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DRAFT -

United States Senate

SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, D.C. 20510

June 25, 1981

*NOT sent
Recd from
Pete Taylor 7/2/81
- said copy of draft
has been sent to
Interior.*

Honorable James G. Watt
Secretary of the Interior
DEPARTMENT OF THE INTERIOR
18th & C Sts., N.W., Rm. 6151
Washington, D.C. 20240

Dear Mr. Secretary:

The Executive Committee of the Oneida Nation of New York has requested our support in seeking an administrative resolution to the re-establishment of a governing body of the Oneida Nation. They have supplied extensive correspondence on this matter, starting in 1975 through the present.

It appears from this correspondence that from 1948 until December, 1975, the Oneida Executive Committee was recognized by the Department of the Interior as the sole governing body of the Oneida Nation and functioned in that capacity pursuant to a written constitution. This constitution, however, had not been formally filed with the Bureau of Indian Affairs (BIA) and, therefore, the Bureau did not consider it a "recognized" constitution.

In August of 1975, the Executive Committee, in an improperly scheduled meeting, voted to remove its President, Mr. Jacob Thompson, from his office. Mr. Thompson had long been recognized by the Bureau as President of the Executive Committee and of the Oneida Nation on the basis of apparent popular support. The Bureau was unfamiliar with the procedures the constitution provided for such removal and questioned the action of the Executive Committee. In September of 1976, Mr. Thompson tendered his resignation as President. Mr. Thompson contends that this resignation was obtained by duress and has filed an action against a number of individuals in Federal court for violation of his civil rights. At a general meeting of the tribe held later that Fall, Mr. Thompson's resignation was refused. He was reinstated as President and other members of the Executive Committee were removed. In the ensuing confusion, the Bureau, in December, 1975, withdrew recognition from the Executive Committee as the governing body and refused to recognize the 1948 constitution and by-laws. The Oneida Nation, a federally recognized Indian tribe, was thus left with no recognized governing body, a situation which has continued to this day.

Early in 1977, an effort was mounted through the auspices of Robert Burr, Jr., Mr. Thompson's successor as President, to set up a procedure for restoration of a tribal government. It appears the

Department was concerned with respect to three rival Oneida groups: the Traditional group; the Constitutional or Elective group; and, the Marble Hill group. Both the Traditional group and the Constitutional group are included on one BIA roll of members whereas the Marble Hill group is separately located and a separate roll is maintained. In June of 1977, the BIA Eastern Area Office outlined a plan for resolution of the conflicts through an election procedure. Copies of this letter were sent to all three groups requesting their acceptance of this process but only the Constitutional group responded.

In an effort to break the impasse, the Department of the Interior early in 1978 took steps to complete and certify a current roll of New York Oneidas in order to establish the eligible participants for choosing a governing system for the tribe. On March 30, 1979, Assistant Secretary Forrest Gerard wrote to all of the adult members of the Oneida Nation of New York enclosing a "polling instrument" for the recipients to advise Interior whether they wished a traditional form of government or a constitutional form. The Assistant Secretary advised the recipients of this letter that he would consider it adequate if 30 percent of the adult Oneidas whose names appeared on the recently developed Federal listing of recognized Oneida Indians of New York participated. This is the same standard prescribed by 25 C.F.R. Sec. 52.7 for adoption or amendment of tribal constitutions for tribes organized under Section 16 of the Indian Reorganization Act of 1934. Of the more than 400 names of adult Indians on the list of recognized New York Oneidas, only 92 properly returned their polling instruments -- barely 20%. The polling by mail procedure thus failed for want of 30% participation.

On May 7, 1979, Congressman Hanley of New York wrote the Interior Department urging a second effort with elimination of the requirement that a fixed percentage of the eligible Oneidas must participate in the election process. However, the Department concluded that such an effort would be fruitless.

In late 1979, the Department of the Interior was approached by Mr. Bertram Hirsch as attorney for the Executive Committee or Constitutional faction. Mr. Hirsch suggested an "affidavit procedure" for resolution of the governmental question. By letter dated December 12, 1979, Assistant Secretary Gerard adopted the affidavit proposal. This letter spelled out in detail the contents to be contained within the Affidavit. It required that 50% plus one of all adult Oneidas as established by the roll prepared by the Bureau earlier in the year should be secured and it set a 90-day time limit in which to collect and file the affidavits. This list included members of the Marble Hill group as well as the Traditional and Constitutional groups. The Department committed itself to recognition of the Executive Committee as the sole and exclusive governing body of the Nation and to accept the 1948 constitution as the governing document if the affidavits were collected and filed as outlined. The date fixed for submission of the affidavits to Interior was March 11, 1980.

The Interior list of eligible participants showed 458 names. Thus, the number of affidavits needed to meet the 50% plus one requirement was 230. According to correspondence from Interior, particularly the letter of Rick Lavis, Deputy Assistant Secretary for Indian Affairs, dated April 25, 1980, a total of 253 individual affidavits were timely submitted to Interior. Of these, the Department rejected 22 on the grounds they had been executed by persons whose names did not appear on the Interior list, and one other on the ground that it was a duplicate. The number of affidavits timely filed was thus 230, the exact number needed to meet 50% plus one.

The Department then rejected another 33 individual affidavits on the ground that a separate "supporting" affidavit executed by one of the affidavit collectors was filed three days late. The basis for this action was that the Department concluded the supporting affidavit and the individual affidavits were "inter-dependent" documents. The rejection of the 33 affidavits left the process 33 affidavits short.

On May 12, 1980, the Executive Committee filed an appeal with the Secretary of the Interior asking for reconsideration of the Lavis opinion of April 25, 1980. Congressman Hanley of New York and Congressman Udall of Arizona also wrote Secretary Andrus urging that the appeal be given a full and fair hearing. Four separate issues were outlined in the appeal. Among these issues was the refusal of the Department to eliminate some 14 deceased persons from the list of eligibles in order to reduce the number of affidavits required. Since a non-vote counted as a "no" vote, failure to remove these deceased persons from the list in effect provided 14 negative votes cast from the grave. An additional point, not raised in the appeal since technically it was not an appealable point, was that of the 458 persons listed as eligible, neither the Bureau nor the tribe was able to secure addresses for some 53 persons. Because of the inability of affidavit collectors to contact these persons, they also were counted as voting "no".

On November 17, 1980, Under Secretary James Joseph issued a ruling sustaining the appellant on all issues raised, including the issue of the removal of the 14 deceased persons from the list of eligibles, but reaffirming the Lavis ruling to the effect that "...the individual and supporting affidavits were inter-dependent to an inseparable degree..." and "...their concurrent submission was absolutely necessary."

The Lavis opinion of April 25, 1980, and the Joseph opinion of November 17, 1980, both indicated that during the affidavit process the Department had begun an investigation into the possible historical divisions of the Oneida Nation into separate groups. On November 24, 1980, Mr. Hirsch wrote the Department seeking clarification with respect to the extent to which this question entered into their considerations of the affidavit process. By letter dated January 30, 1981, Acting Deputy Assistant Secretary James Canan reaffirmed the Joseph letter stating that the question of the unity or separateness of the Marble Hill group from the main body of the Oneida Nation was not a relevant factor in the decision. Despite this denial, it is clear from the correspondence

that the Department during the affidavit collection process developed a concern that historically the Marble Hill Oneidas perhaps constituted one tribe, band, or group while the other Oneidas, i.e., the Traditional group and the Constitutional group, perhaps constituted a separate tribe, band, or group.

Compliance with the technical requirements of the December 12, 1979, letter of agreement of Assistant Secretary Gerard is a matter for legal argument. On this score alone, it does appear to us that there is a sufficient basis for reconsideration. According to Mr. Hirsch's letter to you of May 22, 1981, he has unofficially been advised that the Department may have neglected to consider certain critical factors related to the invalidation of the 33 affidavits. It is our understanding that this question relates to whether the individual affidavits were self-supporting or whether they were indeed "inter-dependent to an inseparable degree" with the supporting affidavits. It would appear to us that these affidavits are self-supporting within the requirements of the Gerard memorandum. It would appear that at least two other questions are also presented: (1) assuming "inter-dependence", was it necessary that the supporting affidavits be filed simultaneously or concurrently with the individual affidavits, and (2) in light of the circumstances relating to the filing of the one supporting affidavit not filed within the 90-day time period, i.e., the fact that the affiant collector was engaged in traditional ceremonies relating to the death of her father at the time the deadline expired, should the technical requirements for filing the supporting affidavits have been relaxed at least with respect to this one supporting affidavit. This latter point is particularly relevant in light of the provisions of the American Indian Religious Freedom Act which, among other things, criticized excessive rigidity in administrative guidelines or regulations in matters where Indian religious practices were concerned. If the individual affidavits are determined to be self-supporting; if the supporting affidavits are determined to be sufficiently independent so as not to require simultaneous or concurrent filing; or, if it is determined that the circumstances surrounding the late filing of the one supporting affidavit accounting for 33 individual affidavits should be relaxed; if any one of these questions is answered in the affirmative, then it would appear that Mr. Hirsch and the constitutional faction have met the technical requirements of the Gerard memorandum.

The Executive Committee has been held to the strictest of interpretations of the Gerard memorandum, while it appears the decisions of the Department have at least been influenced by broader "political" considerations. Certainly, political questions must be considered. However, we believe that the political considerations auger strongly for affirmative action by the Department of the Interior in reconsidering the Executive Committee's appeal and extending recognition to the Executive Committee either as the sole governing body of the Oneida Nation of New York or, at least, the New York Oneidas other than the Marble Hill faction.

In this context, the following observations are offered:

1. The Oneida Nation of New York has been without a recognized governing body for over five years. As a result, there is no effective spokesman for the Nation. The Nation is unable to contract programs from the Department of the Interior and, in fact, no longer receives many of the BIA services it previously received. Programs which the Nation had operated through funding from other agencies such as CETA public service employment, Title IV programs under the Social Security Act for child welfare, and educational programs from pre-school through 12th grade have also been lost. This state of affairs is solely attributable to the actions of the Department of the Interior in withdrawing its recognition from the Executive Committee as the governing body of the tribe.

2. The Oneida Nation of New York is a party with other Oneida Indians to extensive land claims in the State of New York. The lack of a governing body for the Oneida Nation of New York has seriously impaired the ability of the Department to work with the tribes toward a negotiated settlement of this land claims dispute. The extent of the Department's frustration with this situation is manifested by the letter of Assistant Secretary Gerard to Robert Burr, Jr., President of the Executive Committee, dated December 7, 1977; his statement on the New York Oneidas land claim dated January 30, 1978; and, the Departmental news release of May 2, 1978. It is, of course, a self-imposed frustration which it is now within the power of the Department to remedy. However, until a recognized government is restored to the Oneida Nation of New York, the interest of the Wisconsin Oneidas, the State of New York and its citizens, and the United States must continue to suffer along with the New York Oneidas.

3. The Department of the Interior is unable to resolve this issue on its own. When the Department attempted to resolve this problem through a "polling process", it imposed upon itself the standard established in 25. C.F.R. Sec. 52.7 for other federally recognized Indian tribes organized under Sec. 16 of the Indian Reorganization Act of 1934, *i.e.*, a simple majority of those actually voting provided the total vote cast is not less than 30 percent of those entitled to vote. Under this standard, the minimum vote necessary to adopt or amend a constitution could be as low as 15% plus one of the eligible voters. The Departmental "polling" effort barely gleaned 20% participation. The affidavit process agreed to by the Executive Committee or constitutional group requires an affirmative vote (not mere participation) of 50% plus one of all New York Oneida Indians eligible to vote. From the record, it is clear the Department will never be able to secure this degree of participation, let alone obtain an affirmative vote of this magnitude. The accomplishment of the constitutional group should not be dismissed on a questionable technicality. Even if, upon reconsideration of the appeal the technicality is sustained, it is within the authority of the Department to waive this requirement and restore recognition to this government which clearly has a broad base of popular support.

4. The Executive Committee is clearly supported by a majority of the New York Oneida Indian community. The Interior list of Oneidas eligible to participate in the election or affidavit process included 458 names. Of these, 83 persons were known to be of the Marble Hill

group. An additional 51 had not been carried on past rolls of the Oneida Nation and the Executive Committee contends that they probably should have been listed as Marble Hill Oneidas. The inclusion of the Marble Hill Oneidas in the list of Oneida eligibles coupled with the lately developed concern of the Department with respect to possible historical divisions between the Marble Hill group and the other New York Oneida Indians leads to two different calculations, either of which shows the constitutional faction commanding significantly more support than a bare majority.

It should be noted at the outset that of the 458 names of adult New York Oneidas on the Interior list, 14 died before or during the affidavit process, addresses for 53 were not supplied by Interior and could not be obtained by the affidavit collectors, two were found to be in mental hospitals, and one was a minor whose birth date was incorrectly given by Interior which resulted in counting the minor as an adult. Thus, some 70 persons were either dead, addresses unknown, or were otherwise incompetent to participate. The number of persons, including the Marble Hill Oneidas, from whom affidavits could possibly have been collected was thus reduced to 388. Some 230 individual affidavits were filed with the Department prior to the March 11 deadline. Two of these were validly revoked, thus reducing the total of individual affidavits timely filed to 228. This number constitutes 58% of those New York Oneidas, including Marble Hill Oneidas, from whom it was possible for an affidavit to be obtained.

A more complex analysis is required if the Marble Hill Oneidas are to be treated separately. The following discussion assumes that the 51 people who had not previously appeared on the rolls of the Oneida Nation are Marble Hill Oneidas and should be included with the 83 known Marble Hill Oneidas, thus making a total of 134 Marble Hill Oneidas on the list of eligibles. Of this number, ten had died prior to or during the affidavit process, and 20 were among those for whom no address could be found. Thus, the total number of Marble Hill Oneidas from whom an affidavit could possibly have been obtained is reduced to 104. Of this number, 23 submitted affidavits. If the number of Marble Hill Oneidas from whom affidavits could have been obtained (104) is subtracted from the total number of New York Oneidas from whom affidavits could have been obtained (388) we are left with 284 non-Marble Hill Oneidas from whom an affidavit could have been obtained. The number of affidavits actually filed and not validly revoked (228) must be reduced by the number of affidavits obtained from Marble Hill Oneidas (23), leaving 205 individual affidavits of non-Marble Hill Oneidas timely filed. Thus, of the 284 non-Marble Hill Oneidas from whom an affidavit could have been obtained, some 205 did execute an affidavit. This number constitutes 72% of those non-Marble Hill New York Oneidas from whom an affidavit could possibly have been obtained.

Consideration of these figures in reverse underscores the depth of New York Oneida support for the Executive Committee as their form of government. If we subtract from our equations those persons who predeceased the affidavit process and those persons whose addresses are unknown

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or were otherwise incompetent, and we then treat a non-vote as an affirmative act of rejection, we find that of the entire New York Oneida membership, including Marble Hill, 42% oppose having the Executive Committee as their form of government. And, if we separate out the Marble Hill Oneidas, we find that only 28% of the non-Marble Hill Oneidas oppose having the Executive Committee as their form of government. This assumes that every non-vote was a conscious act of rejection.

Throughout the correspondence on this matter, the Department has stressed that the government which is to be recognized must be the government for all of the New York Oneidas, not just one faction or another. This was the premise upon which the affidavit process was founded. It was only during the affidavit process that the Department apparently began to have doubts. This process is now more than a year old. If the Department did undertake historical research, that process should now be complete. We believe that it is vitally important that a government be restored to the New York Oneidas. If the facts warrant separate treatment for the Marble Hill Oneidas, that should not impede restoration of government to the other New York Oneidas. The affidavit processes indicates that the Executive Committee commands the clear support of a significant majority of the New York Oneidas with or without the Marble Hill group.

In the absence of substantial evidence that a majority of New York Oneidas do not support the Executive Committee, recognition should promptly be extended to the Executive Committee as the government of the New York Oneida Nation; and the 1948 constitution and by-laws should be recognized as the governing documents of the Nation.

The Executive Committee of the Oneida Nation had scheduled an election of officers for June 7, 1981. At our request, the Executive Committee has rescheduled this election for July 19, 1981. We requested this extension to allow time for your reconsideration of the Executive Committee's appeal. The Executive Committee has advised us that they would have no objections to having the Department monitor the elections though it does retain the right to determine the actual winners. We most sincerely urge that prompt consideration be given to the Executive Committee's appeal and, that the Department accept forthwith the invitation of the Executive Committee to monitor the election process.

With best wishes.

Sincerely,

Sen. William S. Cohen

Sen. Alfonse M. D'Amato

Cong. George C. Wortley