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CDIB: The Role of the Certificate of Degree of Indian Blood in Defining Native American Legal Identity

Paul Spruhan

Navajo Nation Department of Justice

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CDIB: The Role of the Certificate of Degree of Indian Blood in Defining Native American Legal Identity

Cover Page Footnote

Assistant Attorney General, Navajo Nation Department of Justice. J.D., University of New Mexico (2000); A.B., A.M., University of Chicago (1995, 96). The views expressed in this paper are those of the author. Thanks to the following who read drafts and provided comments: Bidtah Becker, Bethany Berger, Katherine Ellinghaus, Chaitna Sinha, and David Wilkins, and an anonymous reviewer who provided very helpful critiques. Thanks as always to the Spruhan family and the Becker family for their support. This and my other works on this subject are dedicated to Bahe and Tazbah.

CDIB: THE ROLE OF THE CERTIFICATE OF
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AMERICAN LEGAL IDENTITY

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CDIB: THE ROLE OF THE CERTIFICATE OF DEGREE OF INDIAN BLOOD IN DEFINING NATIVE AMERICAN LEGAL IDENTITY

*Paul Spruhan**

I. INTRODUCTION

Native Americans are the only group in the United States that possess a document stating the amount of their “blood” to receive government benefits.¹ The official name is a “Certificate of

* Assistant Attorney General, Navajo Nation Department of Justice. J.D., University of New Mexico (2000); A.B., A.M., University of Chicago (1995, 96). The views expressed in this paper are those of the author. Thanks to the following who read drafts and provided comments: Bidtah Becker, Bethany Berger, Katherine Ellinghaus, Chaitna Sinha, and David Wilkins, and an anonymous reviewer who provided very helpful critiques. Thanks as always to the Spruhan family and the Becker family for their support. This and my other works on this subject are dedicated to Bahe and Tazbah.

¹ There is no current functional equivalent for other racial and ethnic groups in the United States. Official identification of racial and ethnic populations, such as in the United States Census, generally relies on self-identification, and not the proof of a quantum of “blood.” See UNITED STATES CENSUS BUREAU, RACE (Jan. 23, 2018), <https://www.census.gov/topics/population/race/about.html> [<https://perma.cc/8PZS-AE8P>] (United States Census Bureau explanation of racial definitions) (“An individual’s response to the race question is based on self-identification.”). Blood quantum had been used historically to define other racial and ethnic populations. See, e.g., F. JAMES DAVIS, WHO IS BLACK?: ONE NATION’S DEFINITION (1992). For a discussion of the use of blood quantum requirements to define land rights of pacific islanders, see Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL L. REV. 801, 801–37 (2008); J. KEHAULANI KAUANUI, HAWAIIAN BLOOD (2008). While laws related to those groups apply blood quantum criteria, they are not included as “Native Americans” for CDIBs, as they are only issued to “Indians” and “Alaska Natives.” See Certificate of Indian or Alaska Native Blood, Certificate of Indian or Alaska Native Blood, 65 Fed. Reg. 20775, 20776 (April 18, 2000) (“We issue CDIBs so that individuals may establish their eligibility for those programs and services based upon their status as American Indians and/or Alaska Natives.”). As CDIBs are issued to Alaska Natives in addition to Indians, this article uses the term “Native American” for the collective population who may receive them from the federal government.

Degree of Indian or Alaska Native Blood,” or (CDIB) for short.² As suggested in its name, the CDIB states the amount of “Indian” or “Alaska Native” blood possessed by the person named on the document.³ It may be broken down by different tribal blood or may only state the amount of blood of a specific tribe.⁴ It is certified by a Bureau of Indian Affairs (BIA) or tribal official authorized to issue it.⁵ It may be printed on a standard eight and a half by eleven inch piece of paper or on a smaller card, which may or may not be laminated.⁶

Why does such a document exist in the United States in 2018? Simple in form, yet possessing immense bureaucratic power,

² See 65 Fed. Reg. at 20775 (April 18, 2000) (publishing draft CDIB regulations and discussing the CDIB).

³ See Yolynda Begay, *Historic and Demographic Changes that Impact the Future of the Diné and the Development of Community-Based Policy*, in DINÉ PERSPECTIVES: REVITALIZING AND RECLAIMING NAVAJO THOUGHT, 105, 117 (2014) (showing example of blank certificate for the Navajo Nation stating 4/4 Navajo blood.). For a discussion of blood quantum and citizenship in Navajo law and society, see Begay, *supra*; Kristina Jacobsen and Shirley Bowman, *Don't Even Talk to Me Unless You're Kinya'áanii [Towering House]: Adopted Clans, Kinship and "Blood" in Navajo Country* (forthcoming NATIVE AMERICAN AND INDIGENOUS STUDIES); Lloyd Lee, *Navajo Cultural Identity: What Can the Navajo Nation Bring to the American Indian Identity Discussion Table?*, 21 WICAZO SA REV. 79 (2006); Paul Spruhan, *The Origins, Current Status, and Future Prospects of Blood Quantum as the Definition of Membership in the Navajo Nation*, 8 TRIBAL L. J. 1 (2007).

⁴ For example, the Navajo Nation issues a document called a Certificate of Navajo Indian Blood (CNIB), which, as suggested by its name, only lists the amount of Navajo blood, and omits the amount of blood from any other tribe. See Begay, *supra* note 3, at 117 (showing example of blank CNIB). However, the document is issued by the Nation's Office of Vital Records and Identification, as sanctioned by the BIA through a 638 contract with the Nation, and is therefore the Navajo version of the federal document. See 2017 Annual Funding Agreement between the Navajo Nation United States Department of Interior, Scope of Work, Attachment A, § 3 (on file with author). For a contrary example, the Choctaw Nation of Oklahoma will issue a CDIB with tribal blood from other “Five Civilized Tribes” in addition to Choctaw blood; see CDIB & Tribal Membership, Frequently Requested Information, CHOCTAW NATION, <https://www.choctawnation.com/sites/default/files/Frequently%20Requested%20Information%20CDIB%20%26%20Tribal%20Membership.pdf>. [<https://perma.cc/TJ4N-KBH6>].

⁵ See, e.g., Begay, *supra* note 3, at 117 (showing signature line on CNIB for Navajo official).

⁶ A Google Images search reveals multiple examples of CDIBs in several sizes and forms. The Navajo version is issued on a green piece of eight and a half by eleven inch paper, while other tribes or a BIA agency may use a laminated credit-card sized card. Notably, the cause of the most important case involving CDIBs, *Underwood v. Deputy Assistant Secretary*, discussed in detail below, was that the BIA in Oklahoma changed the size of the CDIB from an eight and a half by eleven inch form to a card. 93 Interior Dec. 13, 15 (1986).

the CDIB is a key that unlocks educational loans, medical services,⁷ employment preference, or other federal benefits unique to Native Americans,⁸ and, in some circumstances, even enrollment as a member of a tribal nation.⁹

Simultaneously derided and coveted,¹⁰ pervasive yet

⁷ According to the Indian Health Manual, a CDIB is not explicitly required for eligibility for Indian Health Service (IHS) medical services, as proof of enrollment with a federally recognized tribe is sufficient. *See* Frequently Asked Questions, INDIAN HEALTH SERVICE, <https://www.ihs.gov/IHM/pc/part-2/p2c1/#2-1.1> [<https://perma.cc/Y86A-7VQY>] (stating a new patient should present proof of tribal enrollment to receive benefits). However, according to the Indian Health Manual, the Indian Health Service Patient Registration System, IHS's software, requires the input of an individual's blood quantum as a "mandatory field" as "verified by BIA documents," presumably a CDIB. *Id.* § 2-6.5(C)(7). The Manual states that the software will not allow a user to move beyond that field until blood quantum information is inputted. *Id.* According to the Manual, this blood quantum information is necessary because "membership in an Indian tribe is important to eligibility for [contract health services]." *Id.* In a separate subsection, however, the Manual disclaims that blood quantum is required for medical services, but states that "many tribes have established a blood quantum criteria for their tribal membership," and therefore "[t]his decision does affect eligibility," presumably referring to the decision to set membership eligibility at a certain quantum of Indian blood. *Id.* § 2-6(3)(A)(1). The Manual also requires the recording of "tribal blood quantum," defined as the "average percentage of blood quantum of all tribal members of the specific tribe of which a patient is a registered member." *Id.* § 2-6(3)(A)(2). The Manual does not explain the relevance of this information.

⁸ *See* 25 C.F.R. § 5.1 (1989) (defining "Indian" for Indian preference as including individuals of one-half or more Indian blood). A CDIB is also an acceptable document to prove United States citizenship for Medicaid eligibility. *See* 42 C.F.R. § 435.407(a)(5)(ii)(2)(B) (2012). Indeed, any Native American or parent of a Native American can describe numerous situations where a CDIB is requested or required, for the most mundane of activities, such as registering for on-reservation or near-reservation schools, signing up for sports, or seeking college scholarships.

⁹ For instance, according to its enrollment information provided on the internet, the Chickasaw Nation requires a certificate of degree of Indian blood to be issued before an individual can be eligible for tribal citizenship. *See* Certificate Of Degree Of Indian Blood Cards, THE CHICKASAW NATION, <https://www.chickasaw.net/Services/Certificate-of-Degree-of-Indian-Blood-Cards.aspx>. [<https://perma.cc/W3UQ-CBFY>] (last visited Mar. 23, 2018).

¹⁰ *Compare, e.g.,* Rachel Cocker, *Blood Quantum: the Colonial Tool of Racial Superiority and Economic Dependency Native Communities Can't Let Go of*, KNOWLEDGE IN INDIGENOUS NETWORKS (Aug. 10, 2016) <https://indigenouknowledgenetwork.net/2016/08/10/blood-quantum-the-colonial-tool-of-racial-superiority-and-economic-dependency-native-communities-cant-let-go-of/> [<https://perma.cc/N425-QSS4>] (criticizing CDIBs and use of blood quantum), *with How to Register to get Your CDIB Card*, ACCESS GENEALOGY, <https://www.accessgenealogy.com/native/how-to-register-or-get-your-cdib-card.htm> [<https://perma.cc/5RWS-JU72>] (last visited Mar. 23, 2018) (providing information on process for researching Indian ancestry and applying for a CDIB). In a recent project at the Institute of American Indian Art titled the

mysterious, the CDIB is one of the most important documents for Native Americans, but is issued with no direct statutory authority and governed by no formally published regulations. A CDIB may be issued directly by the BIA or by a tribal enrollment office operating under a “638” contract,¹¹ but with no clear rules to govern how those offices grant or deny a CDIB or calculate the blood quantum listed on the document.

This article is about the CDIB and its role in defining Native American legal identity. The purpose of the article is to describe the CDIB, its function, its statutory authority (or lack thereof), and the BIA’s recent attempts at issuing regulations, which no other article or book has done. First, I discuss its primary purpose as proof of blood quantum for specific federal statutes and regulations, and how its use has expanded to other purposes, including by tribes to define eligibility for membership. Second, I discuss its origins as an internal BIA document lacking any direct congressional authorization or published regulations and suggest several possibilities for its first appearance. I then discuss a 1986 Interior Board of Indian Appeals (IBIA) decision, *Underwood v. Deputy Ass’t Secretary- Indian Affairs (Operations)*.¹² In that decision, the IBIA blocked an attempt by the BIA to unilaterally alter a person’s

“IAIA Blood Quantum Drive,” students distributed a “Certificate of Indigenous Blood” for individuals to fill out, to highlight the controversial nature of Native American identity. See Certificate of Indigenous Blood (on file with author); Journeyway Price, et al., *IAIA Blood Quantum Drive: Making Relatives*, FACEBOOK (Friday, Nov. 7, 2014) <https://www.facebook.com/events/1494841240786272/> [<https://perma.cc/3T8F-KYUF>] (describing project).

¹¹ A 638 contract is a funding agreement between the Bureau of Indian Affairs and a tribal nation under the Indian Self-Determination and Education Assistance Act. See 25 U.S.C. § 5321(a)(1). Under such contracts the tribe performs a function previously done by the Bureau. *Id.* Tribes issue CDIBs through such contracts. See Certificate of Indian or Alaska Native Blood, 65 Fed. Reg. (April 18, 2000) at 20777 (discussing participation of 638 contractor tribes in drafting of CDIB proposed regulations). The Navajo Nation issues CNIBs under its contract. See Annual Funding Agreement, *supra* note 3 (Navajo 638 scope of work). According to their information provided on the internet, other tribes that issue CDIBs directly include the Pascua Yaqui. See PASCUA YAQUI TRIBE, <http://www.pascuayaqui-nsn.gov/index.php/enrollment-forms> [<https://perma.cc/8NRH-5Y4M>] (last visited Mar. 22, 2018). See also THE CHEROKEE NATION OF OKLAHOMA, <http://www.cherokee.org/Portals/0/Documents/Registration/Tribal%20Registration%20Packet%20-%20Download.pdf?ver=2017-01-26-102513-520> [<https://perma.cc/82QR-4DTV>] (demonstrating the application packet with CDIB and tribal citizenship applications) (last visited Mar. 22, 2018).

¹² *Underwood v. Deputy Ass’t Secretary- Indian Affairs (Operations)* 14 IBIA 3 (01/31/1986).

blood quantum on a CDIB, because there were no properly issued regulations. I then discuss the BIA's attempts at issuing regulations since 2000 and the possible reasons for why they have never been finalized. I then discuss potential remedies the BIA might consider in order to solve problems arising out of the CDIB program, including the potential misuse of CDIBs in current disenrollment conflicts within some tribes. In the conclusion, I discuss the CDIB's role in enshrining "blood" as the dominant definition of Native American legal identity. I also argue that, for as long as the CDIB continues, the BIA has an affirmative obligation to issue clear policies that prevent its misuse in internal tribal conflicts.

II. PURPOSE OF THE CDIB

First and foremost, the CDIB is a federal document. It serves a federal need to prove an individual's blood quantum for purposes of several statutes and regulations.¹³ It, by itself, does not establish membership in a tribal nation, because such membership is a tribal, not federal, decision.¹⁴

There are some federal statutes and regulations that do not require tribal membership; a specific quantum of blood suffices whether or not that person is a member of a tribe.¹⁵ The most prominent of these is the Indian Reorganization Act (IRA), passed in 1934, which defines "Indian" as, among other categories, anyone with one-half or more Indian blood.¹⁶ Individuals defined as "Indian" simply by this threshold blood quantum are eligible for employment preference, and the BIA has acquired land and

¹³ See *Certificate of Degree of Indian or Alaska Native Blood* 65 Fed. Reg. at 20776 (April 18, 2000) (discussing "background" of CDIBs in proposed rule); Supporting Statement A, Request for Certificate of Degree of Indian or Alaska Native Blood (CDIB), Office Management Budget Control Number 1076-0153, at 1 (2011) (on file with author) (BIA statement to Office of Management Budget explaining need for personal information and discussing reason for issuance of CDIBs).

¹⁴ 65 Fed. Reg. at 20776, 20785, § 70.28(a) (April 18, 2000) ("Only a tribe may determine membership."). However, the BIA will accept a CDIB as proof of tribal membership to apply to the Housing Improvement Program. 25 C.F.R. § 256.13(d) (2015).

¹⁵ See, e.g., 25 U.S.C. §§ 480, 5133 (restricting federal loans to Indians of one quarter or more Indian blood); 5129 (defining "Indian" in Indian Reorganization Act (IRA) as one-half or more Indian blood). The IRA definition is used in regulations to define eligibility for Indian employment preference. 25 C.F.R. § 5.1.

¹⁶ 25 U.S.C. § 5129.

approved tribal constitutions for Indian groups who fulfilled this blood quantum requirement.¹⁷ Congress also restricts federal loans to Indians of one-quarter or more Indian blood.¹⁸ A regulation similarly authorizes educational loans only to persons of one-quarter or more Indian blood.¹⁹ The Alaska Native Claims Settlement Act (ANCSA) and regulations for the Marine Mammal Protection Act define “Native” as one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood, or “a combination thereof.”²⁰ A bare blood quantum requirement is also used to define the right of Indians of the so-called Five Civilized Tribes to alienate their inherited allotments with or without state court oversight.²¹ Under this provision, known as the “Stigler Act,” individuals of one-half or more Indian blood must obtain permission from a county court in Oklahoma to convey their allotment interests.²²

The CDIB is then the document that proves a person’s blood quantum for these federal purposes. As such, it is the most concrete

¹⁷ See 25 C.F.R. § 5.1 (stating criteria for Indian employment preference); see generally Paul Spruhan, *Indian as Race/Indian as Political Status: Implementation of the Half-Blood Requirement under the Indian Reorganization Act, 1934-1945*, 8 RUTGERS RACE & L. REV. 27 (2006).

¹⁸ 25 U.S.C. §§ 480, 5133.

¹⁹ 25 C.F.R. § 40.1 (1982).

²⁰ 43 U.S.C. § 1602(b); 50 C.F.R. §§ 18.3, 216.3 (2017). The Marine Mammal Protection Act regulations adapt the blood quantum requirement from ANCSA to define the right to take marine mammals for subsistence and handicraft purposes, despite the lack of any such requirement in the statute itself. See 16 U.S.C. § 1371(b) (recognizing exemption from prohibition of taking marine mammals for any “Indian, Aleut, or [E]skimo.”). Consistent with ANCSA, the regulations do, however, also include any United States citizen considered an Alaska Native by his or her town, if his or her mother or father is or was also considered an Alaska Native. 50 C.F.R. §§ 18.3, 216.3. The inclusion of a blood quantum requirement in the regulations is controversial, as some Alaska Natives fear the loss of cultural practices if their descendants are excluded based on the lack of one-quarter blood. See Steve Langdon, *Determination of Alaska Native Status under the Marine Mammal Protection Act*, Research Report, SEALASKA HERITAGE INSTITUTE, at 30–31 (2016), <http://www.sealaskaheritage.org/sites/default/files/MMPAFinalReport.pdf> [<https://perma.cc/UF22-7GKG>] (discussing effect of blood quantum requirement on ability of Alaska Natives to engage in subsistence and art use of marine mammals).

²¹ Act of Aug. 4, 1947, § 1(a). For a discussion of the background of the statute, see Tim Volmann and Sharon Blackwell, *Fatally Flawed: State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform*, 25 TULSA L.J. 1 (1989).

²² Act of Aug. 4, 1947, § 1(a). A bill was recently introduced in Congress to eliminate the blood quantum requirement in the statute. See Bill J. Baker, *Bill Removes Blood Quantum Requirement for Citizens of Five Civilized Tribes*, INDIANZ (May 26, 2017) <https://www.indianz.com/News/2017/05/26/bill-removes-blood-quantum-requirement-f.asp>.

manifestation of “blood” as a required element of Indian legal identity.²³ Though blood quantum has existed alongside other definitions of Native American or tribal membership status since the early eighteenth century, only in the 1934 Indian Reorganization Act did Congress apply blood quantum directly on a large scale to define “Indian.”²⁴

Despite the narrow set of laws for which the CDIB is directly relevant, the document is also used for other purposes,²⁵ including, for some tribes, as proof of tribal membership. Some tribes require a CDIB before an individual can even apply for membership.²⁶

²³ There are a few exceptions to this, including historical and contemporary recognition of individuals without Indian ancestry as tribal citizens. See Paul Spruhan, “Indians, in a Jurisdictional Sense:” *The Continuing Viability of Consent as a Theory of Tribal Criminal Jurisdiction over Non-Indians*, 1 AM. INDIAN L. J. 79, 82–91 (2012) (discussing historical adoption of non-Indians under tribal law). Most recently, the Cherokee Nation recognized descendants of Freedmen, who are classified, at least in federal enrollment records, as having no Indian blood, as citizens of the Cherokee Nation after a prolonged federal legal dispute. See *Cherokee Nation Accepts Court Ruling and Welcomes Freedmen for Citizenship*, INDIANZ (Sep. 5, 2017) <https://www.indianz.com/News/2017/09/05/chokeee-nation-accepts-court-ruling-and.asp>.

²⁴ See generally, Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006); See also KATHERINE ELLINGHAUS, *BLOOD WILL TELL: NATIVE AMERICANS AND ASSIMILATION POLICY* (2017), for a detailed discussion of how “blood” impacted federal Indian policy beyond the bare letter of the law.

²⁵ CDIBs have also been used to prove Indian status in federal criminal cases. As certain federal criminal statutes only apply to “Indians,” e.g. 18 U.S.C. § 1153, federal prosecutors have submitted the CDIB as evidence of Indian status. However, recent Ninth Circuit case law has brought that reliance into question. In *U.S. v. Alvarez*, 831 F.3d 1115, 1122–24 (2016), the Court held a CDIB without authentication was inadmissible, because the Court believed it was not a federal document. Rule 902(1) of the Federal Rules of Evidence allows submission of official documents of certain governments, including the United States, without external authentication, but not documents of Indian tribal governments. See *Alvarez*, 831 F.3d at 1122–23. The Colorado River Indian Tribe issued the CDIB in the case, though it is unclear from the Court’s discussion whether it served the dual purpose of a federal CDIB document and a tribal enrollment document. *Id.* at 1120. The Court did describe the testimony of a police officer of the Hualapai Tribe as stating that the CDIB is “a way to determine a person’s quantum of Indian blood and whether a person was a registered member of a tribe.” *Id.* However, as the Court believed the CDIB to be a tribal, and not federal, document, it held that, by itself, the certificate could not prove Indian status. *Id.* at 1123. Relying on *Alvarez*, the Ninth Circuit similarly rejected the admissibility of a Navajo CDIB, even though, as discussed above, *supra* note 4, the Nation clearly issues the document on behalf of the BIA through a 638 contract. See *United States v. PMB*, 660 Fed. Appx. 521, 523–24 (2016).

²⁶ See *supra*, note 9.

Tribes that have taken over the BIA's function of issuing CDIBs through 638 contracts both issue CDIBs and enroll tribal members.²⁷ Some of those tribes issue two different documents: a CDIB for federal purposes and a tribal membership document for tribal purposes.²⁸ Others, like the Navajo Nation, use the CDIB as the proof of enrollment and issue one document for both purposes.²⁹

This conflation of the CDIB with tribal enrollment can have significant consequences. Importantly, if the threshold blood quantum for tribal membership is based on the quantum recorded on a CDIB, errors or intentional misrepresentations of a person's blood quantum for CDIB purposes can directly affect an individual's eligibility for tribal membership. The opposite can also be true; calculations of blood quantum for tribal membership purposes may affect that individual's federal Native American status if that information is then applied to a CDIB.³⁰ People who are members of tribes that control both membership and the issuance of a CDIB are then particularly vulnerable to the effect of errors or intentional manipulation of blood quantum information on a CDIB.

²⁷ See, e.g., Annual Funding Agreement, *supra*, note 4 (Navajo 638 contract authorizing issuance of CDIBs by Navajo Office of Vital Records and Identification).

²⁸ For example, the Choctaw Nation of Oklahoma issues two different documents, one for federal, and one for tribal purposes. See CDIB & TRIBAL MEMBERSHIP, FREQUENTLY REQUESTED INFORMATION, *supra* note 4. The Pascua Yaqui Tribe and the Comanche Nation appear to do the same. See PASCUA YAQUI TRIBE, <http://www.pascuayaqui-nsn.gov/index.php/enrollment-forms> [<https://perma.cc/8NRH-5Y4M>] (describing procedures for issuing CDIBs and enrollment cards). The Cherokee Nation issues a separate CDIB and "citizenship card," and also issues a photo ID that combines the CDIB with the citizenship card. See Frequently Asked Questions, CHEROKEE NATION, <http://www.cherokee.org/Services/Tribal-Citizenship/Frequently-Asked-Questions> [<https://perma.cc/H6RK-ZW5G>].

²⁹ See Begay, *supra* note 3. The Nation has in the recent past issued laminated photo ID cards, but those cards have not supplanted the CNIB form as the primary proof of Navajo blood and citizenship. Citizens of the Cherokee Nation of Oklahoma have the option of getting one card that serves both purposes. See *supra*, note 28.

³⁰ Indeed, the BIA instructions accompanying the CDIB application form requires an individual to show his or her relationship to a member of a federally-recognized tribe, as shown by enrollment records, such as a tribal base roll. Certificate of Degree of Indian or Alaska Native Blood Instructions, BUREAU OF INDIAN AFFAIRS (Expires Dec. 31, 2017), https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/BIA_CDIB_Instruction_s_OMB_Number_1076-0153.pdf [<https://perma.cc/DYR5-4XFQ>]. According to the instructions, the blood quantum stated on the CDIB is then based on the blood quantum identified on those tribal enrollment records. *Id.*

III. UNKNOWN ORIGINS, LACK OF STATUTORY AUTHORITY AND LACK OF REGULATIONS

The importance of a CDIB might lead to the assumption that there are clear authorities and accessible procedures for how the BIA and tribes issue the document and calculate the blood quantum that appears on it. However, there is no specific congressional authority for the BIA to issue CDIBs. There is no reference to CDIBs at all in Title 25 of the CDIB Code.³¹ There is no mandate by Congress to the BIA to create or continue to issue CDIBs, other than the implicit direction contained within congressional definitions of “Indian” and “Alaska Native” that use blood quantum.³² The CDIB is an internal BIA creation, presumably issued under the Department of the Interior’s general authorities delegated by Congress for matters involving Indian affairs.³³ Also, there are no regulations, and have never been any regulations, in the Code of Federal Regulations authorizing or governing CDIBs.

There are CDIB policies dating from sometime in the late 1970s, issued as a supplement to Part 83 of the Bureau of Indian Affairs Manual (Supplement).³⁴ The Supplement includes a section on CDIBs, as well other sections concerning calculation of blood

³¹ See generally, 25 U.S.C. §§ 1, et seq. There is only one reference in the entire United States Code to CDIBs, in a section concerning proof of citizenship for Medicaid eligibility purposes. 42 U.S.C. § 1396b(x)(3)(B)(v)(ii).

³² Kirsty Gover has identified the half-blood definition of “Indian” in the Indian Reorganization Act as the statutory authority for CDIBs. KIRSTY GOVER, TRIBAL CONSTITUTIONALISM 83 (2010). David Wilkins and Shelly Hulse Wilkins have similarly attributed the BIA’s rationale for CDIBs to the IRA half-blood provision. David E. Wilkins and Shelly Hulse Wilkins, *Blood Quantum: The Mathematics of Ethnocide*, in THE GREAT VANISHING ACT: BLOOD QUANTUM AND THE FUTURE OF NATIVE NATIONS 210, 221 (Kathleen Ratterree and Norbert Hill, eds., 2017) (citing Gover).

³³ See 25 U.S.C. §§ 2, 9. The BIA cited these two statutes as the authority to issue its draft CDIB regulations. Certificate of Degree of Indian or Alaska Native Blood, 65 Fed. Reg. (April 18, 2000) at 20776.

³⁴ Enrollment, Bureau of Indian Affairs Manual 83 Supplement 2 (n.d.), <https://www.bia.gov/sites/bia.gov/files/assets/public/raca/pdf/idc012024.pdf> [<https://perma.cc/C5SH-EM7W>]. Given the references to the Indian Child Welfare Act in the document, the Supplement is from 1978 or later, as Congress passed ICWA in 1978. See 25 U.S.C. Pub. L. 95–608, 92 Stat. 3069, Nov. 8, 1978. The BIA’s own listing on its website confidently identifies the issuance date as “[late 1970s?].” See (HISTORIC) BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/policy-forms/historic-bureau-indian-affairs-manual-biam> [<https://perma.cc/6TT2-LRJ8>].

quantum and policies related to tribal enrollment.³⁵ The Supplement is undated, but is available on the BIA’s web site as part of a compilation of the old Bureau of Indian Affairs Manual (BIAM), which, as stated on the web site, is in the process of being supplanted by the Indian Affairs Manual (IAM).³⁶ It is unclear whether the Supplement is currently in effect, as the IAM available on the site contains no updated sections on CDIBs.³⁷ A statement on the BIAM page provides little guidance: “In cases where a BIAM Part/Chapter has not been replaced by an IAM Part/Chapter, the BIAM does not *necessarily* apply.”³⁸ Further, in 2016, Acting Assistant Secretary Lawrence Roberts issued a memorandum directing BIA officials to “ensure that you and your staff are no longer relying on BIAMs.”³⁹ It is then unclear whether even these internal policies are in effect.

The only publicly available BIA document is an application form for seeking a CDIB.⁴⁰ The form includes instructions on how to fill it out and what supporting documents are necessary to include.⁴¹ It does not state how the BIA or a tribal contractor will process the application or what substantive provisions apply to

³⁵ See Enrollment, BUREAU OF INDIAN AFFAIRS MANUAL 83 Supplement 2 (n.d.), <https://www.bia.gov/sites/bia.gov/files/assets/public/raca/pdf/idc012024.pdf> [<https://perma.cc/C5SH-EM7W>].

³⁶ See United States Department of the Interior Indian Affairs, (HISTORIC) BUREAU OF INDIAN AFFAIRS MANUAL (BIAM), <https://www.bia.gov/policy-forms/historic-bureau-indian-affairs-manual-biam> [<https://perma.cc/3Z7Y-KJ9Q>].

³⁷ See *id.* (noting that “[m]ost of the Parts/Chapters within this section have yet to be updated.”) It is, in fact, unclear whether the Supplement actually was ever incorporated into the Manual, as the Interior Board of Indian Appeals believed in 1986 that the Manual contained no policies on CDIBs. See *infra* text accompanying note 78.

³⁸ See United States Department of the Interior Indian Affairs, (HISTORIC) BUREAU OF INDIAN AFFAIRS MANUAL (BIAM), <https://www.bia.gov/policy-forms/historic-bureau-indian-affairs-manual-biam> [<https://perma.cc/3Z7Y-KJ9Q>] (emphasis added).

³⁹ Memorandum from Assistant Secretary Lawrence Roberts (Feb. 7, 2016) (on file with author).

⁴⁰ Bureau of Indian Affairs, *supra* note 30. There are separate applications available for Alaska Natives to apply for a CDIB under the Alaska Native Claims Settlement Act. See, e.g., CDIB REQUEST FORM, BUREAU OF INDIAN AFFAIRS (2015), <http://www.afognak.org/files/enrollment/CDIB.pdf>. [<https://perma.cc/J2MU-6EM8>] (request form of West-Central Alaska Field Office for Native Village of Afognak); CDIB Request Form, NATIVE VILLAGE OF KOTZEBUE, <http://kotzebueira.org/programs/forms/enrollment/REQUEST-FOR-A-CERTIFICATE-OF-INDIAN-BLOOD.pdf>. [<https://perma.cc/9VVP-6YEZ>] (request form for Native Village of Kotzebue).

⁴¹ Bureau of Indian Affairs, *supra* note 30, at *1.

calculate blood quantum, though it does explain how to complain to the BIA if there are any alleged mistakes.⁴² It also suggests a denial of a CDIB will be communicated in a written determination explaining the reasons for the denial, and a copy of “the appeal procedures.”⁴³ The appeal procedures presumably are the procedures for challenging an “adverse enrollment action” found at 25 C.F.R. Part 62, discussed below.⁴⁴

It is unclear when the BIA began issuing CDIBs. It appears the CDIB was created at some point for a specific purpose, and then expanded to a general program. However, such creation and expansion was done without any clear, or at least published, paper trail, and therefore cannot be easily tracked. There are, however, several hints and possibilities in BIA archival records.

In the late 1930s, the BIA issued letters to individuals registering as half-bloods under the IRA, which served the function of a modern CDIB.⁴⁵ As part of the BIA’s program to seek out and enroll half-bloods for the programs authorized by the IRA, Commissioner of Indian Affairs John Collier issued these letters attesting to an individual’s half or more degree of Indian blood, including letters to twenty-two individuals in Robeson County, North Carolina.⁴⁶ In the letter, Collier stated that the individual would be enrolled based on verification that he or she had one-half or more Indian blood.⁴⁷ This letter then served a similar purpose as later CDIBs, a document attesting to the possession of a quantum of Indian blood for federal purposes.

More directly on point, an undated memorandum, issued by the commissioner of Indian affairs, sometime in the late 1930s or early 1940s, discusses how the BIA would verify blood quantum.⁴⁸ The memorandum is entitled “Instructions Regarding Acceptable Evidence in Support of Claim to a Sufficient Degree of Indian Blood

⁴² *Id.* at *3.

⁴³ *Id.*

⁴⁴ See text accompanying notes 83–92.

⁴⁵ See, e.g., Letter of John Collier to Lawrence Maynor, January 28, 1939 (on file with author).

⁴⁶ See *id.*; Spruhan, *supra* note 17, at 39–40.

⁴⁷ See Letter to Maynor, *supra* note 45.

⁴⁸ Memorandum from the Commissioner of Indian Affairs, Instructions Regarding Acceptable Evidence in Support of Claim to a Sufficient Degree of Indian Blood to be entitled to Consideration for Education Loan Assistance or for Preference in Indian Service Employment (n.d.) (on file with author). I discovered this document in the National Archives in Washington D.C. while researching the half-blood registration program under the IRA.

to be entitled to Consideration for Education Loan Assistance or for Preference in Indian Service Employment.”⁴⁹ In 1939, Congress authorized educational loans for Indians of one-quarter or more Indian blood, with no requirement of tribal enrollment.⁵⁰ Though it is unclear which Indian preference law the Commissioner was referring to, President Franklin Delano Roosevelt in 1936 had exempted BIA positions from the civil service examination for those Indians of one-quarter or more Indian blood, with no additional tribal membership requirement.⁵¹ According to the memorandum, the primary way eligibility would be verified was through:

a *certificate* made by the Superintendent of any Indian agency that the applicant’s name appears on the official tribal or census roll of an Indian group under the jurisdiction of that agency and that the applicant’s degree of Indian blood is shown thereon as one-fourth or more[.]⁵²

The current CDIB accomplishes this task; it certifies that an individual’s name appears on a tribal roll and states his or her quantum of Indian or tribal blood. It is then quite possible this memorandum is the origin of the modern CDIB.⁵³

Whatever the specific origin, it is clear that the BIA expanded the CDIB to be a general document that attests to an individual’s blood quantum, which was then adopted for purposes beyond the original need for proof of eligibility for specific federal programs. Indeed, the quantum of blood recorded on a CDIB may be smaller than the one-half or one-quarter required for the IRA and loan provisions.⁵⁴

⁴⁹ *Id.*

⁵⁰ *See* 25 U.S.C. § 480.

⁵¹ Executive Order 7423 (July 26, 1936).

⁵² Memorandum, *supra* note 48 (emphasis added).

⁵³ There may be other documents in the archives yet to be discovered that may shed further light on the origins of the CDIB.

⁵⁴ The example in the Wikipedia entry for CDIBs is the CDIB of a Cherokee possessing 3/16 Indian blood, which is 1/16 less than a quarter Indian blood. *See* CERTIFICATE OF DEGREE OF INDIAN BLOOD, https://en.wikipedia.org/wiki/Certificate_of_Degree_of_Indian_Blood, [https://perma.cc/GN2Z-3ZT6].

IV. UNDERWOOD AND LACK OF PUBLISHED REGULATIONS

The BIA has been on notice since 1986 that its CDIB program is of questionable validity, because it operates without regulations issued after public notice and comment under the Administrative Procedures Act. In *Underwood v. Deputy Assistant Secretary- Indian Affairs (Operations)*, Morgan Underwood, a member of the Chickasaw Nation, filed a challenge in the Interior Board of Indian Appeals to the unilateral alteration of his CDIB by the BIA agency superintendent.⁵⁵ In 1983, the local Indian Health Service hospital informed him that the BIA had decided to issue “plasticized” cards instead of the eight and a half by eleven inch CDIB he had previously received.⁵⁶ He requested the new, smaller CDIB.⁵⁷ Unfortunately for Underwood, the BIA agency office took it upon itself to review his blood quantum before issuing his new card, and discovered what it considered an error that needed correction.⁵⁸

The alleged error was the lack of adequate proof of paternity for Underwood’s father.⁵⁹ According to the BIA, its records showed no judicial determination of paternity, and therefore Underwood had no proof he was the actual son of his claimed father.⁶⁰ As such, the agency told him it would only credit him for the Indian blood of his mother and would reduce his blood quantum from the previous 4/4, i.e. full-blood, to 1/2.⁶¹

This action reveals perhaps the most controversial policy of the BIA related to blood quantum: the automatic assignment of no Indian blood for a child’s father if paternity is not proven to the BIA’s satisfaction. Again, it is hard to find clear documentation of this policy, but the previously-mentioned 83 BIA Supplement 2 discusses it.⁶² There, the BIA states:

⁵⁵ *Supra* note 12, at 15–16.

⁵⁶ *Id.* at 15.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 15–16.

⁶⁰ *Id.*

⁶¹ *Id.* at 16, 24.

⁶² See Enrollment, BUREAU OF INDIAN AFFAIRS MANUAL 83 Supplement 2 § 7.7, <https://www.bia.gov/sites/bia.gov/files/assets/public/raca/pdf/idc012024.pdf> [<https://perma.cc/C5SH-EM7W>]. See also Supporting Statement A, *supra* note 13, at 5 (“Proof of paternity is needed when an applicant’s parents were not married at the time of the applicant’s birth and the Indian blood is traced through

Degree of Indian blood possessed by children born out of wedlock shall be determined by taking ½ the degree of Indian blood possessed by the mother, unless paternity has been established by the courts, determined in inheritance matters or the alleged father submits an acknowledgment of paternity.⁶³

In a letter denying Underwood's appeal, the deputy assistant secretary followed the same principle:

It has long been the policy of the Bureau that in determining the degree of Indian blood of children born out of wedlock, the child may only be credited with Indian blood derived from the mother UNLESS paternity has been established by the father or determined by the courts.⁶⁴

Underwood's IBIA action challenged this policy.⁶⁵

The deputy assistant secretary made several arguments in defense of the CDIB program that acknowledged there was no statutory or regulatory authority for it. For example, he argued that BIA actions concerning CDIBs were purely "discretionary" because the Bureau allegedly was not required to issue CDIBs at all.⁶⁶ According to the deputy assistant secretary, CDIBs were simply "granted for the convenience of the government, solely at the assistant secretary's discretion, to facilitate its work in determining eligibility of persons for federal programs."⁶⁷ Indeed, he admitted that there is no regulation or statute which requires the issuance of these certificates. He further stated that, "nor is there any statute or regulation that makes the eligibility for any benefits or programs

the father."). The policy may originate in a 1965 memorandum from Associate Commissioner James E. Officer to BIA Area Directors. Memorandum, Determining Degree of Indian Blood, July 26, 1965, *reprinted in* PHOENIX AREA OFFICE, TRIBAL ENROLLMENT, Appendix J (1984). In that memorandum, Officer states "only ½ of the degree of Indian blood possessed by the mother may be counted unless paternity has been acknowledged by the purported father or established through the courts . . . Statements by the mother as to the paternity of the child will not be acceptable." *Id.*

⁶³ *Id.*

⁶⁴ *Supra* note 12, at 16 (emphasis in original).

⁶⁵ *Id.*

⁶⁶ *Id.* at 18–19.

⁶⁷ *Id.* at 19.

dependent on the possession of such certificates.”⁶⁸ Therefore, according to him, the IBIA could not review the decision to issue Underwood’s new CDIB without his father’s blood quantum.⁶⁹

The IBIA rejected these arguments. It held that the deputy assistant secretary’s CDIB decisions were not purely discretionary.⁷⁰ It noted that the “BIA has chosen to memorialize its genealogic research through the issuance of a CDIB showing its determination of a person’s degree of Indian blood.”⁷¹ It also recognized that the BIA accepted a CDIB as proof of eligibility for an individual to receive federal services as an Indian.⁷² Therefore, the IBIA concluded, “[the] BIA’s practice of issuing CDIBs is thus an integral part of the process by which legal rights and privileges of Indians arise.”⁷³ As such, the IBIA held it could review BIA’s actions and decisions related to CDIBs.⁷⁴

On the merits of Underwood’s appeal, the IBIA ruled that changes to CDIBs could not be made absent regulations issued after public notice and comment, as required by the Administrative Procedures Act.⁷⁵ The deputy assistant secretary raised policies from a “BIA instruction manual” and a 1977 memorandum from the Muskogee Area Office, which he alleged set out “evidentiary standards” for blood quantum decisions.⁷⁶ It is unclear whether the “instruction manual” included the rules set out in 83 BIAM Supplement 2, as the IBIA opinion does not specify what manual or section the deputy assistant secretary cited.⁷⁷ However, the IBIA believed that the main BIA Manual contained no such rules.⁷⁸ Regardless, the IBIA noted these policies were unpublished and “hidden regulations, available to and known by only the initiated

⁶⁸ *Id.* The instructions for the current application for a CDIB states “proof of Indian blood is required to receive Federal program services.” Bureau of Indian Affairs, *supra* note 30, at *3. The instructions do not suggest any method of proving such blood other than through a CDIB.

⁶⁹ *Supra* note 12, at 14.

⁷⁰ *Id.* at 21.

⁷¹ *Id.* at 16.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 25.

⁷⁵ *Id.* at 23.

⁷⁶ *Id.* at 18.

⁷⁷ *Id.* The “instruction manual” may be a handbook on tribal enrollment put together by the BIA’s Phoenix Area Office and published in 1984. *See* PHOENIX AREA OFFICE, *supra* note 62.

⁷⁸ *Supra* note 12, at 21 (“BIA has not even seen fit to set forth these rules in the BIA Manual.”).

few” in violation of the requirement of notice and comment.⁷⁹ The IBIA noted that there was no evidence that these policies were known to Underwood and others affected by their contents.⁸⁰ Indeed, the IBIA also noted that the deputy assistant secretary had admitted in his answer brief that even some BIA offices were unaware of procedures related to CDIBs.⁸¹

Based on these reasons, among others, the IBIA blocked the BIA from changing the blood quantum on Underwood’s CDIB and ordered the BIA to issue a card with Underwood’s original 4/4 blood quantum to him.⁸²

V. POST-UNDERWOOD RESPONSE

The BIA did not issue final regulations after *Underwood*. It did, however, make an important procedural change to CDIB administrative appeals.

In 1987, the BIA issued a notice in the Federal Register (Notice) that it was revising the regulations concerning enrollment appeals found at 25 C.F.R. § 62.⁸³ The stated reason for this change was to create uniform rules for enrollment appeals, where some appeals went through the IBIA under 25 C.F.R. Part 2, and others went through the BIA administration under 25 C.F.R. Part 62.⁸⁴ According to the BIA, this caused confusion, as the same BIA action might result in different procedures depending on who appealed the decision.⁸⁵ One example the BIA used was “the change in the degree of Indian blood attributed to an individual.”⁸⁶ According to the BIA, the individual affected by this change had to appeal that decision to the IBIA under Part 2.⁸⁷ However, the change to that individual’s blood quantum might affect his or her children and grandchildren,

⁷⁹ *Id.* The IBIA adopted the 1977 American Indian Policy Review Commission’s characterization of unpublished BIA policies as “hidden regulations.” *Id.* In its report to Congress, the Commission sharply criticized the BIA’s practice to have unpublished internal policies instead of actual published regulations. *Id.* Indeed, the BIA was then on notice even before *Underwood* that their policies, including those for CDIBs, were of questionable validity.

⁸⁰ *Id.* at 21.

⁸¹ *Id.* at 22.

⁸² *Id.* at 25.

⁸³ See Enrollment Appeals, 52 Fed. Reg. 30159 (Aug. 13, 1987).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

causing them to be removed from a tribal roll, triggering a separate appeal by them under Part 62.⁸⁸

Included in that revision was the addition of “certification of degree of Indian blood by a Bureau official which affects an individual” as one “adverse enrollment action” that had to be appealed through the BIA administration.⁸⁹ At the time, the IBIA’s stated jurisdiction under 43 C.F.R. § 4.330(b)(1) excluded “[t]ribal enrollment disputes.”⁹⁰ By adding CDIB decisions to the list of “adverse enrollment” actions, the BIA’s actions on CDIBs were then outside the jurisdiction of the IBIA, precluding the IBIA from making any further decisions on the subject after *Underwood*.⁹¹ Since the revision to Part 62, the IBIA has dismissed several attempts to bring such challenges, holding it lacked jurisdiction under the now codified regulation.⁹²

In the absence of IBIA jurisdiction, where do CDIB challenges go? Under Section 62 of the Code of Federal Regulations, they go through the BIA administration, from the superintendent of the agency, up to the area director or the assistant secretary, depending on which official made the original challenged decision.⁹³ The director or assistant secretary’s decision is final for

⁸⁸ *Id.*

⁸⁹ *Id.*; 25 C.F.R. § 62.4(a)(6) (1987), 52 Fed. Reg. at 30161 (Aug. 13, 1987). This action was consistent with an argument made by the deputy assistant secretary in *Underwood*. In addition to arguments on the BIA’s absolute discretion to issue CDIBs (*see supra* text accompanying notes 66-69), he also argued that CDIB decisions were, in fact, “tribal enrollment” decisions. *Supra* note 12, at 16–17. As such, he argued, they could not be appealed to the IBIA. *Id.* The IBIA rejected that argument, concluding CDIB decisions did not implicate tribal enrollment, and therefore were within its jurisdiction to review. *Id.* at 18. The subsequent revision to the tribal enrollment appeal procedures overrode the IBIA’s holding.

⁹⁰ *See supra* note 12, at 9.

⁹¹ Ironically, given the IBIA’s conclusion that the CDIB program was invalid due to the lack of regulations issued after public notice and comment, the BIA’s revision to the appeal regulations was done without public notice and comment. As discussed in the Notice, the BIA interpreted the revised procedures as internal rules “of agency procedure or practice” that did not require any notice and comment pursuant to the Administrative Procedures Act, because they “do not themselves alter the rights or interests of parties although they may alter the manner in which the parties present their viewpoints to the agency.” 52 Fed. Reg. at 30160.

⁹² *See, e.g.*, *Myles v. Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs*, 55 IBIA 38 (2012); *Sanders v. Eastern Oklahoma Regional Tribal Government Officer*, 50 IBIA 307 (2009); *GrosVenor v. Sacramento Area Director, Bureau of Indian Affairs*, 22 IBIA 193 (1992).

⁹³ 25 C.F.R. §§ 62.5, 62.9, 62.10.

the BIA.⁹⁴

After a decision by the director or assistant secretary under Part 62, it would appear an individual aggrieved by that decision could file an action in federal district court under the Administrative Procedures Act, as presumably, the decision is “final agency action,” for which federal judicial review is available.⁹⁵ However, in the absence of any apparent standards for the BIA to follow, it is unclear what standard would guide a federal court in deciding whether a CDIB decision was valid. No published appellate decision has clarified that question.

VI. 2000 DRAFT REGULATIONS

The BIA is aware of the lack of regulations for CDIBs, and the IBIA’s mandate to create them. The BIA published draft regulations for CDIBs in 2000, and specifically cited the ruling in *Underwood* as the reason to issue them.⁹⁶

Significant work had been done to create the draft regulations long before they were published. According to the BIA’s discussion in the Federal Register, the effort to draft regulations developed in eastern Oklahoma soon after *Underwood*. BIA officials from the Eastern Oklahoma Region and officials from 638 contractor tribes had met in August 1987 and September 1988 to develop CDIB regulations specifically for the eastern Oklahoma

⁹⁴ 25 C.F.R. §§ 62.10(a), 62.11.

⁹⁵ See 5 U.S.C. §§ 702, 704 (authorizing judicial review of “final agency action”). However, as CDIBs are so intertwined with tribal enrollment (*see supra* text accompanying notes 25–29) and tribes may actually be the issuing agency for a challenged CDIB (*see supra* text accompanying notes 27–29) a tribal government might be a required party under Rule 19 of the Federal Rules of Civil Procedure, which cannot be joined due to sovereign immunity. *See* Fed. R. Civ. P. 19; *Cf. Davis ex rel. Davis v. United States*, 343 F.3d 1281, 1294 (dismissing Seminole Freedmen claims challenge to exclusion from tribal programs funded by land claims judgment due to indispensability of Seminole Nation). The Seminole Freedmen in *Davis* also challenged the BIA’s failure to issue them CDIBs, but the Tenth Circuit upheld the dismissal of that claim for failure to exhaust administrative remedies. *Id.* According to the opinion, the district court dismissed the CDIB claim because, despite a statement by the Wewoka Agency Superintendent that Freedmen could not receive CDIBs without showing a connection to a Seminole Indian listed on the “blood” roll, none of the Freedmen had administratively appealed the BIA’s inaction on their CDIB applications. *Id.* at 1286–87, 1295–96.

⁹⁶ 65 Fed. Reg. at 20777. The BIA did not, however, mention that the IBIA no longer had jurisdiction over CDIB appeals after the 1987 revision to the IBIA’s jurisdiction. *See supra* text accompanying notes 83–92.

area.⁹⁷ At the suggestion of a staff member from the BIA's central enrollment office, the regional regulations became draft national regulations, and were forwarded to the BIA central office in 1992.⁹⁸ After the Inter-Tribal Council of the Five Civilized Tribes passed two resolutions in 1997 asking that the assistant secretary move forward to issue the regulations, the draft of the regulations was eventually published in the Federal Register for notice and comment on April 18, 2000.⁹⁹ The movement to create final regulations was then a regional issue unique to eastern Oklahoma, perhaps due to the specific effect of the Stigler Act on those tribes¹⁰⁰ that then became a national one.

In the Federal Register notice, the BIA characterized the effect of *Underwood* as preventing changes to the quantum of Indian blood on a CDIB, including to "invalidate or amend CDIBs issued in error," until valid regulations were finalized.¹⁰¹ Therefore, the BIA said, there were individuals who were not receiving services for which they qualify, and other individuals who received services for which they did not.¹⁰² One of the primary purposes of issuing the regulations was then to empower BIA employees to alter or invalidate CDIBs if they believed they contained errors.

As written, the draft regulations clarify several aspects of the CDIB program. The regulations allow the blood of different tribes to be included on a CDIB.¹⁰³ They also discuss how blood quantum is to be calculated from an individual's lineal ancestors.¹⁰⁴ The regulations also clearly spell out the paternity rule, by requiring certain documents to prove the identity of a birth father of the individual, or even the father of a more distant ancestor of the individual, if the individual or his or her ancestor was born out of wedlock.¹⁰⁵ The regulations set out a timeline for BIA officials to

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 20778.

¹⁰⁰ *See supra* text accompanying notes 21–22.

¹⁰¹ 65 Fed. Reg. at 20776. The BIA did not mention, however, that after 1987, the IBIA lacked the jurisdiction to enforce the *Underwood* rule. *See supra* text accompanying notes 91–92.

¹⁰² 65 Fed. Reg. at 20776.

¹⁰³ *Id.* at 20781, §70.26.

¹⁰⁴ *Id.* §70.12.

¹⁰⁵ *Id.* § 70.13. The reference to an ancestor would seem to authorize an amendment of the blood quantum of an individual through a review of paternity going back multiple generations, and not just based on an individual's own alleged illegitimacy.

issue a CDIB after the submission of an application.¹⁰⁶ The regulations also provide a clear appeal process, with specific time limits for BIA officials to resolve the appeal.¹⁰⁷ Appeals would go through the regional director, up to the commissioner.¹⁰⁸

The draft regulations, however, do not acknowledge or discuss the role of 638 contractor tribes and whether their decisions can be appealed. In a section entitled “Who issues, amends, invalidates a Certificate . . . or denies issuance of a Certificate?,” the regulations only name “[d]eciding Bureau officials with delegated administrative jurisdiction for the federally recognized Indian tribe(s) from which your Indian blood is derived[.]”¹⁰⁹ One category of such officials is identified as “[t]he Secretary’s designee,” which, in theory, could include a tribe operating under a 638 contract. Regardless, the draft regulations are not clear what the role of 638 contractor tribes would be in the process, and, whether decisions by those contractors are federal decisions appealable to the commissioner.

In perhaps the most significant provision, the regulations authorize the BIA to alter an individual’s blood quantum recorded on a CDIB unilaterally, or even invalidate a CDIB altogether.¹¹⁰ Under the regulations, a BIA official could amend a person’s blood quantum if there was a “mathematical error,” without that individual’s consent.¹¹¹ The example given is an erroneously lower blood quantum-when a correct calculation would require a higher one-a seemingly innocuous change for the individual’s benefit.¹¹² However, the regulations also allow unilateral invalidation or amendment of a CDIB if it “contains a substantial error in your degree of Indian blood that results in a manifest injustice to you *or to the public interest.*”¹¹³ The regulations do not define “public interest,” or explain why the “public” would be interested in a specific individual’s blood quantum. The regulations describe a “substantial error” to be, among other things, if a CDIB was

¹⁰⁶ *Id.* § 70.29.

¹⁰⁷ *See Id.* at Subpart E, §§ 70.30–70.36.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 20782, § 70.4. Indeed, the regulations state that an individual needs to go to a “local Bureau office” to request a CDIB application. *Id.* at 20781, § 70.20(a).

¹¹⁰ *Id.* at 20786, § 70.37.

¹¹¹ *Id.* §70.37(a)(1).

¹¹² *Id.*

¹¹³ *Id.*, § 70.37(a)(2) (emphasis added).

obtained by “fraudulent proof of descendancy from someone on the base rolls.”¹¹⁴ Otherwise, a CDIB could be invalidated or amended based on a “substantial mistake of fact,” a term left undefined.¹¹⁵ The person whose CDIB is affected does have a right to appeal, but only after the decision is made, through the general appellate procedure provided by the regulations.¹¹⁶

There is no stated limit in the regulations on the number of generations back a review can go to find errors or fraud. There is also no restriction on when or for what purpose a BIA employee could decide to review an individual’s blood quantum and make unilateral changes. The alteration of a CDIB apparently could be triggered by suspicion of any alleged mistake in blood quantum, even one involving an ancestor on a roll created many years ago. Further, the draft regulations seemingly would authorize full-scale audits of the membership of an entire tribe by federal or tribal officials. The result would then be new, allegedly accurate, blood quantum information applied unilaterally to alter or cancel existing CDIBs.

Despite issuing the draft and seeking comments, the BIA has never finalized those regulations. According to the BIA in 2003, this was due to requests from tribes and individuals for extensions on the comment period.¹¹⁷ By 2006, the BIA stated the delay was due to “various reasons.”¹¹⁸ Other than issuing several Office of Management and Budget notices and renewals on information collection since 2000, there has been no public action to move the regulations forward, and even requests for renewals of collection disappeared from the Federal Register after 2014.¹¹⁹

¹¹⁴ *Id.*

¹¹⁵ *Id.* This declared ability of BIA officials to alter blood quantum unilaterally is in stark contrast to the approach the BIA had previously taken. In the 1965 memorandum issued by Associate Commissioner Officer, he instructed that “[e]xcept where discrepancies are determined to be mathematical errors in computing degree of Indian blood, no changes will be considered unless the basic enrollee or one of his descendants who is an applicant for enrollment questions the degree of Indian blood shown on the basic roll and requests in writing that the degree be changed.” Memorandum, *supra* note 62, at 1.

¹¹⁶ 65 Fed. Reg. § 70.37(c).

¹¹⁷ Certificate of Degree of Indian or Alaska Native Blood Information Collection, 68 Fed. Reg. 7800, 7800 (Feb. 18, 2003).

¹¹⁸ Notice of Submission of Information Collection, 73 Fed. Reg. 8054, 8055 (Feb. 12, 2008); Certificate of Degree of Indian or Alaska Native Blood Information Collection, 71 Fed. Reg. 2268, 2268 (Jan. 13, 2006).

¹¹⁹ Renewal of Agency Information Collection for Certificate of Degree of Degree of Indian or Alaska Native Blood (CDIB), 79 Fed. Reg. 62664, 62664

What has prevented the issuance of these regulations? Only BIA officials know the answer. However, several ongoing issues may drive the reluctance to finalize them.

First, there is the issue of federal recognition, and the connected issue of whether to accept Indian blood from non-recognized tribes on a CDIB. 83 BIAM Supplement 2 suggests the BIA allows the Indian blood from a non-recognized tribe to be included on a CDIB, if “specific justification is presented.”¹²⁰ However, the instructions for the BIA’s CDIB application suggests no blood from a non-recognized tribe can be included at all, as it requires an individual to show his or her familial relationship to a member of a federally recognized tribe, and states that the quantum of Indian blood is computed from the blood of those members.¹²¹ The draft regulations also do not credit an individual with Indian blood from a non-recognized tribe, by defining “Indian blood” as “Indian or Alaska Native blood of a federally recognized tribe.”¹²²

From one perspective, the omission of the blood of non-recognized tribes makes sense, as the federal government’s trust responsibility is defined by its political relationship with tribal nations, not the racial makeup of specific individuals.¹²³ Indeed, the

(Oct. 20, 2014); Renewal of Agency Information Collection for Certificate of Degree of Degree of Indian or Alaska Native Blood (CDIB), 79 Fed. Reg. 42032, 42032 (July 18, 2014); Renewal of Agency Information Collection for Certificate of Degree of Degree of Indian or Alaska Native Blood (CDIB), 76 Fed. Reg. 45291, 45291 (July 28, 2011); Renewal of Agency Information Collection for Certificate of Degree of Degree of Indian or Alaska Native Blood (CDIB), Request for Comments, 76 Fed. Reg. 30961, 30961 (May 27, 2011); Certificate of Degree of Indian or Alaska Native Blood Information Collection (CDIB), Submission, 73 Fed. Reg. 8054, 8055 (Feb. 12, 2008); Certificate of Degree of Indian or Alaska Native Blood Information Collection, Comment Request, 72 Fed. Reg. 61366, 61366 (Oct. 30, 2007).

¹²⁰ 83 BIAM Supplement 2, § 9.1. (The same section apparently authorizes the inclusion of blood from a Canadian or terminated tribe as well with “specific justification.”) *Id.*

¹²¹ 65 Fed. Reg., *supra* note 30, at *1.

¹²² 65 Fed. Reg. at 20782, § 70.2 (emphasis added).

¹²³ *See Morton v. Mancari*, 417 U.S. 535 (1974) (holding definition of “Indian” that uses blood quantum and tribal membership is a political not racial classification). For a discussion of *Mancari* and the legal issues surrounding Native American legislation and equal protection, *see* Spruhan, *supra* note 17, at 45–49; Bethany Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CAL. L. REV. 1165 (2010); Matthew Fletcher, *Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN’S L. REV. 153 (2008); Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491 (2017); Addie Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958 (2011).

very nature of the CDIB as a document attesting to a person's amount of "blood" pushes the boundary of Native American as a "political,"- and not "racial,"- classification for some.¹²⁴ Restricting the type of Native American blood to those tribal nations with a government-to-government relationship with the United States may then alleviate concerns that a CDIB is a purely racial document. However, the issues surrounding how the federal government decides which groups are appropriately recognized are very controversial,¹²⁵ and, to the extent an individual's Indian blood comes from a recognized or non-recognized tribe, it directly affects how much Indian blood quantum is recorded on a CDIB.

Second, and moreover, is the specter of disenrollment, which occurs when tribes remove individuals from tribal membership. Since the original draft was issued in 2000, some tribes have reviewed their enrollment records, and disenrolled individuals, families, or whole classes of members.¹²⁶ High profile controversies have erupted, and litigation has ensued.¹²⁷ In the current environment surrounding disenrollment, it may be that issuing regulations on CDIBs is too complicated or rife with potential mischief; particularly, for those tribes that control both CDIBs and tribal membership. As discussed above, the ability of one tribal office to calculate, assign, and revise Indian and tribal blood

¹²⁴ See, e.g., L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702 (2001) (arguing use of blood quantum to define Indian status may be a racial classification that violates equal protection). Indeed, the Goldwater Institute recently attacked the constitutionality of the Indian Child Welfare Act as being a racial statute inconsistent with equal protection, based on the use of blood quantum to define tribal membership. First Amended Civil Rights Class Action Complaint at ¶¶ 3, 39–62, *Carter v. Washburn*, No. CV-15-01259 (D. AZ, 2016). For a discussion of that case and the role of blood quantum in constitutional attacks on ICWA, see Abi Fain & Mary Kathryn Nagle, *Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-Adoptive Couple Challenges to the Constitutionality of ICWA*, 43 MITCHELL HAMLINE L. REV. 801 (2017).

¹²⁵ See generally RENEE ANN CRAMER, *CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGEMENT* (2005) (discussing controversial nature of recognition); Lorinda Riley, *Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Regulations*, 37 N.Y.U. REV. L. & SOC. CHANGE 629 (2013) (critiquing federal regulations concerning recognition of tribes).

¹²⁶ See generally DAVID WILKINS & SHELLEY HULSE WILKINS, *DISMEMBERED: NATIVE DISENROLLMENT AND THE BATTLE FOR HUMAN RIGHTS* (2017); Gabriel S. Galanda & Ryan A. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 417 (2015).

¹²⁷ *Id.*

quantum for both purposes creates the possibility of purposeful manipulation, with the specific goal of disenrolling specific individuals or families. It may be that the BIA has realized the potential for manipulation of the unilateral right to alter or invalidate CDIBs authorized by the regulations.

In the current environment, any regulations on CDIBs, even indirectly, may feed into the ongoing controversies over tribal recognition, membership, and disenrollment. Finalizing such regulations, particularly as currently drafted, might then inspire new or renewed attempts to purge individuals from tribal rolls, and indeed, from Indian status altogether in the name of the “public interest.”

Given the effect of blood quantum on individuals’ right to federal benefits and tribal membership, and the potential for errors or outright manipulation of blood information on a CDIB, the absence of clear, written rules is problematic. However, the lack of final regulations ultimately reflects the complex issues that surround Native American legal identity, and the potential effect that finalizing such regulations might have on conflicts within and outside tribal nations about who legitimately should be a Native American.¹²⁸

VII. POTENTIAL REMEDIES

If it chooses, the BIA has several options to deal with the issues inherent in the CDIB program.

First, the BIA could simply stop issuing CDIBs. As they are not a congressional mandate, and only exist because the BIA issues them, it could simply stop doing so. As by the BIA’s own representations, a CDIB is only necessary for a few specific federal programs. It could use other methods to confirm an individual’s blood quantum for such purposes. Perhaps a simple verification form, such as is used for employment preference,¹²⁹ to be issued by

¹²⁸ For a critical discussion of current issues surrounding Native American identity and blood quantum, see generally, THE GREAT VANISHING ACT, *supra* text accompanying note 32; Michael D. Oeser, *Avoiding Extinction, Preserving Culture: Sustainable, Sovereignty-Centered Tribal Citizenship Requirements*, 91 N. Dak. L. Rev. 1 (2015).

¹²⁹ See Form BIA-4432: *Verification of Indian Preference for Employment in the Bureau of Indian Affairs and the Indian Health Service*, BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc-005251.pdf> (last accessed Jan. 10, 2018) [<https://perma.cc/K7R7-JJQ8>].

a BIA office in specific situations where blood quantum is required, is sufficient.

Second, if the BIA nonetheless continues to issue CDIBs and decides to reboot its draft regulations, there are some provisions that it might consider to minimize potential problems. Any new regulations should include actual substantive standards on how to calculate blood quantum and a clear procedure for challenging decisions that apply those standards. The BIA might consider returning such appeals to the Interior Board of Indian Appeals, which has accessible, published decisions that future appellants can apply to their cases, creating transparency and consistency in interpretation of the regulations. Regardless, the regulations should also clarify whether decisions of 638 contractors go through tribal or federal appellate review, and therefore aggrieved parties will know where to go if a tribal enrollment office made the CDIB decision. They also should include clear timelines for review and action on appeals, and clear standards of review for whatever hearing official or body to follow when hearing those appeals. Further, if the BIA applies a substantive policy, such as the paternity policy applied to Underwood, it should clearly identify the policy and explain why it exists.

Third, the BIA should also seriously consider whether authorizing the unilateral amendment or invalidation of a CDIB is necessary or prudent, particularly when the power to take such action is diffused among numerous BIA offices and 638 tribal contractors. As shown by recent controversies, disenrollment is a serious issue, and empowering the unilateral revision of CDIB documents has the potential to exacerbate the phenomenon. It is an easy fix to give notice to an individual of an alleged error, and allow that person to comment and provide additional documentation, prior to taking action to revise or rescind a CDIB.

Lastly, the BIA should also consider a limit to the number of generations back a person's blood quantum can be corrected. The draft regulations appear to allow an official to review the paternity of not just the individual named on the CDIB, but his or her ancestors as well. Further, there is no stated restriction on the review and unilateral amendment of a person's blood quantum, suggesting the official can go as far back as is necessary to find alleged errors. Given the known unreliability of blood quantum recorded on federal

documents,¹³⁰ some of them over a hundred years old, and the difficulty in proving or disproving the accuracy of that blood information, there should be some limitation on the number of generations back changes can be made. Otherwise, an individual may be faced with a change to his or her blood quantum based on

¹³⁰ The BIA is well aware of the unreliability of blood quantum information in its own records. Indeed, in its comments in the background section of the draft regulations, it noted:

Some early Bureau and tribal records do not indicate degrees of Indian blood or are inconsistent. Changes and corrections have been made to these records without an indication of who made the change or the basis upon which they were made. Errors occurred when individuals submitted delayed or amended birth certificates and delayed death certificates as documentation for Indian blood certification. Amended birth documents often contain unreliable birth data, or data that was received long after the original birth certification has been issued.

65 Fed. Reg. at 20776.

This is not a new revelation. As long as blood quantum has been applied, government officials have grappled with the fallibilities of identifying and recording the quantum of individuals, due to the impossibility of confirming quantum through scientific methods, biased assumptions about race mixture, and unreliable documentation. *See* Spruhan, *supra* note 24, at 14 n.98 (discussing problems in identifying “half breeds” of Sac and Fox Nation), & 42–43 (same for Freedmen and “Indians by blood” of Five Civilized Tribes by Dawes Commission), & 43–44 (same for application of physical anthropological methods to identify “mixed blood” allottees on White Earth Reservation); Spruhan, *supra* note 17, at 34–35 (discussing BIA acknowledgement of problems in identifying persons of one half or more Indian blood under the Indian Reorganization Act and impossibility of scientifically verifying exact blood quantum), & 38–39 (same for applying physical anthropology techniques to identify half-bloods among Indians of Robeson County, North Carolina); ARIELA GROSS, *WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* 153-160 (2010) (discussing errors in classifying Freedmen by Dawes Commission). Indeed, though the whole structure of blood quantum necessitates accurate records for it to function effectively, the federal government has been well aware it has lacked that accuracy. *See, e.g.,* Spruhan, *supra* note 17, at 35 (discussing Commissioner of Indian Affairs John Collier’s statement that there was “no known sure of scientific proof” for blood quantum and that identification was “entirely dependent on circumstantial evidence”). It has chosen to continue to apply blood quantum, and issue CDIBs based on it, anyway. One way Congress has resolved the issue is to mandate that blood quantum recorded on certain rolls, such as the Dawes Rolls governing allotments for the Five Civilized Tribes, is binding and not subject to challenge by outside evidence. *See, e.g.,* Act of June 30, 1919, ch. 4, § 1, 41 Stat. 3, 9 (mandating blood quantum recorded on final tribal rolls is conclusive); Act of May 27, 1908, § 3, 35 Stat. 312, 313, & Act of April 26, 1906, § 19, 34 Stat. 137, 144 (same for blood quantum on Dawes Rolls).

an alleged error concerning a distant ancestor, with no ability to challenge it, because there may be no existing, or, at least reliable documents to counter a BIA or tribal official's decision.

VIII. CONCLUSION

The CDIB, stretched and distorted beyond its original purpose of defining eligibility for a handful of federal programs, reinforces blood quantum as the dominant definition of Native American legal identity in federal law. Even as some tribal governments move beyond threshold blood quantum criteria,¹³¹ federal law still enshrines “blood” as necessary to legitimize “Indians” and other “Native Americans” under the law.

On one level, it is not the fault of the Bureau of Indian Affairs. It is obliged to implement congressional statutes, passed in the early twentieth century and never revised, that continue to require a threshold quantum of blood for certain benefits and programs. However, the BIA itself created the CDIB and encouraged its use as the main, if not exclusive, proof of Native American status, for purposes beyond simply proving eligibility for those limited programs. It also contracts the CDIB function to tribal governments through the “638” law, signaling the CDIB's primacy in defining eligibility for federal, and by extension, tribal programs.

None of this is unchangeable. Threshold levels of “blood” are not inherent to Native American identity, as other definitions exist, and have existed, in federal Indian law. Congress can revise those statutes that allegedly necessitate the existence of the CDIB to eliminate the bare blood criteria, and adopt other definitions, such as tribal membership, as it has done in the Indian Child Welfare Act.¹³² The BIA could simply stop issuing CDIBs, as it created them

¹³¹ For discussions of the adoption of tribal membership criteria that do not use a quantum cut-off, *See* JEAN DENNISON, COLONIAL ENTANGLEMENT: CONSTITUTING A TWENTY-FIRST CENTURY OSAGE NATION (University of North Carolina Press, 2012); JILL DOERFLER, THOSE WHO BELONG: IDENTITY, FAMILY, BLOOD AND CITIZENSHIP AMONG THE WHITE EARTH ANISHINAABEEG (2015); Also, as mentioned above, the Cherokee Nation now recognizes Freedmen as tribal citizens, even if federal records record no Cherokee blood. *See supra* note 23. For a discussion of several other tribal nations' history of membership criteria, and the internal debates about what those criteria should be, *see* MIKAELA ADAMS, WHO BELONGS?: RACE, RESOURCES, AND TRIBAL CITIZENSHIP IN THE NATIVE SOUTH (Oxford University Press, 2016).

¹³² *See* 25 U.S.C. § 1903(4). Interestingly, the BIA recently issued a Federal Register notice that it was eliminating an existing requirement of one quarter or

and continues to issue them, despite the absence of any congressional mandate to do so. Further, tribal governments can, if they so choose as a matter of their own public policy, de-emphasize blood quantum, by revising their membership rules, or declining to issue CDIBs in lieu of or in addition to tribal citizenship identification documents, or both.¹³³ Such actions dilute, if not fully dissolve, the claimed need for the CDIB.

However, until those actions are taken, and for as long as the CDIB continues, the BIA should apply clear and accessible policies that govern its issuance by its own officials and 638 contractors. Those policies should be sensitive to the possibilities of manipulation, so as not to exacerbate internal tribal conflicts over membership and identity. Ultimately, if the CDIB must continue, because federal statutes or regulations require some proof of blood quantum, the BIA should take the affirmative responsibility to prevent its misuse as an internal weapon within tribal communities.

more Indian blood for receiving Johnson O'Malley Act educational funding. 83 Fed. Reg. 12301 (March 21, 2018) (amending 25 C.F.R. § 273.12). Instead, funding will now be available for any child who is a member of a federally-recognized tribe regardless of blood quantum. *Id.*, at 12302.

¹³³ Such independent actions of tribal governments are, of course, properly within the discretion of each sovereign Indian nation. There may be sound policy reasons, including principles of belonging reflected in the culture and traditions of a given Native community, for a tribal government to retain threshold blood quantum requirements. *See generally* Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437 (2002) (discussing arguments for or against blood requirements); KIM TALLBEAR, *NATIVE AMERICAN DNA: TRIBAL BELONGING AND THE FALSE PROMISE OF GENETIC SCIENCE* 57–66 (2013) (discussing tribal concepts of blood in modern membership criteria as different than outside notions of race).