

# A Hard Look\_Tribal Recognition

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## SPEAKERS

Sarah Knarzer, Professor Fletcher, Olivia Miller



Olivia Miller 00:00

Welcome to A Hard Look the Administrative Law Review podcast from the Washington College of Law. We'll discuss how administrative law impacts your daily life. From regulatory actions by agencies and the litigation over them, to the balance of power among branches of the government. This is A Hard Look.



Sarah Knarzer 00:22

Hello, everybody. Welcome to Administrative Law Review's A Hard Look. I am your host, Sarah Knarzer, and I am extremely excited to introduce our two guests for this episode. First off, we have Professor Matthew L.M. Fletcher, who is MSU foundation professor of law and director of the Indigenous Law and Policy Center at Michigan State University. He sits as an appellate judge for several tribes. He is a citizen of the Grand Traverse Band of Ottawa in Chippewa Indians. Professor Fletcher is the author of the leading law blog on American Indian Law and Policy Turtletalk, which you can find at [turtletalk.wordpress.com](http://turtletalk.wordpress.com). Professor Fletcher graduated from the University of Michigan Law School in 1997, in the University of Michigan in 1994. Our next guest is Olivia Miller, who is a 2L at the American University Washington College of Law, where she is a junior staffer on the Administrative Law Review with me. She's originally from Cape Cod in Massachusetts, and graduated from Colgate University in 2017. Between undergrad and

law school, Olivia served as an AmeriCorps member with City Year Boston. Thank you both so much for joining me today. So for our listeners, one of the junior staff in staffers responsibilities is to write a student comment. Olivia was in our first round of comment writing, which I had the pleasure of reading and knew immediately that I wanted it to be a topic for the episode of A Hard Look. Olivia, can you talk about the comment writing process for the listeners and tell us a little bit about your piece?



Olivia Miller 01:49

Sure. I, uh-- So over, during COVID, I went home for a couple of months. And during that period of time, very early on, like during the whole period where people still don't really know what's going on, and like you weren't supposed to wear masks still and everything, the Secretary of the Interior, released its memo that took the land away from, out of federal trust, the Mashpee Wampanoag's land. And the Mashpee Wampanoag's ancestral lands are on Cape Cod. So this sort of, you know, was all happening while I was home, and I was just really sort of astounded that that was happening at that particular time. You know, there's so many sort of issues, obviously, with the pandemic, but then there's, you know, local issues with summer residents coming and everything. And just seeing that on top of it, I was like this is, it was hard to think of a way that that couldn't be intentional. And I was kind of excited because, you know, I was a 1L and it was kind of the first time that I felt like I could actually delve into that and sort of understand what was going on. And instead of just being like, "this is outrageous." So I kind of started researching. And just separately, and also around that same time I got on journal, and then I decided to do my comment in the summer. So it just kind of flowed naturally from there. So that's how that started. And then I started writing it in May. And I worked with my note and comment editor who's Jackie, and the senior note and comment editor, Annie, and then Professor Rosser, who's my faculty advisor, and gave me a lot of insight on Indian Law because obviously, I hadn't, as a 1L, hadn't taken anything about Indian Law yet. And so I wrote that over the summer and turned it in at the end of August.



Olivia Miller 04:02

Great. And a lot of what we're going to be talking about today will have to do with the federal tribal recognition process. Can one or even both of you elaborate on what federal tribal recognition is, and maybe some of its history?



Professor Fletcher 04:17

I'd be happy to answer that question. So you might notice in the Constitution, there's this thing called the Commerce Clause, and then the Commerce Clause, there's a reference to

Indian tribes, as in Congress has the power to regulate commerce with Indian tribes. So what are Indian tribes? And the United States has to make a determination as to what constitutes an Indian tribe, and which entity is an Indian tribe for purposes of what we now call federal acknowledgement or federal recognition. And that process has often been very informal. In the 19th century, it usually meant that a tribe is something a group of people and entity that the United States would enter into a treaty with so if you were a group of Indians that had a treaty with the United States, you effectively had what we would now call federal acknowledgement because you had signed into a treaty. And that process formally ended in the 1860s. Tribes and the United States no longer enter into new treaties. So for new tribes to come along, the question is how are they acknowledged, and from the end of the treaty era, until 1978, there was no process. It was informal. It was what an administrative law scholar or practitioner might refer to as frequently arbitrary and capricious. There are some tribes that were acknowledged by the stroke of a pen. For example, the Sioux Sainte Marie tribe in Michigan in the early 70s, was not federally acknowledged formally by the United States, thought it should be, asked one of its lawyers to reach out to the interior solicitor's office, guy knew a friend of a friend, guy wrote a memorandum, somebody above that attorneys rank stamped it approved. And that's how the Sioux Sainte Marie tribe in 1972--73 or so became federally acknowledged. This is a little bit of an embarrassment to those who are interested in the true application or the use, uh, the correct application of administrative law. So eventually, the Department of Interior promulgated regulations in 1978, to create a process by which tribes could go through, could become federally acknowledged. And that's where we've been ever since.



Sarah Knarzer 06:40

Olivia, did you have anything to add?



Olivia Miller 06:43

Yeah, I can talk about it also from, you know, the perspective of the Mashpee Wampanoag. You know, like I said, they-- it's been very like arduous process to gain federal recognition. But like Professor Fletcher said, you know, there was a long-- most of history, that wasn't really a thing. And this tribe has-- was one of the first tribes that came in contact with Europeans. It's the tribe that the Thanksgiving myth is based around. So there's obviously a lot of history with the tribe. And for them, they-- they were basically relegated to a part in Mashpee, which is a town on Cape Cod, they were put on sort of like a reservation, it was originally called a plantation, but it's a reservation for hundreds of years. And starting in the mid 1900s. With the influx of tourism, there's a lot more demand for that land. So developers, were taking land to build summer houses, and the tribe

challenge that in court. And so it was in 1978, that they had that challenge. And that was-- the result of that was that they, the court, well an all white jury on the court, determined that the tribe just didn't exist, which was sort of out of nowhere. And, you know, you can imagine, like them having existed for so long, it's that's not-- wasn't really on the radar. But then they obviously filed for official recognition. And then it took more than 25 years for them to be acknowledged. And it was also a really significant process where they had to do a lot of work compiling proof, basically, that they existed. Um. So they were officially recognized in 2007. But that was after having compiled a ton of documents and proof that they existed for as long as Europeans have been here and before, obviously. So it's, uh, you know, I think that that just seeing, I think this particular tribes experience with it demonstrates a lot of the issues with the federal recognition process.



Sarah Knarzer 09:14

Yeah, and I can guess that a process like this isn't without some challenges. So what are some of the hurdles that tribes like the Mashpee Wampanoag and others have to face in order to be federally recognized?



Professor Fletcher 09:28

Well, as I said, the federal government enacted regulations in 1978. And for the first several years, the tribes that filed a petition under those new regulations received a fairly easy road. And but it's changed since then the stakes are much higher. Gaming is very financially lucrative and at the same time, very politically fraught. And so in the last couple of decades, really three decades I would say, the tribal federal recognition process has become incredibly onerous. So tribes, my tribe, for example, filed a petition that was about 50 pages long. And the other tribes that have filed even just six or eight or ten years after my tribe did in 1978, their petitions were bankers boxes full of documents. And these are incredibly expensive, difficult things to generate. They require a lot of lawyer time, they require a lot of expert witness time, historians, anthropologists, archaeologists. And so the Bureau of Acknowledgement and Research that hears and receives these petitions and examines them is kind of overwhelmed with the amount of documents but they are constantly ratcheting up the standard for federal acknowledgement from those early days. And on top of all that, you will have occasionally political opposition. There's a tribe in Connecticut that had basically reached the end of the process, they were about to be federally acknowledged until the Secretary of the Interior at that time was Gail Norton got a visit from the Connecticut congressional delegation. And nobody knows what happened at that meeting. But the that tribe, the Schaghticoke tribe's petition was denied at almost immediately after that meeting. So political opposition can be very, very effective in

stopping tribal petitions. The process is expensive, and very opaque, it's hard to see what matters to the Bureau of Acknowledgement and Research, it's hard to, to challenge their decisions. Nobody, no tribe that has been denied, has been able to persuade a federal court that the Bureau of Acknowledgement and Research did something arbitrary and capricious. The only time that tribes have been able to prevail even temporarily, against the process is when the Department of the Interior, for whatever reason, decides to circumvent the Bureau of Acknowledgement and Research altogether, which does happen on occasion as well. So I mean, it's starting in 1978. It was a fairly simple process. But in 2020, you can fully expect if you're going to take this process seriously to spend decades on it, and millions upon millions of dollars.



Olivia Miller 12:33

Yeah, so for the Mashpee tribe, I think, and for a lot of tribes, too. I think that more recent struggle is the Carcieri case, which is a Supreme Court case in 2009, where the court determined that-- the court is interpreting the Indian Reorganization Act, which is a statute from 1934, that defines what it means to be an Indian, or an Indian tribe. And in the act, they use the term "now" meaning anyone who is "now" recognized and are now under federal jurisdiction, and the court determined that by now, the act meant by 1934. So any tribes that are federally recognized after 1934, don't fall under "now" of that act. And that's an issue for, was and has been an issue for the Mashpee Wampanoag because, as I said, they weren't recognized until 2007. So, you know, you can imagine, I guess, just all the uncertainty around that for the Wampanoag, and for other tribes to where you weren't even really thinking the tribe was in thinking about tribal recognition for hundreds of years, and then it became a thing in the 20th century, and then they sort of had their federal recognition stripped from them kind of out of nowhere. And then a case comes out in 2009. Like that recently, that again, throws another hurdle for them to get federally recognized. And, you know, this federal recognition matters a lot, it enables tribes to get funding and it can enable them to have land in trust, it imposes an obligation on the federal government to give it-- enabling tribes to get more access to resources and whatnot. So yeah, I think that that's for the Mashpee Wampanoag currently a huge issue and a lot of other tribes that are recognized later.



Sarah Knarzer 14:57

But Olivia, you are not a citizen of the Mashpee Wampanoag tribe. What was it like to learn about and analyze their experience for a comment? And can you give us some of the analysis from your paper?



Olivia Miller 15:09

Sure. So, um, I learned a lot about the tribe growing up because of the fact that I grew up on Cape. But the way that I had learned about it was all very historical and nothing really after the late 1600s. So this was the first time that I had read any of the history that was more recent. And I think that that's pretty indicative of sort of how non-native people learn about Native history in the United States in general, like it kind of keeps native people in sort of a historic lens and doesn't, you know, carry that story through today, which I think causes a lot of lack of information about some of the ways that tribes are still experiencing a lot of struggle from non-native people in this country. But it was very, so it's very powerful to learn about the more recent history, and I think especially growing up in the area, I really was noticing how often sort of well known names from the area were coming up, for example, there-- a lot of the like I was saying earlier, during the whole period, for hundreds of years where Mashpee were on a reservation, in present day Mashpee and had white overseers. A lot of those white overseers were people who have towns and villages on Cape named after them, and are sort of well known and respected historical figures, but I had no idea the way that they had been involved with the tribe and selling the tribe's land and forcing Christianity on them and everything like that. So it was definitely very impactful to learn about. And some of that history includes what has most recently been happening with the tribe, and the most recent struggles around the department's memorandum that they issued this year. So that whole issue started after the tribe had received land in federal trust, which was in 2015. There are two parcels of land-- one in Mashpee, and one in Taunton, which is off Cape but close by, and residents from Taunton filed suit, in response to that land being placed in trust. They were financed by competing casinos. And they were arguing that they didn't want a casino in their neighborhood. Because it would ruin like the residential feel of the area. The first circuit ended up determining that the Wampanoag were not-- the Mashpee Wampanoag were not Indians under the IRA's second definition of Indian so that was the act of talking about those from 1934. And the second definition has to do with people who are descendants of such members who are residing within a reservation in 1934. So that analysis then revolved around "such" and what that meant, and the first circuit ended up remanding to the Department of Interior to determine whether the Mashpee Wampanoag were Indians, according to the first definition from that Act. And the department found that they weren't Indians under the first definition. And so the first circuit said that because they're not Indians under the first or second definitions of Indian under the IRA, then the Secretary of the Interior didn't have the authority to place that land in federal trust. So that led to the Secretary-- and that decision also came out this year. But at the beginning of the year, and that then led to the Secretary of the Interior rescinding the land from federal trust on March 27 of this year, and then the tribe sued the Secretary of the Interior in DC District Court. And importantly, that court didn't determine whether the secretary could take land into trust or whether the tribe was eligible for land. But the State

conducted a an interest balancing test and determined that there is no legitimate interest in stripping the National Wampanoag of their land and then they remanded it to the Department of the Interior to decide whether the land should remain in federal trust. But while the Department of Interior is deciding that the tribe is retaining the land and trust, and that decision of the DC Circuit Court has also been appealed, so the both of those things are still pending the department's determination about whether the land should remain in trust and the appeal from the circuit courts decision. So you can kind of see from this, how very complicated, very expensive this whole decision process is, and how much of it revolves around interpretations of words like "now" and "such" from an Act that is almost 100 years old. So that was a lot of the analysis that I did in this paper. And that sort of I think this tribe is a great example. Not a great one. But it's not great in a positive way. But it's an example of how problematic and uncertain and unpredictable the tribal recognition process is.



Sarah Knarzer 21:13

Yeah, it sounds really, really complicated, and almost so complicated to the point where it's not even working the way it maybe was intended to, or maybe it is working how it was intended to, and it's just really, really, really bad. But Professor Fletcher, I guess, what about other tribes is the experience that Olivia is describing typical or at least comparable?



Professor Fletcher 21:37

Well, as you know, there, every tribe has its own unique history. But there are a lot of commonalities, unfortunately, between what happened with his tribe and with other tribes. So as I said, before, my tribe was acknowledged under the new regulations back in 1980, we were the first tribe acknowledged under those regulations. We were a treaty tribe, we could show that we had a long standing land base, we could show we had a long standing tradition of self government. And we had, we had at one point that federal recognition through the treaty that the United States going all the way back to 1855. So that was an easy case. And, but other tribes that are similarly situated to my tribe, in the state of Michigan, some of them who are the same, who are signatories to the same treaty, were literally just down the road from us received totally different treatment by the Department of the Interior, almost comically so. There was one hearing in which when meeting with a Bureau of Acknowledgement and Research, where somebody worked for the government insisted that the tribe be able to explain in a picture from 60 or 70 years earlier that showed a tribal council meeting, what the people sitting in the audience were talking about. And if they didn't know what was going on there, then they had serious doubts as to whether or not the tribes petition was a legitimate petition. Just purely



arbitrary and ridiculous. But the acknowledgement process is always been inherently political. So you're always going to have some weirdness. Unfortunately, and I'm not sure if there's anything to be done about it, but it's an ongoing issue. You know, just the other day the house of res-- House of Representatives passed a bill or had a bill introduced to recognize the Lumbee Nation in North Carolina. The Lumbee Nation has been around for since time immemorial. They've come close to federal acknowledgement many times. And they've been the subject of lots of federal statutes over the years. But they do not possess true federal acknowledgement. And this recent bill would actually extend them an acknowledgement through the through an act of Congress. The opposition is coming from other tribes this time, and it's not the congressional delegation in North Carolina, it's the Cherokee Nation. It's the tribes in the area that see the Lumbee Nation as a competitor. And so unfortunately, you see those kinds of objections coming along as well. And, you know, I promised I wasn't going to say anything about the Mashpee Wampanoag and I'm not going to specifically talk about their issue in their case, but you know, the as Olivia's saying the federal-- the feeder trust process for newly recognized tribes is has shifted dramatically over the past 10 years. You know, there was a position paper that came out, an Interior Solicitor's opinion, describing a process for tribes that were newly acknowledged for acquiring land and trust for gaming purposes. Several Federal Circuits relied upon that opinion saying this is a reasonable interpretation of the law. We apply it, we're going to go forward with this. And then a new administration came in, revoked that paper, and said that not only was the prior administration wrong on that, but all of those federal circuits that relied upon it were wrong, too. And the audacity and arrogance of that position is quite ridiculous and outrageous, but it's not all that on atypical Indian law, we see this kind of activity, actions, politically oriented, politically motivated all the time when it comes to Indian Law.



Sarah Knarzer 25:37

And I don't mean to imply that the two of you can solve every problem in the tribal recognition process just on this episode of the podcast, although that would be really, really cool. But let's at least get the conversation started. And I guess, are there any tangible ways that either of you can think of that we can address some of these challenges? Well, you know, there's, there's a couple of things that are-- that I think probably would, would help. And I'm not sure how to legislate or create a regulation that would require this. But there's been an overlay on the federal acknowledgement process, two overlays that I think, very, very troubling. One is just political interference. Power politics just comes into play into these decisions all the time, overtly, and obviously, and you also have on top of that, and you've seen this with Lumbee, sort of an overlay of racism, too, right? So you have a lot of tribes that have in their communities intermarried



with other racial minorities or non Indians and, you know, to outsiders to the federal government, who probably are politically motivated to say, so they make racial references like "You don't look Indian to us" right. I mean, we even had, prior to him becoming president, Donald Trump testified in Congress about how that some tribe that he was an opposition to in a gaming market didn't look Indian to him. And he, you know, that honesty is really one of the few things you're going to see perhaps from the president, but he was being honest. And that's how people really talk about the federal acknowledgement process too many times. I think I'd like to see the federal courts actually treat the acknowledgement process without as much deference to the Department of the Interior as they do right now. And that, and I don't know where that goes. I mean, it really depends on maybe you're just transferring all of these racial and political overlays from the Department of the Interior over to the federal judiciary, and maybe that changes nothing. And I wish I could have a better prescription for what really is a very difficult process.



Olivia Miller 27:50

Um, yeah, so I talked about some solutions in my papers as well. Also building off what Professor Fletcher was saying about the racist aspect of it. Trump made the same comment about the Mashpee Wampanoag not looking Indian. So you can definitely see that racism in this case, as well. So in my paper, I talked about congressional solutions. There's a bill, HR312, that reaffirms the Mashpee Wampanoag tribe reservation as trust land and requires pending judicial action to be dismissed. That bill was passed by the House, and if it was passed by the Senate, that would alleviate all of these issues for the Wampanoag. This, of course, wouldn't resolve the broader issue surrounding the trust process for I mean, the Federal tribal recognition process for all tribes. So I think, in general, Congress could pass legislation correcting some of the harm of the cursory case of talking about earlier, so that tribes don't have to prove that they existed prior to 1934. Thus, like any tribes that were recognized after 1934, could there would be certainty in that issue being resolved. They could even-- Congress could also correct ambiguity in the definition of Indian in the IRA, to sort of reduce a lot of this litigation. Congress has plenary powers, so that generally causes courts to def-- defer to congressional decisions. So I think that that would be very helpful in removing ambiguity from a judicial perspective. Hypothetically, I think it would be really useful if the Supreme Court were to repeal *Carcieri*. There's been a lot of literature about how many sort of issues that that case has caused for a lot of tribes. And-- and I think, you know, it's obviously very difficult and unusual for the Supreme Court to repeal decisions. So that might be more of a long shot as far as getting a case up to the Supreme Court. But it definitely has increased litigation, which is expensive and a waste of judicial resources. So I think that's, that would be an option, I think, also, kind of similar to Professor Fletcher, the Department of Interior's

role, I think, could be modified to be a little bit less dependent on, you know, whatever political figures in office and the ups and downs that causes for who's getting appointed, removing some ambiguity there. And just in general, the Department of Interior can be very, and is very paternalistic in their approach to managing a lot of various aspects of tribal Affairs. So I think amending that, in specific ways can be helpful as well.



Sarah Knarzer 31:22

And just because you've both touched on it, I just do want to touch on this. We just had an election. What would a Biden administration mean for the tribal recognition process? And we don't have to get into the specifics, we obviously don't know. But just, I guess from experience, what do we think it might look like?



Professor Fletcher 31:43

I think it's easy to overstate what a new president could mean, for the tribal acknowledgement process. One one hand, well it's very political. On the other hand, that the partisan politics that do come up really are very local. So you know, the, the act of Congress that may, for example, acknowledge the Lum-- the Lumbee Nation will likely have to receive but, you know, buy in from North and South Carolina, maybe Tennessee, maybe. And certainly all the tribes in the area, the Cherokee Nation of Oklahoma has an interest in this case, as well, because of its interest in Cherokee lands in the east. So the fact that the President is a Republican or a Democrat, doesn't matter, as much as you might think. But as a general matter, it is it is fair to say that absent some very acute and powerful political interests, Democratic administrations are far more likely to be, you know, to make the machinery of acknowledgment, move a little bit more smoothly. You know, the Republican administrations, when it comes to Indian Law, tend to be what I call pay to play. If you bring some tangible financial benefit to the Republican Party in some way, then you're gonna get what you want. And if you don't, you're absolutely nobody. And the Democrats are somewhat similar, but not quite as much.



Olivia Miller 33:13

And it has also been reported that tribes are disproportionately affected by the Coronavirus. I just wanted to touch on that before we end our episode. Do you think that Coronavirus will have any impact on the tribal recognition process?



Professor Fletcher 33:27

My sense is, and maybe this is a bit esoteric, is that whenever there's a big crisis, and it could be just an interagency crisis, you know, intra-agency crisis, I should say, that the Federal Recognition process sort of just stops. It's sort of one of those processes that is not critical to the operation of the United States. So, you know, the Department of the Interior, puts it on the backburner pretty much at every opportunity. And my sense is if that the federal government is busy doing other things, the recognition process is a dead letter. But this is actually a time when acknowledgement is really important. There are unacknowledged tribes that are suffering as much as acknowledged tribes who are not receiving the benefit of the doubt or government services that tribally or acknowledged tribes are, are entitled to, and it's a real tragedy.



Olivia Miller 34:24

All right. Well, this has been a really excellent conversation. I know I've learned a lot. But as we bring the conversation to an end, I just wanted to give both of you an opportunity to share any final thoughts you have anything you want our listeners to know.



Professor Fletcher 34:38

I think Olivia should get the last word.



Olivia Miller 34:42

Yeah, so I think I will just say as my final word that, I, I really wasn't expecting to write about this. I didn't come to law school to for Indian Law specifically, but I am really glad that I chose this topic. I learned a lot about where I'm from and the tribal recognition process and it brought me to taking Indian law with Professor Rosser, which I would highly, highly recommend. He's great. He helped me a ton with this paper. And thank you to Professor Fletcher for coming and taking the time for this. Really appreciate that.



Sarah Knarzer 35:31

Well, thank you both so much for joining me. We're going to go ahead and wrap up this episode. It's been an excellent conversation once again, I have learned a lot. So listeners, please check the Episode Notes for Professor Fletcher's blog at [turtletalk.wordpress.com](https://turtletalk.wordpress.com). And thank you for listening. This has been A Hard Look.



Sarah Knarzer 35:52

I would like to extend a sincere thank you to the ABA Administrative Law Section. I also want to thank the ALR Exec Board and staffers as well as Sharon Wolf, Professor Jill Olmstead and Professor Andy Popper. Lastly, a huge thank you to Shabbir Hammid, for editing this podcast. You can find us on Apple podcasts, Spotify, SoundCloud, and the ALR website. We would really appreciate if you could like, rate, and subscribe. If you would like to be a guest on the episode or have any comments or questions, please email them to me Sara at [ALR-Sr-Tech-Editor@wcl.american.edu](mailto:ALR-Sr-Tech-Editor@wcl.american.edu). The email will also be posted in the Episode Notes along with any links referenced in this episode. Thank you for listening. I am your host Sarah Knarzer and this has been A Hard Look.