

This essay uses the Brothertown Indian Nation (Wisconsin) to highlight the impact of the current policy of controlling definitions. Previously, congressional passage of the Termination Act served to terminate tribes. The federal government has repudiated this action, but no one has repudiated controlling definitions and telling Indians or tribes they do not meet federal definitions. In reality, however, it has the same impact as congressional termination. Additionally, because no one is calling it “termination,” the action is not limited to Congress. However, when the effect is the same, the same standards should be observed.

The Doctrine of Discovery

Then God blessed them [male and female] and
said to them, be fruitful and multiply;
fill the earth and subdue it. Have dominion over
the fish of the sea,
the birds of the air, the cattle and all the animals
that crawl on the earth (Saint Joseph 1962: 16).

“Dominion over” and the Doctrine of Discovery go together, especially when non-Christians are seen as non-human (Castanha 2015: 44). Tony Castanha noted, “The Western concept of discovery, as viewed through Christian European eyes, provided the political, legal, and moral framework for the colonial system to be validated in the Americas. ... The large majority of European scholars, theologians, jurists, and monarchs upheld that they had a ‘god-given’ right to establish legal title to non-Christian lands and convert local populations with whom they came into contact” (2015: 45).

To fully understand the continuing impact of the Doctrine of Discovery in the United States, it is essential to turn to *Johnson v. M’Intosh*, 21 U.S. 543 (1823). Johnson had inherited land purchased from the Piankeshaw Indian Nation (Illinois). M’Intosh had purchased the same piece of land under a grant from the federal government (Echo-Hawk 2010: 55-86). They asked the Supreme Court to determine which of them had good title. The Court held the United States, *not* the Piankeshaw Indian Nation, owned the land, having inherited it from Great Britain. As the rightful owner, only the United States could sell the land (*Johnson v. M’Intosh*, 21 U.S. 543 (1823)). To give substance to the decision, Chief Justice John Marshall⁴ penned a lengthy history of the European discovery of the Americas and the legal basis for the American colonies. Like a carnival contortionist, he stretched and bent reality to hold that “the United States has the exclusive right to extinguish Indians’ interests in their lands, either by purchase or just war” (Kades 2000:1068).

He detailed charters and treaties to support the British belief in the Doctrine of Discovery (Robertson 1997: 761). European powers that invoked the Doctrine of Discovery had the sole authority to terminate the Indigenous nations’ right of occupancy. The U.S. was not a European power, but, according to Marshall, it had inherited the British right to preemption over Indigenous lands. He went to great lengths to provide a version of history that would serve as beneficial precedent for him and the U.S. government (d’Errico 2000). Despite their flaws, courts continue to cite *Johnson v. M’Intosh* and the other two cases that make up the Marshall Trilogy as a basis of authority (*Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832)).

⁴ John Marshall (1755-1835) was Chief Justice of the United States Supreme Court (1801-1835). His early court decisions laid the foundation for constitutional law, including law involving American Indians and Tribes. In addition to serving as Chief Justice, Marshall was a land speculator (d’Errico 2000).

Marshall's version of history laid the foundation for land ownership in the U.S. (Kades 2000). Since Indigenous peoples remained on the land, policies based on the Doctrine of Discovery would be put forth to deal with the Indian problem, including removal, relocation, reservations, allotment, assimilation, termination, reorganization, and self-determination. The various names barely mask the fact that each policy was about decreasing the Indigenous population.

Fables, Fairy Tales, and Cover-ups

You're not supposed to be so blind with patriotism
that you can't face reality.
Wrong is wrong, no matter who says it (Malcolm X).

Fables

Since first contact with the Indigenous peoples of the western hemisphere, Europeans have sought to distinguish themselves from us.⁵ They were civilized; we were savage. They were Christians; we were heathens. As the people who defined the words, assigned the labels, enacted (and interpreted) the laws, and wrote the (hi)stories, Europeans and their descendants would always come out on the winning side. They were the victors, the conquerors. We were the victims, the conquered. They encouraged (and defined) progress; we impeded progress. The differences and distinctions continued for centuries, repeated until they were accepted as truth and became imbedded in the collective psyche of non-Indigenous people of the U.S. and around the world. There, they could be used to justify injustices and normalize political and legal abnormalities that would continue unabated into the twenty-first century. There, we could be erased from the American landscape. There, few would notice our absence in textbooks, mainstream media, and conversations. In their world, we would exist only in a time and place convenient to someone else's plan.

⁵ I am an enrolled member of the Brothertown Indian Nation (Wisconsin). My ancestors were Mohegan, Pequot, Narragansett, Tunxis, Niantic, and Montauk, as well as Oneida, Stockbridge, and Lenape.

Fairy Tales

Most people in the United States are reluctant to acknowledge they know little about U.S. history. They had, after all, (reluctantly) studied it for as long as they could remember: "In fourteen hundred and ninety-two, Columbus sailed the ocean blue..." Lessons were often delivered as fun, attention-grabbing cartoons, especially around the time of the American Bicentennial (1976), a year-long celebration of all things red, white, and blue. Schoolhouse Rock featured lessons about westward expansion in "Elbow Room," (1976) and the American Revolution in "The Shot Heard 'Round the World" (1976) on Saturday mornings after "Scooby Doo, Where are You?" (Keyser 2015). Easy-to-remember songs taught children about the Declaration of Independence, the American Revolution, manifest destiny, and how a bill becomes a law. These history lessons were delivered up to a captive audience of children. Their sponge-like brains absorbed every ridiculous frame as if they were well-researched, scholarly accounts rather than oversimplified, fairy tale-like justifications of invasion. They provide a "feel good" version of the story of colonization and genocide.

Cover-ups

Non-Indians have long controlled the stories of the American Indians, deciding what was important and what was best left unsaid. They peddled their fairy tales to an unassuming public, most of whom wanted nothing more than confirmation of their patriotic ideals of America. Children carry into adulthood songs they learn on Schoolhouse Rock and stories of Betsy Ross's flag, Paul Revere's horse, and the "Come over and help us" version of the first Thanksgiving. The 1629 seal of Massachusetts Bay Colony included a picture of an Indian with a banner espousing the plea "Come over and help us." The Colony used this seal from 1629 to 1686 and from 1689 to 1692.

What does this mean today? Even when confronted with evidence to the contrary, it is difficult to convince those raised on a particular ver-



Seal of the Massachusetts Bay Colony

sion of U.S. history that perhaps it is full of holes and contradictions. These holes and contradictions cause ongoing harm to American Indians that is reflected in federal Indian policies. It is important to keep in mind that most politicians and other policy makers are educated in the same schools and with the same cartoons and textbooks as the rest of America. The laws and policies in place reflect their biased, problematic, and incomplete education.

Federal Indian Policies

From contact until 1787, the year the founding fathers penned the U.S. Constitution, was an era of “tribal independence” (Pevar 2012; Walch 1983).⁶ The new Constitution would end “tribal independence” by including language known as the Indian Commerce Clause that U.S. courts would later interpret as giving Congress plenary power over Indians and tribes. In reality, the land purchased by Johnson and the land purchased by M’Intosh did not overlap. This violates the constitutional requirement that courts hear only cases or controversies. They may not issue advisory opinions.

⁶ There is little agreement among scholars as to the names of Indian policies and the periods during which they were prevalent. In this essay, I use Stephen Pevar’s policy names and time periods.

Agreements Between Equals (1787-1828)

Having several independent nations exist within the external boundaries of another is complicated. As the U.S. population increased, the land on which they lived, like the world, seemed to grow smaller. More land was needed on which to raise families, breed cattle, and grow food. The federal government would draft treaties that unilaterally favored non-Indigenous interests and placed the Indigenous population on smaller pieces of land (Spirling 2012).

Relocation of Indians (1828-1887)

The two principles on which our conduct towards the Indians should be founded are justice and fear. After the injuries we have done them, they cannot love us, which leaves us no alternative but that of fear to keep them from attacking us. But justice is what we should never lose sight of, and in time it may recover their esteem.
--Thomas Jefferson to Benjamin Hawkins, Indian agent, 13 August 1786 (Keller 2000: 39).

Relocation includes both removal and reservations, because both take tribes off their homelands. In May 1830, President Andrew Jackson signed the Indian Removal Act. The Act authorized the federal government to negotiate with tribes within existing states in the southeast for their removal to unsettled lands in federal territory west of the Mississippi River. In exchange, they would give up their ancestral lands, but according to President Jackson’s message to Congress prior to passage, “This emigration should be voluntary, for it would be as cruel as unjust to compel the aborigines to abandon the graves of their fathers, and seek a home in a distant land” (Cave 2003: 1332). Removal would help the young country achieve countless goals. It would remove many Indians, both physically as well as in the minds of mainstream America. It would create a physical as well as a mental buffer between Indians and whites.

The effects of removal were temporary. As white settlers spread west, they would run into tribes. The federal government would need

another method to dispossess Indians of land. The most expedient way was to put tribes on land reserved for them. The land may or may not be the tribe's original homeland. While there are currently 567 federally acknowledged Indian tribes, there are only 326 reservations. Reservations take up 56.2 million acres, ranging in size from the 16 million acre Navajo reservation to the 1.32-acre reservation occupied by the Pit River Tribe's cemetery in California.

Today, within the U.S., one will find the highest concentrations of poverty (Regan 2014; Burich 2016), violent crime (d'Errico 2012), and ill health (Sarach and Spicer 2008) on Indian reservations. There are a number of reasons for the disparities in health, safety, education, and more between American Indians and the general population in the U.S., but nearly all of the differences can be traced to the Doctrine of Discovery and the harmful federal Indian policies that followed it.

Allotment and Assimilation (1887-1934)

It's cheaper to educate Indians than to kill them.

-- Thomas Jefferson Morgan, U.S. Commissioner of Indian Affairs, speaking at the establishment of the Phoenix Indian School, 1891 (Ault 2009: ii)

By expanding yet again on the definition of "destroy" to include other means of destruction, it was possible to continue with settler colonial goals. Assimilation was another means to this end. Assimilation would become essential as physical separation became a less realistic option. In 1879, with the overarching plan to assimilate Indian children by removing them from their parents, their tribes, their ancestral lands, their religions, and their cultures, Lieutenant Richard Henry Pratt, veteran of the Indian wars and leader of the "Friends of the Indian" group, established Carlisle Indian School. His goal was to disentangle those traits that make one "Indian." At an 1892 conference in Denver, Colorado, Pratt stated:

A great general [Sherman] has said that the only good Indian is a dead one. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian

in him and save the man (Pratt 1973: 261).

Assimilation was about absorbing Indians into mainstream culture until they became invisible, melding into the white masses with no distinction except perhaps skin tone (Gram 2016). Even skin tone differences could be diminished in "before" and "after" photographs at the boarding schools. The "before" photographs showed dark children in native dress. The "after" photographs, sometimes taken as little as a couple hours after the "before" photographs, showed a miraculous lightening of the child made possible with strategically placed lighting and filters that could affect skin tone (Reyhner 2017). Staff at the schools cut the long hair of Indian boys and dressed children in American style clothing. Teachers punished children for speaking native languages or practicing traditional religions.

While Boarding Schools could assimilate children, what was to be done about their parents? In 1887, Congress enacted the General Allotment Act (also known as the GAA or the Dawes Act).⁷ The goals of the GAA "were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large" (Pevar 2012: 9). Some might question the effect forced assimilation into another culture might have on identity, but, "At the height of the Dawes-era assimilation program, for instance, in the decade after Richard Pratt penned his Denver paper, Indian numbers hit the lowest level they would ever register" (Wolfe 2006: 399). This decrease does not necessarily mean the Indians were dying off. Assimilated Indians would often not be counted as Indians for census purposes.

The GAA would allot reservation land to individual Indians. However, the reservation was not divided equally between tribal members. Indians, based on Indian blood percentage and definition by the federal government, would receive a small piece of land while the "excess" land

⁷ Henry Dawes (1816-1903) was a Republican politician from western Massachusetts and the primary proponent of the General Allotment Act.

(also the most fertile) would go to white settlers (Magoc and Bernstein 2016). In four decades, the GAA would decrease the amount of Indian land from 150 million acres to fewer than 50 million acres (Pevar 2012: 9). The Act's primary proponent, Massachusetts politician Henry Dawes, "... expressed his faith in the civilizing power of private property with the claim that to be civilized was to 'wear civilized clothes ... cultivate the ground, live in houses, ride in Studebaker wagons, send children to school, drink whiskey [and] own property'" (Public Broadcasting Service).

The GAA was the U.S. government's first look at the effectiveness of getting rid of tribal governments. It granted citizenship to Indian allottees but only if they forfeited their tribal affiliation. In 1924, Congress would make citizens of all Indians that were not yet citizens whether they wanted it or not (Indian Citizenship Act, 43 U.S. Stats. At Large, Ch. 233, 1924).

Indian Reorganization (1934-1953)

The land was theirs under titles and guaranteed by treaties and law;
and when the government of the United States set up a land policy which, in effect, became a forum of legalized misappropriation of the Indian estate, the government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship.
-- Congressman Edgar Howard, Nebraska, a principal author of the IRA, 78 Cong.Rec. 11727-11728, 1934)

In 1934, the federal government ended its policy of allotment and assimilation in response to a report commissioned by the Institute for Government Research (now known as the Brookings Institution) and Secretary of the Interior Hubert Work, "Problems with Indian Administration." The Meriam Report, as it is more commonly known, declared the GAA an unqualified disaster. Indian land holdings were reduced from ownership of the entire continental United States to

ownership of 138 million acres. As a result of the GAA, land holdings were reduced to 48 million acres by 1933. 20 million acres was desert or semi-desert lands. Between 1933 and 1949, land holdings were increased 4 million acres (Cohen 1953: ftnt. 58). In particular, it made note of two glaring deficiencies in Indian administration: (1) the exclusion of Indians from managing their own affairs; and (2) the substandard quality of public services rendered by public officials, particularly services relating to health and education (Cohen 1953: 348). In response, Congress drafted the Indian Reorganization Act (IRA), also known as the Indian New Deal. It abolished the GAA and permitted tribal communities to establish their own governments (Landry 2016).

The IRA successfully returned 2 million acres to the Indians, but the government took another 500,000 acres of tribal land during World War II (Newton 2005: 97). With land changing hands regularly, the devastating impacts of the GAA could not be undone. However, for the next twenty years there was a federal Indian policy in place that did not have the *express* goal of eliminating Indians through assimilation.

In 1948, a Hoover Commission report called for the "complete integration" of Indians into white society. The Commission declared that, "support of tribal cultures was unsound policy and that assimilation remained the best solution to the Indian problem" (Landry 2016). The scathing conclusions of the Meriam Report were considered irrelevant (U.S. Congress, Commission on Organization of the Executive Branch of Government, *A report to Congress*, 81st Cong., 1st sess., 1949). Drawing on the Hoover Commission's recommendation, the Indian policy that would follow IRA was "termination." On July 1, 1949, the House of Representatives passed a resolution charging the Committee on Interior and Insular Affairs with the task of investigating BIA activities and developing legislative proposals "designed to promote the earliest practicable termination of all federal supervision and control over Indians" (H.R. Rep. No. 82-2503).

Termination (1953-1968)

At the end of the Truman administration the Indian people were worse off than they were at the beginning, [because Truman's solution to the Indian problem was] to wipe out the reservations and scatter the Indians and then there won't be Indian tribes, Indian cultures, or Indian individuals.

-- Philleo Nash, Commissioner of Indian Affairs under Presidents Kennedy and Johnson, in a 1967 interview (Landry 2016).

In 1953, the first year of Eisenhower's administration, Felix Cohen authored an article that began with the attention-grabbing sentence: "Our 450,000 American citizens who are members of Indian tribes are probably the only racial group in the United States whose rights are more limited in 1953 than they were in 1950" (Cohen 1953: 348). On August 1, 1953, Congress enacted House Concurrent Resolution No. 108, an experiment better known as the Termination Act (Walch 1983: 1186). That same year, Congress passed Public Law 280, which transferred criminal jurisdiction on reservations to states. While it suggested specific tribes for termination, subsequent congressional action was needed to terminate individual tribes. Tribal consultation was not. Between 1954 and 1964, Congress passed 14 acts terminating 109 tribes in eight states (Walch 1983: 1186). This accounted for 12,000 American Indians (3 percent of the Indian population in the United States) and 2.5 million acres of land that had been held in trust by the U.S. government (Wilkins and Stark 2010). While termination had many effects, including losing tax-exempt status for the land, one of the more severe results was that the Act ended the government's recognition of tribal members as Indians (Walch 1983: 1188).

Termination, of course, was also about assimilation. When the U.S. government disbanded tribes and decommissioned reservations, government officials encouraged Indians to move to cities (Joe 1986). Congress passed the Indian Relocation Act in 1956 to encourage Indians to move to cities, learn a vocation, and blend in with the general population. The Act provided

some funding for moving and training. Like earlier policies, the Act was a failure. The idea that centuries of neglect could be fixed by a move to a city such as Chicago, Minneapolis, or Milwaukee must have seemed absurd even in 1956 (Philip 1985).

Self-determination (1968-present)

The effects of termination were severe, leaving many Indians in dire straights (Walch 1983: 1181-1190). In 1970, President Nixon declared:

Forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong... The second reason for rejecting forced termination is that the practical results have been clearly harmful in the few instances in which termination actually has been tried... The third argument I would make against forced termination concerns the effect it has had upon the overwhelming majority of tribes which still enjoy a special relationship with the Federal government (Nixon 1970).

In 1994, Congress formally repudiated its termination policy with the Federally Recognized Indian Tribe List Act (108 Stat. 4791, Public Law 103-454, section 103(5)). The Act called for an annually published list of federally acknowledged tribes. It also explicitly stated, "Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously has been terminated" (Federally Recognized Indian Tribe List Act 1994). Rather than terminate tribes, the goal was to encourage self-determination.

Federally Acknowledged Status (or Not)

If you can't change them, absorb them until they simply disappear into the mainstream culture...

In Washington's infinite wisdom, it was decided tribes should no longer be tribes, never mind that they had been tribes for thousands of years.

-- Nighthorse Campbell (2007: 2-3).

That brings us to today. Despite the numerous repudiations of tribal termination, there is today crisis that comes from a tribe being classified as either federally acknowledged or not. At the writing of this essay, there were 567 tribes on

the Department of the Interior's official list of federally acknowledged tribes, most of which were always recognized. They did nothing to get this status except to have never experienced the misfortune of being terminated by Congress or removed from the list. Others got their status through treaties, acts of Congress, executive orders, or other federal administrative actions. Now, the Federally Recognized Indian Tribe List Act of 1994 lists three ways to get recognition: (1) by Act of Congress; (2) by decision of a U.S. court; or (3) by administrative procedures (25 C.F.R. Part 83) (Federally Recognized Indian Tribe List Act 1994). Realistically, however, the odds of a non-recognized tribe regaining acknowledgment in the twenty-first century are slim.

While there is a lot of discussion about *gaining* federal acknowledgment, there is little discussion about how a tribe that was previously acknowledged ended up with its name being removed from the official list. The formal Termination Act required explicit action on the part of Congress. The de-acknowledgment process that replaced formal termination, which can be as simple as erasing a tribe from the list, was done under cloak of darkness and a cone of silence. Long after the era of congressional termination had been repudiated, tribes could one day find themselves removed from the list without congressional investigation or hearings. They were, in fact, removed without any congressional action at all.

The Administrative Federal Acknowledgment Process

Despite the Federally Recognized Indian Tribe List Act specifying three ways an unrecognized tribe can get recognized, it is unlikely to happen via the courts or Congress. Today, when a tribe seeks recognition, it enters the administrative federal acknowledgment process and tries to prove the seven criteria considered evidence that a group is a tribe (*Procedures for Establishing that an American Indian Group exists as an Indian Tribe*, 25 C.F.R. Part 83).

The Brothertown Indian Nation

My tribe, the Brothertown Indian Nation, is not federally acknowledged. Congress did not terminate us during the Termination Era of the mid-twentieth century. We lost that status in a letter dated March 24, 1980, despite two hundred years of interaction and treaties. One day we were recognized and the next we weren't. While there is official government correspondence to confirm this, I also clearly remember making a trip to Black Hawk Community College with my mother, who was a student there. It was the summer of 1980. She was visiting Mr. David Sprenkle, a financial aid advisor at the school. He explained to her that he received a letter indicating she was no longer eligible for BIA funding for school.

Shortly thereafter, the Brothertown Indian Nation began its thirty-year journey through the administrative federal acknowledgment process. It is an arduous process that sets the bar so high that few tribes will ever meet the seven criteria. Holly Reckord, cultural anthropologist for the Bureau of Indian Affairs, Office of Federal Acknowledgment, once stated, "Fairness is not our eighth criterion" (Miller 2006). Testimony in a Senate record asserted that the federal acknowledgment process is so awful and unfair (Miller 2006) that 72% of the tribes currently on the federally acknowledged list (407 of the 567) could not prove all seven of the criteria (Norwood 2012).

The official purpose of the federal acknowledgment process is to give non-recognized tribes a chance to prove the federal government wrong, to prove that they should be on the list. In reality, the process is an administrative agency's opportunity to confirm that non-recognized tribes do not deserve recognition. A 2001 General Accounting Office report claimed that "the resolution of tribal recognition cases will have less to do with the attributes and qualities of a group as an independent political entity deserving of a government-to-government relationship with the United States and more to do with the resources that petitioners and third parties can marshal to develop a successful political and

legal strategy” (U.S. General Accounting Office 2001).

Plenary Power over Indians and Tribes

A tribe that enters the process is not recognized, but why isn't it recognized? One answer might be that Congress terminated the tribe during the Termination Era. As noted above, Congress did not terminate the Brothertown Indian Nation during this era. In fact, because of the seventh criterion, tribes that Congress terminated are not supposed to be in the administrative process. The seventh criterion (25 CFR Part 83.7(g)) *forbids* the Office of Federal Acknowledgment (OFA) from recognizing a tribe if it was previously terminated by an act of Congress: Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship (25 C.F.R. Part 83.7(g)).

The analysis of this criterion by the OFA, however, begs the question of which tribes may use the administrative process. Based on the seventh criterion, it is intended for tribes that lost their status in a manner *other than* congressional termination. It is intended for tribes other than the 109 tribes that Congress terminated during the Termination Era. Those tribes can regain their recognized status only by asking Congress for an act of recognition. That is because an administrative agency cannot reverse an act of Congress. So, who terminated the tribes that are in the administrative process? I am asserting with confidence in this essay that the administrative federal acknowledgment process is for tribes that were terminated by an administrative agency, the BIA. They were informal, quiet, and, as mentioned earlier, done under cloak of darkness and a cone of silence.

Greg Sarris wrote in the foreword of *Quest for Tribal Acknowledgment: California's Honey Lake Maidu*, “Tribes have been created – and destroyed – with the stroke of a pen” (Tolley 2006: xiii). Congress, the branch of government that has plenary power over Indians and tribes, does not always hold that pen. Many of those

that are not on the list of federally acknowledged tribes were simply removed at some point – *erased* – by the BIA. This is modern termination. It is not about being forcibly removed off ancestral lands or walking hundreds of miles to a new home; it is not about being assimilated out of Indigenous existence. It is about being removed from the official list of tribes. This would have been particularly easy prior to 1994, when Congress first required that the list be published in the *Federal Register*.

John Shappard, a former BIA official who was a prominent author of the federal acknowledgment regulations, once stated he had not anticipated the acknowledgment process would be used to eliminate recognized tribes: “Traditional wisdom has it that only Congress can terminate a tribe. What is so bothersome about it is the BIA could cut back on its budget by picking off some tribes, just bumping them off. I didn't intend that in the regulations” (Tolley 2006). Possibly even more disturbing is the fact that such erasures were often done without evidence, transparency, or tribal consultation. Every tribe that is not federally acknowledged should know exactly when and how this happened, but many don't. Instead, one day the tribe might have found itself in need of BIA services, like education funding, or they might have contacted the BIA for another reason only to be told, much to their surprise, that they no longer have a government-to-government relationship with the U.S. government; they're no longer on the list; they're no longer recognized as Indian.

In *U.S. v. Kagama*, 118 U.S. 375 (1886), the Supreme Court confirmed Congress' plenary power over Indian affairs. While much of this authority can be delegated to the BIA, Congress may *not* delegate the most devastating action, that of termination. Congress states this explicitly in the Federally Recognized Indian Tribe List Act: “a tribe which has been recognized ... may not be terminated except by an Act of Congress” (Federally Recognized Indian Tribe List Act 1994).

A number of other sources confirm this. Cohen's *Handbook of Federal Indian Law*, unques-

tionably the most important book in the area, states: “Further reflecting this repudiation of the [termination] policy, Congress has announced that once a tribe has been federally recognized, it may not be terminated except by *express congressional action*” (emphasis added). This section of Cohen cites the Federally Recognized Indian Tribe List Act, adding the clarification that, “As a result [of the requirement to publish a list of federally recognized tribes], failure to publish a tribe’s name on the list of federally recognized tribes *will not be effective to terminate a tribe*” (emphasis added).

There is no shortage of examples of the Supreme Court’s support that only Congress can terminate a tribe:

- *U.S. v. Rickert*, 188 U.S. 432, 445 (1903): “It is for the legislative branch to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question, which the courts may not determine. We can only deal with the case as it exists under the legislation of Congress.”
- *U.S. v. Nice*, 241 U.S. 591, 598 (1916): “Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one sui juris, the tribal relation may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this is done, and whether the emancipation shall at first be complete or only partial.”
- *U.S. v. Wheeler*, 435 U.S. 313 (1978): “It is well settled, however, that administrative action cannot terminate an Indian tribe’s Federal recognition. This Congress has cured administrative mistakes and legislatively restored the Federal recognition of many ... tribes. ... The sovereignty that the Indian tribes retain is of a unique and limited character... *But until Congress acts*, the tribes retain their existing sovereign powers.”

The executive branch supports the Supreme Court’s position on termination: “Only the Congress has the power to terminate a tribe from

federal recognition. In that case, a tribe no longer has its lands held in trust by the U.S. nor does it receive services from the BIA” (U.S. Bureau of Indian Affairs 1991: 21). Finally, as if there were any question at this point, Congress asserted its own authority in recent years: “The Bureau of Indian Affairs lacked and lacks the legal authority to terminate a tribe that has been acknowledged by an Act of Congress” (U.S. Congress, House Committee on Resources. *To reaffirm and clarify the Federal relationship of the Burt Lake Band as a distinct federally recognized Indian Tribe, and for other purposes*, 109th Cong., 2d sess., Feb. 16, 2006).

Not only is termination limited to Congress, but, should Congress take this extreme (and officially repudiated) step, it must do so with only clear and specific action. Because of the trust relationship between the U.S. government and tribes, canons of construction require a finding of clear and unequivocal evidence of congressional intent to terminate. If there are ambiguities, they must be resolved in favor of the Indians (*Hagen v. Utah*, 510 U.S. 399, 422 (1994) (Blackmun, J., dissenting); *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977)).

Unambiguous Previous Federal Acknowledgment

Congress did not terminate the Brothertown Indian Nation, but we nonetheless ended up removed from the official list of tribes. A rational analysis might question whether or not the Brothertown were ever federally acknowledged. While in the federal acknowledgment process, the OFA asked the same question.

In August 2009, the OFA issued a negative proposed finding for the Brothertown (Brown-Pérez 2012; Brown-Pérez 2013; Office of Federal Acknowledgment, Proposed Finding Against Acknowledgment of the Brothertown Indian Nation (Petitioner #67), August 17, 2009, 5). In the proposed finding, OFA staff first tackled the required preliminary question of whether or not the BIN had “unambiguous previous federal

acknowledgment” (25 C.F.R. Part 83). Evidence includes: (1) treaty relations with the U.S.; (2) denomination as a tribe by an act of Congress or Executive Order; or (3) evidence of being treated by the federal government as having collective rights in tribal lands or funds. Determination of unambiguous previous federal acknowledgment is necessary because it alters the evidence needed to prove the seven mandatory criteria.

The OFA determined that the Brothertown Indian Nation “was previously acknowledged by the United States in a Senate proviso to its approval of the Treaty of February 8, 1831, with the Menominee; in the Treaty of October 27, 1832, with the Menominee; and in the Act of March 3, 1839, which brought that Federal acknowledgment to an end. This previous Federal acknowledgment was clearly premised on identification of a tribal political entity and recognized a relationship between that entity and the United States. Most of the petitioner’s members descend from the previously acknowledged tribe and the petitioner is able to advance a claim that it may have evolved as a group from that previously acknowledged tribe” (Office of Federal Acknowledgment, Proposed Finding Against Acknowledgment of the Brothertown Indian Nation (Petitioner #67), August 17, 2009).

The OFA’s Analysis of the Brothertown Indian Nation

The OFA went on to determine that the Brothertown Indian Nation failed to provide evidence proving five of the seven mandatory criteria, including criterion (g), which, as mentioned earlier, forbids any tribe terminated by Congress from becoming federal acknowledged via the administrative process. As OFA noted in the determination of previous federal acknowledgment, evidence included “... the Act of March 3, 1839, which brought that Federal acknowledgment to an end.” Congress passed the 1838 act in response to a tribal request for U.S. citizenship and allotment of our reservation land (an action we took to avoid force removal). Because of this concern, the attorneys for the Native American

Rights Fund, on behalf of the BIN, asked for guidance from the Department of the Interior. Clarification was necessary, because, if the 1839 act was an act of termination, there was no reason to pursue acknowledgment through the administrative process. Doing so would result in failure, because the BIN could not pass the requirements of criterion (g).

On August 28, 1990, in response to NARF’s request, Marcia M. Kimball of the Office of the Field Solicitor, Twin Cities, provided a six and one-half page analysis to Earl J. Barlow, Area Director of the BIA in Minneapolis, on “whether the [Brothertown Nation] group would be precluded from seeking federal recognition through the federal acknowledgment process contained at 25 C.F.R. Part 83 (1990) because of the Act of March 3, 1839, 5 Stat 349... If the Act of March 3, 1839, is viewed as ‘termination’ legislation, then the Brothertowns would be prohibited from using the process outlined at 25 C.F.R. § 83.7 [because of criterion (g)].” The letter explains that, “the Brothertown Act of 1839 can hardly be viewed in the same light as the termination acts of the 1950s or the acknowledgment regulations which were published in the Federal Register on September 5, 1978. The termination acts of the 1950s were designed to end officially the historic relationship between the tribes and the federal government and to end the federal trusteeship over tribal or individual trust land... The language of the Act of 1839 should not be compared to the twentieth century concept of termination.”

On August 19, 1993, David C. Etheridge, the Acting Assistant Solicitor, Division of Indian Affairs, provided a memo to the Assistant Secretary – Indian Affairs and the Director of Tribal Services regarding the status of the Brothertown Indians of Wisconsin. He again addressed the 1839 congressional act: “If the Brothertown tribe was terminated, only Congress can restore the tribe’s government-to-government relationship with the United States, and the Department is powerless to recognize a group claiming to be the tribe’s successor.” The memo concludes by stating, “Since we believe that the Brothertown

tribe was not terminated by the Act of March 3, 1839, 5 Stat. 349, the group calling themselves the Brothertown Indians is eligible to petition the Department for federal acknowledgment as an Indian tribe pursuant to 25 C.F.R. Part 83.”

So, how is it that the OFA concluded in the 2009 Proposed Finding (and again the 2012 Final Determination) that the BIN had failed on criterion (g)? The OFA staff chose to interpret the 1990 letter and the 1993 memo in a manner that is blatantly inconsistent with the plain meaning of the documents and despite the fact that it was the BIA’s attorneys that reached the conclusion that Congress had not terminated the BIN. That being said, it is now clear that the BIN was terminated, as we are not on the official list of tribes. However, it was *not* in 1839 and it was *not* by Congress.

In August 1978, Donald J. Fosdick, Acting Director, Office of Indian Education Programs, Department of the Interior, sent a letter to Senator Gaylord Nelson (D-WI): “While there has been some misunderstanding on this matter between the Agency and the Minneapolis Area Office, the final determination is that they are federally recognized and entitled to Bureau services.” In March 1979, this status was confirmed in a letter from Edmund Manydeeds, Superintendent of the BIA Great Lakes Agency to Dr. John A. Turcheneske: “Although the Brotherton’s [sic] are Federally recognized, we do not provide extensive services to this tribe at the present.” In January 1980, Manydeeds reiterates this in a letter to the Acting Director, Office of Indian Services (to the attention of Lynn Lambert at the Federal Acknowledgment Project): “We are enclosing copies of two letters which lead us to believe that the Brotherton [sic] Indians are a recognized group of Indians.”

The official position on the status of the BIN changed on March 24, 1980. The following statement was included in a memo from Director, Office of Indian Services, to the Minneapolis Area Acting Director: “The Brotherton [sic] Community is not a federally-acknowledged tribe.” It goes on to note that this is confirmed in the list

of federally acknowledged tribes that was published in the January 31, 1979 *Federal Register*, a list that predates the list mandated in the 1994 act referenced earlier. The only evidence provided is that the Brothertown are not on the list of tribes. What happened between January 1980 and March 1980? A congressional act terminating us? No, an administrative act – an erasure – by an agency *without the authority to terminate a tribe*. The OFA analysis did not dare admit the BIA had terminated us by removing us from the published list of tribes. Instead, the OFA *had to* find a congressional act, and its staff went back to 1839 to find it. They *had to* find a congressional act, because *only Congress may terminate a tribe*.

As noted in Cohen’s *Handbook of Federal Indian Law*, “Congress has announced that once a tribe has been federally recognized, it may not be terminated except by express congressional action” (Newton 2005: 164). In a footnote to this statement, the authors note, “As a result, failure to publish a tribe’s name on the list of federally recognized tribes will *not* be effective to terminate a tribe.” In providing details of “Withdrawal of Acknowledgment or Recognition” in the Federally Recognized Indian Tribe Act of 1994, Congress found that:

- (1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;
- (2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;
- (3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated ‘Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;’ or by a decision of a United States court;
- (4) *a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;*

- (5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;
- (6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;
- (7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and
- (8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians (Federally Recognized Indian Tribe List Act 1994) (emphasis added).

Not only is termination limited to congressional action, but “clear and specific congressional action [is required] to terminate tribal rights and powers” (Federally Recognized Indian Tribe List Act 1994). As David C. Etheridge of the Office of the Solicitor, Department of the Interior stated unequivocally in the aforementioned 1993 memo, “The judicial standard for disestablishment requires a clear expression of congressional intent. The unmistakable terms for the determination of congressional intent must come from the ‘fact of the Act’ or ‘the surrounding circumstances and legislative history.’ *Mattz v. Arnett*, 412 U.S. 481, 505 (1973).” But even “surrounding circumstances” do not permit a reading between the lines to find congressional termination.

Unilateral and Illegal Termination

I am certain the Brothertown Indian Nation is not unique in having been terminated/removed from the list by the BIA. There are many non-acknowledged tribes, spending money and providing documentation to the point of distraction. The BIA continues to assert authority beyond

that which exists in the Constitution, federal legislation, and judicial interpretation. It has an “Office of Federal Acknowledgment” that apparently exists to correct acts of termination that never should have happened in the first place. But, in order to correct them, tribes must spend excessive amounts of time and money to prove criteria they likely cannot prove in a process they will likely fail. The BIA has imposed the rhetoric of federal acknowledgment on us to the point of distraction. Phrases like “federal acknowledgment” are repeated until they become part of our subconscious, until we think they are normal, until we accept the use of such a phrase to define us, our tribes, and other tribes, and until we use their words and their acceptance of us (their *acknowledgment* of us) to exclude others from the Indigenous conversation because they are somehow less worthy, less authentic. Why? Because the BIA says so.

Making Things Right

Settler colonialism strives for the dissolution of Indigenous societies. It destroys to replace. Invasion is a continuing structure, not a single event (Wolfe 388). We can see the structure in the federal acknowledgment process, especially as it is used to distract us from the real issues. And the real issue with which I am most concerned now is illegal termination by the BIA that happens when they simply leave a tribe off the list in the Federal Register (Tolley 2006: xiv). As stated earlier, John Shappard, former BIA official, was vocal in his observation that, “What is so bothersome about it is the BIA could cut back on its budget by picking off some tribes, just bumping them off” (Tolley 2006).

The Senate Committee on Indian Affairs has held meetings over the years to address “fixing the broken federal acknowledgment process.” I argue that it cannot be fixed; it should be scrapped entirely and tribes returned to the official list as quickly as they were once erased. There are many reasons to do this. It is an unfair, arbitrary, expensive, exhausting, and distracting process. But, more importantly, it is a process available

only to those tribes that lost their acknowledgment because the BIA illegally terminated them. It was not a formal termination or official action. Instead, the BIA terminates by simply removing them from the list or by not putting them on the list once it was formalized in 1994. The federal acknowledgment process is set up to distract us from the real issues, sometimes for decades, as our petitions crawl their way to disappointing outcomes. Removal, relocation, reservations, allotment, assimilation, reorganization, termination, and even self-determination ... different federal policies, same settler colonial goal: destroy to replace. In twenty-first century America, the destruction comes from tribes' failure to meet the federal government's definition of "Indian" and "tribe." If Indigenous peoples do not put a stop to this, we will have stood by silently while another government defines us out of existence.

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