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Hon. Jesse M. Furman
Chair, Advisory Committee on the Rules of Evidence
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Evidence 902

Dear Judge Furman:

We write to urge the Advisory Committee on the Rules of Evidence ("Advisory Committee") to reject the proposed amendment to Rule 902 of the Federal Rules of Evidence relating to self-authenticating documents. This proposal would add "***a federally-recognized Indian tribe***" to the list of entities whose documents are self-authenticating. In 2013, the Advisory Committee considered an identical proposal and rejected it. Nothing has changed in the last twelve years that merits revisiting the Advisory Committee's original decision to forego changes in the Rule.

As will be outlined below, this proposed amendment, while undoubtedly well-intentioned, is insufficiently informed by, and insufficiently considerate of, the diversity of Native tribes. Moreover, the amendment is unnecessary, given that the Rules of Evidence already provide multiple mechanisms to properly admit evidence of Indian status that the government has used successfully for decades in prosecutions of Indian defendants. The government has pointed to two cases out of the Northern District of Oklahoma where it recently failed to make the proper showing. However, only one of those two cases implicated Rule 902 at all, and in that case, the sole issue was a failure by the local federal prosecutors to comply with the notice requirements of Rule 902(11), not a general inability to authenticate documents using presently available rules. To the extent that any difficulty exists, it appears to be a localized issue in a single jurisdiction that has only recently begun to see significant numbers of Indian jurisdiction cases and does not have sufficient familiarity with relevant documents and applicable Rules.

If the Advisory Committee is interested in amendments to Rule 902, we ask the Advisory

Committee to refrain from taking any action without ***first***, consulting with representatives from Indian Tribes and ***second***, undertaking a thorough and comprehensive study to determine how widespread the problem of authentication is.

BACKGROUND

I. Proof of Indian Status

A person's Indian status triggers federal criminal jurisdiction in two situations. First, 18 U.S.C. § 1153 grants jurisdiction to federal courts over Indians who commit any one of more than a dozen enumerated offenses when those offenses occur in Indian country.[1] In such cases, the defendant's Indian status is an element of the crime.[2] Second, in cases where the defendant is not an Indian, but the crime occurs in Indian country and involves an Indian victim, jurisdiction arises under 18 U.S.C. § 1152, and the victim's Indian status is an element of the crime.[3]

The two jurisdictional statutes do not define the term "Indian;" however, courts generally agree on a two-part test to determine someone's Indian status: (1) does the individual have a degree of Indian blood; and (2) is he recognized as an Indian by the tribe or by the government.[4] As with all elements of an offense, the burden falls on the Government to prove beyond a reasonable doubt a defendant's Indian status.[5]

With respect to the first factor – degree of Indian blood – courts have held that, "Indian status is a political classification, not a racial or ethnic one. Indian status requires… proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe."[6] As to the second factor – recognition by the tribe or by the government – Indian status requires proof of a "link to a federally recognized tribe."[7] This link can be shown through proof of "(1) enrollment in a federally recognized tribe; (2) government recognition formally and informally through receipt of assistance available only to individuals who are members, or eligible to become members, of federally recognized tribes; (3) enjoyment of the benefits of affiliation with a federally recognized tribe; [or] (4) social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a

[1] In 1953, Congress enacted Public Law 83-280, which grants certain states criminal jurisdiction over Indians living on reservations. Those states are generally not at issue here because in those states Indian jurisdiction cases do not appear in federal court.
[2] *See United States v. Bagola*, 108 F.4th 722, 726 (8th Cir. 2024). In § 1152 cases, the defendant's status as an Indian is an affirmative defense to the charge. *See United States v. Bruce*, 394 F.3d 1215, 1222–23 (9th Cir. 2005).
[3] *See United States v. Reza-Ramos*, 816 F.3d 1110, 1120 (9th Cir. 2016); *United States v. Walker*, 85 F.4th 973, 978 (10th Cir. 2023).
[4] *United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) (en banc).
[5] *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012).
[6] *United States v. Cooley*, 919 F.3d 1135, 1142 (9th Cir. 2019), *overruled on other grounds*, 593 U.S. 345 (2021).
[7] *Zepeda*, 792 F.3d at 1114.

federally recognized tribe."[8]

Typically, the government will establish a person's Indian status in a criminal prosecution by introducing documents reflecting that the person has some degree of Indian blood and is affiliated with a tribe. With respect to blood quantum, the government may introduce a Certificate of Degree of Indian Blood ("CDIB") issued by the Bureau of Indian Affairs ("BIA"). The BIA is a federal agency of the Department of the Interior, and CDIBs "certif[y] that an individual possesses a specified degree of Indian blood of a federally recognized Indian tribe."[9] CDIBs are issued by, and bear the seal of, the United States and are already self-authenticating under rule 902(1).[10]

With respect to the issue of tribal affiliation, prosecutors commonly introduce documents that show evidence of tribal enrollment. "Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative."[11] One commonly used document is a certificate of enrollment, though there is no requirement that tribal enrollment documents be issued in any particular format, and there is wide variation among the tribes with respect to what these documents look like. An enrollment certificate introduced for the purpose of showing tribal affiliation may also suffice to establish that a person has Indian blood, even in the absence of a CDIB, because blood quantum information is sometimes included on the enrollment certificate.[12]

Unlike CDIBs issued by the BIA, enrollment certificates and other documents issued by the various Indian tribes are not self-authenticating under Rule 902.[13] In order to introduce these documents at trial, the government either must proffer, alongside the tribal certificate, the testimony of a "custodian or other qualified witness" who can explain that the certificate reflects regularly conducted business activity relating to enrollment," or it must furnish a certificate under Rule 902(11) before trial that explains how the document meets the requirements of the hearsay exception for records of a regularly conducted activity.[14]

[8] *Id.*
[9] *United States v. Rainbow*, 813 F.3d 1097, 1103 (8th Cir. 2016); *see also* Bureau of Indian Affairs, Certificate of Degree of Indian or Alaska Native Blood Instructions, available at https://www.bia.gov/sites/default/files/media_document/1076-0153_cdib_form_expires_05.31.2025_updatedlink_508.pdf (directing applicants to submit their CDIB application to their regional BIA office).
[10] *See Harper*, 118 F.4th at 1296 (citing *Walker*, 85 F.4th at 981–82).
[11] *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979).
[12] *United States v. Alvirez*, 831 F.3d 1115, 1121 (9th Cir. 2016); *see also Bagola*, 108 F.4th at 727 (enrollment certificate reflected blood quantum and tribal affiliation); *Zepeda*, 792 F.3d at 1115 (enrollment certificate reflected blood quantum and tribal affiliation); *but cf. Harper*, 118 F.4th at 1297 (no CDIB or enrollment paperwork introduced).
[13] *Alvirez*, 831 F.3d at 1123.
[14] *Harper*, 118 F.4th at 1297 (discussing Fed. R. Evid. 803(6) and quoting *United States v. Wood*, 109 F.4th 1253, 1258 (10th Cir. 2024)).

ARGUMENT

The Advisory Committee should reject the proposed amendment because it is inconsistent with the history and purpose of Rule 902, does not take into account the wide variation among tribes and tribal histories, and is not necessary to address any observed deficiency in the existing rules.

I. The proposed amendment is inconsistent with the history and purpose of Rule 902.

FRE 902 was created to codify existing caselaw holding that certain records were self-authenticating "because practical considerations reduce the possibility of unauthenticity to a very small dimension."[15] Rule 902(1), which allows for the self-authentication of "documents bearing a public seal and signature" was justified specifically by "the practical underlying considerations . . . that forgery is a crime and detection is fairly easy and certain."[16] Where there could be "greater ease of effecting a forgery," however, such as where documents are signed but not sealed, more is required in order to authenticate the document.[17]

With this background in mind, it appears that the Advisory Committee presently lacks information sufficient to determine that "the possibility of unauthenticity" of tribal documents would be of a similarly "small dimension." This is especially true given that (1) tribal documents are not subject to FOIA requests,[18] and many tribes have no tribal public records laws (2) tribal sovereign immunity may place relevant documents beyond the reach of subpoenas by private parties,[19] (3) tribes have no jurisdiction to prosecute non-Indian defendants—or Indian defendants who commit crimes on non-Indian land—for forgery, and (4) federal prosecutions for forgery or obstruction of justice require proof of additional elements, such as "intent to defraud the United States,"[20] that can render the threat of federal prosecution less effective. By contrast, every state or territory has adopted a public records law allowing members of the public, including non-residents, to obtain documents and other public records from state and local governments. State records and state officials are subject to subpoena, and there are few legal barriers to prosecuting people for forgery of state documents.

In sum, different treatment of tribes under the Rule is justified given the history and purpose of the Rule and the different legal status of tribes compared to entities currently covered under the Rule.

[15] Fed. R. Evid. 902, Advisory Committee Notes.
[16] *Id.*
[17] *Id.*
[18] 42 CFR § 137.176.
[19] As a matter of law, a federally recognized tribe "is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751, 754 (1998).
[20] 18 U.S.C. § 495.

II. The proposed amendment ignores the diverse histories of tribal-government relations.

There are 574 federally recognized Indian tribes in the United States.[21] Although each of these tribes has at some point been recognized by the federal government, none of these tribes is a creation of the federal government. Each and every one is comprised of descendants of the people who inhabited the territorial lands of the United States for thousands of years before the widespread arrival of European settlers.

To provide one example, the Little Shell Tribe of Chippewa Indians did not gain federal recognition until December 20, 2019.[22] Undoubtedly, the tribe possesses many records that predate this formal recognition. The proposed amendment provides little assistance to courts or litigants in determining whether tribal documents created prior to December 20, 2019, yet bearing appropriate seals and signatures, should be considered self-authenticating under the Rule. More complicated yet, the Ottawa Tribe of Oklahoma's reservation was created by treaty in 1867, terminated in the 1890s by the Dawes Act, reestablished in 1936 by the Oklahoma Indian Welfare Act, terminated again in 1956 by the Ottawa Termination Act, and finally reestablished again in 1978 by the 1978 Reinstatement Act.[23] It is unclear from the language of the proposed amendment whether documents from each of these historical periods should be treated the same or differently under the Rule.

Without a more nuanced understanding of the universe of tribes and tribal documents potentially affected by the amendment, the amendment risks introducing uncertainty into a system that is, at the present time, easily understood by all parties.

III. The proposed amendment fails to appreciate the wide disparity in recordkeeping practices and recordkeeping capacity among tribes.

The proposed amendment also fails to appreciate the diversity in recordkeeping practices among tribes. Undoubtedly, some tribes keep excellent records. And some tribes who previously struggled with recordkeeping have made tremendous progress. The Hocak Nation, for example, currently has a high-quality tribal records management program and gives presentations about best practices in tribal records management.[24] The Hocak Nation was not, however, always a success story. It did not have any records management program at all prior to 1993.[25] When the tribe first implemented its records management program, the Hocak record manager had to begin by "sorting through papers/documents in pest-infested basements, storage units and garages all around Wisconsin"

[21] *Indian Tribes Recognized by and Eligible to Receive Services,* 89 Fed. Reg. 99899 (Dec. 11, 2024).
[22] Kathleen McLaughlin, *A Big Moment Finally Comes for the Little Shell: Federal Recognition of Their Tribe*, THE WASH. POST (Dec. 21, 2019).
[23] *See generally Oklahoma v. Brester*, 531 P.3d 125 (Okla. Crim. App. 2023) (discussing the termination and reestablishment of the tribe)
[24] *See* Denise Redbird and Bethany Redbird, Hocak Nation Records Managers, Presentation at the Association of Tribal Archives, Libraries and Museums Annual Conference: Tribal Records Management 102 (Sept. 9–12, 2015), available at https://www.youtube.com/watch?v=retaN8KDs3M.
[25] *Id.*

without any clear idea of what she might find.[26] Unfortunately, there are many tribes today that are still in the same position that the Hocak Nation was in 1993, including tribes that lack funds sufficient to buy filing cabinets.

Among the 574 federally recognized tribes, there are many who have admirable recordkeeping practices. There are many others that fall short of desired completeness, accuracy, and reliability. A rule that affords all public records from all 574 the same presumption of authenticity without any serious inquiry or investigation into the variety of recordkeeping practices among various groups risks unfair prejudice to litigants, who have limited legal options for investigating any potential or perceived irregularity in the documents.

IV. The proposed amendment is not necessary to solve any problem that currently exists under the Rules.

The Rules already provide a mechanism under Rule 902(11) for tribal records to be admitted absent testimony by a live witness. Instead of a seal and a signature, Rule 902(11) simply requires that the "custodian or another qualified person" certify that the record "meets the requirements of Rule 803(6) (A)–(C)," and requires the proponent to provide "reasonable written notice of the intent to offer the record [and to] make the record and certification available for inspection."

It is unclear, and the Government has made no attempt to explain, why Rule 902(11) is impracticable or unworkable. Of the four cases the government cites in support of the need to reform the rule, only one of the cases—*United States v. Wood*, 109 F.4th 1253 (10th Cir. 2024)—involved a failed attempt to use Rule 902(11) to authenticate tribal documents. And in that case, the issue was not that the documents could not be authenticated under the Rule, it was that the government simply failed to comply with the notice requirement. *United States v. Harper*, 118 F.4th 1288 (10th Cir. 2024), on the other hand, did not involve Rule 902 at all. In that case, the tribal custodian and author of the contested piece of evidence testified at trial and authenticated the document. On appeal, the defendant did not raise an authentication challenge. Instead, the defendant's conviction in *Harper* was overturned because the letter on which the government relied to prove enrollment was hearsay that did not meet the requirements of Rule 803(6).[27] In sum, while the losses in *Wood* and *Harper* are no doubt frustrating for the Government, neither case supports an inference that tribal records are unreasonably difficult to authenticate under the current Rules.

Indeed, experience shows that they are not.[28] There is a long history of federal prosecutors successfully complying with these rules in the course of prosecuting cases under §§ 1152 and 1153. In

[26] *Id.*

[27] *Harper*, 118 F.4th at 1300 ("At bottom, the district court abused its discretion in admitted the verification letter because the document was hearsay. . . .")

[28] *See e.g., Bagola*, 108 F.4th at 727 (director of enrollment confirmed the certificate's accuracy); *Rainbow*, 813 F.3d at 1104 ("the enrollment clerk prepared certificates using records maintained in the ordinary course of business"); *Zepeda*, 792 F.3d at 1108, 1115 (enrollment officer confirmed that the certificate confirms the fact of enrollment and blood quantum, and then parties stipulated to admitting it); *United States v. Ramirez*, 537 F.3d 1075, 1082–83 (9th Cir. 2008) (director of membership services explained information reflected on enrollment certificate); *Prentiss*, 273 F.3d at 1282–83 (listing three examples from the 1970s and 1980s of successful presentation of tribal enrollment certificates).

fact, as the Committee reporter acknowledges, "the absence of Indian tribes from the list in Rule 902(1) does not raise a significant problem in practice." As the cases below demonstrate, parties have been following these procedures, with no issue, for decades.

For instance, in *United States v. Dodge*, the court held that testimony from the superintendent of an Indian entity that the defendant was listed on the roll and that a one- quarter blood quantum was required to be so listed was sufficient to sustain a conviction under § 1153.[29] Similarly in *United States v. Lossiah*, a certificate from the tribal enrollment officer explaining that the defendant was enrolled and had three-quarters blood quantum was sufficient to sustain a conviction under § 1153.[30] In *United States v. Ramirez*, testimony from the victims that they were enrolled members of a tribe, coupled with their tribal enrollment certificates and testimony from the tribe's enrollment officer, was sufficient to establish jurisdiction under § 1152.[31] In *United States v. Rainbow*, testimony from a BIA agent about how enrollment certificates were generated was sufficient to allow admission of the certificates themselves as business records under Rule 803(6).[32] And finally, in *United States v. Walker*, the court held that an enrollment certificate issued by the BIA was self-authenticating, and thus supplied sufficient proof of Indian status.[33]

This long history shows that the government regularly succeeds in properly introducing evidence of a person's Indian status in prosecutions under §§ 1152 and 1153. It is only when the government deviates from these procedures that appellate courts will reverse convictions. For instance, when the government presents a certificate in a manner other than as prescribed under FRE 902(11) and also fails to introduce testimony from the appropriate tribal officials, the failure to follow the rules of evidence will sometimes be deemed not harmless and the conviction reversed.[34]

Amending Rule 902(1) to render tribal enrollment certificates self-authenticating is unnecessary to prevent convictions from being reversed. Complying with existing procedures for authenticating evidence of tribal enrollment is not onerous. Even where the government does not comply with those procedures, the courts of appeals reverse convictions only when there is no *other* admissible evidence that would address the two prongs of the definition of the term "Indian."[35] Most federal prosecutors manage to present enough evidence to insulate convictions under the harmless-error rule. *Harper* and *Wood* appear to represent isolated instances in which the prosecutors may

[29] 538 F.2d 770, 786 (8th Cir. 1976).
[30] 537 F.2d 1250, 1251 (4th Cir. 1976).
[31] 537 F.3d 1075, 1082–83 (9th Cir. 2008).
[32] 813 F.3d 1097, 1103–05 (8th Cir. 2016).
[33] 85 F.4th 973, 981–82 (10th Cir. 2023).

[34] *Compare United States v. Alvirez*, 813 F.3d 1115 (9th Cir. 2016) (conviction reversed), *with United States v. Tsosie*, 709 F. App'x 447, 449 (9th Cir. Sep. 25, 2017) (conviction affirmed because testimony from the defendant's wife about his Indian status made the evidentiary error harmless).
[35] *See Harper*, 118 F.4th at 1301 (finding non-harmless error where the government did not prove an element of the crime "by legal and competent evidence beyond a reasonable doubt"); *Wood*, 109 F.4th at 1266–67 (noting that absence of other information in the record on the defendant's Indian status meant that the error was not harmless); *Alvirez*, 813 F.3d at 1124 (other properly admitted testimony that did not corroborate the improperly admitted certificate meant that the error in admitting the certificate was not harmless).

not have been familiar with the relevant tribal documents and therefore did not adequately prepare to meet the minimal showing required to establish a defendant's Indian status under the current rules.

V. The government's arguments in favor of the proposed amendment are unpersuasive.

A number of the arguments in favor of the amendment appear to be misinformed. For example, it has been suggested that the BIA has stopped issuing CDIB documents. There is no evidence to support this suggestion. In *Harper*, *Wood*, and *Walker*, these BIA-issued documents were available to the government for use as evidence at trial. In *Walker*, the government presentedsuch a document, and the conviction was affirmed.[36] In *Harper*, the court specifically noted that the government opted to prove its case without relying on such a document.[37] The BIA continues to issue CDIB documents and appears to intend to continue doing so.[38]

The government's arguments about the burden and cost of the current Rule appear to assume that the current Rule requires personal appearance in federal court by a tribal official at every trial in which tribal documents are to be introduced. This is not correct. As noted above, tribal documents can be authenticated under Rule 902(11) without testimony by a live witness. It is not clear why obtaining a certification under Rule 902(11) is more burdensome or costly than obtaining a signed and sealed document under Rule 902(1).

The Government's argument that the Transportation Security Administration ("TSA") "does not distinguish among tribes based on the purported reliability of their record systems" is not correct. TSA provides tribes with an opportunity to enter into an agreement with the Department of Homeland Security to produce scannable identifications that meet the requirements of the Western Hemisphere Travel Initiative (WHTI) and that can be used in place of passports at land and sea ports of entry.[39] Tribal identifications that do not meet these high standards and that cannot be scanned are in fact treated differently. Specifically, they are "inspected manually and cross-referenced with the Federal Register,"[40] a process similar to that employed to screen individuals who arrive at the airport with no acceptable identification at all.[41] In other words, TSA does expressly distinguish between tribes and does not treat all tribal

[36] *See* 85 F.4th at 981–82.
[37] *See* 118 F.4th at 1297 (observing that the defendant had a CDIB card but the government chose not present it at trial).
[38] *See* Bureau of Indian Affairs, *Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Request for Certificate of Degree of Indian or Alaska Native Blood*, 89 Fed. Reg. 84927, 84928 (Oct. 24, 2024) ("Currently, the BIA certifies an individual's degree of Indian or Alaska Native blood if the individual can provide sufficient information to prove his or her identity and prove his or her descent from an Indian ancestor(s) listed on historic documents approved by the Secretary of the Interior that include blood degree information.").
[39] *See, e.g., Western Hemisphere Travel Initiative: Designation of an Approved Native American Tribal Card Issued by the Kickapoo Traditional Tribe of Texas as an Acceptable Document To Denote Identity and Citizenship for Entry in the United States at Land and Sea Ports of Entry*, 87 FR 37879 (June 24, 2022).
[40] Transportation and Safety Administration, Tribal and Indigenous, *available at https://www.tsa.gov/travel/tsa-cares/tribal-and-indigenous*
[41] Transportation and Safety Administration, Acceptable Identification at the TSA Checkpoint, *available at https://www.tsa.gov/travel/security-screening/identification.*

identification the same regardless of their demonstrated reliability.

The Government's analogy to FRCP 6(e)(3), on the other hand, has no clear relevance to the issue under review. FRCP 6(e)(3) allows tribes to receive grand jury information "in order to enforce federal law."[42] The role that tribal law enforcement plays in enforcing federal law and the documents tribes might need to perform that task is not obviously related to the question of what rules federal courts should follow when accepting tribal records in evidence, and the government does not explain the connection between the two.

Nor is the government's analogy to "political subdivisions of remote territories overseas" a good fit given that, as noted above, these subdivisions are subject to public records laws, and their records and recordkeepers are subject to subpoenas. These important tools—nearly completely absent in the context of tribes—give litigants a fair opportunity to test the authenticity and reliability of those materials before trial and to raise appropriate objections in response.

VI. If the amendment is intended to bolster the dignity of Indian tribes, the Advisory Committee should seek input from tribes.

As the Committee Reporter has already acknowledged, the absence of Indian tribes from the list in Rule 902(1) does not raise a significant problem in practice and therefore the issue was one of the "dignity" of Indian tribes. Yet, the Advisory Committee has not sought nor received any feedback from Indian tribes on this proposed amendment. Nor has the Committee heard from judges and attorneys who regularly deal with these evidentiary issues to determine how widespread this problem is. Before amending the rule, the Advisory Committee should solicit feedback from relevant parties.

Regards,

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/s/ Jami Johnson (Choctaw Nation of Oklahoma)
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[42] Fed. R. Crim. P. 6, Advisory Committee Notes to the 1999 Amendment.