TESTIMONY OF
ATTORNEY GENERAL RICHARD BLUMENTHAL
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
SEPTEMBER 17, 2002

I appreciate the opportunity to speak in support of S.1392, the Tribal Recognition and Indian Bureau Enhancement Act of 2001 and S.1393, which would provide grants to municipalities, Indian groups and other interested parties to ensure full and fair participation in tribal recognition and other procedures at the Bureau of Indian Affairs.

The present system for recognizing Indian tribes is fatally and fundamentally flawed. It is in serious need of reform to ensure that such decisions -- which have such profound ramifications -- are fair, objective and timely. After ten years of experience with tribal recognition issues, I strongly and firmly believe that fundamental, far-reaching reform is necessary and that the present system should be replaced by an independent agency insulated from the presently prevalent influences of money and politics. I support S.1392 and S.1393 as a clear, specific starting point to form an Indian recognition process that is both equitable and expeditious. Moreover, I support Senator Christopher Dodd and Senator Joseph Lieberman's proposed amendment to place a moratorium on tribal recognition decisions until fundamental reforms are made to the recognition process – ensuring meaningful participation by all interested parties and that all recognition criteria are properly and consistently applied.

The central principle should be: Tribes that meet the seven legally established criteria deserve federal recognition and should receive it. Groups that do not meet the criteria should not be accorded this sovereign status.

Fatally flawed and desperately in need of repair, the present recognition process has been ruled by too little law or objective, open fact-finding -- and has proven to be susceptible to improper influences of power, money and politics, as recent reports by both the GAO and the Department of Interior's Inspector General have documented.

In theory and under present legal rules, any tribal group seeking federal recognition must meet seven distinct criteria – aimed at proving the petitioning tribe's continuous existence as a distinct community, ruled by a formal government, and descent from a historical tribe, among others.

In practice, the BIA's political leaders have routinely distorted and disregarded these standards, misapplied evidence, and denied state and local governments a fair opportunity to be

heard. On behalf of Connecticut, my office has brought two major lawsuits against this federal agency for failing to follow federal law. The current Administration may bring different attitudes and approaches, but new people in the same position is not a lasting solution.

The impacts of federal recognition of an Indian tribe cannot be understated -- underscoring the urgent need for reform. A decision to acknowledge an Indian tribe has profound and irreversible effects on tribes, states, local communities and the public and in Connecticut's experience greatly affects the quality of life in those communities living in close proximity to Indian reservations. Federal recognition creates a government-to-government relationship between the tribe and the federal government and makes the tribe a quasi-sovereign nation. A federally recognized tribe is entitled to certain privileges and immunities under federal law. They are exempt from most state and local laws and land use and environmental regulations. They enjoy immunity from suit. They may seek to expand their land base by pursuing land claims against private landowners, or seeking to place land into trust under the Indian Reorganization Act. They are insulated from many worker protection statutes relating, for example, to the minimum wage or collective bargaining protections as well as health and safety codes.

Since the enactment of the Indian Gaming Regulatory Act (IGRA) more than a decade ago, federally recognized tribes may operate commercial gaming operations. This law has vastly increased the financial stakes involved in federal recognition. Several of the petitioning groups in Connecticut are reported to have been funded by gaming interests such as Lakes Gaming of Minnesota and Donald Trump. The law has pitted petitioning tribes against not only states and local governments, but also against each other. For example, two Connecticut groups with pending acknowledgment petitions, the Schaghitcoke and the Golden Hill Paugussett tribes, are currently engaged in a heated public dispute, each accusing the other of theft of ancestral heritage. Contrary to the law and agency precedent, two other Connecticut groups that have recently received a single recognition finding, the Eastern Pequots and the Paucatuck Eastern Pequots, contested each other's claims to a common reservation and ancestry.

Connecticut has been particularly impacted by the federal recognition process. Although geographically one of the smallest states, Connecticut is home to two of the world's largest and most profitable casinos within 15 miles of each other. We also have 13 other groups seeking recognition as federally recognized Indian tribes, most of whom have already indicated their intention to own and operate commercial gaming establishments. The interest in reform however, extends beyond Connecticut. Last year, 20 state Attorneys General across the country signed a letter to the Assistant Secretary for Indian Affairs, Neal McCaleb, expressing serious concern about arbitrary and illegal changes to the tribal recognition process made by the prior administration without adequate public input.

The enormity of the interests at stake make public confidence in the integrity and efficacy of recognition decisions all the more essential. Unfortunately, public respect and trust in the current process have completely evaporated.

The deficiencies in the recognition process are well-established.

Recently, the Government Accounting Office (GAO) issued a report documenting significant flaws in the present system, including uncertainty and inconsistency in recent BIA recognition decisions and lack of adherence to the seven mandatory criteria. The GAO report also cited lengthy delays in the recognition process -- including inexcusable delays by the BIA in providing critical petition documents to interested parties like the states and surrounding towns. The GAO urged the BIA to address these deficiencies and included specific suggestions for improvement. To date, the BIA has not acted to cure these noted defects in the recognition process.

The United States Department of the Interior's Office of the Inspector General also found numerous irregularities with the way in which the Bureau of Indian Affairs handled federal recognition decisions involving six petitioners. The report documents that the Assistant Secretary and Deputy Assistant Secretary either rewrote civil servant research staff reports or ordered the rewrite by the research staff so that petitioners that were recommended to be denied would be approved. The former Assistant Secretary himself admitted that "acknowledgement decisions are political"and later expressed concern that the huge amount of gaming money that is financially backing some petitions would lead to petitions being approved that should not be approved. Interestingly, he also advocated for reform of the current system.

Connecticut's experience with this process mirrors and confirms the GAO and OIG findings and conclusions. In petitions involving the state of Connecticut, the former head of the BIA unilaterally overturned staff findings that two Indian groups failed to provide evidence sufficient to meet several of the seven mandatory regulatory criteria. He also issued an illegal directive barring staff from conducting necessary independent research and prohibiting the BIA from considering information submitted after an arbitrary date -- regardless of whether the BIA's review had begun -- without notice to interested parties in pending recognition cases.

In June, the BIA issued a Final Determination recognizing a single Eastern Pequot tribe in Connecticut comprised of the Eastern Pequot and the Paucatuck Eastern Pequot groups, despite the fact that these groups had filed separate conflicting petitions for recognition. The two petitions were pending for years and contradicted each other. In fact, in one of their last submissions, the Paucatuck Easterns argued vigorously that the Eastern Pequots did not submit adequate proof that they were an Indian Tribe. The Final Determination reflected substantial gaps in evidence in both tribal petitions, but the BIA distorted the relationship between the state of Connecticut and the Eastern Pequot group to bridge these gaps, contrary to the BIA's own regulations. I announced last week that the state and towns would appeal that decision.

To make matters worse, shortly after the recognition decision was released and before the appeal could even be filed, top BIA officials held a private (ex parte) meeting with representatives of the Paucatuck Eastern and Eastern Pequot groups – a secret session that seems improper under the rules. At the very least, the private meeting reinforces public perception that the recognition process is unfair and biased toward petitioning groups.

The BIA is admittedly overworked and understaffed, leading inevitably to lengthy delays in processing petitions and in providing essential documents to interested parties. Connecticut was forced to sue the BIA to obtain critical information necessary to respond to petitions—

information, including petition documents the state was clearly entitled to under the FOIA. In some cases, the documents have not been provided until after the BIA has issued proposed findings in favor of recognition.

The federal courts have also ordered the BIA to complete petitions in a timely manner. All four of Connecticut's active petitions, Eastern Pequot, Paucatuck Eastern Pequot, Schaghticoke and Golden Hill Paugussett, are presently proceeding under court ordered schedules. Federal courts have intervened and set schedules in the petitions of the Mashpee Tribe of Massachusetts and the Muwekma Tribe of California. Constant and continuous federal court intervention is an additional sign that the present recognition system is simply not working – and the trend will continue toward further judicial intervention in the absence of significant reform.

Congress must act swiftly and strongly to reform the system and restore its credibility and public confidence.

Long-term reform requires an independent agency -- insulated from politics or lobbying -- to make recognition decisions. It must have nonpartisan members, staggered terms, and ample resources. There is compelling precedent for such an independent agency -- the Securities and Exchange Commission, for example, or the Federal Communications Commission, and the Federal Trade Commission, which deal professionally and promptly with topics that require extraordinary expertise, impartiality, and fairness.

Such reform is critical to restoring the integrity and credibility of the present system. Even with the best of intentions, and better resources and personnel under a new Administration, the present flaws remain fatal. They are crippling to credibility and objectivity, because the protections against improper influences are inadequate, and are likely to remain so. Indeed, the argument may be made that the Department of Interior currently has an unavoidable conflict of interest -- responsible for advocating for and protecting Native American interests as trustee, and at the same time deciding objectively among different tribes which ones merit recognition.

S.1392 is a good step in the right direction. One of the most frustrating and startling consequences of the current review process is the potential for manipulation and disregard of the seven mandatory criteria for recognition—a potential that the GAO and Inspector General reports found has been realized in recent petitions. By adopting these criteria in statute, Congress will reduce the likelihood that the BIA will stretch or sandbag criteria in an effort to recognize an undeserving petitioner. The criteria in S.1392 should be amended slightly to conform with the burden of proof requirements for the distinct community or political authority criteria that is contained in the current BIA regulations. This proposal would also help to ensure meaningful participation by the entities and people directly impacted by a recognition decision.

S.1393 would provide additional much needed, well deserved resources and authority for towns, cities and Indian groups alike in an effort to reduce the increasing role of gaming money in the recognition process. Federal assistance is necessary and appropriate, in light of the burdens that towns, cities and Indian groups, as well as the state, must bear in retaining experts in archeology, genealogy, history and other areas -- all necessary to participate meaningfully in the

recognition process. Because recognition has such critical, irrevocable consequences, it is essential that all involved—petitioning groups, the public, local communities, states--- have confidence in the fairness and impartiality of the process. That confidence has been severely compromised in recent times. I urge the committee to approve these bills and begin the process of overhauling the system so that public faith can be restored.

I wish to thank the committee for allowing me this opportunity to address the committee with respect to this important issue and urge the committee's further consideration of these proposals.