



Oneidas bringing several hundred bags of corn to Washington's starving army at Valley Forge, after the colonists had consistently refused to aid them.

Oneida Tribe of Indians of Wisconsin BUSINESS COMMITTEE



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UGWA DEMOLUM YATEHE
Because of the help of this Oneida Chief in cementing a friendship between the six nations and the colony of Pennsylvania, a new nation, the United States was made possible.

Testimony of
Gerald Danforth, Chairman
Oneida Business Committee
Oneida Tribe of Indians of Wisconsin

On behalf of the Oneida Tribe of Indians of Wisconsin, I am pleased to be with you today to present our views concerning HR 5608, the "Consultation and Coordination with Indian Tribal Governments Act". Since before the formation of the United States of America leaders from the Oneida Tribe have been actively engaged in the consultation of our affairs with leaders from other governments.

The United States has had a rocky relationship with Tribal nations since the beginning of development of the federal government and executive agencies. Only recently, the first Executive Order was issued directing that consultation with Tribal governments be made respecting the government to government relationship between the federal government and Tribes. Each following President has renewed this call to government-to-government relationships with Tribal governments. It seems fitting that Congress move to institutionalize this process.

I am very pleased to report that many agencies recognize the primacy of tribal governments within Indian Country. Most interact with Indian nations in ways that recognize the roles and authorities exercised by those nations in service to their citizens and their environments. We believe that H.R. 5608 takes the next logical step by clarifying and codifying the true intergovernmental nature of our relationship consistent with treaty, federal policy, and the intent of Executive Orders issued by Presidents representing both parties. We applaud this much needed recognition.

To support my belief that this legislation is merited, I will focus on recent events that demonstrate that current consultation initiatives do not consistently function effectively. I point to an issue of Indian gaming regulation and a federal agency. Had H.R. 5608 been in force, I am confident that the federal agency would have come to very different decisions.

Last October, the National Indian Gaming Commission (NIGC) published a series of five proposed regulations and asked tribes to provide their comments within 45 days of publication. While there had been meetings between NIGC commissioners and

representatives of interested tribes, most tribes would agree that the NIGC failed in its effort to meet its obligations under the government-to-government consultation policy set forth under Executive Order #13175.

Executive Order #13175 directs that agencies of the Federal government shall “respect Indian tribal self-government and sovereignty”, that the agencies of the Federal government “shall grant Indian tribal governments the maximum administrative discretion possible” and those agencies of the Federal government shall “encourage tribes to develop their own policies; [and]...defer to Indian tribes to establish standards.” (E.O. 13175, Sec. 3).

President Bush issued an Executive Memorandum that reiterated this commitment by directing that the Federal government is, “...committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination[; and,] that all departments and agencies adhere to these principles and work with tribal governments in a manner that cultivates mutual respect and fosters greater understanding to reinforce these principles.” Exec. Mem., September 23, 2004.

While I understand that this bill’s mandate extends beyond the work of the NIGC, it is useful to consider the actions of this Commission in order to demonstrate the need for this legislation.

To begin, the NIGC’s own consultation policy recognizes that Tribes are the primary regulator in Indian gaming, whether as sole responsibility under Class II, or Compact negotiated responsibilities through Class III gaming. The Oneida Tribe believes that respecting these responsibilities requires and demands consultation. The NIGC itself has committed to the following standard on consultation.

(III)(D) The NIGC will initiate consultation by providing early notification to affected tribes of the regulatory policies...that it is proposing to formulate and implement, before a final agency decision is made regarding their formulation or implementation.

Tribal governments have created associations to better identify technical and policy matters that arise in Indian gaming and Indian country such as National Indian Gaming Association, National Congress of American Indians, United South and Eastern Tribes Midwest Alliance of Sovereign Tribes, we also recognize that meeting with these entities is not consultation. NIGC also recognizes this in its consultation policy.

(III)(B) ...Consultation with authorized intertribal organizations and representative intertribal advisory committees will be conducted in coordination with and not to the exclusion of consultation with individual tribal governments...

Further, individuals with expertise in Indian gaming have participated in working groups created by the NIGC to help the NIGC understand the technical nature of Indian gaming activities. However, these working groups are not Tribal working groups, and do not

purport to have the authorization of tribal governments to act on our behalf.

Finally, the Oneida Tribe does not believe that consultation regarding proposed regulations developed beginning in 2004, published in the Federal Register in 2006, and withdrawn in early 2007, can be considered consultation when publishing “new proposed regulations” in October of 2007. Consultation, as defined by the NIGC, means meetings and discussions, “before a final agency decision is made regarding their formulation or implementation.” Although notice may have been presented regarding these proposed rules in ‘Dear Leader’ correspondence, that type of notice is insufficient to meet the requirements of NIGC’s consultation policy, does not respect our mutual roles in regulating Indian gaming, and does not respect tribal government role in regulating activities occurring within their jurisdiction.

Now that I have spent some time explaining what we believe is not consultation, I think it would be constructive to consider what consultation should include. We believe that clarifying the expectations regarding consultation will assist NIGC, the Department of Interior, the Indian Health Service and tribes in developing mutual and cooperative working relationships regarding regulation and oversight of Indian activities.

It is our position that legislation considered by this body should begin with the foundation that Tribal governments have the primary responsibility for acting within Indian country and that any action should be considered in a perspective of providing assistance in carrying out that responsibility. Indian country, Tribal governments, and matters affecting Tribes are unique, and a single regulation or policy decision cannot take into account this unique aspect. As a result, beginning with the premise that Tribal governments are responsible will recognize that we have taken into account appropriate governing responses addressing the needs within our reservations.

If regulation or policy is needed, specifically, we believe there should be...

- Notification to tribes that the federal Department, agency or Commission is considering promulgating rules regarding a subject matter.
- Meetings with tribal leaders scheduled to discuss this consideration and the parameters of those proposed rules.
- Meetings with tribal leaders to identify how those proposed rules will impact individual tribal governments.
- Notification to tribes of the result of those meetings and recommendations on how to proceed.
- Meetings with Tribal leaders to explain and/or discuss those recommendations.

It may appear that I have suggested a route that leads to endless delays. But I would urge you to consider that tribal governments are not idly waiting for agencies to promulgate regulations regarding protection of Indians and our lands. Our tribal governments work to identify policy and technical matters at all levels. Tribal leaders have formed associations to look at national issues, and we have the capacity to respond quickly to the call of the federal government. In fact, the failure of proper consultation is what leads to a delay in implementing new regulations due to an

assortment of legal challenges that might otherwise be avoided under true consultation processes.

What I have suggested is a consultation process that recognizes tribal government's front line exposure and response to a host of issues facing our people and our lands. The Oneida Tribe of Indians of Wisconsin believes that the proposed consultation process will result in recognition of the roles and responsibilities of tribal governments and the federal agencies impacted by this legislation.

We would note that the Indian Health Service is part of the Department of Health and Human Services, and that many of the agencies in this Department provide programs and services that significantly impact Indian tribes. Further, tribes have become more capable of managing their own affairs and administering programs under contracts with departments and agencies of the federal government that are not included in this bill. Our last request regarding consultation would be that Congress considers expanding this bill to include the entire Department of Health and Human Services and other federal agencies that have a profound impact on our affairs, including at least the Departments of Justice, Defense, Energy, Housing and Urban Development, Commerce and the Environmental Protection Agency.

This bill is an important step forward regarding recognizing the government to government relationship. However, we are concerned that the language in the proposed legislation could result in increased litigation challenges where Tribes find that the agency has not addressed Tribal government concerns. As a result, this may place tribes and agencies in adversarial positions. We look forward to working with your Committee to identify alternative language which would address this concern and return to positive working relationships.

As a final note, the bill contains provisions which would lessen the burden on Tribes of unfunded mandates. We agree with these provisions and urge the final bill to include all federal departments, agencies, and commissions which have the authority to promulgate rules and regulations that significantly affect Indian self-determination and self-governance.

Thank you for your time and I would be pleased to answer any questions you might have regarding our views on this bill.

April 7, 2008