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Congress, Tribal Recognition, and Legislative-Administrative Multiplicity

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Congress, Tribal Recognition, and Legislative-Administrative Multiplicity

KIRSTEN MATOY CARLSON*

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INTRODUCTION

Kevin Spacey, as the ruthless Vice President Frank Underwood in the Netflix original series *House of Cards*, assures Chief Whitehall of the Ugaya Tribe that the U.S. government will recognize his nation so the tribe can build a casino.¹

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1. The Ugaya Tribe is a fictional tribe. *House of Cards: Season 2, Chapter 21* (Netflix 2014). Underwood supports the Tribe’s recognition because their casino will compete with his

Underwood's legislative assistant then promises the Assistant Secretary for Indian Affairs millions of dollars in appropriations in exchange for recognizing the Ugaya Tribe.² This portrayal of how the government recognizes Indian tribes contradicts conventional narratives by highlighting the influence of Congress.

Most descriptions of federal recognition by political scientists, anthropologists, and legal scholars focus on an administrative process run by the Office of Federal Acknowledgment (OFA) within the Bureau of Indian Affairs (BIA).³ To the extent that scholars discuss the role of Congress in recognizing Indian nations, they suggest that it plays a diminishing one.⁴ In fact, this misconception pervades the field.⁵ Most scholars assume that Congress has largely ceded control over the recognition of Indian nations to the BIA.

This discrepancy begs the question: Who has it right? Hollywood screenwriters or the academic experts? The answer to this question matters because the stakes of federal recognition are extremely high. The survival of Indian nations depends

political enemies.

2. *Id.*

3. See, e.g., RENÉE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT (2008); BRIAN KLOPOTEK, RECOGNITION ODYSSEYS: INDIGENEITY, RACE, AND FEDERAL TRIBAL RECOGNITION POLICY IN THREE LOUISIANA INDIAN COMMUNITIES (2011); MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGEMENT PROCESS (2004); RECOGNITION, SOVEREIGNTY STRUGGLES, & INDIGENOUS RIGHTS IN THE UNITED STATES (Amy E. Den Ouden & Jean M. O'Brien eds., 2013); Joanne Barker, *Recognition*, 46 AM. STUD. 133 (2005); Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271 (2001); Lorinda Riley, *Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Regulations*, 37 N.Y.U. REV. L. & SOC. CHANGE 629 (2013).

The BIA created this process by promulgating the regulations in 25 C.F.R. § 83 (2015), and throughout this Article, I refer to it as the administrative process.

4. See, e.g., MILLER, *supra* note 3, at 109 (suggesting that the Pascua Yaqui benefited from seeking legislative recognition in the late 1970s when "the position of Congress toward legislatively recognizing tribes was still somewhat fluid"). Miller also identifies opposition by federally recognized tribes and the BIA as major obstacles to legislative recognition, indicates that only tribes with evidence of an earlier relationship with the federal government have succeeded in gaining recognition through the legislative process, and suggests that a strong legislative advocate is key to legislative success. *Id.* at 120–21.

A few sources report numbers or lists of tribes receiving direct congressional recognition but contain little, if any, analysis of the reported data. For a discussion of these, see *infra* Part I. Most of the existing studies are case studies focusing on one tribe and its experience in the political process. See, e.g., MILLER, *supra* note 3, at 79 (Pascua Yaqui); Mark Moberg & Tawnya Sesi Moberg, *The United Houma Nation in the U.S. Congress: Corporations, Communities, and the Politics of Federal Acknowledgment*, 34 URB. ANTHROPOLOGY 85 (2005) (United Houma Nation). Others debate whether Congress or the bureaucracy should extend recognition to Indian nations. See, e.g., David E. Wilkins, *Breaking into the Intergovernmental Matrix: The Lumbee Tribe's Efforts to Secure Federal Acknowledgment*, 23 PUBLIUS: J. FEDERALISM 123, 127 (1993).

5. See, e.g., Riley, *supra* note 3, at 630–31 ("Today, the administrative process codified at 25 C.F.R. § 83 ('Part 83') is the dominant approach to determining whether an entity is a federally recognized Indian tribe.").

upon their ability to exercise sovereignty over their territories and peoples.⁶ In the United States, such survival is often linked to recognition of the Indian nation by the federal government. Recognition allocates power by confirming the legal status of the Indian nation as a separate sovereign government with legal rights to land, territories, and resources. It also provides the means to economic development through federal grants and loans and funding for cultural programs, educational programs, and social services.⁷

Scholars, policy makers, and American Indian communities deserve a more accurate answer to these questions. The widely-accepted proposition that Congress has relinquished control over recognition merits empirical examination. This Article empirically evaluates this common scholarly wisdom. It contributes to a growing body of empirical research in Indian law and demonstrates the importance of such analyses.⁸

I use descriptive, empirical methods to investigate the congressional role in recognition. I review federal recognition bills and hearings from 1975 to 2013. The results call into question the dominant narrative about the congressional role in federal recognition and show that it is just plain wrong. A systematic look at the data reveals that over the past forty years Congress has recognized more Indian tribes than the OFA.⁹

In addition to debunking prevailing misconceptions, the data expose an intriguing puzzle—a more complicated tale of jurisdictional multiplicity. Federal recognition is not a uniform administrative process. Instead, parallel legislative and administrative processes exist and often intersect in complex ways. This discovery is an important first step toward understanding these dual processes and their

6. Robert Laurence, *A Memorandum to the Class, in Which the Teacher Is Finally Pinned Down and Forced to Divulge His Thoughts on What Indian Law Should Be*, 46 ARK. L. REV. 1, 4 (1993).

7. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3] (Nell Jessup Newton ed., 2012).

8. For examples of empirical studies in federal Indian law, see Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77 (2015) [hereinafter Carlson, *Congress and Indians*]; Kirsten Matoy Carlson, *Does Constitutional Change Matter? Canada's Recognition of Aboriginal Title*, 22 ARIZ. J. INT'L & COMP. L. 449 (2005) [hereinafter Carlson, *Canada's Recognition*]; Kirsten Matoy Carlson, *Political Failure, Judicial Opportunity: The Supreme Court of Canada and Aboriginal and Treaty Rights*, 44 AM. REV. CAN. STUD. 334 (2014) [hereinafter Carlson, *Supreme Court of Canada*]; Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy*, 11 CARDOZO J. INT'L & COMP. L. 393 (2003); Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933 (2009); Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1997); Mark D. Rosen, *Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY 275, 323 (Kristen A. Carpenter, Matthew L. M. Fletcher & Angela R. Riley eds., 2012).

9. See *infra* Part III.

implications for federal Indian law and understandings of legislative-administrative relationships more generally.

Reframing federal recognition as legislative-administrative multiplicity raises serious questions about how we think about, evaluate, and attempt to reform it. Most critiques of federal recognition emphasize the administrative process—and condemn it as broken.¹⁰ Debunking the myth of recognition as an administrative process, however, will change evaluations of it. The criticisms lodged against the administrative process may not apply or apply, but not in the same way to the legislative-administrative multiplicity that dominates federal recognition. As a clearer view of the complex path to recognition and its implications develops, scholars and tribal leaders may have to rethink their proposals for reforming the administrative process. Identifying these issues and fully considering them based on an accurate picture of federal recognition is critical since the BIA has recently revised the administrative process and faced serious questioning from members of Congress about these reforms.¹¹

Moreover, the dual legislative and administrative processes in federal recognition intersect in ways that challenge conventional views of congressional agency interactions. Many administrative law scholars assume that when Congress delegates to an agency, it constrains agency action through statutory language and structural design and then recedes into the background apart from occasional oversight.¹² In

10. See, e.g., CRAMER, *supra* note 3, at 47–56; KLOPOTEK, *supra* note 3, at 1; MILLER, *supra* note 3, at 8–17.

11. See, e.g., Letter from Kevin K. Washburn, Assistant Sec’y, Indian Affairs, U.S. Dep’t of the Interior, to Tribal Leaders (June 21, 2013), available at <http://www.bia.gov/cs/groups/public/documents/text/idc1-022125.pdf> [<https://perma.cc/RR77-9YVW>]; *Office of Federal Acknowledgment (OFA)*, U.S. DEPARTMENT INTERIOR: INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/AS-IA/OFA/> [<https://perma.cc/98C5-PRSC>] (last updated Sept. 29, 2015). The BIA published a final rule on July 1, 2015. Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37862 (July 1, 2015) (to be codified at 25 C.F.R. pt. 83).

12. See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 65 (2006) (explaining that “the dominant image as a legal matter is that once Congress legislates, it loses control over how its laws are administered”); see also WILLIAM N. ESKRIDGE JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION STATUTES AND THE CREATION OF PUBLIC POLICY* 1136–48 (4th ed. 2007) (discussing congressional delegation to and oversight of administrative agencies). A robust literature on political control of the bureaucracy also exists within political science. See, e.g., David Epstein & Sharyn O’Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AMER. J. POL. SCI. 697 (1994); Murray J. Horn & Kenneth A. Shepsle, *Commentary on “Administrative Arrangements and the Political Control of Agencies”*: *Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499 (1989); Arthur Lupia & Mathew D. McCubbins, *Learning from Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J. L. ECON. & ORG. 96 (1994); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984). Some legal scholars have recently drawn on this literature to develop more nuanced understandings of the relationships between the legislative branch and agencies. See, e.g., Brigham Daniels, *Agency as Principal*, 48 GA. L. REV. 335 (2014); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443

this instance, however, Congress engages in an unpredictable pattern of acquiescence in, oversight of, and interference with agency action through direct legislation. While no rule prevents Congress from continually getting involved in matters delegated to an agency,¹³ my account of federal recognition illuminates unusual legislative-administrative dynamics that have eluded attention so far. These dynamics reveal a new kind of jurisdictional overlap—called legislative-administrative multiplicity in this Article—which occurs when Congress acquiesces in agency action but continues to perform the same function. Legislative-administrative multiplicity arises in other contexts, such as private bills and legislative earmarks, and its implications on administrative law merit further investigation.

The Article proceeds as follows. Part I presents the prevailing narrative of recognition by administrative process, which assumes that Congress is not a player and thus omits Congress from analyses of federal recognition. Part II explains how I empirically evaluated the assumptions underlying the prevailing narrative by investigating the congressional role in federal recognition. Part III debunks the dominant narrative. It demonstrates that Congress plays a significant role in federal recognition and describes recognition as a legislative-administrative multiplicity rather than a single administrative process. Part IV explores the implications of and research questions raised by the legislative-administrative multiplicity revealed in the study for federal Indian law and administrative law.

I. THE PREVAILING NARRATIVE: AN OVERVIEW OF FEDERAL RECOGNITION

The United States government has recognized Indian nations since its formation. But only recently has it attempted to devise a coherent recognition policy by adopting an administrative process to recognize tribes.¹⁴ For the first century of its existence, the United States government acknowledged Indian nations either through the treaty process or specifically by statute.¹⁵ In 1871, Congress unilaterally ended treaty making with Indian nations. A century later, in 1978, the BIA finalized the regulations governing federal acknowledgment.¹⁶ During the intervening period, recognition policy oscillated as the federal government struggled to decide whether to assimilate Indians into mainstream America or to acknowledge their status as separate governments.¹⁷ In the 1930s, the BIA attempted to establish a formal policy by defining criteria for recognizing tribes under the Indian Reorganization Act. But this effort largely ended with the Termination Policy of the 1950s, which dissolved the political and legal relationship between the United States and over 110 tribal governments, liquidated tribal assets, and converted tribally held lands into fee simple properties.¹⁸

(2003).

13. Congress's interference is not entirely unusual—even when Congress mostly leaves a matter to an agency, it can micromanage the agency through oversight hearings or appropriations riders. ESKRIDGE ET AL., *supra* note 12, at 1136–48.

14. COHEN, *supra* note 7, § 3.02[4].

15. *Id.*

16. MILLER, *supra* note 3, at 25–26.

17. For a full history of federal recognition processes, see MILLER, *supra* note 3, at 23–46.

18. Termination Act of 1953, H.R. Con. Res. 108, 83rd Cong., 67 Stat. 132 (1953)

By the end of the 1960s, tribal leaders, the Red Power movement, scholars, nonfederally recognized tribes, and other advocates mounted a highly visible campaign for the U.S. government to abandon its termination policy and develop a more formal, structured process for recognizing Indian nations. The existence and plight of nonfederally recognized tribes gained national attention as Indian nations litigated land claims along the East Coast and treaty fishing rights in Washington State.¹⁹ As a result, the federal government considered several options for developing a policy and process for recognizing Indian nations. Congress, however, never enacted legislation crafting such a policy.

In 1978, the BIA stepped into the vacuum left by Congress and adopted regulations for recognizing Indian nations. The BIA concluded that it must have general authority to determine tribal status in order to administer statutes providing benefits and services to Indians and Indian tribes. The agency identified such authority in two statutes, enacted in the 1830s, which convey the “management of all Indian affairs and of all matters arising out of Indian relations” to the Commissioner of Indian Affairs.²⁰ Part 83 of the Code of Federal Regulations created a comprehensive administrative process for recognizing Indian nations.²¹ BIA officials expected the process to emerge as the dominant way for tribes to gain recognition and thus ensure consistency, fairness, efficiency, and transparency.²²

To facilitate its new administrative process, the BIA sought to identify all federally and nonfederally recognized tribes.²³ After two centuries of unclear policy, approximately 400 Indian nations remained unrecognized.²⁴ Some tribes had never established a legal relationship with the United States—either because they never entered into a treaty with the United States or because Congress never ratified those

(enacted). See Wilkins, *supra* note 4, at 136–37.

19. See, e.g., *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

20. 25 U.S.C. §§ 2, 9 (2012).

21. For a detailed description of the administrative process, see Riley, *supra* note 3, at 633–38.

22. *Oversight Hearing on Federal Acknowledgment Process: Hearing Before the S. Select Comm. on Indian Affairs*, 100th Cong. 3 (1988) (statement of Hazel Elbert, Deputy to the Assistant Secretary for Indian Affairs) (“Piecemeal legislation for individual groups invites the problem of inconsistent standards that in the past led to the establishment of the present administrative process.”); *Oversight of the Federal Acknowledgment Process and the Federal Acknowledgment Project of the Bureau of Indian Affairs: Hearing Before the S. Select Comm. on Indian Affairs*, 96th Cong. 33–34 (1980) (statement of Theodore C. Krenzke, Acting Deputy Comm’r, Bureau of Indian Affairs) (“[T]he project eliminates the need for lengthy congressional involvement with each of the 150 Indian groups expected to seek acknowledgment.”); MILLER, *supra* note 3, at 49–45 (describing the influences on the BIA’s decision to promulgate the federal recognition regulations in 1978).

23. *Oversight of the Federal Acknowledgment Process and the Federal Acknowledgment Project of the Bureau of Indian Affairs: Hearing Before the S. Select Comm. on Indian Affairs*, 96th Cong. 35 (1980) (statement of Theodore C. Krenzke, Acting Deputy Comm’r, Bureau of Indian Affairs).

24. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-348, INDIAN ISSUES: FEDERAL FUNDING FOR NON-FEDERALLY RECOGNIZED TRIBES, 1 (2012), available at <http://www.gao.gov/products/GAO-12-348> [<https://perma.cc/FRX5-43TG>].

treaties—and were known simply as “nonfederally recognized” tribes.²⁵ Some tribes had been recognized through treaty, legislation, or executive order, but, either for administrative reasons or through error, the federal government had stopped dealing with them.²⁶ Over 110 other Indian nations who had been recognized were terminated statutorily.²⁷

As a result, the BIA started keeping a list of all federally recognized tribes in 1979.²⁸ In 1994, Congress required the BIA to “publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”²⁹ Federal agencies use this list to determine the eligibility of Indian nations for federal services, grants, and other programs.

The BIA refers tribes not on the list to its administrative process. The regulations allow an Indian group to petition for a recognition determination by the Department of the Interior (DOI).³⁰ The regulations provide seven criteria that a petitioning tribe

25. Barker, *supra* note 3, at 135.

26. Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 502–08 (2006).

27. See, e.g., Termination Act of 1953, H.R. Con. Res. 108, 83rd Cong., 67 Stat. 132 (1953) (enacted); California Rancheria Act, Pub. L. 85-671, 72 Stat. 619 (1958) (originally proposed as H.R. 2824, 85th Cong.). Congress can reinstate these “terminated” tribes, but not all terminated tribes have been restored. Barker, *supra* note 3, at 135.

28. In making the list, the BIA asserted itself as the gatekeeper of federal recognition. Thus, the list has generated its own controversy. Several Alaska Native nations contended that they were incorrectly left off the initial list. Subsequently, the BIA administratively added Alaska Native villages to the list of federally recognized tribes without making them go through the OFA process. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-49, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 23 (2001), available at <http://www.gao.gov/products/GAO-02-49> [<https://perma.cc/GR5C-D378>] (“The names of 222 Alaskan tribes now appear on the BIA’s current list of recognized tribes. These were determined to have governmental relations with the United States at the time the first list was published in 1979. However, these tribes were not included in the first list because they were not completely identified and their status remained uncertain until 1993. According to one Department of the Interior official involved in developing the first list, Alaskan tribes were not included in the list because of errors in the list and confusion over the political status of Alaskan tribes created by provisions of a 1936 amendment to IRA, which instructed most Alaskan tribes to be brought under the act. In 1993, the Department of the Interior’s Office of the Solicitor issued a comprehensive opinion analyzing the status of Alaskan tribes and determined that they were tribes in the same sense as tribes in the contiguous 48 states. The BIA then identified 222 Alaskan tribes and included them on the list of recognized tribes published in October 1993.”). More recently, the Assistant Secretary has added other tribes to the list without requiring them to go through the § 83 process. See *infra* note 67.

29. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, 4792 (originally proposed as H.R. 4180, 103d Cong.).

30. Barker, *supra* note 3, at 135 (noting that the agency amended the regulations in 1994, 1997, and 2000); Riley, *supra* note 3, at 632. The revised final rule, announced on July 1, 2015, introduces two main procedural changes to the regulations. It initiates a process of phased review and provides for a hearing if the BIA denies the petitioner’s request for recognition. Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37862, 37863 (July 1, 2015) (to be codified at 25 C.F.R. pt. 83).

must meet for recognition and place on the tribe the burden of establishing these criteria by a “reasonable likelihood.”³¹ The seven mandatory criteria are:

- (a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900;
- (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;
- (c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present;
- (d) The petitioner has provided a copy of the group’s present governing documents;
- (e) The petitioner’s membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes that combined and functioned as a single autonomous political entity;
- (f) The membership of the petitioning group is composed principally of persons who are not members of any other previously acknowledged Indian Tribe; and
- (g) Neither the petitioner nor its members are the subjects of congressional legislation that has expressly terminated or forbidden the Federal relationship.³²

The OFA has received 356 letters of intent from tribal groups and continues to receive petitions.³³

The prevailing narrative of federal recognition has centered on the administrative process since its inception, largely because the process has proven much more time-consuming and less efficient than BIA officials predicted.³⁴ First, the OFA struggles to complete and review petitions, and tribes often spend decades waiting for the OFA to respond to their petition.³⁵ From 1978 to 2013, the OFA resolved

31. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. § 83.6 (2014).

32. *Id.* § 83.7(a)–(g). For a critique of how the OFA applies these criteria, see Riley, *supra* note 3, at 639–62. The revisions to the rule do not change past departmental practices and make two changes to the application of the mandatory criteria. First, it changes the evidence admissible to prove criterion (a), requiring identification of the petitioner as an Indian entity. Second, it changes the review of the number of marriages in support of criterion (b) (community). Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37862, 37863 (July 1, 2015) (to be codified at 25 C.F.R. pt. 83). The final rule altered the regulations much less than the proposed rule would have. *Id.* at 37863–64. While the final rule rewrites the criteria in question and answer form, I have left them in their previous form because it is easier to read.

33. THE OFFICE OF FED. ACKNOWLEDGEMENT, BRIEF OVERVIEW (AS OF 11/12/2013) (2013), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024417.pdf> [<https://perma.cc/2KQQ-5E4X>].

34. *Oversight of the Federal Acknowledgment Process and the Federal Acknowledgment Project of the Bureau of Indian Affairs: Hearing Before the S. Select Comm. on Indian Affairs*, 96th Cong. 35 (1980) (statement of Theodore C. Krenzke, Acting Deputy Comm’r, Bureau of Indian Affairs).

35. Cramer breaks down the length of time, explaining that “[o]n average, a petitioner

fifty-seven out of eighty-seven completed petitions.³⁶ In 2001, the U.S. Government Accountability Office (GAO) found that, of the ten tribes with petitions then ready to be evaluated, six had been waiting at least five years.³⁷ More extreme examples include the Little Shell Band of Chippewa Indians of Montana, who spent over thirty years in the process.³⁸

Second, the administrative process has tremendous costs—both for the federal government and for tribes. The estimated funding for BIA staff evaluating petitions and for related costs was \$900,000 in fiscal year 2000 alone.³⁹ While estimates of what it costs to petition for federal recognition vary, everyone agrees that nonfederally recognized tribes lack the resources necessary to document a petition.⁴⁰ In fact, the issue of financial resources arose as early as 1980 and has contributed to popular concerns about gaming interests dominating the process.⁴¹

Third, the BIA has not provided clear guidance as to the application of the criteria⁴² and tribes continue to point to inconsistency and unfairness in applying 25 C.F.R. § 83. Many allege that the OFA applies the criteria more strictly now than it did in the early 1980s.⁴³ Scholars have documented changes and biases in the application of the criteria, including favoritism towards land-based tribes.⁴⁴ Some

spends six to ten years collecting and transcribing oral histories, drawing maps, and researching county records as it documents its claim. The [Branch of Acknowledgment and Research] staff spends another six to ten years, on average, evaluating a petition and moving it through bureaucratic channels.” CRAMER, *supra* note 3, at 51.

36. THE OFFICE OF FED. ACKNOWLEDGEMENT, *supra* note 33. In 2015, the OFA decided two more petitions, recognizing the Pamunkey Indian Tribe, Bureau of Indian Affairs, Final Determination for Federal Acknowledgment of the Pamunkey Indian Tribe Rule, 80 Fed. Reg. 39144 (July 8, 2015), and declining to recognize the Duwamish Tribal Organization, Bureau of Indian Affairs, Final Decision on Remand Against Federal Acknowledgment of the Duwamish Tribal Organization, 80 Fed. Reg. 39142 (July 8, 2015).

37. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 28, at 15.

38. *Process of Federal Recognition of Indian Tribes: Hearing Before S. Comm. on Indian Affairs*, 110th Cong. 15 (2007) (statement of Hon. John Sinclair, President, the Little Shell Tribe of Chippewa Indians of Montana).

39. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 28, at 17.

40. *See, e.g.*, CRAMER, *supra* note 3, at 54 (citing estimates that a petition costs at least \$50,000 and that the price tag for recognition is close to \$1 million per petition).

41. *Oversight of the Federal Acknowledgment Process and the Federal Acknowledgment Project of the Bureau of Indian Affairs: Hearing Before the S. Select Comm. on Indian Affairs*, 96th Cong. 22 (1980) (statement of Eddie Tullis, Chairman, Poarch Board of Creeks); *see also Oversight of the Branch of Federal Acknowledgment, Bureau of Indian Affairs: Hearing Before the S. Select Committee on Indian Affairs*, 98th Cong. 43 (1983) (statement of Dr. Frank W. Porter III, Director, American Indian Research and Resource Institute). To date, the claims that gaming interests dominate the federal recognition process remain empirically unsubstantiated. *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 28, at Appendix III; Bureau of Indian Affairs Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37862, 37864 (July 1, 2015) (to be codified at 25 C.F.R. pt. 83).

42. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 28, at 10–14.

43. For a discussion of many of these criticisms, see KLOPOTEK, *supra* note 3, at 4–5. Legal scholars also deride the OFA for having no statutory authorization. Riley, *supra* note 3, at 632.

44. Riley, *supra* note 3, at 650–53.

contend that the OFA has a conflict of interest and should not be involved in the initial recognition process.⁴⁵ They claim that the OFA acts as “prosecutor, defense, and judge.”⁴⁶

The mainstream narrative not only focuses on the administrative process, it largely condemns it as broken. Scholars, tribal leaders, members of Congress, and former BIA officials have launched an almost continuous assault on the administrative process. Since 1975, Congress has entertained almost thirty bills to establish or reform the recognition process.⁴⁷ As a result, the OFA modified its process in 1994, 1997, and 2000.⁴⁸ In July 2015, the BIA enacted additional revisions to the process, including phased review to expedite decisions, a reduced documentary burden on petitioners, and hearings on proposed denials.⁴⁹

While the prevailing narrative has centered on the administrative process, all three branches of the U.S. government can recognize Indian nations.⁵⁰ The U.S. Constitution confers this authority on Congress in the Indian Commerce Clause and on the executive branch through its treaty making powers.⁵¹ Federal courts have adjudicated questions of tribal status under federal statutes.⁵² Since the 1970s,

45. Wilkins, *supra* note 4, at 127–28.

46. KLOPOTEK, *supra* note 3, at 4. Others assert the process has an appearance of impropriety because it allows “the same agency responsible for providing services to the tribes to make decision regarding the recognition that would increase their service population, in some cases by many thousands.” *Federal Recognition of Indian Tribes: Hearing on H.R. 2549, H.R. 4462, and H.R. 4709 Before the H. Subcomm. on Native Am. Affairs*, 103d Cong. 78 (1994) (statement of Hon. Craig Thomas).

47. MILLER, *supra* note 3, at 74 (“Between 1989 and 1997 Senator McCain, Senator Inouye, and Congressional Delegate Faleomavaega introduced several bills that sought to establish an independent commission to examine acknowledgment cases.”); *Recommendations for Improving the Federal Acknowledgment Process: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 31–33, 38, 46–48 (2008) (attachment to prepared statement of Professor Patty Ferguson-Bohnee, Director of the Indian Legal Clinic, Sandra Day O’Connor College of Law, Arizona State University) (recounting the various legislative efforts to reform the federal recognition process). Despite these numerous bills, Congress has yet to enact legislation either establishing an administrative process or reforming the currently enacted administrative regulations in 25 C.F.R. part 83.

48. Barker, *supra* note 3, at 135.

49. Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37862, 37862, 37863, 37869 (July 1, 2015) (to be codified at 25 C.F.R. pt. 83).

50. COHEN, *supra* note 7, § 3.02[4] (“Congress has approved a variety of mechanisms by which Indian nations can secure federal recognition, including determinations by legislative, administrative, and judicial bodies.”). KLOPOTEK, *supra* note 3, at 258 (noting that “tribes can be acknowledged by Congress, executive order, or judicial authority”). Miller also documents how all three branches have historically recognized Indian nations as separate governments. MILLER, *supra* note 3, at 23–46.

51. COHEN, *supra* note 7, § 3.02[4]. The courts have never overturned a congressional or executive determination of tribal status and regularly defer to Congress and the executive branch to make decisions on these matters. *Id.*

52. *See, e.g., United States v. Sandoval*, 231 U.S. 28 (1913); COHEN, *supra* note 7, § 3.02[6][g].

however, the OFA and Congress have emerged as the two institutions most likely to extend recognition to Indian tribes.⁵³

Despite this shared authority, the academic literature rarely analyzes congressional recognition, leaving our understanding of Congress's role underdeveloped. Scholars have devoted more time and attention to the administrative process, which has sought to dominate federal recognition.⁵⁴ Legal scholars have criticized the administrative criteria⁵⁵ and social scientists have studied their application as well as the various struggles faced by individual Indian nations in the administrative process.⁵⁶

Some studies include a limited discussion of Congress's role in federal recognition. A few studies look at recognition from an institutional perspective and include case studies of Indian nations that achieved congressional recognition.⁵⁷ Others study recognition from the tribal perspective, detailing the costs and benefits to tribes pursuing recognition either legislatively or administratively.⁵⁸ At least one of these discussions identifies the difficulties that nonfederally recognized tribes face in seeking congressional recognition instead of submitting to the administrative process.⁵⁹ These difficulties include reluctance on the part of Congress to recognize tribes and limitations incurred as conditions of legislative recognition, such as restrictions on their sovereignty.⁶⁰

A few case studies focus exclusively on the experience of a specific tribe in seeking congressional recognition.⁶¹ These studies provide rich description of the process and its pitfalls. They give some sense of why a specific tribe may have chosen a congressional strategy and of the tribe's experiences in the political process. But these studies provide only limited insights into Congress's role. They do not provide enough information to compare the congressional and administrative processes more generally.

Additionally, a few sources compile information on federal recognition and include data on congressional recognitions. First, the OFA collects information on recognition. As of November 12, 2013, the OFA reports that nine tribes have received congressional recognition and that the BIA referred one petition for federal acknowledgement to Congress for clarification.⁶² The BIA report does not, however,

53. Wilkins, *supra* note 4, at 126–27. The Federally Recognized Indian Tribe List Act of 1994 reaffirmed Congress's role in recognizing Indian tribes by providing that tribes may be recognized by an act of Congress, following the OFA. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, 4792 (originally proposed as H.R. 4180, 103d Cong.). Federal courts have not developed a consistent definition of what a tribe is, COHEN, *supra* note 7, § 3.02[6][g], and since the establishment of the OFA, have largely deferred to the administrative process. *Id.* § 3.02[7][b].

54. *See supra* note 0.

55. *See, e.g.*, Riley, *supra* note 3, at 639–62.

56. *See, e.g.*, KLOPOTEK, *supra* note 3; MILLER, *supra* note 3.

57. *See, e.g.*, MILLER, *supra* note 3, at 79 (detailing how the Pascua Yaquis received congressional federal recognition prior to the creation of a federal administrative process).

58. *See, e.g.*, KLOPOTEK, *supra* note 3, at 10–12.

59. *Id.* at 258–59.

60. *Id.* at 258.

61. MILLER, *supra* note 3, at 79; Moberg & Moberg, *supra* note 4.

62. According to the BIA, two tribes—the Confederated Tribes of the Coos, Lower

include any information about tribes who were unsuccessful in their quests for congressional recognition, about congressional recognitions prior to 1982, or about tribes excluded from the OFA process. A second source, *Cohen's Handbook on Federal Indian Law*, provides a more complete accounting of the congressional role by supplementing it with a list of nineteen restored tribes.⁶³

Finally, in its 2001 report, the GAO included an appendix on how tribes have obtained federal recognition.⁶⁴ The GAO reported that the U.S. government recognized forty-seven tribes between 1960 and 2001, with Congress recognizing sixteen tribes and the BIA recognizing thirty-one tribes.⁶⁵ In these numbers, the GAO included tribes recognized by the BIA through processes other than the § 83 administrative process.⁶⁶ For example, the BIA reaffirmed the recognition of the Koi Nation by memorandum in 2000.⁶⁷ In fact, according to the GAO Report, the BIA

Umpqua and Siuslaw Indians, and the Federated Coast Miwok—were legislatively restored. Seven more were legislatively recognized (the Cow Creek Band of Umpqua Indians, Western (Mashantucket) Pequot Tribe, Aroostook Band of Micmacs, Pokagon Potawatomi Indians of Indiana and Michigan, Little Traverse Bay Bands of Odawa Indians, Little River Band of Ottawa Indians, and Loyal Shawnee Tribe). BUREAU OF INDIAN AFFAIRS, STATUS SUMMARY OF ACKNOWLEDGMENT CASES (2013), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idcl-024435.pdf> [<https://perma.cc/ZGZ3-PQEB>].

63. *Cohen's* lists the following nineteen restored tribes:

25 U.S.C. § 566 (Klamath); 25 U.S.C. § 711-711f (Siletz Restoration Act of 1977); 25 U.S.C. § 712a (Cow Creek Band of Umpqua Tribe); 25 U.S.C. § 713b (Confederated Tribes of the Grand Ronde Community); 25 U.S.C. § 714a (Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians); 25 U.S.C. § 715a (Coquille Indian Tribe); 25 U.S.C. § 733 (Alabama and Coushatta Indian Tribes); 25 U.S.C. 762 (Paiute Indian Tribe of Utah); 25 U.S.C. § 861 (1978) (Wyandotte, Peoria, Ottawa, and Modoc Tribes of Oklahoma); 25 U.S.C. § 903a (Menominee); 25 U.S.C. § 941b (Catawba Tribe); 25 U.S.C. § 983a (the Ponca Tribe); 25 U.S.C. §1300g-2 (1987) (Ysleta Del Sur Pueblo); 25 U.S.C. §1300 l-1300 l-7 (Auburn Indian Tribe); 25 U.S.C. §1300m-1300m-7 (Paskenta Band of Nomlaki Indians); 25 U.S.C. §§ 1300n et seq. (Graton Rancheria).

COHEN, *supra* note 7, at § 3.02[8][c] 167 n.246. The 2005 *Cohen's* did not rely on a BIA report but included a list of nine tribes receiving congressional recognition along with the same list of nineteen restored tribes as in the 2012 *Cohen's*. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 3.02[6][a], 3.02[8][c] (2005 ed. 2005) (listing recognized tribes and restored tribes, respectively). The lists in the 2005 *Cohen's*, however, were duplicative with at least one tribe listed as both restored and recognized. *Id.*

64. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 28, at App. I. The GAO reported that "[a]bout 92 percent of the 561 currently recognized tribes either were part of the federal effort to reorganize and strengthen tribal governments in the 1930s or were part of a group of Alaskan tribes that were determined to have existing governmental relations with the United States when the BIA's first list of recognized tribes appeared in 1979." *Id.* at 21.

65. *Id.*

66. *Id.*

67. *Federal Recognition: Politics and Legal Relationship Between Governments: Hearing Before S. Comm. on Indian Affairs*, 112th Cong. 37–38 (2012) (statement of Michael J. Anderson, Owner, Anderson Indian Law). More recently, the BIA has acknowledged the Tejon Indian Tribe in 2012, see Patric Helund, *Branch of Tejon Indian Tribe Regains Federal Recognition; Talk of Casino Resumes*, MOUNTAIN ENTERPRISE (Jan. 6, 2012),

recognized less than half of the tribes (fourteen of thirty-one) through the administrative process.⁶⁸

None of these data compilations have attempted rigorous empirical data collection or analysis. They only cover petitioners who ultimately received congressional recognition. This greatly limits the information they provide. They do not track the number of bills introduced, how far the bills progressed within the legislative process, whether tribes simultaneously engaged in both legislative and administrative processes, or whether the tribes seeking legislation have been denied by the BIA. Nor do they consider changes in recognition rates, or any of these other factors, over time.

The lack of studies investigating the role of Congress in federal recognition motivated this study. The limited information on the congressional role undermines attempts to understand fully how, why, and with what frequency the federal government recognizes Indian nations. Further, the heavy focus on the administrative process provides a lopsided view, which overlooks and downplays the role of Congress in the process. This constrained perspective obscures the effect of any possible interactions between the two branches on the process by omitting one branch from study almost entirely. As a result, we do not have a complete picture of the process. This, in turn, makes it hard to understand the process and its problems fully and to reform it successfully.

II. EMPIRICALLY INVESTIGATING THE PREVAILING NARRATIVE: CONGRESS'S ROLE IN FEDERAL RECOGNITION

This Part describes how I investigated the prevailing narrative that the OFA dominates federal recognition by empirically assessing Congress's role in recognition. It explains the data collection, methodology, and some of the limits of the study.

A. Data Collection

I collected data on nonfederally recognized tribes pursuing recognition from 1975 to 2013 from several sources, including a database of all Indian-related bills, congressional hearings on federal recognition, GAO reports on federal recognition, and DOI reports on the administrative process (detailing the numbers and names of petitioners and petitioners' status in the process).

<http://mountainenterprise.com/story/branch-of-tejon-indian-tribe-regains-federal-recognition-talk-of-casino-resumes-2719/> [<https://perma.cc/6X72-ZNM6>], and the King Salmon Tribe, Shoonaq' Tribe of Kodiak, and the Lower Lake Rancheria without requiring these tribes to go through the administrative process, see Press Release, U.S. Dep't of the Interior, Assistant Secretary Gover Reaffirms Federal Trust Relationship for the King Salmon Tribe and Shoonaq' Tribe of Kodiak in Alaska and the Lower Lake Rancheria in California (Jan. 3, 2001), *available at* <http://www.bia.gov/cs/groups/public/documents/text/idc-018346.pdf> [<https://perma.cc/RN7F-FHQ4>].

68. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 28, at 21.

I started with a dataset that I had created, which includes all identifiable legislation relating to Indians introduced in Congress from 1975 to 2013.⁶⁹ I used this dataset to locate tribal federal recognition bills. Tribal federal recognition bills are bills seeking the federal recognition, acknowledgement, or the restoration of a government-to-government relationship between the United States and a specific group of Indians or Indian nation. I identified 178 bills, naming 72 tribes. A full list of these bills and the tribes named in them as well as more detailed information on how I compiled the lists of bills and tribes is included in the Methodological Appendix.

I also identified how many tribes were engaged in the legislative and administrative processes. I started with the 72 tribes named in the 178 tribal recognition bills. I then compared these 72 tribes with the 74 tribes on the OFA's most recent, publicly available list of active and decided petitions for acknowledgement.⁷⁰ I combined the two lists to identify a total of 124 tribes that had actively sought recognition during the time period studied. Some tribes appeared on both lists, but I only included them once. More detailed information on how I compiled this list of tribes is included in the Methodological Appendix.⁷¹

69. Carlson, *Congress and Indians*, *supra* note 8, at 157–64.

70. BUREAU OF INDIAN AFFAIRS, STATUS SUMMARY OF ACKNOWLEDGMENT CASES (2013), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024435.pdf> [<https://perma.cc/ZGZ3-PQEB>]. I did not include all the tribes that have filed a letter of intent with the OFA since 1975 because many of these entities have not pursued recognition. For an account of the status of each entity filing a letter of support, see BUREAU OF INDIAN AFFAIRS, LIST OF PETITIONERS BY STATE (AS OF NOVEMBER 12, 2013) (2013), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024418.pdf> [<https://perma.cc/LGG4-D6FR>].

71. The Methodological Appendix lists the 72 tribes named in tribal federal recognition bills but not the 52 additional tribes that only sought recognition administratively. Those tribes (as named on the OFA list) are: Tolowa Nation, Meherrin Tribe (NC), Southern Sierra Miwuk Nation (CA), Georgia Tribe of Eastern Cherokees, Amah Mutsun Band of Ohlone/Coastanoan Indians (CA), Grand River Bands of Ottawa Indians (MI), Fernandeno Tataviam Band of Mission Indians (CA), Biloxi, Chitimacha Confederation of Muskogees (LA), Pointe-au-Chien Indian Tribe (LA), Grand Traverse Band of Ottawa and Chippewa Indians, Jamestown Clallam Tribe, Tunica-Biloxi Tribe, Death Valley Timbisha Shoshone Band, Narrangansett Indian Tribe, Poarch Band of Creeks, Wampanoag Tribal Council of Gay Head, San Juan Southern Paiute Tribe, Mohegan Indian Tribe, Huron Potawatomi, Samish Indian Tribe, Match-E-Be-Nash-She-Wish Band of Pottawatomi, Snoqualmie Indian Tribe, Cowlitz Tribe of Indians, Mashpee Wampanoag, Shinnecock Tribe, Creeks East of the Mississippi, Munsee-Thames River Delaware, Principal Creek Nation, Kawewah Indian Nation, United Lumbee Nation of NC and America, Southeastern Cherokee Confederacy, Northwest Cherokee Wolf Band, Red Clay Inter-tribal Indian Band, Tchinouk Indians, MaChis Lower Alabama Creek Indian Tribe, Ramapough Mountain Indians, Yuchi Tribal Organization, Muwekma Ohlone Tribe of San Francisco Bay, Snohomish Tribe, Golden Hill Paugussett Tribe, Eastern Pequot Indians, Pauatuak Eastern Pequot Indians, Schaghticoke Tribal Nations, St. Francis/Sokoki Band of Abenakis, Nipmuc Nation, Webster/Dudley Band of Chaubunagungamaug Nipmuck Indians, Steilacoom Tribe, Juaneno Band of Mission Indians, The Central Band of Cherokee, The Brothertown Indian Nation, Juanenon Band of Mission Indians, Acjachemen Nation, and Choctaw Nation of Florida.

B. Coding

I devised a coding scheme to apply to the bills so that I would have data comparable to the existing data on tribes using the administrative process. My coding scheme analyzed each bill to determine the following: (1) which tribes it would recognize; (2) the geographic location of the tribes; (3) the kind of federal recognition it would extend; (4) its legislative progress; and (5) the existence of restrictions on the tribes' authority as a condition of recognition. A complete description of the coding scheme appears in the Methodological Appendix. From the analysis of the bills, I generated a list of tribes named in tribal federal recognition bills. A full list of these tribes is in the Methodological Appendix. I coded each tribe by whether it received congressional recognition, the kind of congressional recognition sought, and its location by region of the country. I further coded tribes receiving congressional recognition by any restrictions placed on their tribal authority as a condition of their recognition. Research assistants assisted in the refinement of the coding scheme and provided background research on the bills.

I categorized the strategies used by nonfederally recognized tribes into administrative strategies, legislative strategies, and dual strategies.⁷² If a tribal federal recognition bill named a particular tribe, I identified that tribe as having a legislative strategy.⁷³ If the OFA included the tribe on its official list or if I found evidence of the tribe having filed an OFA petition, I identified that tribe as having an administrative strategy. Tribes named in a bill and having filed a letter of intent with the OFA were identified as having dual strategies.

To gain additional insight into Congress's role, I supplemented the bills by reviewing a nonsystematic sample of congressional hearings on federal recognition during this time period. My review of congressional hearings bolsters my analysis of the bills by providing additional context and details on the interactions between Congress and the administrative branch.

C. Methodology

This study investigates the role of Congress in recognizing Indian nations by looking at all tribal federal recognition bills introduced and enacted in Congress from 1975 to 2013. It is the first to use empirical methods to look systemically at how Congress has extended recognition to Indian nations in the modern era. I chose this time period because it coincides with the rise of recognition as an issue at the end of the 1960s. Starting the study just before the inception of the administrative process in 1978 allows for comparison of the two processes over a thirty-year period. Finally, this time period also allows for the identification of trends in congressional recognition over time.

72. For a similar typology, see Amy Melissa McKay, *The Decision to Lobby Bureaucrats*, 147 PUB. CHOICE 123, 127 (2011).

73. I could not link eight tribes listed in the California Tribal Status Act of 1990, H.R. 5436, 101st Cong. (1990), to tribes listed on the BIA List of Petitioners. The tribes were: Northern Pomo Tribe, Nomlaki Tribe, Pomo Tribe, Maidu Tribe, Northern Pomo Tribe, Wailaku and Maidu Tribes, Wappo Tribe, and Nsenan-Southern Maidus Tribe. As a result, I coded them as having a legislative only strategy.

Unlike earlier studies, I used comparative analysis to evaluate the role of Congress in the recognition process over time. I evaluated the proposition that Congress has ceded control over federal recognition to the OFA. I expected the evidence to indicate that Congress has played a diminishing role and the OFA an increasing role in recognition. I anticipated a decrease in congressional recognitions accompanied by an increase in administrative recognitions over time. The existing data indicated that to the extent that Congress recognized tribes, it restored them.⁷⁴ Accordingly, I expected Congress to restore tribes rather than recognize them and that these restorations would occur earlier in the time period studied and diminish over time.⁷⁵ As congressional recognitions decreased, I anticipated a corresponding decline in the number of tribal federal recognition bills. I investigated these expectations by looking at enactment rates of tribal federal recognition bills, the number of Indian nations pursuing congressional recognition, the number of Indian nations receiving congressional recognition, and the furthest advance of bills in the legislative process over time. I used comparative analysis to determine how frequently Indian nations pursued and received legislative and administrative recognition. I supplemented this analysis with a review of congressional testimony. I relied on a number of secondary sources, including case studies of individual tribes' experiences in the recognition process, to confirm and cast suspicions on certain findings.⁷⁶

D. Limits to the Study

I chose a quantitative study of all tribal federal recognition bills to capture a broader and more systematic picture of recognition in the United States than that provided in the existing literature. The benefit of the study is that it allows more of a bird's-eye view that supplements many of the existing case studies done on particular cases of recognition. I capture and describe overall patterns and frequencies of behavior over time. I have not attempted to explain these patterns. Nor have I tried to explain why some tribes obtain recognition and others do not.⁷⁷

The major downside is that the data do not necessarily provide any detailed information about any particular case. As a result, I cannot tell the stories behind

74. See *supra* Part I.

75. I did not expect recognitions to decline generally over time due to recent estimates of the number of nonfederally recognized tribes, see U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 24, at 1, and the number of outstanding petitions that the OFA has yet to evaluate. At some point, the number of federal recognitions should decrease as there is a finite number of tribes.

76. Social scientists commonly refer to using multiple techniques and sources to check the deficiencies of each as triangulation. For more information on triangulation, see MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 16–17 (1994).

77. While I did not investigate fully why some tribes receive congressional recognition and others do not, I did run Pearson's Chi Square tests to see if the variables correlated with congressional recognition. See generally LEE EPSTEIN & ANDREW D. MARTIN, *AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH* 165–171 (2014). Using congressional recognition as the dependent variable, I found correlations significant at the 0.05 level for the kind of recognition, region, and strategy. Party in control of Congress was significant at the 0.1 level. The full results of these tests are available upon request.

most of the bills. Rich, detailed, and sometimes disturbing stories accompany each of the bills in the dataset and flesh out how politicized, controversial, and messy federal recognition is.⁷⁸ I supplemented the bills with congressional testimony on federal recognition to add richness and some level of detail, but it does not compare to a detailed case study of each of the bills.

Another limit to the study is that it does not include any information prior to 1975. As a result, the study excludes data on the recognition of the vast majority of Indian nations in the United States because they were recognized in the nineteenth or early twentieth centuries.⁷⁹ The study also does not include data on the restoration of some of the tribes terminated by the federal government in the 1950s. For example, due to the time period, the study does not include the restoration of the Menominee Tribe in 1973.⁸⁰

III. REVEALING CONGRESS'S REAL ROLE IN FEDERAL RECOGNITION

This Part debunks the common misconception that Congress does not play an active role in federal recognition, leaving the OFA to emerge as the primary institution recognizing Indian nations. It answers four questions about the congressional role in recognition: (1) How often does Congress extend recognition and how does this compare to the OFA? (2) Who receives congressional recognition? (3) How frequently does Congress restrict tribal authority in congressional recognitions? (4) How frequently do tribes engage in both the congressional and administrative processes? By illuminating the unusual role that Congress plays, it uncovers the legislative-administrative multiplicity that dominates federal recognition.

A. Frequency of Congressional Recognitions

The amount of federal recognition legislation introduced and enacted by Congress reveals that Congress remains an active player in the process. To understand the congressional role, Part III.A discusses the number of bills in Congress and their rate of enactment as well as the sheer number of tribes recognized by Congress from 1975 to 2013. It then compares this data to similar data on tribes recognized through the administrative process during the same time period.

Table 1 demonstrates that Congress has played a considerable role in recognition. It shows that members of Congress have introduced federal recognition bills in every congressional session during the time period studied. From 1975 to 2013, members of Congress introduced 178 bills, seeking to extend recognition to 72 different Indian

78. Some of these stories receive fuller treatment in the literature. *See, e.g.*, CRAMER, *supra* note 3, at 137 (describing the backlash to the Mashantucket Pequot Tribe's federal recognition); KLOPOTEK, *supra* note 3 (telling the stories of the Mowa Band of Choctaws, the Jena Band of Choctaws, and the Tunica-Biloxi Tribe); Moberg & Moberg, *supra* note 4 (recounting the experiences of the United Houma Nation while seeking legislative recognition); Wilkins, *supra* note 4 (discussing the Lumbee Tribe).

79. For information on federal recognition prior to 1975, see U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 28, at 21–23.

80. Menominee Restoration Act of 1973, 25 U.S.C. §§ 903–903g (2012).

nations. Each Congress varied in its willingness to recognize Indian nations through legislation; but recognition remained on the agenda in every congressional session. The data thus indicate that while the ability of a tribe to secure recognition may depend on the composition of Congress and the timing of the bill, among other factors, at least some members of Congress are engaged in the issue and willing to introduce bills.⁸¹

Table 1. Federal recognition bills by Congress

Congress	Party in Control	Introduced	Enacted	Percentage Enacted
94 th (1975–77)	Dem.	5	0	—
95 th (1977–79)	Dem.	5	3	60%
96 th (1979–81)	Dem.	4	2	50%
97 th (1981–83)	Split	6	2	33%
98 th (1983–85)	Split	7	3	43%
99 th (1985–87)	Split	3	1	33%
100 th (1987–89)	Dem.	14	3	21%
101 st (1989–91)	Dem.	17	2	12%
102 nd (1991–93)	Dem.	16	1	6%
103 rd (1993–95)	Dem.	20	6	29%
104 th (1995–97)	Rep.	5	0	—
105 th (1997–99)	Rep.	5	0	—
106 th (1999–2001)	Rep.	13	1	8%
107 th (2001–03)	Rep./Split	6	0	—
108 th (2003–05)	Rep.	7	0	—
109 th (2005–07)	Rep.	9	0	—
110 th (2007–09)	Dem.	13	0	—
111 th (2009–11)	Dem.	13	0	—
112 th (2011–13)	Split	10	0	—
Totals		178	24	13%

Comparison of the number of tribes recognized in the legislative and administrative processes reveals the extent of congressional engagement on recognition issues. The data show that Congress has recognized more Indian nations than the OFA and that both legislative and administrative recognitions have decreased since 2001. Figure 1 compares the number of tribes receiving congressional recognition with the number of tribes acknowledged through the administrative process. It indicates that more tribes, in sheer numbers, have received recognition in the legislative than the administrative process. Congress recognized 32 tribes while the OFA only acknowledged 17 tribes through the administrative process from 1979 to 2013.⁸²

81. In particular, the data suggests that a tribe had a better chance of getting a federal recognition bill enacted in the 94th through 103rd Congresses than in the 107th through 112th Congresses.

82. Congress recognized six tribes during the time period studied but before the implementation of the administrative process in 1978. These six tribes are the Pascua Yaqui Tribe, the Siletz Tribe, the Modoc Tribe of Oklahoma, the Ottawa Tribe of Oklahoma, the

The data also demonstrate that tribes seeking congressional recognition have a higher success rate than tribes in the administrative process. From 1975 to 2013, the OFA has resolved 55 petitions and recognized 17 Indian nations through 25 C.F.R. § 83.⁸³ Accordingly, tribes have a success rate of 31 percent (17 of 55) in the administrative process.⁸⁴ In comparison, members of Congress have introduced 178 bills seeking to extend recognition to 72 Indian nations from 1975 to 2013.⁸⁵ Of those 72 tribes, Congress has recognized 32 Indian nations, making the success rate 44.5 percent.⁸⁶ Thus, congressional recognition has been almost 1.5 times more effective during this period than recognition through the administrative process. Even if the six tribes receiving congressional recognition before the establishment of the OFA in 1978 are excluded from the analysis, a higher percentage (39.4 percent) of Indian nations received congressional recognition than the percentage of Indian nations receiving administrative recognition.⁸⁷ Thus, the data indicate that scholars have overemphasized the role of the OFA in recognition while downplaying the role played by Congress.

Peoria Tribe of Oklahoma, and the Wyandotte Tribe of Oklahoma.

83. BUREAU OF INDIAN AFFAIRS, STATUS SUMMARY OF ACKNOWLEDGMENT CASES (2013), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024435.pdf> [<https://perma.cc/ZGZ3-PQEB>].

84. The BIA reports that it has resolved 55 petitions in total and 51 petitions through the administrative process. *Id.* Tribes have a higher success rate in Congress even if the number of petitions granted through the administrative process is used rather than the total number of petitions resolved (33 percent or 17 of 51). The BIA's final decisions for recognition of the Pamunkey Tribe and against recognition of the Duwamish Tribe in 2015 also do not affect these numbers. The percentage of tribes recognized administratively remains 31 percent (18 of 57) and 33 percent respectively (18 of 53).

85. For a full list of the tribes, see *infra* Methodological Appendix.

86. Congress has extended federal recognition to the Pasqua Yaqui twice, but I only counted it once. An Act To Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona, Pub. L. No. 95-375, 92 Stat. 712 (1978) (originally proposed as S.1633, 95th Cong.); An Act To Amend the Act Entitled "An Act To Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona", Pub. L. No. 103-357, 108 Stat. 3418 (1994) (originally proposed as H.R. 734, 103d Cong.). For a list of the 33 tribes, see *infra* Methodological Appendix.

87. I generated 39.4 percent by taking the number of tribes receiving congressional recognition after 1978 (32 total minus 6 before 1978 equals 26) and dividing it by the number of tribes in federal recognition bills after 1978 (72 total minus 6 before 1978 equals 66). Actually, this number is somewhat suppressed because the Pascua Yaqui received recognition both before and after 1978. I have only included the first congressional recognition of the Pascua Yaqui in 1978. If I included the second, both percentages would be higher. (33 of 72 equals 45.8 percent and 27 of 66 equals 40.9 percent respectively).

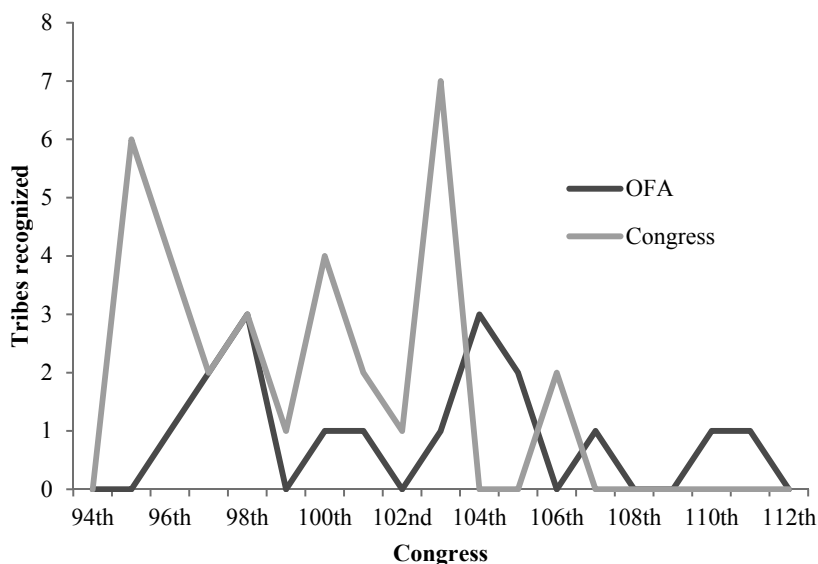


Figure 1. Number of tribes federally recognized from 1975 to 2013

While the data demonstrate congressional involvement in federal recognition, they also suggests that Congress has recently been more reluctant to recognize Indian nations than before. Congress has not extended recognition to an Indian nation since 2000 (the 106th Congress). The data do not explain this trend away from extending congressional recognition to Indian nations. It could be a reflection of a change in Congress’s stance on congressional recognition, of larger legislative trends in Congress,⁸⁸ or of a general decline in recognitions.⁸⁹ Significantly, as figure 1 shows, federal recognitions in general have decreased since the 106th Congress. The OFA only recognized three tribes through the section 83 process between 2000 and 2013.⁹⁰

88. The decrease in the number of federal recognition bills enacted is consistent with a general trend of fewer bills passing in Congress after the 106th Congress. *See* Carlson, *Congress and Indians*, *supra* note 8, at 114 tbl.2, 117 tbl.3 (comparing legislative enactment rates generally from 1975 to 2013).

89. There are several possible explanations for the overall decline in recognitions. First, there may be a finite number of tribes eligible for recognition, and, as a result, recognitions will decrease over time as all the tribes that should be recognized are recognized. For reasons I explain in footnote 0, I do not think we have reached this point. Further, this explanation assumes that at some point nonfederally recognized tribes unsuccessful in the administrative and/or legislative process will stop seeking recognition. As shown in Part III.D, some tribes have refused to give up. Upon denial by the OFA, they seek recognition legislatively. A second possible explanation is that Congress and the OFA have recognized all the “easy” cases and this has led to the decrease. This explanation presupposes a way to identify the “easy” cases. I have not tried to establish such criteria. If restorations are used as a proxy for “easy” cases (and I do not mean to suggest it is a good one), then the data indicate limited support for the proposition that congressional recognitions have declined because Congress has recognized all the “easy” cases by restoring several, but not all, of the terminated tribes.

90. The three tribes recognized administratively between 2000 and 2013 are the Cowlitz

The decline in congressional recognitions has not translated into a decrease in the number of bills introduced.⁹¹ Figure 2 shows fluctuations in the number of recognition bills introduced over time. A consistent decline in the number of bills introduced did not occur after the 106th Congress. In fact, the number of bills increased from the 107th to the 110th Congresses.

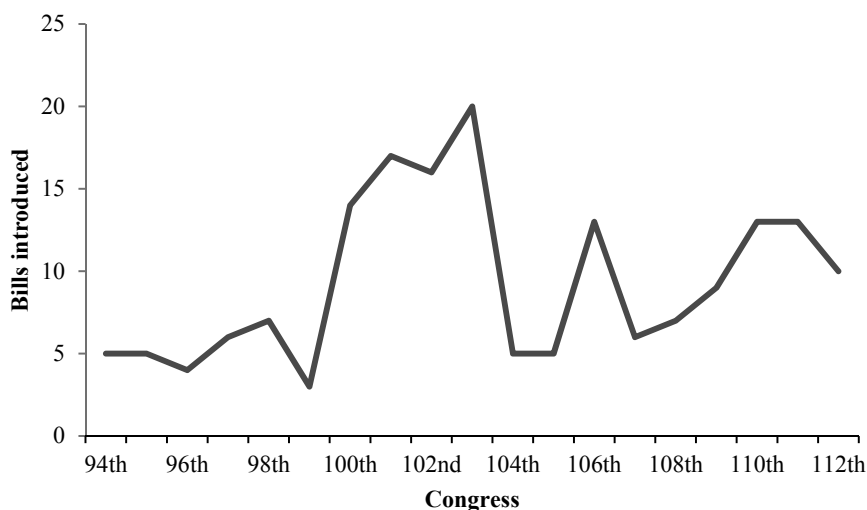


Figure 2. All federal recognition bills introduced by Congress

Even if recent Congresses appear less willing to enact recognition bills, Congress continues to play a role in recognition.⁹² First, as figure 2 shows, members of

Tribe of Indians, the Mashpee Wampanoag, and the Shinnecock Indian Nation. *Decided Cases: Petitions Resolved by DOI*, U.S. DEPARTMENT INTERIOR: INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/AS-IA/OFA/DecidedCases/index.htm> [https://perma.cc/2KSH-9PDX] (last updated Feb. 18, 2016). Since 2013, the OFA has recognized one more tribe through the administrative process, the Pamunkey Indian Tribe. Final Determination for Federal Acknowledgment of the Pamunkey Indian Tribe Rule, 80 Fed. Reg. 39,144 (July 8, 2015).

91. BIA officials have reported that the number of the OFA petitions has not decreased either. *Recommendations for Improving the Federal Acknowledgment Process: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 70 (2008) (statement of Carl Artman, Assistant Secretary of Indian Affairs, Department of the Interior).

92. I did not consider the motivations legislators could have for introducing tribal federal recognition bills. To get a bill introduced, a nonfederally recognized tribe has to surmount serious hurdles given their marginalized political status. Many do this by soliciting state and local support. See, e.g., *Federal Acknowledgment of Various Indian Groups: Hearing Before the H. Comm. on Interior and Insular Affairs*, 102d Cong. 446 (1992) (testimony of Russell Baker, Jr., Alabama Indian Affairs Commission) (state support for MOWA Band of Choctaw); *id.* at 491 (testimony of Diane S. Williamson, Governor's Commission on Indian Affairs) (state support for Jena Band of Choctaw). For example, the state of Virginia passed a resolution supporting legislation, which would recognize six tribes in Virginia, and the governor testified for the bill. See, e.g., *The Thomasina E. Jordan Indian Tribes of Virginia*

Congress continue to introduce these bills. Members of Congress introduced 58 bills after the 106th Congress. Second, of these 58 bills, 23 or 40 percent did not simply die in committee like the majority of bills introduced in Congress.⁹³ Figure 3 displays the legislative progress of recognition bills introduced after the 106th Congress. During this time period, congressional committees have held hearings on 18 bills⁹⁴ and have favorably reported out of committee 13 bills for consideration by the entire

Federal Recognition Act and the Grand River Band of Ottawa Indians of Michigan Referral Act: Hearing Before the S. Comm. on Indian Affairs 109th Cong. (2006). The exception is the Catawba Tribe of South Carolina, which had its settlement act enacted even without active support from the state. *Federal Acknowledgment of Various Indian Groups: Hearing Before the H. Comm. on Interior and Insular Affairs*, 102d Cong. 407 (1992) (testimony of E. Fred Sanders, assistant chief, Catawba Indian Nation).

Conversely, many of the tribes that face tremendous state or local opposition have not sought congressional recognition. For example, no tribe in Connecticut has sought congressional recognition since the Mashantucket Pequot Tribe. After receiving recognition, the Mashantucket Pequot Tribe faced extensive, racialized challenges both to their federal recognition and their gaming enterprises. CRAMER, *supra* note 3, at 137. State officials and members of Congress from Connecticut have vigorously opposed federal recognition of other Connecticut tribes, Schaghticoke Acknowledgment Repeal Act of 2005, H.R. 1104, 109th Cong. (2005); *Federal Recognition and Acknowledgement Process by the Bureau of Indian Affairs: Oversight Hearing Before the House Comm. on Resources*, 108th Cong. (2004), which may have deterred Connecticut tribes from seeking congressional recognition. In fact, Ramapough Chief Ronald Red Bone Van Dunk has suggested that his New Jersey-based tribe, which was denied administrative recognition, has not pursued legislative recognition because of the opposition it would face from Atlantic City. MILLER, *supra* note 3, at 253.

93. THEODORE J. LOWI, BENJAMIN GINSBERG & KENNETH A. SHEPSLE, *AMERICAN GOVERNMENT: POWER AND PURPOSE* 194 (10th core ed. 2008).

94. The number of hearings does not match the number of bills with a hearing only in figure 3 because figure 3 reports the furthest progress that the bills made in the legislative process, not whether a committee held a hearing on the bill. Some bills progress further in the legislative process than a hearing. Congressional committees held hearings on the following bills: Little Shell Tribe of Chippewa Indians Restoration Act of 2011, S. 546, 112th Cong. (2011); Indian Tribes of Virginia Federal Recognition Act of 2011, S. 379, 112th Cong. (2011); Indian Tribes of Virginia Federal Recognition Act of 2009, S. 1178, 111th Cong. (2009); Little Shell Tribe of Chippewa Indians Restoration Act of 2009, H.R. 3120, 111th Cong. (2009); Chinook Nation Restoration Act, H.R. 3084, 111th Cong. (2009); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2009, H.R. 1385, 111th Cong. (2009); Burt Lake Band of Ottawa and Chippewa Indians Reaffirmation Act, H.R. 1358, 111th Cong. (2009); Burt Lake Band of Ottawa and Chippewa Indians Reaffirmation Act, H.R. 1575, 110th Cong. (2008); Muscogee Nation of Florida Federal Recognition Act, S. 514, 110th Cong. (2007); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2007, H.R. 1294, 110th Cong. (2007); Little Shell Tribe of Chippewa Indians Restoration Act of 2007, S. 724, 110th Cong. (2007); Lumbee Recognition Act, S. 660, 109th Cong. (2006); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2005, S. 480, 109th Cong. (2005); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2003, S. 1423, 108th Cong. (2003); Lumbee Acknowledgment Act of 2003, S. 420, 108th Cong. (2003); Lumbee Recognition Act, H.R. 898, 108th Cong. (2003); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2002, S. 2694, 107th Cong. (2002); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2001, H.R. 2345, 107th Cong. (2001).

chamber.⁹⁵ Significantly, 4 bills passed one house of Congress during this time period.⁹⁶

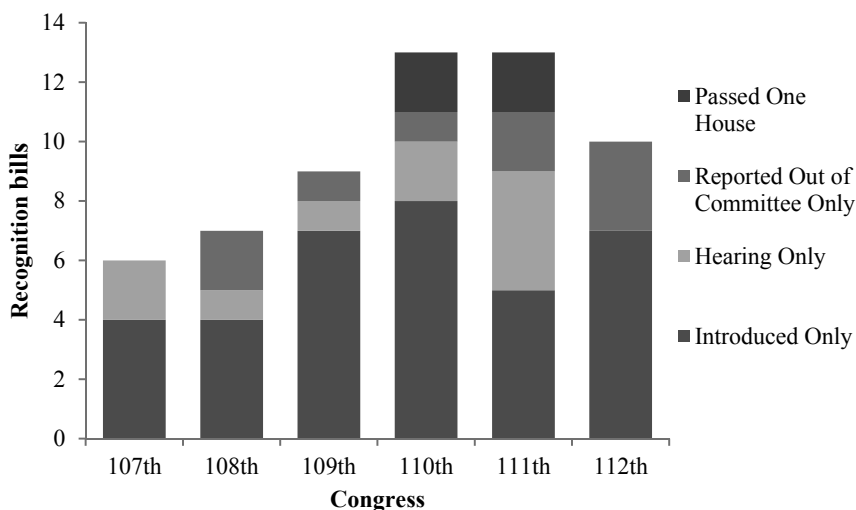


Figure 3. Legislative progress of recognition bills by Congress

Figure 3 further demonstrates that activity on recognition bills is not consistently decreasing over time as would be expected if Congress had ceded recognition to the OFA. While activity decreased slightly in the 107th Congress, it has since increased. Figure 3 suggests that at least some members of Congress remain interested in

95. The number does not match the number of bills reported out of committee only in figure 3 because figure 3 reports the furthest progress that the bills made in the legislative process, not whether a committee reported out the bill. Some bills progress further in the legislative process than a committee report. Congressional committees reported favorably on the following bills: Lumbee Recognition Act, S. 1218, 112th Cong. (2011); Little Shell Tribe of Chippewa Indians Restoration Act of 2011, S. 546, 112th Cong. (2011); Indian Tribes of Virginia Federal Recognition Act of 2011, S. 379, 112th Cong. (2011); Lumbee Recognition Act, S. 1735, 111th Cong. (2010); Indian Tribes of Virginia Federal Recognition Act of 2009, S. 1178, 111th Cong. (2009); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2009, H.R. 1385, 111th Cong. (2009); Lumbee Recognition Act, H.R. 31, 111th Cong. (2009); Lumbee Recognition Act, H.R. 65, 110th Cong. (2008); Burt Lake Band of Ottawa and Chippewa Indians Reaffirmation Act, H.R. 1575, 110th Cong. (2007); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2007, H.R. 1294, 110th Cong. (2007); Lumbee Recognition Act, S. 660, 109th Cong. (2006); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2003, S. 1423, 108th Cong. (2003); Lumbee Acknowledgment Act of 2003, S. 420, 108th Cong. (2003).

96. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2009, H.R. 1385, 111th Cong. (2009); Lumbee Recognition Act, H.R. 31, 111th Cong. (2009); Lumbee Recognition Act, H.R. 65, 110th Cong. (2008); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2007, H.R. 1294, 110th Cong. (2007).

extending recognition through legislation and that Congress remains involved in congressional recognition of Indian nations.⁹⁷

The data demonstrate that Congress continues to play a considerable role in federal recognition and has not been eclipsed by the OFA. But the data tell us very little about the role Congress actually plays in recognition. The next parts take a closer look at Congress's role in recognition and its relationship with the administrative process.

B. Recipients of Congressional Recognition

Since 1975, members of Congress have introduced legislation to extend congressional recognition to a wide variety of Indian nations. This Part analyzes recognition bills introduced and enacted by Congress. It describes the Indian nations involved in the congressional recognition process during the time period studied. It provides information on the kind of recognition Congress considered extending and the locations of the tribes seeking recognition. This information paints a more complete picture of the congressional role.

1. Kind of Recognition

This Part considers whether Congress is more likely to recognize tribes under certain conditions. It uses the three categories of recognition suggested by the literature: recognition, restoration, and reaffirmation.⁹⁸ These categories matter because only Congress can restore a tribe that it has terminated, which suggests that Congress might be more likely to restore tribes than recognize or reaffirm them.⁹⁹ The data, however, indicate that Congress extends recognition to all three categories of tribes. This finding suggests that Congress serves as an alternative to the administrative process rather than as a mere corrective entity (as would be the case if it only recognized tribes excluded from the administrative process).

Members of Congress have styled recognition bills using the three categories of recognition, restoration, and reaffirmation. Members of Congress have introduced 26 bills to reaffirm 9 tribes, 33 bills to restore 28 tribes, and 120 bills to recognize 35 tribes.¹⁰⁰ Figure 4 displays the number of bills by kind that members of Congress introduced. It also shows how the kinds of bills introduced have fluctuated over time. While the numbers of recognition, restoration, and reaffirmation bills introduced were fairly consistent early on (until the 99th Congress), they vary tremendously after that. Recognition bills increased greatly until the 102nd Congress, plummeted

97. A review of recent congressional hearings on federal recognition confirms this conclusion. *See, e.g., Recommendations for Improving the Federal Acknowledgement Process: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 72 (2008) (statement of Sen. Byron Dorgan); *Lumbee Recognition Act: Hearing on S. 660 Before the S. Comm. on Indian Affairs*, 109th Cong. 11 (2006) (statement of Sen. Elizabeth Dole).

98. *See infra* Methodological Appendix.

99. *Frequently Asked Questions*, U.S. DEPARTMENT INTERIOR: INDIAN AFFAIRS, <http://www.bia.gov/FAQs/> [<https://perma.cc/3G3X-CFFJ>] (last updated Apr. 11, 2016).

100. The numbers do not total 178 because one of the bills included both recognition and restoration, so I counted it as both.

over the next three Congresses, then rebounded in the 106th only to fall again in the 107th. Restoration bills have oscillated up and down since the 99th Congress, and reaffirmation bills peaked in the 103rd. Since the 107th Congress, the number of bills to recognize tribes has increased while the number of bills to restore or reaffirm tribes has declined.

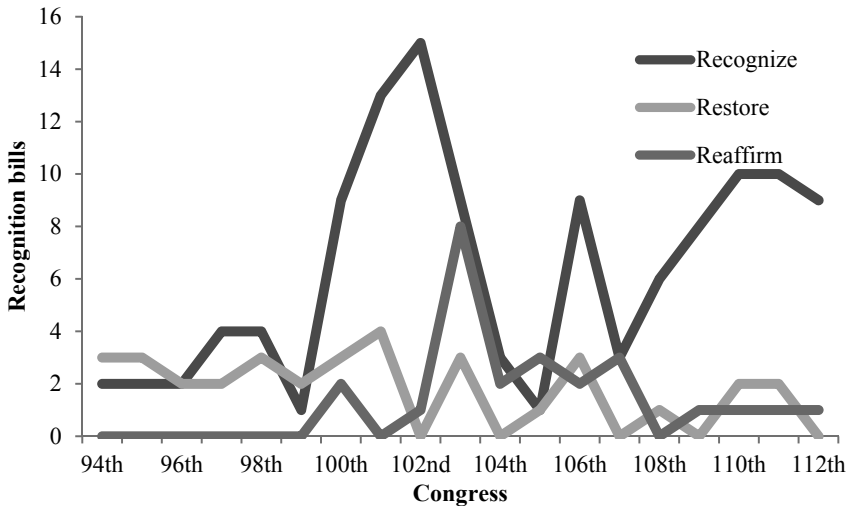


Figure 4. Kinds of recognition bills introduced by Congress

Figure 4 shows that tribes have sought each kind of recognition in the legislative process. It does not, however, provide any information about the *kinds* of tribes that Congress recognizes. Still, the willingness of members of Congress to introduce all three kinds of bills shows that Congress plays an expansive role in recognition.

Figure 5 shows that, of all the legislatively recognized tribes, restored tribes constituted 53 percent, newly recognized tribes comprised 31 percent, and reaffirmed tribes made up 16 percent. This suggests that the higher percentage of legislatively recognized tribes during the time period studied does not simply reflect Congress's exclusive authority to restore terminated tribes.¹⁰¹

101. Because terminated tribes cannot petition the OFA, one might expect a higher number of legislatively recognized tribes than administratively recognized tribes during the time period studied. Analyzing the data by the kind of tribe demonstrates that recognition of terminated tribes is not artificially inflating the number of legislatively recognized tribes. The ten tribes recognized by Congress are: Pascua Yaqui Tribe of Arizona (twice), Passamaquoddy Tribe, Penobscot Nation, Houlton Band of Maliseet Indians, Texas Band of Kickapoo, Mashantucket Pequot Indians, Aroostook Band of Micmacs, Catawba Indian Tribe of South Carolina, the Yurok Tribe, and the Shawnee Tribe. While Congress has recognized the Pascua Yaqui Tribe twice, I only counted it once. For a list of the bills recognizing each of these tribes, see Methodological Appendix, *infra*.

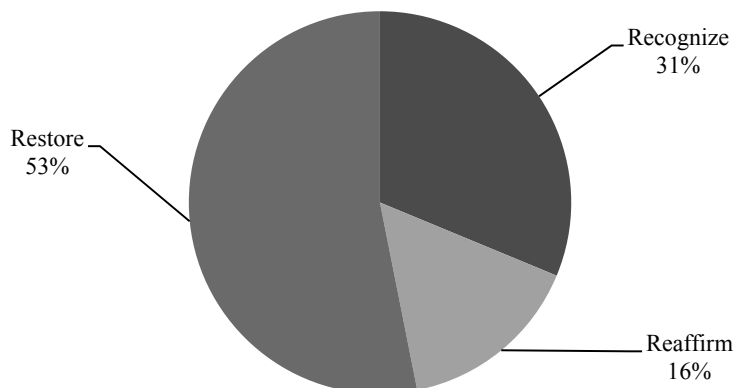


Figure 5. Enactment rates of recognition bills by kind, 94th through 112th Congresses

As expected, Congress restored a number of terminated tribes during the time period studied. In fact, Congress is more likely to restore a previously terminated tribe than to affirm or recognize a tribe. As Figure 5 shows, 17 of the 32 tribes (53 percent) receiving congressional recognition were terminated tribes that Congress restored.¹⁰² This finding reflects the fact that only Congress can restore a terminated tribe and the longstanding presumption that a previous relationship with the United States is *prima facie* evidence of tribal existence.¹⁰³

The proportion of bills enacted by kind suggests that tribes seeking restoration and reaffirmation have been more successful in the legislative process than tribes seeking recognition. Seventeen out of 28, or 60.7 percent, of the tribes seeking

102. Congress restored the following tribes during the time period studied: Confederated Tribes of Siletz Indians, Modoc Tribe of Oklahoma, Wyandotte Tribe of Oklahoma, Peoria Tribe of Indians of Oklahoma, Ottawa Tribe of Oklahoma, Paiute Indian Tribe of Utah, Cow Creek Band of Umpqua Tribe of Indians, Confederated Tribes of Grand Ronde, Klamath Tribe of Indians, Confederated Tribes of Coos, Lower Umpqua and Siuslaw, Ysleta del Sur Pueblo, Alabama and Coushatta Indian Tribes of Texas, Coquille Tribe of Indians, Ponca Tribe of Nebraska, United Auburn Indian Community of the Auburn Rancheria of California, Paskenta Band of Nomlaki Indians of California, and Graton Rancheria of California. For a list of the bills restoring each of these tribes, see Methodological Appendix, *infra*.

103. The 1994 revisions to the federal regulations made it easier for tribes with evidence of a previous treaty or administrative relationship with the federal government to obtain federal recognition through that process. See MILLER, *supra* note 3, at 75. These revisions may have responded to congressional testimony by tribes with evidence of a previous treaty or administrative relationship with the federal government and their success in obtaining congressional recognition in the early 1990s. See, e.g., An Act To Restore Federal Services to the Pokagon Band of Potawatomi Indians, Pub. L. No. 103-323, 108 Stat. 2152 (1994) (originally proposed as S. 1066, 103d Cong.); Little Traverse Bay Band of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, 108 Stat. 2156 (1994) (originally proposed as S. 1357, 103d Cong.); *Michigan Indian Recognition: Hearing on H.R. 2376 and H.R. 878 Before the H. Subcomm. on Native Am. Affairs*, 103d Cong. (1993).

restoration have received it from Congress. In comparison, 55.7 percent (5 of 9) of tribes in reaffirmation bills and 28.6 percent (10 of 35) of tribes named in recognition bills have received congressional recognition. This suggests that tribes seeking restoration or reaffirmation may have an easier time in the legislative process than tribes seeking recognition. Even these findings, however, depend on the congressional session. Figure 6 shows that the kind of recognition granted to tribes varies by congressional session.

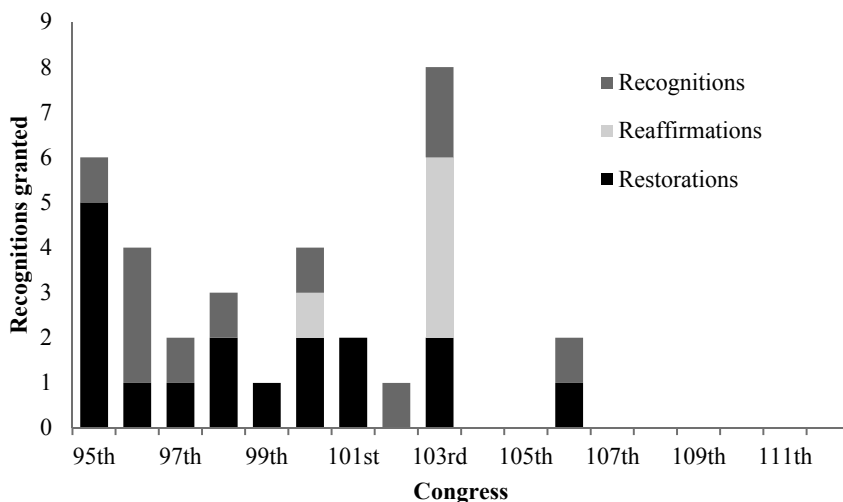


Figure 6. Kinds of recognition granted to tribes by Congress

Figure 6 indicates that many of the earliest legislative recognitions restored terminated tribes, and the numbers of restorations have declined over time. Congress has increasingly granted fewer legislative recognitions over time; however, when Congress has granted recognition, it has transitioned from granting restorations to granting recognitions and reaffirmations. This confirms the earlier finding that the congressional role has not been limited to restoring terminated tribes. This finding is significant because, contrary to expectations, Congress has served as an alternative competing with the administrative process rather than just supplementing it by restoring terminated tribes.

2. Geographic Location

Many critics of the administrative process have suggested that it does not accommodate regional differences and thus makes it harder for tribes in the South and East to obtain federal recognition.¹⁰⁴ Others note that the OFA has only

104. See *Oversight of the Federal Acknowledgment Process: Hearing Before the S. Select Comm. on Indian Affairs*, 98th Cong. 48 (1983) (statement of Arlinda Locklear, Staff Att’y, Native American Rights Fund); *id.* at 49 (statement of Julian T. Pierce, Exec. Director, Lumbee River Legal Services, Inc.); Wilkins, *supra* note 4, at 127–30. For the OFA’s list of the number of petitioners by state as of November 12, 2013, see BUREAU OF INDIAN AFFAIRS,

recognized one California tribe and suggest that the particular history of California complicates the efforts of tribes there.¹⁰⁵ This Part considers the geographic location of tribes receiving congressional recognition. It provides more detailed information on which tribes Congress recognizes and compares it with data on the administrative process. The data show that Congress has been more likely to recognize tribes from the Northeast than tribes in other regions and more willing to recognize California and Southern tribes than the OFA.¹⁰⁶

Members of Congress have introduced 11 bills to recognize 5 tribes in the Northeast, 81 bills to recognize 25 tribes in the South, 55 bills to recognize 33 tribes in the West, and 33 bills to recognize 9 tribes in the Midwest.¹⁰⁷ Figure 7 shows the breakdown of bills by region over time.

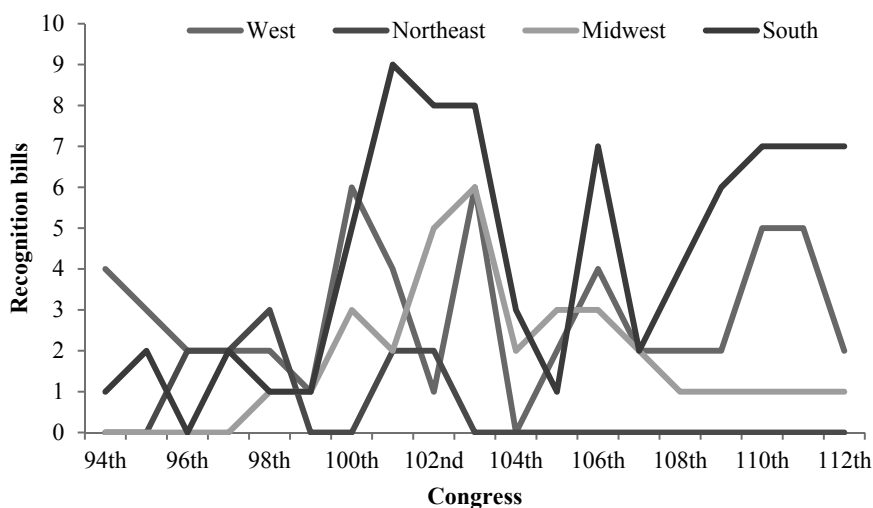


Figure 7. Introduced recognition bills by region by Congress

NUMBER OF PETITIONS BY STATE AS OF NOVEMBER 12, 2013 (2013), *available at* <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024416.pdf> [<https://perma.cc/FD2C-3U63>].

105. The OFA has recognized one tribe, the Death Valley Timbisha Shoshone Band, BUREAU OF INDIAN AFFAIRS, STATUS SUMMARY OF ACKNOWLEDGMENT CASES (2013), *available at* <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024435.pdf> [<https://perma.cc/KM7N-9LVR>], with lands in both California and Nevada. *See* Timbisha Shoshone Homeland Act, Pub. L. No. 106-423, 114 Stat. 1876 (2000). The distinctive history of California has raised concerns about the need for a specialized process for recognizing tribes there. *See, e.g., California Tribal Status Act of 1991: Hearing on H.R. 2144 Before the H. Comm. on Interior and Insular Affairs*, 102d Cong. 81 (1991) (statement of Ronal Eden, Director, Office of Tribal Services of the Bureau of Indian Affairs).

106. *See infra* Figure 8.

107. The numbers do not total 178 because some of the bills included tribes in more than one region and I included them in both regions.

Congressional recognitions vary by region. Congress has extended recognition to all 5 of the tribes in the Northeast seeking congressional recognition.¹⁰⁸ None of these congressional recognitions were restorations or reaffirmations; they were all recognitions included in a land claims settlement.¹⁰⁹ Congress enacted all of these bills between 1978 and 1991.

Congress has less frequently extended congressional recognition to tribes in other regions of the country. Five of the 9 tribes, or 55.6 percent, from the Midwest seeking recognition have received congressional recognition.¹¹⁰ Congress reaffirmed four of these tribes and restored the fifth.¹¹¹ Western tribes fare slightly less well than Midwestern tribes. Thirteen of 33 tribes (39.4 percent) in the West received congressional recognition, and 10 of these were restorations.¹¹² Recognitions of tribes from the South lag furthest behind, with Congress extending recognition to only 9 of 25 tribes (36 percent).¹¹³ This may change, however, as the bills that have made the most progress recently involve Southern tribes.¹¹⁴

108. The five tribes are the Passamaquoddy Tribe (Me.), Penobscot Nation (Me.), Houlton Band of Maliseet Indians (Me.), Mashantucket Pequot Tribe (Conn.), and Aroostook Band of Micmacs (Me.). For a list of the bills recognizing these tribes, see *infra* Methodological Appendix.

109. See sources cited *supra* note 108.

110. The five tribes are: Little Traverse Bay Bands of Odawa Indians, Little River Band of Ottawa Indians, Pokagon Band of Potawatomi Indians, Lac Vieux Desert Band of Lake Superior Chippewa Indians, and the Ponca Tribe of Nebraska. For a list of the bills recognizing these tribes, see *infra* Methodological Appendix.

111. The four reaffirmed tribes are Little Traverse Bay Bands of Odawa Indians, Little River Band of Ottawa Indians, Pokagon Band of Potawatomi Indians, and Lac Vieux Desert Band of Lake Superior Chippewa Indians. Congress restored the Ponca Tribe of Nebraska. For a list of the bills recognizing these tribes, see *infra* Methodological Appendix.

112. The ten restored tribes are as follows: United Auburn Indian Community of the Auburn Rancheria of California, Coquille Tribe of Indians, Cow Creek Band of Umpqua Tribe of Indians, Klamath Tribe of Indians, Graton Rancheria of California, Paskenta Band of Nomlaki Indians of California, Confederated Tribes of Grand Ronde, Confederated Tribes of Coos, Lower Umpqua and Siuslaw, Paiute Indian Tribe of Utah, and the Confederated Tribes of Siletz Indians. Congress reaffirmed the Central Council of the Tlingit and Haida Indian Tribes of Alaska and recognized the Yurok Tribe and the Pascua Yaqui Tribe of Arizona. For a list of the bills recognizing these tribes, see *infra* Methodological Appendix.

113. The Southern tribes are Peoria Tribe of Indians of Oklahoma, Ottawa Tribe of Oklahoma, Modoc Tribe of Oklahoma, Wyandotte Tribe of Oklahoma, Ysleta del Sur Pueblo, Alabama and Coushatta Indian Tribes of Texas, Shawnee Tribe, Catawba Indian Tribe of South Carolina, and Texas Band of Kickapoo. For a list of the bills recognizing these tribes, see *infra* Methodological Appendix. The data do not suggest why fewer tribes from the South have gained legislative recognition. Some scholars have suggested that tribes in the South have a harder time in the administrative process when they are racially mixed. KLOPOTEK, *supra* note 3, at 8–9.

114. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2009, H.R. 1385, 111th Cong. (2009); Lumbee Recognition Act, H.R. 31, 111th Cong. (2009); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2007, H.R. 1294, 110th Cong. (2007); Lumbee Recognition Act, H.R. 65, 110th Cong. (2008).

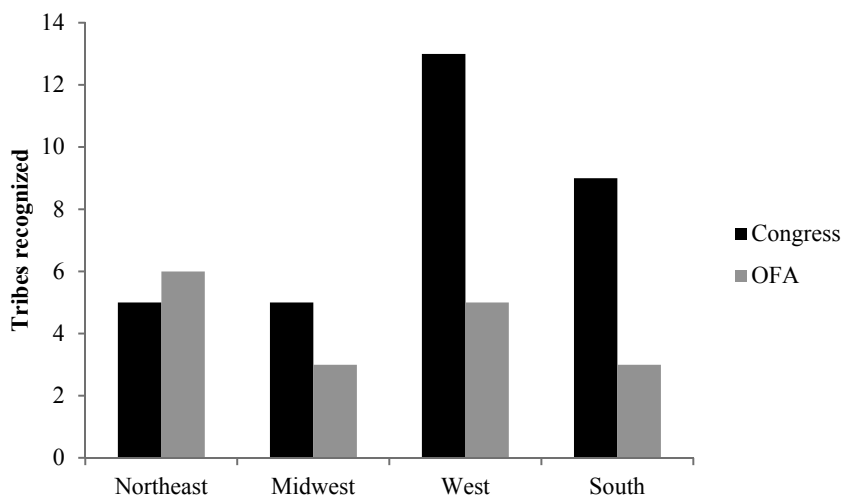


Figure 8. Number of tribes recognized by region, 1975 to 2013

Figure 8 compares the number of tribes recognized by region by the two processes. It shows that Congress has recognized more tribes in the Midwest, West, and South than the OFA. Most of the tribes gaining recognition through the administrative process—6 of 17 (35 percent)—reside in the Northeast.¹¹⁵ Tribes from the West have fared almost as well as Northeastern tribes in the administrative process, with the OFA recognizing five tribes located there.¹¹⁶ Of the Western tribes, only one includes lands in California.¹¹⁷ Congress, however, has recognized far more Western tribes (13), including four California tribes.¹¹⁸ Southern and Midwestern tribes tend to fare less well in the administrative process, with the OFA extending

115. I obtained the data on the number of tribes recognized by the OFA through the administrative process from the BIA website. BUREAU OF INDIAN AFFAIRS, STATUS SUMMARY OF ACKNOWLEDGMENT CASES (2013), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024435.pdf> [<https://perma.cc/ZGZ3-PQEB>]. This data was used to generate the comparisons between administrative and legislative recognitions. The six Northeastern tribes gaining recognition through the OFA are the Jamestown S’Klallam Tribe, Narragansett Indian Tribe, Wampanoag Tribe of Gay Head, Mohegan Tribe, Mashpee Wampanoag Tribe, and Shinnecock Indian Nation. While Congress has recognized the same number of Northeastern tribes, proportionally these tribes comprise a smaller percentage of all tribes congressionally recognized (15.6 percent or 5 of 32 tribes).

116. The five Western tribes are the Death Valley Timbisha Shoshone Band, San Juan Southern Paiute Tribe, Samish Indian Tribe, Snoqualmie Indian Tribe, and Cowlitz Indian Tribe. *Id.* In terms of proportions, Western tribes comprise 29 percent of all tribes recognized administratively (5 of 17) and 40 percent of all tribes recognized legislatively (13 of 32).

117. The Death Valley Timbisha Shoshone Band has lands in California and Nevada. *Id.*

118. The four California tribes are as follows: Graton Rancheria of California, Paskenta Band of Nomlaki Indians of California, United Auburn Indian Community of the Auburn Rancheria of California, and Yurok Tribe. None of these tribes had restrictions placed on their authority as part of their recognition. For a list of the bills recognizing these tribes, see *infra* Methodological Appendix.

recognition to only three Midwestern and three Southern tribes.¹¹⁹ In contrast, Congress has recognized two more Midwestern tribes and six more Southern tribes than the OFA.¹²⁰

C. Restrictions on Congressional Recognitions

A major difference in legislative and administrative recognition is that only Congress has the ability to restrict tribal authority as a condition of recognition. Some scholars have recently identified restrictions placed on tribal authority as a major risk that tribes face in pursuing congressional recognition.¹²¹ Others assume that restrictions on tribal authority as a condition of federal recognition have increased with the rise of gaming. Accordingly, to understand the differences between the congressional and administrative processes, we need to consider the nature and extent of these restrictions.

This Part analyzes the frequency and kinds of restrictions that Congress places on tribal authority in granting congressional recognition. It reports that the majority of tribal federal recognition bills do not include any restrictions on tribal authority as a condition of recognition. Further, many of the bills that include restrictions also affirm tribal authority. Of the 178 bills introduced during the time period studied, almost half (81 or 45.5 percent) included a restriction on tribal authority.¹²² These bills sought to restrict the authority of 31, or 43 percent, of the 72 tribes seeking congressional recognition.

Half of the 32 congressionally recognized tribes had restrictions placed on their recognition but restrictions on recognition decreased over time.¹²³ Moreover, one tribe, the Pascua Yaqui, later had these restrictions removed.¹²⁴ Another tribe, the

119. The three Southern tribes recognized by the OFA through the administrative process are the Poarch Band of Creek Indians, Tunica-Biloxi Tribe of Louisiana, and Jena Band of Choctaws of Louisiana. BUREAU OF INDIAN AFFAIRS, STATUS SUMMARY OF ACKNOWLEDGMENT CASES (2013), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024435.pdf> [<https://perma.cc/ZGZ3-PQEB>]. The three Midwestern tribes recognized by the OFA through the administrative process are the Grand Traverse Band of Ottawa and Chippewa Indians, Nottawaseppi Huron Band of the Potawatomi, and Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan. *Id.* All three of the Midwestern tribes reside in Michigan. Proportionally, Southern and Midwestern tribes constitute 17.6 percent (3 of 17) of all tribes recognized administratively and 28.1 percent (9 of 32) and 15.6 percent (5 of 32) of all tribes recognized legislatively.

120. See *supra* Figure 8.

121. See KLOPOTEK, *supra* note 3, at 258–59.

122. For a full list of the bills with restrictions, see *infra* Methodological Appendix.

123. The sixteen tribes are: Confederated Tribes of Siletz Indians, Mashantucket Pequot Indians, Klamath Tribe of Indians, Alabama and Coushatta Indian Tribes of Texas, Coquille Tribe of Indians, Confederated Tribes of Grand Ronde, Aroostook Band of Micmacs, Pascua Yaqui Tribe of Arizona, Paiute Indian Tribe of Utah, Passamaquoddy Tribe, Houlton Band of Malisleet Indians, Penobscot Nation, Catawba Indian Tribe of South Carolina, Texas Band of Kickapoo, Confederated Tribes of Coos, Lower Umpqua and Siuslaw, and Ysleta del Sur Pueblo. For a list of the bills recognizing these tribes, see *infra* Methodological Appendix.

124. An Act To Amend the Act Entitled “An Act To Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona”, Pub. L.

Alabama and Coushatta Indian Tribes of Texas, is currently advocating for the removal of restrictions placed on its recognition.¹²⁵

Restrictions vary by the kind of bill and frequently appear in bills recognizing and restoring tribes but only in one bill reaffirming a tribe.¹²⁶ Of the 81 bills including restrictions, 73 percent (59 of 81) are recognition bills and 26 percent (21 of 81) are restorations. Restrictions occur in all the settlement bills recognizing tribes from the Northeast.¹²⁷

Restrictions transcend the geographic location of the tribe, but they are the most common in bills recognizing tribes from the Northeast. The frequency of restrictions by location are as follows: 100 percent (11 of 11) are in bills involving Northeastern tribes;¹²⁸ 15.1 percent (5 of 33) in bills involving Midwestern tribes; 51.8 percent (42 of 81) in bills involving Southern tribes; and 41.8 percent (23 of 55) in bills involving Western tribes. This suggests that Southern and Northeastern tribes are more likely to face restrictions as a condition of their recognition.

Further analysis of the bills recognizing Indian nations reveals a long history of Congress's restricting or limiting recognition. Figure 9 shows the number of bills including restrictions by Congress during the time period studied. This finding contradicts the common assumption that restrictions have increased over time and that the number of restrictions has increased with the advent of Indian gaming.

No. 103-357, 108 Stat. 3418 (1994) (originally proposed as H.R. 734, 103d Cong.).

125. See Alabama-Coushatta Tribe of Texas Equal and Fair Opportunity Settlement Act, H.R. 1144, 113th Cong. (2013) (removing gaming restrictions in Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (1987)).

126. The only reaffirmation bill with a restriction is Winnemem Wintu Tribe Clarification and Restoration Act, S. 2879, 108th Cong. (2004).

127. Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, 105 Stat. 1143 (1991) (originally proposed as S. 374, 102d Cong.); Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 851 (1983) (originally proposed as S. 1499, 98th Cong.); Maine Land Claims Settlement Act of 1980, Pub. L. No. 95-420, 94 Stat. 1785 (1980) (originally proposed as H.R. 7919, 96th Cong.); Aroostook Band of Micmacs Settlement Act, H.R. 932, 102d Cong. (1991); Aroostook Band of Micmacs Settlement Act, S. 1413, 101st Cong. (1989); Mashantucket Pequot Indian Claims Settlement Act, S. 366, 98th Cong. (1983); Mashantucket Pequot Indian Claims Settlement Act, H.R. 982, 98th Cong. (1983); Mashantucket Pequot Indian Claims Settlement Act, S. 2719, 97th Cong. (1982); Mashantucket Pequot Indian Claims Settlement Act, H.R. 6612, 97th Cong. (1982); Maine Land Claims Settlement Act of 1980, S. 2829, 96th Cong. (1980).

128. See sources cited *supra* note 127.

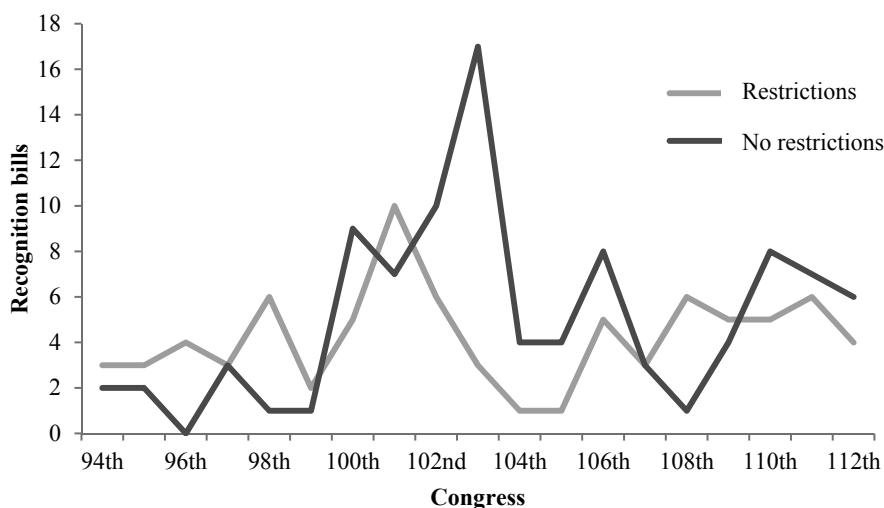


Figure 9. Recognition bills with restrictions by Congress

The proportion of recognition bills with restrictions varies by Congress. The rise of gaming, however, does not appear to have affected this variation. As Figure 9 shows, the number of bills with restrictions does not increase consistently after the enactment of the Indian Gaming Regulatory Act (IGRA) in the 100th Congress.¹²⁹ The data indicate that Congress has placed restrictions on recognitions since the mid-1970s. One of the first bills in the dataset, which extended certain federal benefits to the Pascua Yaqui Tribe, limited its federal recognition.¹³⁰ Although there is some evidence that it supported these restrictions in 1978, the Pascua Yaqui Tribe later pursued additional legislation to remove those limitations.¹³¹

Restrictions in recognition bills have decreased since the enactment of the IGRA in the 100th Congress.¹³² Members of Congress introduced 44 pre-IGRA bills and 26, or 59 percent, included restrictions.¹³³ Post-IGRA, members of Congress

129. 25 U.S.C. §§ 2701–2721 (2012).

130. A Bill To Provide for the Extension of Certain Federal Benefits, Services, and Assistance to Pascua Yaqui Indians of Arizona, H.R. 8411, 94th Cong. (1975).

131. See An Act To Amend the Act Entitled “An Act To Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona”, Pub. L. No. 103-357, 108 Stat. 3418 (1994) (originally proposed as H.R. 734, 103d Cong.) (removing the original limitations on the federal recognition of the Pascua Yaqui and recognized them as a “historic” tribe); see also MILLER, *supra* note 3, at 79 (presenting a case study on Pascua Yaqui).

132. To determine whether IGRA affects the restrictions placed on federal tribal recognition bills, I compared bills before and after its enactment, using the 100th Congress as a line of demarcation. Bills introduced or enacted prior to the 101st Congress will be referred to as pre-IGRA and bills during or after the 101st Congress will be referred to as post-IGRA.

133. For a full list of the bills with restrictions before the 100th Congress, see *infra* Methodological Appendix.

introduced 134 bills but only 55 bills, or 41 percent, included restrictions.¹³⁴ The data shows that a much higher proportion of bills included restrictions pre-IGRA than post-IGRA.

Three primary kinds of restrictions materialize in bills during the time period studied: jurisdictional restrictions, gaming restrictions, and hunting and fishing restrictions. By far, the most popular restrictions limit the tribe's criminal or civil jurisdiction by granting jurisdiction over tribal lands to the state government.¹³⁵ Figure 10 shows a breakdown of each kind of restriction during the time period studied.

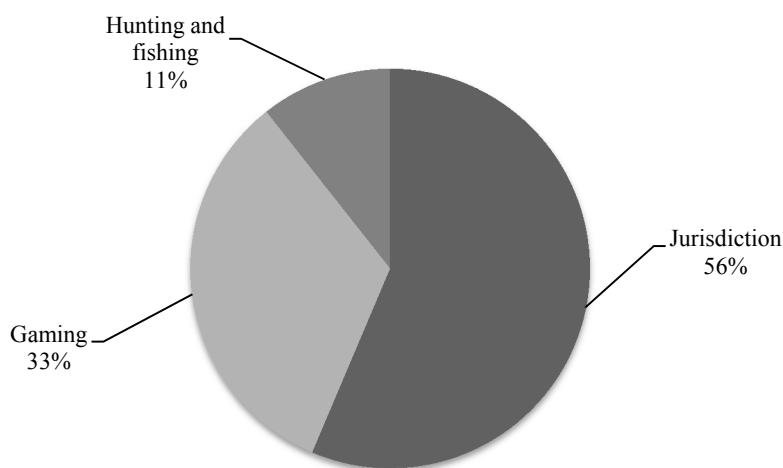


Figure 10. Kinds of restrictions in recognition bills, 1975 to 2013

The kinds of restrictions have changed post-IGRA. Hunting and fishing restrictions were more common pre-IGRA and gaming restrictions have been more prevalent post-IGRA.¹³⁶ Unsurprisingly, the number of gaming restrictions increased dramatically. Only two pre-IGRA bills included gaming restrictions.¹³⁷ By

134. For a full list of the bills with restrictions after the 100th Congress, see *infra* Methodological Appendix.

135. These jurisdictional grants sometimes allow for concurrent tribal-state or concurrent tribal-federal jurisdiction.

136. Only one tribe, the Chinook Nation, has faced restrictions on their ability to commercially hunt and fish in their attempts for congressional recognition post-IGRA. Chinook Nation Restoration Act, H.R. 3084, 111th Cong. (2009); Chinook Nation Restoration Act, H.R. 2576, 111th Cong. (2009); Chinook Nation Restoration Act, H.R. 6689, 110th Cong. (2008). Although each of the bills would restrict commercial fishing, they recognize the ceremonial fishing rights of the Chinook Nation.

137. Ysleta del Sur Pueblo and Alabama and Coughatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (1987) (originally proposed as H.R. 318, 100th Cong.); Ysleta del Sur Pueblo and Alabama and Coughatta Indian Tribes of Texas Restoration Act, H.R. 1344, 99th Cong. (1985).

The existence of gaming restrictions in bills prior to the enactment of IGRA suggests that

comparison, 29 post-IGRA bills have gaming restrictions.¹³⁸ This suggests that the advent of gaming has led to an increase in gaming restrictions in congressional recognition bills. A majority (53.7 percent, or 29 of 54) of bills with restrictions include gaming restrictions post-IGRA. These bills, however, make up less than half of all recognition bills—only 21.6 percent (29 of 134).¹³⁹ Thus, while restrictions on gaming are more common, they do not appear to be a condition of congressional recognition post-IGRA.

Moreover, gaming restrictions do not consistently emerge in all of the bills or even consistently in bills to recognize the same tribe over time.¹⁴⁰ Gaming

the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (upholding Indian gaming), not IGRA, may have been the initial impetus for gaming restrictions in recognition bills.

138. The 29 bills are as follows: Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, 107 Stat. 1118 (1993) (originally proposed as H.R. 2399, 103d Cong.); Lumbee Recognition Act, S. 1218, 112th Cong. (2012); Indian Tribes of Virginia Federal Recognition Act of 2011, S. 379, 112th Cong. (2011); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2011, H.R. 783, 112th Cong. (2011); Lumbee Recognition Act, H.R. 27, 112th Cong. (2011); Lumbee Recognition Act, S. 1735, 111th Cong. (2010); Indian Tribes of Virginia Federal Recognition Act of 2009, S. 1178, 111th Cong. (2009); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2009, H.R. 1385, 111th Cong. (2009); Lumbee Recognition Act, H.R. 31, 111th Cong. (2009); Lumbee Recognition Act, H.R. 65, 110th Cong. (2008); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2007, H.R. 1294, 110th Cong. (2007); A Bill To Extend Federal Recognition to the Rappahannock Tribe, H.R. 106, 110th Cong. (2007); A Bill To Extend Federal Recognition to the Rappahannock Tribe, H.R. 5130, 109th Cong. (2006); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2005, S. 480, 109th Cong. (2005); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2005, H.R. 3349, 109th Cong. (2005); Winnemem Wintu Tribe Clarification and Restoration Act, S. 2879, 108th Cong. (2004); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2003, S. 1423, 108th Cong. (2003); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2003, H.R. 1938, 108th Cong. (2003); Miami Nation of Indiana Recognition Confirmation Act, H.R. 954, 108th Cong. (2003); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2002, S. 2694, 107th Cong. (2002); Gabrieleno Band of Mission Indians Federal Recognition Act, H.R. 3824, 107th Cong. (2002); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2001, H.R. 2345, 107th Cong. (2001); Lower Muscogee-Creek Indian Tribe of Georgia Recognition Act, S. 2771, 106th Cong. (2000); Lower Muscogee-Creek Indian Tribe of Georgia Recognition Act, H.R. 4730, 106th Cong. (2000); Graton Rancheria Restoration Act, H.R. 946, 106th Cong. (2000); Graton Rancheria Restoration Act, S. 2633, 106th Cong. (2000); Miami Nation of Indiana Act, H.R. 5403, 106th Cong. (2000); Graton Rancheria Restoration Act, H.R. 4434, 105th Cong. (1998); Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, S. 1156, 103d Cong. (1993).

139. For a full list of the bills with and without restrictions after the 100th Congress, see *infra* Methodological Appendix.

140. Compare Lumbee Recognition Act, H.R. 65, 110th Cong. (2008), with Lumbee Recognition Act, S. 333, 110th Cong. (2007). Compare Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2005, S. 480, 109th Cong. (2005), with Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2000, H.R. 5073, 106th Cong. (2000).

restrictions can appear and disappear from one congressional session or one bill to the next. For example, a gaming restriction appears for the first time in a bill extending recognition to the Lumbee Tribe in the 111th Congress, but another bill introduced in the same session does not include gaming restrictions.¹⁴¹ Finally, undermining the importance of these gaming restrictions, at least one post-IGRA bill expressly allowed gaming under IGRA.¹⁴²

Jurisdictional limitations were more common post-IGRA than gaming restrictions—in 34 compared with 29 of 55 bills.¹⁴³ Proportionally, the percentage of bills with jurisdictional restrictions has decreased from 73 percent (19 of 26) pre-IGRA, to 62 percent (34 of 55) post-IGRA. The data do not explain this decline in restrictions on jurisdiction.

Of the bills containing restrictions, Congress has declined to enact most of them—either pre- or post-IGRA. Of the 81 bills including restrictions, Congress has enacted only 13, or 16 percent.¹⁴⁴ The enactment rate for bills with restrictions has decreased dramatically post-IGRA. Seventy-one percent of enacted bills pre-IGRA (10 of 14) included restrictions while only 30 percent do post-IGRA (3 of 10).¹⁴⁵ Further, the majority of these restrictions have related to jurisdiction, not gaming. Ten of the thirteen congressional recognitions with restrictions included jurisdictional restrictions.¹⁴⁶ Only three tribes receiving congressional recognition are limited in their ability to conduct gaming on their lands.¹⁴⁷

141. Compare Lumbee Recognition Act, H.R. 65, 110th Cong. (2008), with Lumbee Recognition Act, S. 333, 110th Cong. (2007).

142. Florida Tribe of Eastern Creek Indians Recognition Act, H.R. 3353, 101st Cong. (1989). Other bills allow gaming under state law. See, e.g., Miami Nation of Indiana Recognition Confirmation Act, H.R. 954, 108th Cong. (2003). Similarly, a few post-IGRA bills expressly provide for ceremonial hunting and fishing. Chinook Nation Restoration Act, H.R. 3084, 111th Cong. (2009); Chinook Nation Restoration Act, H.R. 2576, 111th Cong. (2009).

143. Some bills included more than one restriction, and it was fairly common for a bill to include both a gaming and a jurisdictional restriction, which is why the numbers here do not add up to either 39 bills or 100 percent.

144. For a list of enacted bills with restrictions, see *infra* Methodological Appendix.

145. *Id.*

146. Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, 107 Stat. 1118 (1993) (originally proposed as H.R. 2399, 103d Cong.); Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, 105 Stat. 1143 (1991) (originally proposed as S. 374, 102d Cong.); Ysleta del Sur Pueblo and Alabama and Coushatta Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (1987) (originally proposed as H.R. 318, 100th Cong.); Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (1986) (originally proposed as H.R. 3554, 99th Cong.); Texas Band of Kickapoo Act, Pub. L. No. 97-429, 96 Stat. 2269 (1983) (originally proposed as H.R. 4496, 97th Cong.); Cow Creek Band of Umpqua Tribe of Indians Recognition Act, Pub. L. No. 97-391, 96 Stat. 1960 (1982) (originally proposed as H.R. 6588, 97th Cong.); Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 (originally proposed as H.R. 7919, 96th Cong.); Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, 94 Stat. 317 (1980) (originally proposed as H.R. 4996, 96th Cong.).

147. Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, 107 Stat. 1118 (originally proposed as H.R. 2399, 103d Cong.); Ysleta del Sur Pueblo and Alabama and Coushatta Tribes of Texas Restoration Act, Pub. L. No. 100-89,

While some restrictions on tribal authority as a condition of recognition do exist, the data show that it is not uncommon for members of Congress to introduce bills that do not restrict tribal authority and that restrictions have decreased over time. This indicates that tribes may face the risk of restrictions on their authority less frequently than some scholars have suggested. The stakes, however, may be high when conditions on tribal authority are proposed in a recognition bill. Almost half of congressional recognitions include restrictions on tribal authority, but these restrictions have decreased dramatically over time. Moreover, these restrictions most frequently arise in land claims settlements that also recognize tribes.¹⁴⁸ Finally, restrictions on tribal authority tend to be jurisdictional, suggesting that the political trade-off for recognition may be tribal acceptance of some form of state jurisdiction.¹⁴⁹

D. Tribal Engagement in the Legislative and Administrative Processes

So far, the data suggest that Congress serves as an alternative to the administrative process in federal recognition. Part III.B.1 showed that Congress does not just restore terminated tribes but recognizes all kinds of tribes. This section analyzes how tribes engage in the two processes and focuses on tribes that choose to use both.¹⁵⁰ The data reveal that tribes have crafted multiple strategies to use the two processes to improve their chances of gaining recognition. This finding further undermines the expectation that the administrative process dominates recognition because the data indicate that some tribes use Congress to influence the administrative process or to circumvent it entirely. The evidence suggests that, by providing an alternative, Congress wields some indirect influence over the administrative process.

Tribes view Congress as playing an influential role in the recognition process. First, tribes have not relied solely on the administrative process but have resorted to

101 Stat. 666 (1987) (originally proposed as H.R. 318, 100th Cong.). The Alabama-Coushatta have actually proposed legislation to remove these gaming restrictions. See Alabama-Coushatta Tribe of Texas Equal and Fair Opportunity Settlement Act, H.R. 1144, 113th Cong. (2013).

148. See *supra* note 127.

149. Additional research should investigate when, why, and how these restrictions occur; it should also investigate how they relate to changing federal-state-tribal relations. For more on federal-state-tribal relations, see, for example, JEFF CORNTASSEL & RICHARD C. WITMER II, FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD (2008); LAURA E. EVANS, POWER FROM POWERLESSNESS: TRIBAL GOVERNMENTS, INSTITUTIONAL NICHES, AND AMERICAN FEDERALISM (2011). Interestingly, many of these restrictions appear in land claims settlement bills that also extend recognition to a tribe, so it may be worth investigating the relationship, if any, between the land claims settlement process and jurisdictional restrictions.

150. For a fuller discussion of tribal strategies in seeking federal recognition, see Kirsten Matoy Carlson, *Gambling on Congress: Indian Nations' Federal Recognition Strategies* (2016) (unpublished manuscript) (on file with author). Some tribes have also resorted to litigation strategies. See, e.g., Alva C. Mather, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. PA. L. REV. 1827 (2003) (discussing litigation filed by tribes challenging the administrative process).

both the administrative and legislative processes in pursuing recognition.¹⁵¹ Of the 124 tribes identified as actively seeking recognition during the time period studied,¹⁵² 38 tribes have filed a letter of intent with the OFA and have also sought recognition legislatively.¹⁵³ Thus, almost a third of the 124 tribes actively seeking recognition during the time period studied (30.6 percent) have sought recognition both administratively and legislatively.¹⁵⁴ Moreover, of the 72 tribes seeking legislative recognition, 38, or 52.8 percent, have also filed a letter of intent with the OFA.¹⁵⁵ An additional two tribes have petitions currently on active status with the OFA and have been subject to proposed legislation in Congress—the Muscogee Nation of Florida and the Grand River Band of Ottawa Indians.¹⁵⁶ The sheer number of tribes turning to Congress instead of relying exclusively on the administrative process indicates its importance.¹⁵⁷ Further, some of these tribes have successfully gained recognition by

151. Carlson, *supra* note 150.

152. For an explanation of how I identified the 124 tribes actively engaged in the recognition process, see *supra* Part II.A and the Methodological Appendix *infra*.

153. The tribes are: Lumbee Tribe, Muscogee Nation of Florida, Dunlap Band of Mono Indians, Tuscarora Nation of Indians of the Carolinas, United Houma Nation, Swan Creek Black River Confederated Ojibwa Tribe, Gabrieleno Band of Mission Indians, Jena Band of Choctaw, Texas Band of Kickapoo, Little Traverse Bay Bands of Odawa Indians, Little River Band of Ottawa Indians, Pokagon Pottawatomi Indians of Indiana and Michigan, Lac Viex Desert Band of Lake Superior Chippewa Indians, Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, Federated Coast Miwok (Graton Rancheria), Cow Creek Band of Umpqua Indians, Mashantucket Pequot Tribe, Aroostook Band of Micmacs, Loyal Shawnee Tribe, Lower Muskogee Creek Tribe – East of the Mississippi, Miami Nation of Indians of Indiana, Mowa Band of Choctaw, Duwamish Indian Tribe, Chinook Indian Tribe, Burt Lake Band of Ottawa and Chippewa Indians, Inc., Little Shell Tribe of Chippewa Indians of Montana, Piro/Manso/Tiwa Indian Tribe, Gabrieleno/Tongva Band, Rappahannock Tribe, Monacan Indian Nation, Chickahominy Tribe, Chickahominy Indian Nation – Eastern Division, Upper Mattaponi Tribe, Nansemond Indian Tribe, Ione Band of Miwoks, Mattaponi Tribe, Pamunkey Tribe, and Qutekcak Tribe. Two other tribes—the Grand River Band of Ottawa Indians and the Mashpee Wampanoag Tribe—have sought to have Congress mandate that the OFA expedite their petitions for administrative recognition. Grand River Band of Ottawas of Michigan Referral Act, S. 436, 109th Cong. (2005). See *infra* Methodological Appendix.

154. I generated 30.6 percent by dividing the number of tribes using both administrative and legislative strategies and dividing it by the total number of tribes (38/124).

155. As mentioned *supra* note 71, 52 of these tribes (42 percent) only sought recognition administratively.

156. The bill involving the Grand River Band of Ottawa Indians is not included in the dataset. It does not seek direct congressional recognition of the tribe, but mandates the expediting of their OFA petition. Grand River Band of Ottawa Indians of Michigan Referral Act, S. 437, 109th Cong. (2005).

157. In informal discussions, practitioners have suggested that the actual number of tribes seeking legislative recognition is much higher because these numbers only reflect tribes that can get a bill introduced in Congress. Some tribes may be unable to get on the congressional agenda.

going to Congress. Congress has extended recognition to 11, or 28.9 percent, of the 38 tribes seeking recognition both congressionally and administratively.¹⁵⁸

Second, tribes have various strategies for using the two processes. By far, the majority of tribes resorting to both processes seek congressional recognition and, thus, identify Congress as an alternative to the administrative process. They file a letter of intent and document their OFA petition while seeking congressional recognition.¹⁵⁹ A few tribes have sought recognition from Congress only after the OFA denied their petitions.¹⁶⁰ As of yet, none of these tribes has received recognition. This fact may suggest that it is harder for Indian nations to obtain congressional recognition if the OFA has already denied them.

Tribes, however, have also used the legislative process to pressure the OFA. In a few cases, members of Congress have introduced legislation seeking to mandate the OFA's review of a petition on behalf of a specific tribe. These bills have taken two distinct forms. First, some bills seek to allow a tribe to petition through the OFA for recognition.¹⁶¹ Only the Lumbee Tribe has used this strategy as a way to gain access to the administrative process. Interestingly, the Tribe simultaneously sought congressional recognition.¹⁶² Second, members of Congress have introduced bills that would require the OFA to expedite its review of a specific tribe's petition.¹⁶³

158. The eleven tribes with dual strategies granted congressional recognition are Texas Band of Kickapoo, Little Traverse Bay Bands of Odawa Indians, Little River Band of Ottawa Indians, Pokagon Potawatomi Indians of Indiana and Michigan, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, Graton Rancheria, Cow Creek Band of Umpqua Tribe of Indians, Mashantucket Pequot Tribe, Aroostook Band of Micmacs, and Shawnee Tribe.

159. MILLER, *supra* note 3, at 162 (explaining that the Jena Band of Choctaw turned to Congress after filing a petition with the OFA and learning that the OFA would not review their petition for several years).

160. For example, the Miami Indians of Indiana petitioned for congressional recognition only after the OFA denied their application. *Federal Acknowledgment of Various Indian Groups: Hearing Before the H. Comm. on Interior and Insular Affairs*, 102d Cong. 120 (1992) (statement of Hon. Raymond O. White, Chairman, Miami Nation of Indiana, Inc.).

161. A Bill To Provide for the Consideration of a Petition for Federal Recognition of the Lumbee Indians of Robeson and Adjoining Counties and Other Indian Groups in North Carolina, and for Other Purposes, H.R. 839, 111th Cong. (2009); A Bill To Provide for the Consideration of a Petition for Federal Recognition of the Lumbee Indians of Robeson and Adjoining Counties, and for Other Purposes, H.R. 2022, 110th Cong. (2007); A Bill To Provide for the Consideration of a Petition for Federal Recognition of the Lumbee Indians of Robeson and Adjoining Counties, and for Other Purposes, H.R. 1408, 108th Cong. (2003); A Bill To Provide for the Consideration of a Petition for Federal Recognition of the Lumbee Indians of Robeson and Adjoining Counties, and for Other Purposes, H.R. 3469, 103d Cong. (1993).

162. *Compare* Lumbee Recognition Act, H.R. 65, 110th Cong. (2008), *with* A Bill To Provide for the Consideration of a Petition for Federal Recognition of the Lumbee Indians of Robeson and Adjoining Counties and Other Indian Groups in North Carolina, and for Other Purposes, H.R. 839, 111th Cong. (2009).

163. A Bill To Require the Prompt Review by the Secretary of the Interior of Petition No. 120 for Federal Recognition of the Amah Mutsun of Mission San Juan Bautista as an Indian Tribe, and for Other Purposes, H.R. 3475, 109th Cong. (2005); A Bill To Require the Prompt Review by the Secretary of the Interior of the Longstanding Petitions for Federal Recognition

These tribes are appealing to Congress to push the OFA to act in a timely manner. For example, the Grand River Band of Ottawa has pursued this strategy because the Band is confident that it meets the OFA regulations and will be granted recognition through that process, but it is tired of waiting for the OFA to review its petition and issue a decision.¹⁶⁴ To date, Congress has yet to pass one of these bills, but their existence suggests that the congressional role includes wielding influence over the administrative process as well as providing an alternative to it.

Tribes have also used tribal federal recognition bills to highlight the problems of pursuing recognition through the administrative process. Some simply maintain that the process is broken.¹⁶⁵ Others contend that they cannot afford the delay of going through the administrative process.¹⁶⁶ Southern tribes and California tribes, in particular, insinuate that the process does not work for them and that it is not tailored to meet regional differences.¹⁶⁷ For example, several Southern tribes have argued that the administrative process is rigged against them because they do not have the documentation required to support their petitions due to past racial discrimination.¹⁶⁸ Publicizing the deficiencies of the administrative process encourages Congress to interfere in the recognition process.

of Certain Indian Tribes, and for Other Purposes, H.R. 512, 109th Cong. (2005); Mashpee Wampanoag Tribal Petition Act, H.R. 4933, 108th Cong. (2004); A Bill To Require the Prompt Review by the Secretary of the Interior of the Long-Standing Petitions for Federal Recognition of Certain Indian Tribes, and for Other Purposes, H.R. 5134, 108th Cong. (2004).

164. *Federal Acknowledgment of Various Indian Groups: Hearing on S. 724, S. 514, S. 1058 and H.R. 1294 Before the S. Comm. on Indian Affairs*, 110th Cong. 24 (2008) (statement of Hon. Ron Yob, Chairman, Grand River Band of Ottawa Indians).

165. *Michigan Indian Recognition: Hearing on H.R. 2376 and H.R. 878 Before the H. Subcomm. on Native American Affairs*, 103d Cong. 162 (1993) (statement of Rachel Daugherty, Treasurer, Potawatomi Indian Nation) (asserting that the administrative process does not work).

166. *Houma Recognition Act: Hearing on S. 2423 Before the S. Select Comm. on Indian Affairs*, 101st Cong. 83–84 (1990) (statement of Jack Campisi, Associate Professor of Anthropology at Wellesly College).

167. *See, e.g., Hearing Before the S. Comm. on Indian Affairs on S. 724, Little Shell Tribe of Chippewa Indians Restoration Act of 2007, S. 514, Muskogee Nation of Florida Federal Recognition Act, S. 1058, Grand River Bands of Ottawa Indians of Michigan Referral Act, H.R. 1294, Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2007*, 110th Cong. 28 (2008) (statement of Helen C. Rountree, Ph.D., Professor Emeritus, Old Dominion University); *Id.* at 22 (statement of Hon. Ann Denson Tucker, Chairwoman, Muskogee Tribe of Florida); *Federal Recognition and Acknowledgement Process by the Bureau of Indian Affairs: Oversight Hearing Before the H. Comm. on Resources*, 108th Cong. 25–30 (2004) (statement of Rosemary Cambra, Chairman, Muwekma Ohlone Tribe).

168. *See, e.g., Hearing Before the S. Comm. on Indian Affairs on S. 724, Little Shell Tribe of Chippewa Indians Restoration Act of 2007, S. 514, Muskogee Nation of Florida Federal Recognition Act, S. 1058, Grand River Bands of Ottawa Indians of Michigan Referral Act, H.R. 1294, Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2007*, 110th Cong. 28 (2008) (statement of Helen C. Rountree, Ph.D., Professor Emeritus, Old Dominion University); *Id.* at 22 (statement of Hon. Ann Denson Tucker, Chairwoman, Muskogee Tribe of Florida).

The evidence shows that Congress remained involved in and has extended federal recognition to more Indian nations than the OFA from 1975 to 2013.¹⁶⁹ Even though recognitions have declined in the last decade, members of Congress continue to introduce recognition bills. Many of the bills have received hearings and some have even passed one house.¹⁷⁰ Congress thus has not relinquished recognition to the administrative process. Instead, Congress provides an alternative way for tribes to gain recognition, and, thus, to some extent it competes with the administrative process by allowing tribes to avoid that process by going through the legislative process. Providing an alternative also allows Congress to wield indirect influence over the administrative process, which acts in the congressional shadow.

E. Reframing Recognition as Legislative-Administrative Multiplicity

What this study shows is that Congress plays a quite significant role in the recognition process. Contrary to conventional accounts, Congress has not abdicated recognition to the OFA. Legislative-administrative multiplicity, rather than a single administrative process, dominates federal recognition.

A more accurate description of federal recognition illuminates the congressional role. Congress has extended recognition to and continues to consider the recognition of select Indian nations. In granting recognition to tribes, Congress is not merely supplementing or correcting errors in the administrative process. If it were, it would only restore terminated tribes or recognize tribes that the administrative process refused to recognize. Contrary to expectations, Congress is not just restoring tribes. Rather, Congress has recognized tribes by ratifying Indian land claims settlements along the East Coast, extending recognition to tribes in the South and the West, fixing administrative errors for previously recognized tribes in the Midwest, and restoring terminated tribes throughout the country.¹⁷¹ Congress can place restrictions on a tribe's authority as a condition of recognition; however, it often recognizes tribal authority simultaneously.¹⁷² As the data demonstrates, Congress provides an alternative to the administrative process, one that at least a third of tribes seeking recognition perceive to be viable and worth pursuing.¹⁷³ In addition, members of Congress introduce legislation to pressure the OFA into granting access to the administrative process or expediting the process for specific tribes. The administrative process exists in the shadow of Congress.

Perhaps more importantly, this study shows that Congress treats the administrative process in this area quite differently than it treats other administrative processes. Usually, Congress either relinquishes authority to an administrative agency through delegation or performs the function entirely itself.¹⁷⁴ Take, for example, the federal Food and Drug Administration (FDA). Congress has delegated

169. *See supra* Part III.A.

170. *See supra* Figure 3.

171. *See supra* Part III.B.

172. *See supra* Part III.C.

173. *Supra* Part III.D.

174. *See, e.g.,* ESKRIDGE ET AL., *supra* note 12, at 1117–54.

the approval of new drugs to the FDA.¹⁷⁵ As a result, pharmaceutical companies do not contest this delegation by circumventing the FDA and proposing legislation in Congress to approve specific drugs. Rather, pharmaceutical companies utilize and rely solely on the administrative process for drug approval. In contrast, when it comes to federal recognition of Indian nations, Congress has both acquiesced in agency authority by allowing the OFA to run its administrative process and exercised the authority itself by directly recognizing some tribes.¹⁷⁶

One unusual—and anomalous—aspect of federal recognition is Congress's failure to delegate explicitly the task of recognition to the BIA in legislation.¹⁷⁷ Members of Congress introduced legislation to devise a uniform process for federal recognition as early as 1978.¹⁷⁸ Since then, members of Congress have introduced over thirty bills seeking to establish a uniform process for the recognition of Indian nations.¹⁷⁹ These bills have varied in their proposals, but Congress has not enacted any of them.¹⁸⁰ In fact, Congress has yet to enact a bill creating a recognition process or clearly delegating the authority to the BIA to

175. 21 U.S.C. § 355 (2012).

176. I use the word “acquiesced” here because the actual delegation of this authority to the BIA is ambiguous. Riley, *supra* note 3, at 632. Congress confirmed (even if it never delegated) this authority in the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, § 103(3), 108 Stat. 4791, 103d Cong. (1994) (finding that “Indian tribes presently may be recognized by . . . the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated ‘Procedures for Establishing that an American Indian Group Exists as an Indian Tribe’”).

177. For a description of how Congress delegates authority to an administrative agency through legislation, see ESKRIDGE ET AL., *supra* note 12, at 1117–50.

178. See, e.g., A Bill To Establish an Administrative Procedure and Guidelines To Be Followed by the Department of the Interior in Its Decision To Acknowledge the Existence of Certain Indian Tribes, S. 2375, 95th Cong. (1977).

179. See, e.g., A Bill To Establish an Administrative Procedure and Guidelines To Be Followed by the Department of the Interior in its Decision To Acknowledge the Existence of Certain Indian Tribes, H.R. 2701, 96th Cong. (1979); A Bill To Establish an Administrative Procedure and Guidelines To Be Followed by the Department of the Interior in its Decision To Acknowledge the Existence of Certain Indian Tribes, H.R. 13773, 95th Cong. (1978); A Bill To Establish an Administrative Procedure and Guidelines To Be Followed by the Department of the Interior in its Decision To Acknowledge the Existence of Certain Indian Tribes, H.R. 12996, 95th Cong. (1978); A Bill To Establish an Administrative Procedure and Guidelines To Be Followed by the Department of the Interior in its Decision To Acknowledge the Existence of Certain Indian Tribes, H.R. 12830, 95th Cong. (1978); A Bill To Establish an Administrative Procedure and Guidelines To Be Followed by the Department of the Interior in its Decision To Acknowledge the Existence of Certain Indian Tribes, H.R. 12691, 95th Cong. (1978); A Bill To Establish an Administrative Procedure and Guidelines To Be Followed by the Department of the Interior in its Decision To Acknowledge the Existence of Certain Indian Tribes, H.R. 11630, 95th Cong. (1978); A Bill To Establish an Administrative Procedure and Guidelines To Be Followed by the Department of the Interior in its Decision To Acknowledge the Existence of Certain Indian Tribes, S. 2375, 95th Cong. (1977).

180. For a review of the various proposals, see *Recommendations for Improving the Federal Acknowledgement Process: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 12 (2008) (statement of Professor Patty Ferguson-Bohnee, Director of the Indian Legal Clinic, Sandra Day O'Connor College of Law, Arizona State University).

devise one. Instead, in 1994, Congress acquiesced to the existing regulatory process devised by the BIA and has spent the last two decades continually pushing the DOI to improve it.¹⁸¹

No law or practice prohibits this behavior. Congress can refuse to delegate to an administrative agency.¹⁸² Congress regularly micromanages agencies, but not in this active way.¹⁸³ What is unusual here is that Congress continues to exercise the authority itself. Congressional recognition is not oversight in the traditional sense; Congress is not monitoring the administrative process or a policy for federal recognition that it established.¹⁸⁴ If Congress were acting to correct administrative errors by recognizing tribes denied by the OFA or supplementing the administrative process by restoring tribes, it would look more like oversight. But Congress has yet to correct an OFA denial, and it recognizes tribes as well as restores them. Rather than exercising oversight, Congress is bypassing the agency entirely and exercising its own independent authority.

Congress also exercises oversight by closely supervising the administrative process through oversight hearings. Five different congressional committees held over two dozen hearings on federal recognition from 1977 to 2011.¹⁸⁵ These hearings

181. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, § 103(3), 108 Stat. 4791, 103d Cong. (1994).

182. Historically, the debate has centered around the ability of Congress to delegate its authority to agencies. Under the nondelegation doctrine, “the legislature cannot delegate its inherent lawmaking powers to agencies without providing specific standards the bureaucracy shall apply in administering the delegation.” *ESKRIDGE ET AL.*, *supra* note 12, at 1136. The Supreme Court, however, has not invalidated a statute on nondelegation doctrine grounds since the 1930s. *Id.*

183. For examples of Congress micromanaging agencies, see generally *ESKRIDGE ET AL.*, *supra* note 12, at 1143–46.

184. For a general discussion of congressional oversight, see Beermann, *supra* note 12.

185. The committees holding hearings are: the House Committee on Resources, the Senate Committee on Indian Affairs (including its predecessor, the Senate Select Committee on Indian Affairs), the House Subcommittee on Natural Resources, the House Committee on Interior and Insular Affairs, and the House Committee on Government Reform. See, e.g., *Hearing on Fixing the Federal Acknowledgment Process: Before the S. Comm. on Indian Affairs*, 111th Cong. (2009); *Recommendations for Improving the Federal Acknowledgment Process: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. (2008); *Hearing Before the H. Comm. on Natural Resources on H.R. 2837, Indian Tribal Federal Recognition Administrative Procedures Act*, 110th Cong. (2007); *Hearing Before the S. Comm. on Indian Affairs on the Process of Federal Recognition for Indian Tribes*, 110th Cong. (2007); *Hearing Before the S. Comm. on Indian Affairs on the Federal Recognition for Indian Tribes*, 109th Cong. (2005); *Hearing Before the H. Comm. on Governmental Reform: Betting on Transparency: Toward Fairness and Integrity in the Interior Department's Tribal Recognition Process*, 108th Cong. (2004); *Oversight Hearing on the Federal Recognition and Acknowledgment Process by the Bureau of Indian Affairs: Before the H. Comm. on Resources*, 108th Cong. (2004); *Hearing Before the S. Comm. on Indian Affairs on S. 297*, 108th Cong. (2004); *Hearing Before the S. Comm. on Indian Affairs on S. 420*, 108th Cong. (2003); *Work of the Department of Interior's Branch of Acknowledgment and Research within the Bureau of Indian Affairs: Hearing Before the S. Comm. on Indian Affairs*, 107th Cong. (2002); *Hearing Before the S. Comm. on Indian Affairs on Tribal Recognition*, 106th Cong. (2000); *Federal Recognition Administrative Procedures Act: Hearing Before the S. Comm. on Indian*

are often acrimonious affairs, with members of Congress criticizing the OFA and the BIA defending itself.¹⁸⁶

All of this suggests that legislative-administrative multiplicity permeates and more accurately describes federal recognition than do traditional accounts emphasizing the administrative process. Parallel legislative and administrative processes exist for recognition, and Congress acts both as an alternative to and as the overseer of the administrative process.

Affairs, 104th Cong. (1995); *Federal Recognition of Indian Tribes: Hearing Before the H. Subcomm. on Natural Resources*, 103d Cong. (1994); *Hearing Before the H. Comm. on Interior and Insular Affairs on Indian Federal Acknowledgment Process*, 102d Cong. (1992); *Hearing Before the H. Comm. on Interior and Insular Affairs on Federal Acknowledgment of Various Indian Groups*, 102d Cong. (1992); *Hearing Before the H. Comm. on Resources on Indian Federal Recognition Administrative Procedures Act of 1991*, 102d Cong. (1991); *Hearing Before the S. Select Comm. on Indian Affairs on Federal Acknowledgment Administrative Procedures Act of 1989, Part 2*, 101st Cong. (1989); *Hearing Before the S. Select Comm. on Indian Affairs on Federal Acknowledgment Administrative Procedures Act of 1989, Part 1*, 101st Cong. (1989); *Oversight Hearing on the Federal Acknowledgment Process: Before the S. Select Comm. on Indian Affairs*, 100th Cong. (1988); *Oversight of the Federal Acknowledgment Process: Hearing Before the S. Select Comm. on Indian Affairs*, 98th Cong. (1983); *Oversight of the Federal Acknowledgment Process and the Federal Acknowledgment Project of the Bureau of Indian Affairs: Hearing Before the S. Select Comm. on Indian Affairs*, 96th Cong. (1980); *Hearing Before S. Select Comm. on Indian Affairs on Recognition of Certain Indian Tribes*, 95th Cong. (1978); *Hearing Before H. Comm. on Interior and Insular Affairs on Federal Recognition of Indian Tribes*, 95th Cong. (1978); *Hearing Before the S. Select Comm. on Indian Affairs: Federal Recognition of Certain Indian Tribes*, 95th Cong. (1977).

186. Members of Congress regularly deride the OFA and its administrative process. See, e.g., *Hearing on Fixing the Federal Acknowledgment Process: Before the S. Comm. on Indian Affairs*, 111th Cong. 1 (2009) (statement of Chairman Byron Dorgan); *Recommendations for Improving the Federal Acknowledgment Process: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 2 (2008) (statement of Sen. Murkowski, Member, S. Comm. on Indian Affairs); *Oversight Hearing on the Federal Recognition and Acknowledgment Process by the Bureau of Indian Affairs: Before the H. Comm. on Resources*, 108th Cong. 1 (2004) (statement of Chairman Richard Pombo) (criticizing the OFA process as broken); *Federal Recognition of Indian Tribes: Hearing Before the H. Subcomm. on Natural Resources*, 103d Cong. 78 (1994) (statement of Hon. Craig Thomas) (“the perception is that the process is overly cumbersome, political, and ineffective.”); *Houma Recognition Act: Hearing Before the S. Select Comm. on Indian Affairs*, 101st Cong. 11 (1990) (statement of Sen. J. Bennett Johnston) (“[T]he current acknowledgment process is administered by the Bureau of Indian Affairs (BIA) is an inadequate method for processing the applications of Indian tribes seeking Federal recognition. The procedure is lengthy, cumbersome, and extremely expensive.”). More recently, BIA officials have pushed back on this criticism. See, e.g., *Oversight Hearing on the Obama Administration’s Part 83 Revisions and How They May Allow the Interior Department To Create Tribes, Not Recognize Them: Hearing Before the H. Subcomm. on Indian, Insular, and Alaska Native Affairs*, 114th Cong. (2015) (recording an exchange between members of Congress and Kevin Washburn, Assistant Secretary of Indian Affairs), available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=398320> [<https://perma.cc/QBD8-3WL3>]. *Hearing Before the S. Comm. on Indian Affairs on S. 297*, 108th Cong. 12–14 (2004) (recording an exchange between members of Congress and Aurene Martin, Principle Deputy Assistant Secretary of Indian Affairs).

IV. IMPLICATIONS OF LEGISLATIVE-ADMINISTRATIVE MULTIPLICITY FOR FEDERAL INDIAN LAW AND ADMINISTRATIVE LAW

This Part explores some of the implications of the legislative-administrative multiplicity revealed in the study. Part IV.A highlights the new and important questions the study raises for federal Indian law, especially in terms of federal recognition and the role of Indians in the political process. Part IV.B looks beyond federal Indian law to consider how legislative-administrative multiplicity affects current understandings of the relationship between Congress and agencies.

A. Federal Indian Law

The most obvious implications of the study relate to federal Indian law. First, the study indicates that scholars need to more accurately evaluate federal recognition by taking the congressional role into account. By disproving the dominant misconception that Congress has relinquished recognition to the BIA, the data suggest that current critiques and evaluations of federal recognition are incomplete and that more accurate assessments are needed. These new evaluations should treat federal recognition as a legislative-administrative multiplicity and examine it as such.

Because this reassessment will occur in the shadow of a long history of criticisms of the administrative process,¹⁸⁷ scholars should query the criteria they have used and the conclusions they have drawn in the past. The criticisms lodged against the administrative process may not apply or may apply, but not in the same way, to the legislative-administrative multiplicity. In fact, the calculus may change dramatically for parties once recognition is considered as a two-track system. For instance, the administrative process may disadvantage tribes in the Southeast or in California by not recognizing their particular historical experiences, but having Congress as an option may benefit them, especially since the data suggest that California tribes and Southern tribes have fared better in the legislative process.¹⁸⁸

Re-evaluation will require fuller analyses of the implications of jurisdictional multiplicity in federal recognition.¹⁸⁹ The study demonstrates that legislative-administrative multiplicity has advantages and disadvantages that merit further exploration. In terms of advantages, the study indicates that petitioning tribes may benefit from the two-track process because they can seek legislative as well as administrative recognition and use the legislative process to influence the

187. See *supra* Part I.

188. See *supra* Part III.B.2. Similarly, some members of Congress may prefer the jurisdictional overlap because it allows them to correct administrative mistakes. See, e.g., *Pokagon Band of Potawatomi Indians Act and the Little Traverse Bay Bands of Ottawa Indians and the Little River Band of Ottawa Indians Act: Hearing Before the S. Comm. on Indian Affairs*, 103d Cong. 22–23 (1994) (statement of Hon. Dale Kildee, U.S. Rep. from Michigan).

189. See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 640–42 (1981) (outlining the functions of complex concurrency).

administrative one.¹⁹⁰ But not all parties benefit from legislative-administrative multiplicity. For instance, my account suggests that the anomalous congressional role has negatively affected the agency by undermining its legitimacy. Congress's failure to delegate clearly—and recently—to the OFA seems to have enabled critics, including members of Congress, to question the OFA's legitimacy.¹⁹¹ Congress has further weakened the OFA's institutional legitimacy by extending recognition to some tribes and positioning itself as a viable alternative to the administrative process. Congress's actions have thus undermined the agency. These examples suggest the importance of fuller investigations into the advantages and disadvantages of the legislative-administrative multiplicity.

Another area worth researching in re-evaluating federal recognition is the intersection between the two processes. The study shows that the two tracks of federal recognition do not operate in isolation, but it does not provide a qualitative analysis of their interactions. The data indicate that there is some political and functional overlap between the two. Politically, overlap occurs as tribes use one institution to gain leverage in the other. For example, some tribes have used the legislative process to pressure the OFA.¹⁹² Functionally, the evidence suggests that the dual processes may serve separate functions in that Congress restores terminated tribes while the OFA recognizes tribes. Congress, however, also recognizes and reaffirms tribes, so the extent to which the two processes are complementary or duplicative merits further study. Future research should investigate the interactions between the two branches and their spillover effects on federal recognition.

Once a more accurate evaluation of recognition exists, scholars may want to rethink reforming federal recognition. Scholars, members of Congress, and former BIA officials have suggested a complete overhaul of the federal recognition process.¹⁹³ Some argue that Congress should take recognition away from the BIA by creating an independent commission or advisory body to handle the process.¹⁹⁴ Others have called for extensive revision of the regulations and administrative process.¹⁹⁵ The problem with all these proposals is simple: they treat recognition as a single administrative process, overlooking the legislative-administrative multiplicity.¹⁹⁶ Successful reform seems unlikely without a more informed

190. See *supra* Part III.

191. See, e.g., *Oversight of the Federal Acknowledgment Process: Hearing Before the S. Select Comm. on Indian Affairs*, 98th Cong. 47–48 (1983) (statement of Arlinda Locklear); *id.* at 49 (statement of Julian T. Pierce, Exec. Director, Lumbee River Legal Services, Inc.).

192. See *supra* Part III.D; Carlson, *supra* note 150.

193. See, e.g., Riley, *supra* note 3, at 662–68.

194. CRAMER, *supra* note 3, at 48–51.

195. See, e.g., Riley, *supra* note 3, at 662–68.

196. See *Recommendations for Improving the Federal Acknowledgment Process: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 30–60 (2008) (written statement of Professor Patty Ferguson-Bohnee, Director of the Indian Legal Clinic, Sandra Day O'Connor College of Law, Arizona State University) (discussing legislative proposals for an independent commission or advisory body and evaluating various ways to improve the federal recognition process). Congress could also eliminate the administrative process and maintain that direct congressional recognition is the only option for nonfederally recognized tribes, but no one has seriously proposed this as a way to reform federal recognition.

understanding of the legislative-administrative multiplicity and a more careful thinking about the role that Congress should play.¹⁹⁷ Further studies may want to use comparative institutional analysis to help determine the appropriate institutional roles for the BIA and Congress. Moreover, taking the multiplicity into account may encourage innovative reforms by illuminating how reforms to the administrative process may not resolve all of the problems plaguing federal recognition. For example, both petitioning tribes and the administrative process have suffered from inadequate funding.¹⁹⁸ Because only Congress has the power to appropriate money, rewriting the administrative regulations will not resolve funding problems.¹⁹⁹ This suggests that the success of proposed reforms, including revisions of the administrative process, may depend on congressional action or cooperation.²⁰⁰

In addition to indicating that scholars need to take congressional role into account when evaluating federal recognition, the study reveals an intriguing new puzzle about federal recognition that merits further investigation: Why the legislative-administrative multiplicity? How did it start? Why does it continue? My account suggests that Congress's lack of a decision to relinquish its role in recognition may help account for the multiplicity. Members of Congress may continue to engage in recognition because a majority of them have never legislated the task to the BIA.²⁰¹ But other factors, such as the unique history of federal Indian law and the political nature of recognition, which seeks to allocate power rather than services or benefits, may also contribute to the multiplicity, and those factors deserve more in-depth consideration. Future research is needed to investigate what caused this multiplicity and why it persists.

Finally, the study contributes to a growing literature on Indian nations in politics and raises fascinating new questions about the role of marginalized groups in the political process.²⁰² Contrary to popular narratives about marginalized groups not

197. A few members of Congress have expressed a need for Congress to get involved when a nonfederally recognized tribe, such as the Lumbee, does not have access to the administrative process. *Recommendations for Improving the Federal Acknowledgement Process: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 3 (2008) (statement of Sen. Byron L. Dorgan, Chairman, S. Comm. on Indian Affairs) (noting that “the Lumbee Tribe couldn’t go to Interior” but that “[i]t is the only tribe with a bill pending before the Senate that is prevented from going to Interior”).

198. See *supra* Part I.

199. See *Recommendations for Improving the Federal Acknowledgement Process: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 12 (2008) (statement of Professor Patty Ferguson-Bohnee, Director of the Indian Legal Clinic, Sandra Day O’Connor College of Law, Arizona State University). Increases in funding and staff in the past have alleviated some of the timeliness issues. *Id.* at 40 (written statement of Professor Patty Ferguson-Bohnee, Director of the Indian Legal Clinic, Sandra Day O’Connor College of Law, Arizona State University).

200. *Id.* at 11–13 (statement of Professor Patty Ferguson-Bohnee, Director of the Indian Legal Clinic, Sandra Day O’Connor College of Law, Arizona State University).

201. See *supra* Part I (recounting how the BIA relies on two statutes from the 1830s as its authority to recognize a tribe); *infra* Part IV.B.

202. See, e.g., CORNTASSEL & WITMER, *supra* note 149; EVANS, *supra* note 149; DAVID E. WILKINS & HEIDI KIIWETINEPINESIHK STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* (3d ed. 2011); Carlson, *Congress and Indians*, *supra* note 8; Jeff J.

far from well in the political process, the data suggests that nonfederally recognized tribes—arguably the most marginalized Indians in the United States²⁰³—have used the political process successfully.²⁰⁴ This finding raises important questions about how, when, and why Indian nations use legislative strategies. It also indicates that more complicated stories can be told about Indian advocacy.²⁰⁵ These stories of Indian advocacy may affect our thinking about marginalized groups and politics more generally.

The data also indicate that the relationship between Congress and Indians may be more complicated than scholars previously thought. Some scholars have maintained that Congress cannot pass legislation opposed by Indian tribes, implying Congress could not enact anti-Indian legislation, such as the Termination Act of 1953, today.²⁰⁶ The data, however, suggest the problematic nature of trying to categorize Indian-related legislation as pro- or anti-Indian. The inquiry into restrictions on tribal authority shows that a bill may simultaneously include both pro- and anti-Indian provisions.²⁰⁷ The existence of pro- and anti-Indian provisions may reflect the trade-offs and deal making that are necessary in the political process. Future research should seek to better understand the nuances of the deal making as well as the trade-offs involved.

B. Administrative Law

The legislative-administrative multiplicity exposed in the study has implications for how administrative law scholars and political scientists understand relationships between Congress and agencies. First, the study uncovers a new kind of jurisdictional multiplicity in administrative law that merits further investigation. To date, the literature has focused on administrative redundancy, which occurs when multiple agencies have overlapping jurisdiction,²⁰⁸ and legislative redundancy, which stems

Cortassel & Richard C. Witmer, II, *American Indian Tribal Government Support of Office-Seekers: Findings from the 1994 Election*, 34 SOC. SCI. J. 511 (1997); Richard Witmer & Frederick J. Boehmke, *American Indian Political Incorporation in the Post-Indian Gaming Regulatory Act Era*, 44 SOC. SCI. J. 127 (2007).

203. See generally CRAMER, *supra* note 3, at 52.

204. See *supra* Part III.

205. For an attempt to answer these questions, see Carlson, *supra* note 150.

206. See, e.g., Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5, 17 (2004); Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 781 (2006).

207. My preliminary assessment of the data indicates that most of the bills that include restrictions on and acknowledgments of tribal authority are bills that seek to settle a land claim as well as recognize the tribe. Typically, settlements involved more players and issues than tribal recognitions because they resolved longstanding, historical land and jurisdictional claims among tribes, local communities, states, and the federal government. Thus, the data may suggest that the more complicated the political deal, the more likely that restrictions will be placed on tribal authority.

208. See, e.g., Michael Doran, *Legislative Organization and Administrative Redundancy*, 91 B.U. L. REV. 1815, 1816 (2011) (“When pursuing a policy objective, Congress seldom uses a single program administered by a single agency.”); Lance Gable & Benjamin Mason Meier, *Complementarity in Public Health Systems: Using Redundancy as a Tool of Public Health*

from multiple committees with the same authority.²⁰⁹ The study illuminates another kind of jurisdictional overlap. Legislative-administrative multiplicity occurs when Congress acquiesces in agency authority but continues to legislate on the same issue. In theory, this jurisdictional redundancy always exists, as Congress retains the authority to enact legislation and perform the functions delegated to an agency.²¹⁰ This raises perplexing questions about when, why, and how legislative-administrative multiplicities occur. While Congress does not always choose to create such multiplicities, it may have so chosen in at least two other contexts: private bills²¹¹ and earmarks.²¹² The existence of these other cases of legislative-administrative multiplicity indicates a need for further exploration into when, why, and how Congress engages in this behavior.

Even if legislative-administrative multiplicity is not a widespread phenomenon, it differs from other kinds of congressional involvement in administrative affairs and raises questions about how we view administrative-legislative relationships.²¹³ Legislative-administrative multiplicity does not seem to fit descriptions of political control of agencies, which focus on how members of Congress typically attempt to prevent agencies from drifting from their statutory mandates through ex ante limits and ex post controls.²¹⁴ Here, Congress appears to be neither guiding the agency to

Governance, 22 ANNALS HEALTH L. 224 (2013) (discussing the beneficial functions of redundancy in public health law); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201; Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415 (2012); Allan W. Lerner, *There Is More Than One Way To Be Redundant: A Comparison of Alternatives for the Design and Use of Redundancy in Organizations*, 18 ADMIN. & SOC'Y 334 (1987); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181 (2011); Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1222–30 (2006); Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 287–88 (2003); David A. Weisbach, *Tax Expenditures, Principal-Agent Problems, and Redundancy*, 84 WASH. U. L. REV. 1823, 1839–43 (2006).

209. See Doran, *supra* note 208, at 1823–27 (discussing the considerable jurisdictional overlap among standing House and Senate Committees).

210. Beermann, *supra* note 12, at 71–84 (discussing legislation as one way to control agency); David S. Rubenstein, “*Relative Checks*”: *Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2205–08 (2010).

211. Private bills award benefits to individuals even though a broader regulatory scheme exists. Beermann, *supra* note 12, at 91. For example, Congress has granted certain immigrants permanent residency or citizenship who would not have been entitled to it or received it as quickly through the administrative process. Kati L. Griffith, *Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents*, 18 GEO. IMMIGR. L.J. 273 (2004).

212. Earmarks “involve a targeted spending measure requested by a legislator to fund a specific project of particular interest to a geographically concentrated community, particularly where such a measure circumvents a more general process of evaluation for allocating funding that would otherwise take place in the executive branch.” Mariano-Florentino Cuéllar, *Earmarking Earmarking*, 49 HARV. J. ON LEGIS. 249, 264 (2012). For example, members of Congress used earmarks to complete the Tellico Dam even after the Secretary of the Interior determined that its completion would violate the Endangered Species Act. *Id.* at 250–51.

213. For a discussion of when congressional involvement in agency affairs is appropriate, see Beermann, *supra* note 12, at 69–144.

214. See, e.g., Daniels, *supra* note 12, at 353 (explaining that ex ante limits seek to

prevent drift nor creating a national approach to a policy problem, like in rule making. If this is not oversight or national policy making, what is it? Descriptively, Congress appears to have adopted a do-it-yourself response to the administrative process, in which it is resolving recognition issues on a case-by-case basis. Further exploration of legislative-administrative multiplicity will illuminate how to characterize it in relation to the literature on political control of the bureaucracy.

A related puzzle is what the goals of a legislative-administrative multiplicity are and how it affects policy making. Some legislative-administrative multiplicities could serve corrective functions and be intentional redundancies. Others may reflect undue influence by powerful legislators seeking to obtain as many benefits for their constituents as necessary.²¹⁵ More research is needed to determine how to characterize the various possible multiplicities and evaluate their goals, advantages, and disadvantages.

Second, the study may have implications for how scholars think about the impact of delegation on agencies. Scholars frequently talk about delegation as constraining agency action,²¹⁶ but the study indicates that delegation could also legitimize agency action. The BIA relies on two statutes, which give it general authority in the area of Indian affairs, to recognize tribes. This broad statutory authority most likely meets the legal requirements for a valid delegation.²¹⁷ But Congress's failure to cede control over recognition challenges the BIA's authority and suggests that the administrative process lacks political (not legal) legitimacy. Here, the lack of a specific, statutory mandate to the agency appears to have led to political illegitimacy. This suggests that delegation may confer not just legal legitimacy but also political legitimacy. Additional research should investigate whether agencies, such as the Federal Communications Commission and the Occupational Safety and Health Administration, with similarly broad delegations suffer from similar problems of political legitimacy.²¹⁸

Third, the study may add a new wrinkle to principal-agent theory as applied to legislative-administrative relationships.²¹⁹ While administrative law scholars

constrain agency action through statutory mandates, structure, and design).

215. If the latter is true, we may be particularly concerned about the contexts in which legislative-administrative multiplicity arises and how it could skew benefits towards particular constituents while overlooking others.

216. Beermann, *supra* note 12, at 77–78; Daniels, *supra* note 12, at 353; McCubbins, Noll & Weingast, *supra* note 12, at 440–45.

217. The leniency of the nondelegation doctrine means that agencies can point to almost any statutory language and have it upheld as a valid delegation. ESKRIDGE ET AL., *supra* note 12, at 1136–37.

218. Agencies facing new technological developments may also encounter problems of political legitimacy when they attempt to regulate these new problems under an old statute. For example, litigation erupted over the ability of the Environmental Protection Agency to regulate climate change under the Clean Air Act, *Massachusetts v. EPA*, 549 U.S. 496 (2007), and the issue remains controversial. For a thorough discussion of agencies adapting old statutes to address new problems, see Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 5 (2014) (discussing how when Congress fails to update statutes to address new problems it invites agencies to adapt old statutes and noting that such adaptation could exceed the agency's legal authority).

219. The principal-agent analogy pervades both the political science literature on political

acknowledge the limits of the principal-agent analogy, my study further problematizes it by questioning whether a principal always exists.²²⁰ Scholars almost always assume the existence of a congressional majority, acting as a principal, at some point in time (usually at least at the time of the delegation).²²¹ This assumption is questionable in the context of federal recognition, where the BIA has relied on statutes enacted almost 150 years prior to the promulgation of the regulations. It is unlikely, at best, that Congress meant to delegate the authority to recognize new tribes a few years after it enacted the Removal Act, which sought to end conflicts between states and Indian nations by removing the Indians to the West.²²² Even if it did, the congressional majority that existed at the time of the 1978 regulations was not prepared to legislate such authority or take any action on federal recognition. In fact, the lack of legislation suggests that a congressional majority willing to act on the issue may never have existed.²²³ The only majority appears to be one willing not to act on the issue, which has led to acquiescence in the administrative process. This congressional acquiescence seems to complicate our ability to apply the principal-agency analogy in this context. It suggests potential problems with delegation by acquiescence, and possibly raises concerns about political accountability and control of agencies.²²⁴

CONCLUSION

Critiques of the administrative process have dominated the recognition literature. As a result, scholars have paid insufficient attention to the other institutions involved in federal recognition and assumed that Congress has largely ceded control over recognition to the BIA. Questioning this assumption reveals how it has eclipsed and oversimplified the true nature of the recognition of Indian nations in the United States.

control of administrative agencies and the related legal literature on delegation and oversight. *See, e.g.*, Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 164–65 (2006); McCubbins, Noll, & Weingast, *supra* note 12, at 247–48. Some scholars define the principal as the elected branches and include the President as well as Congress. *See, e.g.*, Daniels, *supra* note 12, at 340.

220. Scholars have added dimensionality to this view by discussing temporality (how the principal changes over time) and multiplicity (the existence of not one, but many congressional principals). DeShazo & Freeman, *supra* note 12, at 1449. Others have flipped the dominant view upside down by suggesting that agencies seek to reverse roles and act as principals influencing the elected branches at specific times. Daniels, *supra* note 12, at 341.

221. *See* DeShazo & Freeman, *supra* note 12, at 1455 (assuming Congress delegates through a statute to an agency).

222. Indian Removal Act, ch. 148, 4 Stat. 411, 411–12 (1830). For a more detailed history of removal, see FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790–1834*, at 224–49 (1962).

223. *See, e.g.*, Daniels, *supra* note 12, at 353; DeShazo & Freeman, *supra* note 12, at 1447–48.

224. For example, the statutes relied on by the BIA as delegating the recognition power place almost no *ex ante* limits on the agency. This dearth of *ex ante* limits may make *ex parte* controls more important if we normatively believe that the elected branches should control agencies. *See, e.g.*, Rubenstein, *supra* note 210, at 2173 (explaining the need for checking agency power in general).

The study exposes recognition as a legislative-administrative multiplicity rather than a single administrative process. This study thus forces us to admit the far-reaching implications of the misconceptions we have about federal recognition. Almost forty years of critiques and reforms—possibly misguided ones—have flowed from this myopia. It is time to rethink and re-evaluate now that we can see federal recognition for what it is—a legislative-administrative multiplicity.

The study, however, offers more than an opportunity to revisit an important but troubled area of the law. It identifies a new kind of jurisdictional overlap—legislative-administrative multiplicity—previously overlooked in the administrative law literature. This discovery illuminates the complicated interactions among agencies and Congress and raises new questions about these relationships.

Finally, the study illustrates how scholars can use empirical investigation to check prevailing assumptions and describe the world more accurately. More accurate descriptions can inform normative arguments and may produce policy outcomes better tailored to existing complexities.

METHODOLOGICAL APPENDIX

This Appendix elaborates on the discussion of the methodology provided in the Article.

I. Data

I collected data on nonfederally recognized tribes pursuing federal recognition from 1975 to 2013 from several sources, including a database of all Indian-related bills, congressional hearings on federal recognition, GAO reports on federal recognition, and DOI reports on the OFA process (detailing the numbers and names of petitioners and the petitioners' status in the process).

I started with a dataset that I had created, which includes all identifiable legislation relating to Indians introduced in Congress from 1975 to 2013.²²⁵ I used this dataset to locate tribal federal recognition bills. Tribal federal recognition bills are bills seeking the federal recognition, acknowledgement, or restoration of a government-to-government relationship between the United States and a specific group of Indians or Indian nation. I initially identified tribal recognition bills in the dataset by searching for key words in the summaries of the bills in the dataset. Searching by the key words "federal recognition" generated 227 bills in the dataset.²²⁶ I reviewed each of the bills on the list to see whether the bill was related to federal recognition of an Indian nation. As a result, I identified three bills that were not related to federal recognition and excluded them from further analysis.²²⁷ Of the 224 remaining bills, 30 of the bills addressed either establishing or changing the OFA process, another 21 bills dealt with extending federal recognition to Native Hawaiians,²²⁸ and 4 bills sought to limit the ability of newly recognized tribes to take land into trust.²²⁹ None of these bills fit into the definition of a tribal federal

225. Carlson, *Congress and Indians*, *supra* note 8, at 157–64.

226. I also searched by bill title using several different key words, including "recognition," "restoration," and "settlement." These searches generated overinclusive lists of bills. For example, the settlement search produced a multitude of bills on water rights settlements and land claims settlements that were not related to federal recognition. I ran this search, however, because some land claims settlement bills do address federal recognition, such as the Mashantucket Pequot Indian Claims Settlement Act. I used the lists generated in these searches to triangulate the data and ensure that I had a complete list of all federal recognition bills.

227. The three bills were Optimizing Visa Entry Rules and Demanding Uniform Enforcement Immigration Reform Act of 2007, H.R. 4192, 110th Cong. (2007); National Defense Authorization Act for Fiscal Year 1995, S. 2182, 103d Cong. (1994); and National Defense Authorization Act for Fiscal Year 1994, H.R. 2401, 103d Cong. (1993). Each of these bills did include the term "federal recognition," but the term was not used in the context of the federal recognition, acknowledgment, or restoration of Indian nations.

228. The bills relating to the clarification of the relationship between Native Hawaiians and the U.S. government were excluded from the analysis because they focused on creating a process of federal recognition for Native Hawaiians rather than extending recognition to a specific Indian nation. Native Hawaiians are currently excluded from the OFA process under 25 C.F.R. § 83.

229. These bills dealt with land into trust issues and limiting the ability of newly recognized tribes to take land into trust. *See, e.g.*, To Encourage Competition and Tax Fairness and To

recognition bill because they did not seek to recognize a specific Indian nation. As a result, these bills were excluded from the analysis. Only 164 of the 224 bills sought to extend or restore federal recognition to Indian nations.

To ensure a complete list of tribal federal recognition bills, I then searched for related key words in the summaries of the bills in the dataset, including “federally recognized,” “restoration,” “recognition,” and “settlement.” I cross-referenced the list generated by the “federal recognition” search with the lists generated by these searches and with the lists of federally recognized and restored tribes in the *Cohen’s Handbook of Federal Indian Law*. Bills were added to the list based on their title and/or summary. If neither the title nor the summary indicated that the bill would restore, affirm, or extend federal recognition to an Indian nation, then it was excluded from the list. Once I had a list of bills, I searched the database for identical bills to ensure that I had every relevant bill. The final list included 178 bills.

From the dataset, I created several lists of tribes and bills engaged in seeking congressional recognition.

Tribes Seeking Congressional Recognition from 1975 to 2013
(* indicates tribes receiving congressional recognition)²³⁰

1. Lumbee Tribe
2. Rappahannock Tribe
3. Monacan Indian Nation
4. Chickahominy Tribe
5. Chickahominy Indian Tribe—Eastern Division
6. Upper Mattaponi Tribe
7. Nansemond Indian Tribe
8. Peoria Tribe of Indians of Oklahoma*
9. Ottawa Tribe of Oklahoma*
10. Modoc Tribe of Oklahoma*
11. Wyandotte Tribe of Oklahoma*
12. Winnemem Wintu Tribe
13. Mowa Band of Choctaw Indians of Alabama
14. Jena Band of Choctaws of Louisiana
15. Burt Lake Band of Ottawa and Chippewa Indians
16. Little Shell Tribe of Chippewa Indians of Montana
17. Central Council of the Tlingit and Haida Indian Tribes of Alaska*
18. Muscogee Nation of Florida (Florida Tribe of Eastern Creek Indians)
19. Dunlap Band of Mono Indians
20. Tuscarora Nation of Indians of the Carolinas
21. Chinook Nation
22. Duwamish Tribe
23. Miami Nation of Indiana
24. Confederated Tribes of Siletz Indians*
25. Pascua Yaqui Tribe of Arizona*
26. Paiute Indian Tribe of Utah*
27. Passamaquoddy Tribe*

Protect the Tax Base of State and Local Governments, H.R. 1168, 105th Cong. (1997).

230. The tribes have been listed in accordance with the name used in their recognition bills (as compared to, for example, the name provided in the most recent BIA list).

28. Houlton Band of Maliseet Indians*
29. Penobscot Nation*
30. Cow Creek Band of Umpqua Tribe of Indians*
31. Mashantucket Pequot Indians*
32. Confederated Tribes of Grand Ronde*
33. Confederated Tribes of Coos, Lower Umpqua and Siuslaw*
34. Klamath Tribe of Indians*
35. Ysleta del Sur Pueblo*
36. Alabama and Coushatta Indian Tribes of Texas*
37. Coquille Tribe of Indians*
38. Lac Vieux Desert Band of Lake Superior Chippewa Indians*
39. Aroostook Band of Micmacs*
40. Ponca Tribe of Nebraska*
41. United Houma Nation
42. Ione Band of Miwok Indians
43. Northern Pomos Tribe
44. Nomlaki Tribe
45. Pomo Tribe
46. Maidu Tribe
47. Northern Pomo Tribe
48. Wailaku and Maidu Tribes
49. Wappo Tribe
50. Nsenan-Southern Maidus Tribe
51. Little Traverse Bay Bands of Odawa Indians*
52. Little River Band of Ottawa Indians*
53. Pokagon Band of Potawatomi Indians*
54. United Auburn Indian Community of the Auburn Rancheria of California*
55. Paskenta Band of Nomlaki Indians of California*
56. Swan Creek Black River Confederated Ojibwa Tribes of Michigan
57. Lower Muscogee-Creek Indian Tribe of Georgia
58. King Salmon Traditional Village
59. Shawnee Tribe*
60. Graton Rancheria of California*
61. Shoonaq Tribe of Kodiak
62. Gabrieleno Band of Mission Indians
63. Gabrieleno/Tongva Nation
64. Tiwa Indian Pueblo
65. Yurok Tribe*
66. Osage Tribe of Indians
67. Mille Lacs Band of Ojibwe
68. Catawba Indian Tribe of South Carolina*
69. Texas Band of Kickapoo*
70. Qutekcak Native Tribe of Alaska
71. Mattaponi Tribe
72. Pamunkey Tribe

Recognition Bills Introduced in Congress from 1975 to 2013

(* indicates an enacted bill)

1. A Bill To Provide for the Extension of Certain Federal Benefits, Services, and Assistance to Pascua Yaqui Indians of Arizona, H.R. 8411, 94th Cong. (1975).
2. Siletz Restoration Act, H.R. 11221, 94th Cong. (1975).
3. Siletz Restoration Act, S. 2801, 94th Cong. (1975).
4. A Bill Relating to the Tiwa Indian Pueblo of San Juan de Guadalupe, Tortugas, New Mexico, H.R. 3352, 94th Cong. (1976).
5. Indian Tribal Restoration Act of 1976, S. 2968, 94th Cong. (1976).
6. Siletz Indian Restoration Act, Pub. L. No. 95-195, 91 Stat. 1415 (1977) (originally proposed as S. 1560, 95th Cong.).*
7. A Bill To Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona, H.R. 6612, 95th Cong. (1978).
8. An Act To Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona, Pub. L. No. 95-375, 92 Stat. 712 (1978) (originally proposed as S.1633, 95th Cong.).*
9. Modoc, Wyandotte, Peoria and Ottawa Restoration Act of 1975, HR. 2497, 95th Cong. (1978).
10. An Act To Reinstate the Modoc, Wyandotte, Peoria, and Ottawa Indian Tribes of Oklahoma, Pub. L. No. 95-281, 92 Stat. 246 (1978) (originally proposed as Indian Tribal Restoration Act, S. 661, 95th Cong.).*
11. Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, 94 Stat. 317 (1980) (originally proposed as H.R. 4996, 96th Cong.).*
12. Paiute Indian Tribe of Utah Restoration Act, S. 1273, 96th Cong. (1979).
13. Maine Land Claims Settlement Act of 1980, Pub. L. No. 95-420, 94 Stat. 1785 (1980) (originally proposed as H.R. 7919, 96th Cong.).*
14. Maine Land Claims Settlement Act of 1980, S. 2829, 96th Cong. (1980).
15. Mashantucket Pequot Indian Claims Settlement Act, H.R. 6612, 97th Cong. (1982).
16. Mashantucket Pequot Indian Claims Settlement Act, S. 2719, 97th Cong. (1982).
17. Cow Creek Band of Umpqua Tribe of Indians Restoration Act, Pub. L. No. 97-391, 96 Stat. 1960 (1982) (originally proposed as H.R. 6588, 97th Cong.).*
18. Cow Creek Band of Umpqua Tribe of Indians Recognition Act, S. 2819, 97th Cong. (1982).
19. Osage Nation Reorganization Act, H.R. 5425, 97th Cong. (1982).
20. Texas Band of Kickapoo Act, Pub. L. No. 97-429, 96 Stat. 2269 (1983) (originally proposed as H.R. 4496, 97th Cong.).*
21. Ysleta del Sur Pueblo and Alabama and Coushatta Tribes of Texas Restoration Act, H.R. 6391, 98th Cong. (1984).
22. Mashantucket Pequot Indian Claims Settlement Act, H.R. 982, 98th Cong. (1983).
23. Mashantucket Pequot Indian Claims Settlement Act, S. 366, 98th Cong. (1983).

24. Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 851 (1983) (originally proposed as S. 1499, 98th Cong.).*
25. Grand Ronde Restoration Act, Pub. L. No. 98-165, 97 Stat. 1064 (1983) (originally proposed as H.R. 3885, 98th Cong.).*
26. Mille Lacs Band of Chippewa Indians Separation Act, S. 3078, 98th Cong. (1984).
27. Coos, Lower Umpqua and Siuslaw Restoration Act, Pub. L. No. 98-481, 98 Stat. 2250 (1984) (originally proposed as H.R. 5540, 98th Cong.).*
28. Mille Lacs Band of Chippewa Indians Separation Act, S. 354, 99th Cong. (1985).
29. Ysleta del Sur Pueblo and Alabama and Coushatta Tribes of Texas Restoration Act, H.R. 1344, 99th Cong. (1985).
30. Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (1986) (originally proposed as H.R. 3554, 99th Cong.).*
31. Lac Vieux Desert Band of Lake Superior Chippewa Indians Act, H.R. 3194, 100th Cong. (1987).
32. Mowa Band of Choctaw Indians Recognition Act, H.R. 3107, 100th Cong. (1987).
33. Mowa Band of Choctaw Indians Recognition Act, S. 1142, 100th Cong. (1987).
34. Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (1987) (originally proposed as H.R. 318, 100th Cong.).*
35. Lac Vieux Desert Band of Lake Superior Chippewa Indians Act, S. 1735, 100th Cong. (1987).
36. Lac Vieux Desert Band of Lake Superior Chippewa Indians Act, Pub. L. No. 100-420, 102 Stat. 1577 (1988) (originally proposed as H.R. 3679, 100th Cong.).*
37. Hoopa-Yurok Settlement Act, H.R. 5340, 100th Cong. (1988).
38. Hoopa-Yurok Settlement Act, H.R. 5248, 100th Cong. (1988).
39. Hoopa-Yurok Settlement Act, H.R. 4469, 100th Cong. (1988).
40. Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (1988) (originally proposed as S. 2723, 100th Cong.).*
41. Coquille Restoration Act, S. 2696, 100th Cong. (1988).
42. Coquille Restoration Act, H.R. 4787, 100th Cong. (1988).
43. Lumbee Recognition Act, S. 2672, 100th Cong. (1988).
44. Lumbee Recognition Act, HR. 5042, 100th Cong. (1988).
45. A Bill To Amend the Act of September 18, 1978 (92 Stat. 712), Providing for the Extension of Certain Federal Benefits, Services and Assistance to the Pascua Yaqui Indians of Arizona, H.R. 1455, 101st Cong. (1989).
46. Coquille Restoration Act, S. 521, 101st Cong. (1989).
47. Coquille Restoration Act, Pub. L. No. 101-42, 109 Stat. 91 (1989) (originally proposed as H.R. 881, 101st Cong.).*
48. Mowa Band of Choctaw Indians Recognition Act, H.R. 1562, 101st Cong. (1989).
49. Florida Tribe of Eastern Creek Indians Recognition Act, H.R. 3353, 101st Cong. (1989).
50. Lumbee Recognition Act, S. 901, 101st Cong. (1989).
51. Miami Nation of Indiana Tribal Status Confirmation Act, S. 3157, 101st Cong. (1990).

52. Aroostook Band of Micmacs Settlement Act, H.R. 3049, 101st Cong. (1989).
53. Aroostook Band of Micmacs Settlement Act, S. 1413, 101st Cong. (1989).
54. Mowa Band of Choctaw Indians Recognition Act, S. 381, 101st Cong. (1990).
55. United Houma Nation Recognition Act, H.R. 4886, 101st Cong. (1990).
56. Jena Band of Choctaw Recognition Act, H.R. 5772, 101st Cong. (1990).
57. Lumbee Recognition Act, H.R. 2335, 101st Cong. (1990).
58. United Houma Nation Recognition Act, S. 2423, 101st Cong. (1990).
59. Jena Band of Choctaws Recognition Act, S. 1918, 101st Cong. (1989).
60. Ponca Restoration Act, Pub. L. No. 101-484, 104 Stat. 1167 (1990) (originally proposed as S. 1747, 101st Cong.).*
61. California Tribal Status Act of 1990, H.R. 5436, 101st Cong. (1990).
62. Aroostook Band of Micmacs Settlement Act, H.R. 932, 102d Cong. (1991).
63. Miami Nation of Indiana Restoration Act, S. 538, 102d Cong. (1991).
64. A Bill To Amend the Act Entitled "An Act To Provide for the extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona", H.R. 3479, 102d Cong. (1991).
65. Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, 105 Stat. 1143 (1991) (originally proposed as S. 374, 102d Cong.).*
66. Lumbee Recognition Act, S.1036, 102d Cong. (1991).
67. A Bill To Restore Federal Services to the Pokagon Band of Potawatomi Indians, H.R. 6205, 102d Cong. (1992).
68. Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, H.R. 3958, 102d Cong. (1992).
69. Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, S. 3121, 102d Cong. (1992).
70. Miami Nation of Indiana Restoration Act, H.R. 1475, 102d Cong. (1992).
71. Lumbee Recognition Act, H.R. 1426, 102d Cong. (1991).
72. Mowa Band of Choctaw Indians Recognition Act, S. 362, 102d Cong. (1992).
73. Jena Band of Choctaws of Louisiana Restoration Act, S. 3095, 102d (1992).
74. Jena Band of Choctaw Recognition Act, S. 45, 102d Cong. (1991).
75. Mowa Band of Choctaw Indians Recognition Act, H.R. 2349, 102d Cong. (1991).
76. Jena Band of Choctaws of Louisiana Restoration Act, H.R. 3607, 102d Cong. (1991).
77. A Bill To Restore and Extend Federal Recognition to the Catawba Nation, H.R. 5562, 102d Cong. (1992).
78. An Act To Restore Federal Services to the Pokagon Band of Potawatomi Indians, Pub. L. No. 103-323, 108 Stat. 2152 (1994) (originally proposed as S. 1066, 103d Cong.).*
79. A Bill To Restore Federal Services to the Pokagon Band of Potawatomi Indians, H.R. 878, 103d Cong. (1993).

80. Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, 108 Stat. 2156 (1994) (originally proposed as S. 1357, 103d Cong.)*
81. Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, H.R. 2376, 103d Cong. (1993).
82. Lumbee Recognition Act, H.R. 334, 103d Cong. (1993).
83. Mowa Band of Choctaw Indians Recognition Act, H.R. 923, 103d Cong. (1993).
84. Jena Band of Choctaw Indians of Louisiana Confirmation Act, S. 1078, 103d Cong. (1993).
85. Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, 107 Stat. 1118 (1993) (originally proposed as H.R. 2399, 103d Cong.)*
86. Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, S. 1156, 103d Cong. (1993).
87. Jena Band of Choctaw Indians of Louisiana Confirmation Act, H.R. 2366, 103d Cong. (1993).
88. Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub. L. No. 103-434, 108 Stat. 4526 (1994) (originally proposed as S. 1146, 103d Cong.)*
89. Burt Lake Band of Ottawa and Chippewa Indians Act, H.R. 4232, 103d Cong. (1994).
90. Burt Lake Band of Ottawa and Chippewa Indians Act of 1994, S. 2361, 103d Cong. (1994).
91. An Act To Amend the Act Entitled “An Act To Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona”, Pub. L. No. 103-357, 108 Stat. 3418 (1994) (originally proposed as H.R. 734, 103d Cong.)*
92. Tlingit and Haida Status Confirmation Act, Pub. L. No. 103-454, 108 Stat. 4792 (1994) (originally proposed as H.R. 4180, 103d Cong.)*
93. Tlingit and Haida Status Clarification Act, S. 1784, 103d Cong. (1994).
94. Paskenta Band Restoration Act, H.R. 5050, 103d Cong. (1994).
95. Auburn Indian Restoration Act, H.R. 4228, 103d Cong. (1994).
96. Mowa Band of Choctaw Indians Recognition Act, H.R. 3605, 103d Cong. (1994).
97. Mowa Band of Choctaw Indians Recognition Act, S. 282, 103d Cong. (1994).
98. Burt Lake Band of Ottawa and Chippewa Indians Act of 1995, S. 1182, 104th Cong. (1995).
99. Burt Lake Band of Ottawa and Chippewa Indians Act, H.R. 377, 104th Cong. (1995).
100. Mowa Band of Choctaw Indians Recognition Act, S. 292, 104th Cong. (1995).
101. Lumbee Recognition Act, H.R. 3810, 104th Cong. (1996).
102. United Houma Nation Recognition and Land Claims Settlement Act of 1996, H.R. 3671, 104th Cong. (1996).
103. Burt Lake Band of Ottawa and Chippewa Indians Act, S. 746, 105th Cong. (1997).
104. Burt Lake Band of Ottawa and Chippewa Indians Act, H.R. 948, 105th Cong. (1997).
105. Swan Creek Black River Confederated Ojibwa Tribes of Michigan Act, H.R. 2822, 105th Cong. (1997).

106. Graton Rancheria Restoration Act, H.R. 4434, 105th Cong. (1998).
107. Tuscarora Nation of Kau-ta-Noh Recognition Act, H.R. 4693, 105th Cong. (1998).
108. Swan Creek Black River Confederated Ojibwa Tribes of Michigan Act, H.R. 1608, 106th Cong. (1999).
109. Lower Muscogee-Creek Indian Tribe of Georgia Recognition Act, H.R. 3262, 106th Cong. (1999).
110. Burt Lake Band of Ottawa and Chippewa Indians Act, H.R. 4703, 106th Cong. (2000).
111. Miami Nation of Indiana Act, H.R. 5403, 106th Cong. (2000).
112. King Salmon Traditional Village and the Shoonaq' Tribe of Kodiak Recognition Act, H.R. 4842, 106th Cong. (2000).
113. Graton Rancheria Restoration Act, S. 2633, 106th Cong. (2000).
114. Graton Rancheria Restoration Act, H.R. 946, 106th Cong. (2000).
115. Omnibus Indian Advancement Act, Pub. L. No. 106-568, 114 Stat. 2868 (2000) (originally proposed as H.R. 5528, 106th Cong.).*
116. Lower Muscogee-Creek Indian Tribe of Georgia Recognition Act, H.R. 4730, 106th Cong. (2000).
117. Lower Muscogee-Creek Indian Tribe of Georgia Recognition Act, S. 2771, 106th Cong. (2000).
118. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2000, H.R. 5073, 106th Cong. (2000).
119. Shawnee Tribe Status Act of 2000, H.R. 5207, 106th Cong. (2000).
120. Shawnee Tribe Status Act of 2000, S. 3019, 106th Cong. (2000).
121. Swan Creek Black River Confederated Ojibwa Tribes of Michigan Act, H.R. 939, 107th Cong. (2001).
122. Burt Lake Band of Ottawa and Chippewa Indians Act, H.R. 1633, 107th Cong. (2001).
123. Gabrieleno/Tongva Nation Act, H.R. 2619, 107th Cong. (2001).
124. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2001, H.R. 2345, 107th Cong. (2001).
125. Gabrieleno Band of Mission Indians Federal Recognition Act, H.R. 3824, 107th Cong. (2002).
126. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2002, S. 2694, 107th Cong. (2002).
127. Miami Nation of Indiana Recognition Confirmation Act, H.R. 954, 108th Cong. (2003).
128. Duwamish Tribal Recognition Act, H.R. 477, 108th Cong. (2003).
129. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2003, H.R. 1938, 108th Cong. (2003).
130. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2003, S. 1423, 108th Cong. (2003).
131. Lumbee Acknowledgment Act of 2003, S. 420, 108th Cong. (2003).
132. Winnemem Wintu Tribe Clarification and Restoration Act, S. 2879, 108th Cong. (2004).
133. Lumbee Recognition Act, H.R. 898, 108th Cong. (2003).
134. Duwamish Tribal Recognition Act, H.R. 852, 109th Cong. (2005).
135. Lumbee Recognition Act, H.R. 21, 109th Cong. (2005).
136. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2005, H.R. 3349, 109th Cong. (2005).
137. Mowa Band of Choctaw Indians Recognition Act, H.R. 3526, 109th Cong. (2005).

138. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2005, S. 480, 109th Cong. (2005).
139. Burt Lake Band of Ottawa and Chippewa Indians Reaffirmation Act, H.R. 4802, 109th Cong. (2006).
140. Little Shell Tribe of Chippewa Indians Restoration Act of 2006, H.R. 5804, 109th Cong. (2006).
141. Lumbee Recognition Act, S. 660, 109th Cong. (2006).
142. A Bill To Extend Federal Recognition to the Rappahannock Tribe, H.R. 5130, 109th Cong. (2006).
143. Little Shell Tribe of Chippewa Indians Restoration Act of 2007, H.R. 1301, 110th Cong. (2007).
144. Little Shell Tribe of Chippewa Indians Restoration Act of 2007, S. 724, 110th Cong. (2007).
145. Dunlap Band of Mono Indians Reaffirmation Act, H.R. 3069, 110th Cong. (2007).
146. Duwamish Tribal Recognition Act, H.R. 949, 110th Cong. (2007).
147. Lumbee Recognition Act, S. 333, 110th Cong. (2007).
148. A Bill To Extend Federal Recognition to the Rappahannock Tribe, H.R. 106, 110th Cong. (2007).
149. Mowa Band of Choctaw Indians Recognition Act, H.R. 1946, 110th Cong. (2007).
150. Muscogee Nation of Florida Federal Recognition Act, H.R. 2028, 110th Cong. (2007).
151. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2007, H.R. 1294, 110th Cong. (2007).
152. Burt Lake Band of Ottawa and Chippewa Indians Reaffirmation Act, H.R. 1575, 110th Cong. (2008).
153. Chinook Nation Restoration Act, H.R. 6689, 110th Cong. (2008).
154. Lumbee Recognition Act, H.R. 65, 110th Cong. (2008).
155. Muscogee Nation of Florida Federal Recognition Act, S. 514, 110th Cong. (2007).
156. Burt Lake Band of Ottawa and Chippewa Indians Reaffirmation Act, H.R. 1358, 111th Cong. (2009).
157. Little Shell Tribe of Chippewa Indians Restoration Act of 2009, S. 1936, 111th Cong. (2009).
158. Little Shell Tribe of Chippewa Indians Restoration Act of 2009, H.R. 3120, 111th Cong. (2009).
159. Duwamish Tribal Recognition Act, H.R. 2678, 111th Cong. (2009).
160. Chinook Nation Restoration Act, H.R. 2576, 111th Cong. (2009).
161. Chinook Nation Restoration Act, H.R. 3084, 111th Cong. (2009).
162. Muscogee Nation of Florida Federal Recognition Act, H.R. 1899, 111th Cong. (2009).
163. Muscogee Nation of Florida Federal Recognition Act, S. 530, 111th Cong. (2009).
164. Lumbee Recognition Act, H.R. 31, 111th Cong. (2009).
165. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2009, H.R. 1385, 111th Cong. (2009).
166. Indian Tribes of Virginia Federal Recognition Act of 2009, S. 1178, 111th Cong. (2009).
167. Mowa Band of Choctaw Indians Recognition Act, H.R. 5149, 111th Cong. (2010).
168. Lumbee Recognition Act, S. 1735, 111th Cong. (2010).

169. Burt Lake Band of Ottawa and Chippewa Indians Reaffirmation Act, H.R. 2322, 112th Cong. (2011).
170. Little Shell Tribe of Chippewa Indians Restoration Act of 2011, S. 546, 112th Cong. (2011).
171. Duwamish Tribal Recognition Act, H.R. 2999, 112th Cong. (2011).
172. Muscogee Nation of Florida Federal Recognition Act, H.R. 2591, 112th Cong. (2011).
173. Muscogee Nation of Florida Federal Recognition Act, S. 880, 112th Cong. (2011).
174. Lumbee Recognition Act, H.R. 27, 112th Cong. (2011).
175. Mowa Band of Choctaw Indians Recognition Act, H.R. 766, 112th Cong. (2011).
176. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2011, H.R. 783, 112th Cong. (2011).
177. Indian Tribes of Virginia Federal Recognition Act of 2011, S. 379, 112th Cong. (2011).
178. Lumbee Recognition Act, S. 1218, 112th Cong. (2012).

Recognition Bills with Restrictions Introduced in Congress from 1975 to 2013

(* indicates the bill was enacted):

1. A Bill To Provide for the Extension of Certain Federal Benefits, Services, and Assistance to Pascua Yaqui Indians of Arizona, H.R. 8411, 94th Cong. (1975).
2. Siletz Restoration Act, H.R. 11221, 94th Cong. (1975).
3. Siletz Restoration Act, S. 2801, 94th Cong. (1975).
4. Siletz Indian Restoration Act, Pub. L. No. 95-195, 91 Stat. 1415 (1977) (originally proposed as S. 1560, 95th Cong.).*
5. A Bill To Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona, H.R. 6612, 95th Cong. (1978).
6. An Act To Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona, Pub. L. No. 95-375, 92 Stat. 712 (1978) (originally proposed as S.1633, 95th Cong.).*
7. Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, 94 Stat. 317 (1980) (originally proposed as H.R. 4996, 96th Cong.).*
8. Paiute Indian Tribe of Utah Restoration Act, S. 1273, 96th Cong. (1979).
9. Maine Land Claims Settlement Act of 1980, Pub. L. No. 95-420, 94 Stat. 1785 (1980) (originally proposed as H.R. 7919, 96th Cong.).*
10. Maine Land Claims Settlement Act of 1980, S. 2829, 96th Cong. (1980).
11. Mashantucket Pequot Indian Claims Settlement Act, H.R. 6612, 97th Cong. (1982).
12. Mashantucket Pequot Indian Claims Settlement Act, S. 2719, 97th Cong. (1982).
13. Texas Band of Kickapoo Act, Pub. L. No. 97-429, 96 Stat. 2269 (1983) (originally proposed as H.R. 4496, 97th Cong.).*
14. Ysleta del Sur Pueblo and Alabama and Coushatta Tribes of Texas Restoration Act, H.R. 6391, 98th Cong. (1984).
15. Mashantucket Pequot Indian Claims Settlement Act, H.R. 982, 98th Cong. (1983).

16. Mashantucket Pequot Indian Claims Settlement Act, S. 366, 98th Cong. (1983).
17. Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 851 (1983) (originally proposed as S. 1499, 98th Cong.).*
18. Grand Ronde Restoration Act, Pub. L. No. 98-165, 97 Stat. 1064 (1983) (originally proposed as H.R. 3885, 98th Cong.).*
19. Coos, Lower Umpqua and Siuslaw Restoration Act, Pub. L. No. 98-481, 98 Stat. 2250 (1984) (originally proposed as H.R. 5540, 98th Cong.).*
20. Ysleta del Sur Pueblo and Alabama and Coushatta Tribes of Texas Restoration Act, H.R. 1344, 99th Cong. (1985).
21. Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (1986) (originally proposed as H.R. 3554, 99th Cong.).*
22. Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (1987) (originally proposed as H.R. 318, 100th Cong.).*
23. Coquille Restoration Act, S. 2696, 100th Cong. (1988).
24. Coquille Restoration Act, H.R. 4787, 100th Cong. (1988).
25. Lumbee Recognition Act, S. 2672, 100th Cong. (1988).
26. Lumbee Recognition Act, HR. 5042, 100th Cong. (1988).
27. Coquille Restoration Act, S. 521, 101st Cong. (1989).
28. Coquille Restoration Act, Pub. L. No. 101-42, 109 Stat. 91 (1989) (originally proposed as H.R. 881, 101st Cong.).*
29. Florida Tribe of Eastern Creek Indians Recognition Act, H.R. 3353, 101st Cong. (1989).
30. Lumbee Recognition Act, S. 901, 101st Cong. (1989).
31. Miami Nation of Indiana Tribal Status Confirmation Act, S. 3157, 101st Cong. (1990).
32. Aroostook Band of Micmacs Settlement Act, H.R. 3049, 101st Cong. (1989).
33. Aroostook Band of Micmacs Settlement Act, S. 1413, 101st Cong. (1989).
34. United Houma Nation Recognition Act, H.R. 4886, 101st Cong. (1990).
35. Lumbee Recognition Act, H.R. 2335, 101st Cong. (1990).
36. United Houma Nation Recognition Act, S. 2423, 101st Cong. (1990).
37. Aroostook Band of Micmacs Settlement Act, H.R. 932, 102d Cong. (1991).
38. Miami Nation of Indiana Restoration Act, S. 538, 102d Cong. (1991).
39. Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, 105 Stat. 1143 (1991) (originally proposed as S. 374, 102d Cong.).*
40. Lumbee Recognition Act, S.1036, 102d Cong. (1991).
41. Miami Nation of Indiana Restoration Act, H.R. 1475, 102d Cong. (1992).
42. Lumbee Recognition Act, H.R. 1426, 102d Cong. (1991).
43. Lumbee Recognition Act, H.R. 334, 103d Cong. (1993).
44. Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, 107 Stat. 1118 (1993) (originally proposed as H.R. 2399, 103d Cong.).*
45. Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, S. 1156, 103d Cong. (1993).
46. Lumbee Recognition Act, H.R. 3810, 104th Cong. (1996).
47. Graton Rancheria Restoration Act, H.R. 4434, 105th Cong. (1998).

48. Miami Nation of Indiana Act, H.R. 5403, 106th Cong. (2000).
49. Graton Rancheria Restoration Act, S. 2633, 106th Cong. (2000).
50. Graton Rancheria Restoration Act, H.R. 946, 106th Cong. (2000).
51. Lower Muscogee-Creek Indian Tribe of Georgia Recognition Act, H.R. 4730, 106th Cong. (2000).
52. Lower Muscogee-Creek Indian Tribe of Georgia Recognition Act, S. 2771, 106th Cong. (2000).
53. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2001, H.R. 2345, 107th Cong (2001).
54. Gabrieleno Band of Mission Indians Federal Recognition Act, H.R. 3824, 107th Cong. (2002).
55. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2002, S. 2694, 107th Cong. (2002).
56. Miami Nation of Indiana Recognition Confirmation Act, H.R. 954, 108th Cong. (2003).
57. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2003, H.R. 1938, 108th Cong. (2003).
58. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2003, S. 1423, 108th Cong. (2003).
59. Lumbee Acknowledgment Act of 2003, S. 420, 108th Cong. (2003).
60. Winnemem Wintu Tribe Clarification and Restoration Act, S. 2879, 108th Cong. (2004).
61. Lumbee Recognition Act, H.R. 898, 108th Cong. (2003).
62. Lumbee Recognition Act, H.R. 21, 109th Cong. (2005).
63. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2005, H.R. 3349, 109th Cong. (2005).
64. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2005, S. 480, 109th Cong. (2005).
65. Lumbee Recognition Act, S. 660, 109th Cong. (2006).
66. A Bill To Extend Federal Recognition to the Rappahannock Tribe, H.R. 5130, 109th Cong. (2006).
67. Lumbee Recognition Act, S. 333, 110th Cong. (2007).
68. A Bill To Extend Federal Recognition to the Rappahannock Tribe, H.R. 106, 110th Cong. (2007).
69. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2007, H.R. 1294, 110th Cong. (2007).
70. Chinook Nation Restoration Act, H.R. 6689, 110th Cong. (2008).
71. Lumbee Recognition Act, H.R. 65, 110th Cong. (2008).
72. Chinook Nation Restoration Act, H.R. 2576, 111th Cong. (2009).
73. Chinook Nation Restoration Act, H.R. 3084, 111th Cong. (2009).
74. Lumbee Recognition Act, H.R. 31, 111th Cong. (2009).
75. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2009, H.R. 1385, 111th Cong. (2009).
76. Indian Tribes of Virginia Federal Recognition Act of 2009, S. 1178, 111th Cong. (2009).
77. Lumbee Recognition Act, S. 1735, 111th Cong. (2010).
78. Lumbee Recognition Act, H.R. 27, 112th Cong. (2011).
79. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2011, H.R. 783, 112th Cong. (2011).
80. Indian Tribes of Virginia Federal Recognition Act of 2011, S. 379, 112th Cong. (2011).
81. Lumbee Recognition Act, S. 1218, 112th Cong. (2012).

II. Coding

I devised a coding scheme to apply to the bills so I would have data comparable to the existing data on tribes using the administrative process. My coding scheme analyzed each bill to determine: (1) which tribes it would federally recognize, (2) the geographic location of the tribes, (3) the kind of federal recognition it would extend, (4) its legislative progress, and (5) the existence of restrictions on the tribes' authority as a condition of federal recognition. I used the bill text to code which tribes the bill would recognize. I used the Census Regions to code the bills by geographic location. The U.S. Census Bureau divides the United States into four regions: Northeast,²³¹ West,²³² South,²³³ and Midwest.²³⁴

Based on the language in the bills, I coded the bills into three categories: recognitions, restorations, and reaffirmations.²³⁵ Scholars, government officials, and tribes have historically subdivided nonfederally recognized tribes into three categories: (1) terminated tribes, (2) tribes that lost federal recognition by administrative mistake, and (3) tribes never recognized by the United States.²³⁶ Bills fall into three similar categories: (1) bills "restoring" terminated tribes, (2) bills "reaffirming" tribes that lost recognition by administrative mistake, and (3) bills extending federal recognition to tribes that have never had a government-to-government relationship with the federal government (even though some of their members may have received federal services as individual Indians).²³⁷

231. The Northeast includes the following states: Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. *Census Regions and Divisions of the United States*, U.S. CENSUS BUREAU, http://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf [<https://perma.cc/C7YJ-68J3>] (last updated Feb. 9, 2015).

232. The West includes the following states: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. *Id.*

233. The South includes the following states: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *Id.*

234. The Midwest includes the following states: Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin. *Id.*

235. I used the bill text rather than the title or the summary because some bills were called reaffirmations or restorations but actually sought congressional recognition of a tribe that the United States had never formally recognized or terminated. There appeared to be some strategy to the titling of the bills, and only by looking at the bill text could I determine the appropriate category.

236. These terms can have tremendous significance to the Indian nations. Several of the Indian nations in Michigan insist that they were reaffirmed; they never lost federal recognition, they were just left off the list through administrative error or oversight. *See Fletcher, supra* note 26, at 511–15.

237. There is some fluidity to these terms that is not reflected in my definitions. For example, some tribes are restored tribes under the Indian Gaming Regulatory Act even though they were never terminated and would be categorized as reaffirmed rather than restored under my definitions. *See Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y for the W. Dist. Of Mich.*, 369 F.3d 960, 971–72 (6th Cir. 2004).

I coded the legislative progress of the bills as how far the bill progressed in the legislative process as measured by the furthest advance of any relevant bill. I coded bills into the following categories: (1) introduced and referred to committee only, (2) subject to a committee hearing, (3) reported out, (4) debated on the floor but not passed by either house, (5) passed by one house, (6) passed by both houses, or (7) enacted into law.²³⁸

I coded the bills for restrictions placed on tribal authority.²³⁹ If a provision limited or prohibited the authority of the tribe or granted jurisdictional or regulatory powers to another government (e.g. the state government), it was coded as a restriction. I used grounded theory to identify the kinds of restrictions and then coded each bill with a restriction by kind.²⁴⁰ I also noted bills that included claims releases or waivers, but I did not count claims releases as restrictions on tribal authority.

From the analysis of the bills, I generated a list of tribes named in each bill. Using the coding scheme described above, I coded each tribe by whether it received congressional recognition, the kind of congressional recognition it sought, and its location by region of the country. I further coded tribes receiving congressional recognition by any restrictions placed on their tribal authority as a condition of their federal recognition. Research assistants assisted in the refinement of the coding scheme and provided background research on the bills.

I then identified how many tribes were engaged in the legislative and administrative processes. I started with the 72 tribes named in the 178 tribal recognition bills. I then compared these 72 tribes with the 74 tribes on the OFA's most recent, publically available list of active and decided petitions for

238. Political scientists and sociologists regularly use these categories. *See, e.g.*, Paul Burstein & Shawn Bauldry, *Bill Sponsorship and Congressional Support for Policy Proposals, from Introduction to Enactment or Disappearance*, 58 POL. RES. Q. 295, 298 (2005).

239. To code for restrictions, I used Proquest Congressional and Congress.gov to find the bill text. I coded the version of the bill with the most recent date of action. I used the public law for enacted bills. Bills that settled land claims, *see, e.g.*, Maine Land Claims Settlement Act of 1980, S. 2829, 96th Cong. (1980), or separated two tribes, *see, e.g.*, Shawnee Tribe Status Act of 2000, H.R. 5207, 106th Cong. (2000), were the hardest to code because they frequently included provisions unrelated to the recognition of the tribe. I coded four categories of restrictions: hunting and fishing, jurisdictional, gaming, and other. I coded a provision as restricting hunting and fishing if it did not restore hunting or fishing rights, *see, e.g.*, Siletz Restoration Act, H.R. 11221, 94th Cong. (1975), or prohibited any kind of hunting and fishing, *see, e.g.*, Chinook Nation Restoration Act, H.R. 6689, 110th Cong. (2008). I coded a provision as restricting tribal jurisdiction if it granted jurisdiction to the state. *See, e.g.*, Lumbee Recognition Act, H.R. 898, 108th Cong. (2003). I coded provisions that applied state laws to gaming, *see, e.g.*, Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, P.L. No. 103-116, 107 Stat. 1118 (1993), prohibited gaming by the tribe, *see, e.g.*, Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2001, H.R. 2345, 107th Cong (2001) or stated that the IGRA did not apply, *see, e.g.*, Miami Nation of Indiana Recognition Confirmation Act, H.R. 954, 108th Cong. (2003), as restricting gaming. If the bill included a provision that restricted tribal authority but did not fit into the other three categories, I coded it as other.

240. *See generally* H. RUSSELL BERNARD, RESEARCH METHODS IN ANTHROPOLOGY: QUALITATIVE AND QUANTITATIVE APPROACHES 463–69 (3d ed. 2002).

acknowledgement.²⁴¹ I combined the two lists to identify a total of 124 tribes that had actively sought recognition during the time period studied. Some tribes appeared on both lists, but I only included them once.

I coded the 124 tribes by recognition strategy: legislative only, administrative only, or dual.²⁴² If a tribe only appeared in a tribal federal recognition bill, I coded that tribe as having a legislative only strategy. If the tribe only petitioned for recognition through the OFA process and did not appear in a tribal federal recognition bill, I coded it as having an administrative only strategy. Tribes named both in a bill and as having filed a letter of intent with the OFA (on either of the OFA lists) were identified as having dual strategies. I could identify most of the tribes having dual strategies by comparing the names of tribes in tribal recognition bills with the list included in the OFA's Status Summary of Acknowledgment Cases.²⁴³ For the tribes named in a bill but not on this OFA list, I searched the OFA's List of Petitioners by State and congressional hearings on the bills related to them to determine whether they had also filed a letter of intent with the OFA.²⁴⁴ This search generated information on most but not all of the tribes. If I could not find a letter of intent filed by the tribe, I coded it as having a legislative only strategy.

To gain additional insight into Congress's role, I supplemented the bills by reviewing a nonsystematic sample of congressional hearings on federal recognition during this time period. My review of congressional hearings bolsters my analysis of the bills by providing additional context and details on the interactions between Congress and the administrative branch.

241. BUREAU OF INDIAN AFFAIRS, STATUS SUMMARY OF ACKNOWLEDGMENT CASES (2013), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024435.pdf> [<https://perma.cc/ZGZ3-PQEB>]. I did not include all the tribes that have filed a letter of intent with the OFA since 1975 because many of these entities have not pursued recognition. For an account of the status of each entity filing a letter of support, see BUREAU OF INDIAN AFFAIRS, LIST OF PETITIONERS BY STATE (AS OF NOVEMBER 12, 2013) (2013), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024418.pdf> [<https://perma.cc/FD2C-3U63>].

242. See McKay, *supra* note 73, at 124, for a similar typology.

243. BUREAU OF INDIAN AFFAIRS, STATUS SUMMARY OF ACKNOWLEDGMENT CASES (2013), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024435.pdf>.

244. BUREAU OF INDIAN AFFAIRS, LIST OF PETITIONERS BY STATE (AS OF NOVEMBER 12, 2013) (2013), available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024418.pdf> [<https://perma.cc/FD2C-3U63>].

