



'You're gonna have a lot of trouble': Judge trashes Trump over changes in tribal homelands policy

Wednesday, May 20, 2020, By Acee Agoyo



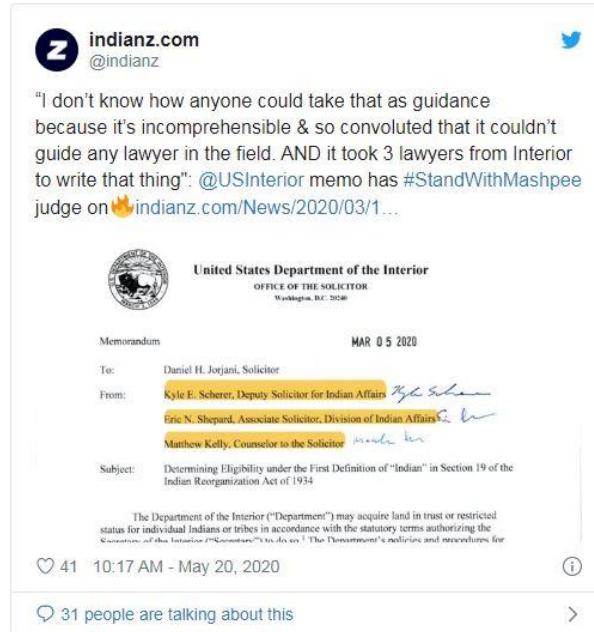
A federal judge trashed the Trump administration for [changing course on Indian Country homelands policy](#) during the worst [public health crisis](#) in decades.

A [March 5 legal memorandum](#) in which the [Department of the Interior](#) laid out new criteria for evaluating tribal land applications is "one of the worst written documents I've ever read from any government agency," [Judge Paul L. Friedman](#) said during a lengthy hearing on Wednesday.

"For them to be talking about grammar, when they don't know the first thing about grammar, when they have typos throughout the whole thing, when [they don't know how to spell Justice Stevens' name](#), is a joke," Friedman said via proceedings that took place via video because the [COVID-19 pandemic has shut down the federal courthouse](#) in the nation's capital.

"And you can tell your client that," Friedman told a government attorney. "It's a [joke, that March 5 document](#)."

"Your honor, I certainly apologize," responded Sara E. Costello from the [Department of Justice](#). "I certainly will convey the court's words regarding the March 5 opinion."



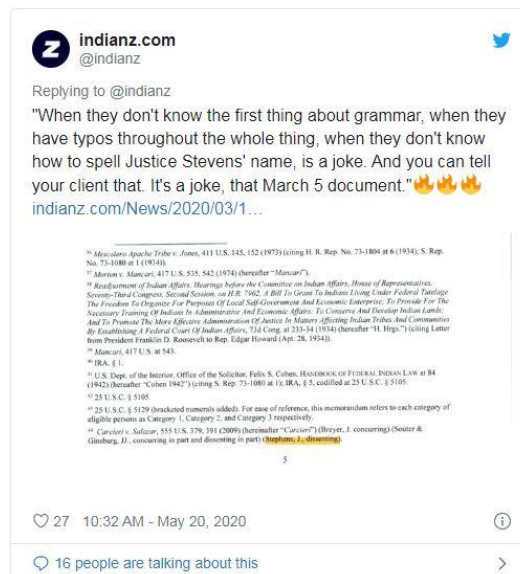
Despite the offer of regret, Friedman, who serves as a senior judge for the United States District Court for the District of Columbia, wasn't done with the verbal lashing. Instead of bringing certainty to the tribal homelands process, he said the legal memo makes matters more complicated for Indian Country.

"I don't know how anyone could take that as guidance, because it's incomprehensible and so convoluted that it couldn't guide any lawyer in the field," said Friedman, who previously worked as a federal government attorney.

"And it took three lawyers from Interior to write that thing," he said.

"I'm gonna try to note all that down," Costello said.

"We're gonna tell everybody," she added.



"Everybody" presumably includes the two career bureaucrats within Interior's legal arm -- Kyle Scherer and Eric Shepard from the [Office of the Solicitor](#) -- who signed the document. But "that thing" also bore a political touch, as the third attorney who put his name on it was Matthew Kelly, who serves as a Counselor to [Secretary David Bernhardt](#), the top Trump administration official at the department.

According to Friedman, the [31-page memo](#) "makes it harder" for Indian nations to secure approval of their [fee-to-trust applications](#). He said it imposes a new standard on tribes whose sovereign status was only [recently acknowledged](#) by the United States.

More specifically, he indicated it would harm the [Mashpee Wampanoag Tribe](#), whose ancestors helped the first [European settlers survive 400 years ago](#) and are now facing a new crisis as the Trump administration attempts to take their reservation out of trust. He reacted negatively when Costello refused to provide clarity on some major issues, including whether the land will remain protected while the litigation continues.

"Will the government agree to maintain the status quo pending a remand?" Friedman asked. "Yes or no?"

Costello went silent for about five seconds, though the pause seemed much longer over the teleconference line the public was dialed into.

"Your honor, I simply am not authorized" to answer, she finally said.



On a second matter, Friedman sounded surprised when Costello said the tribe would be forced to go back to square one should the matter be sent back to Interior for reconsideration.

According to Costello, the department would review the request for a reservation in Massachusetts as a "pending application," instead of the one [Mashpee leaders submitted way back in 2007](#), during a prior presidential administration and well before the ongoing legal developments.

"And so the new guidance would apply to pending applications," Costello said, referring to the March 5 memo the judge ended up trashing.

"That's not what you say in your brief," Friedman quickly noted.

"Well, then I guess we did not express it clearly," Costello responded.

Friedman did not seem amused.

"If I remand it to Interior, you want to apply a new guidance to them, which makes it hard for them to succeed," Friedman said.

"We don't agree that it makes it harder for them to succeed," Costello asserted.

"Sure it does," the judge shot back. "They were not recognized by the federal government in 1934."

"I am telling you that that's the agency's position," pleaded Costello.

"The agency is gonna have a tough time with this judge if that's what they do," Friedman responded.

"You're gonna have a lot of trouble with this judge," he added.



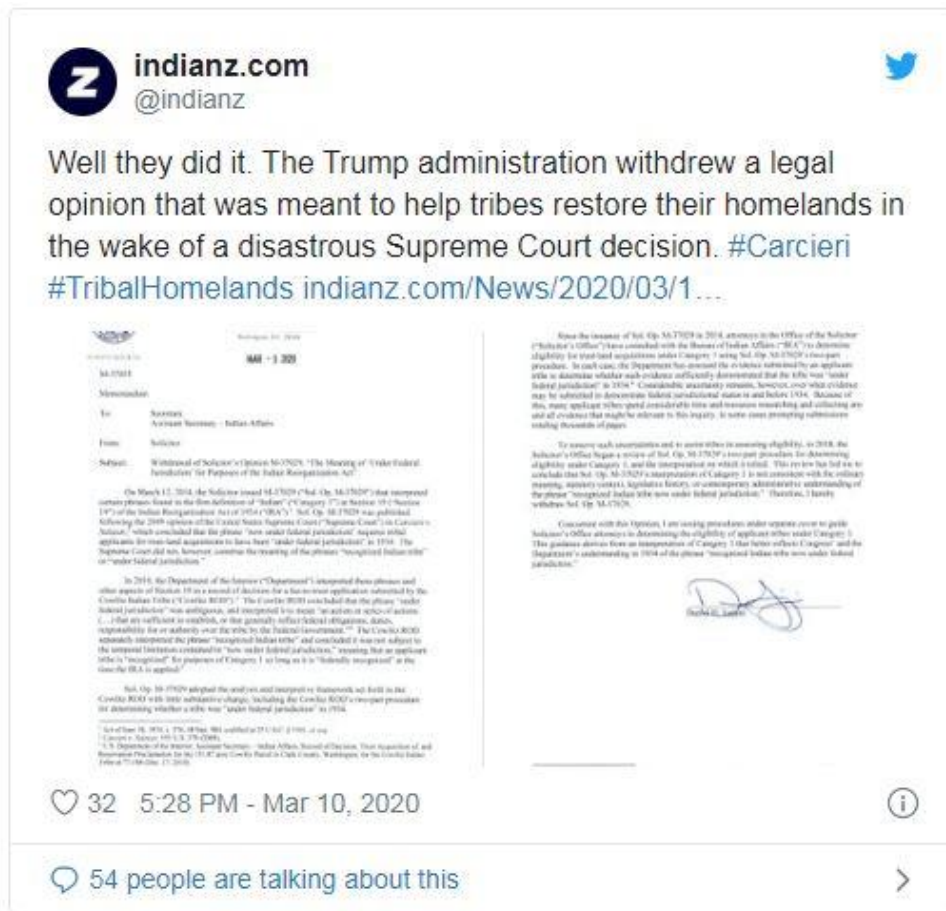
Friedman's critique comes after he said he was blindsided by the Trump administration's change in course on tribal homelands. Earlier this month, he [blasted government attorneys for failing to inform him](#) about the withdrawal of a legal document, known internally as an M-Opinion, and how such a development could affect the outcome of the Mashpee case.

"The court frankly is shocked that the government did not bring this change to the court's attention and discuss its relevance, or lack thereof, to the pending motions for summary judgment and preliminary injunction," [Friedman wrote](#) on May 1. "The court was left to discover this change on its own less than one week before oral argument on the very question of whether

the agency's application of the M-Opinion was arbitrary, capricious, an abuse of discretion, or contrary to law."

The government responded by downplaying the implications of the withdrawal of [M-Opinion 37029](#), which had been written during the Barack Obama administration by [Hillary Tompkins](#), who was the [first Native American and the first Native woman](#) to serve as Solicitor of the Interior. A May 4 filing claimed that publication of a single story on Indianz.Com and posting of relevant documents on Turtle Talk, a widely-read Indian law and policy site, provided sufficient notice.

"The Solicitor's Guidance appeared on the popular federal Indian law blog Turtle Talk and the news website Indianz.com thoroughly covered Interior's decision," [Costello wrote](#) in her response.



The March 10 story was titled "[Trump administration changes course with withdrawal of pro-tribal homelands policy](#)" and it described how Interior's decision -- which occurred with prior consultation or public notice -- would make it harder for recently-recognized Indian nations to go through the fee-to-trust process. [Turtle Talk's post](#) appeared on the same day. Another news article also was cited.

"With respect to the court's inquiry as to whether plaintiff was aware of the withdrawal of the M-Opinion, the answer is yes—the tribe was aware," Costello said in reference to Mashpee.

In the filing, Costello made another claim that also came under fire at the hearing on Wednesday. She indicated that the tribe's case should be judged under existing legal criteria.

"Interior made clear that the Solicitor's Guidance (including the Deputy Solicitor's Memorandum) would not apply retroactively and that existing eligibility determinations need not be revisited," Costello wrote at the time.

Costello instead said on Wednesday that the tribe's pending and future applications will be subjected to the new standards outlined by Interior in the March 5 memo from the three attorneys.

Costello further declared that any promises Interior might have made to keep the tribe's reservation in trust pending resolution of litigation were linked to [an entirely different matter](#). The [1st Circuit Court of Appeals](#) issued the mandate in a separate case on March 19.



[Eight days later](#), the Trump administration informed the tribe via phone that the reservation would be going out of trust.

"At 4:00 pm today -- on the very day that the United States has reached a record 100,000 confirmed cases of the coronavirus and our tribe is desperately struggling with responding to this devastating pandemic -- the Bureau of Indian Affairs informed me that the Secretary of the Interior has ordered that our reservation be disestablished and that our land be taken out of trust," [Chairman Cedric Cromwell](#) wrote on March 27. "Not since the termination era of the mid-twentieth century has a Secretary taken action to disestablish a reservation."

Despite the bad news, the tribe believed the reservation would remain in trust for the time being as the lawsuit assigned to Friedman had not resolved. The pledge turned out to be a hollow one.

"That's why it was such a shock," Mashpee attorney [Tami Azorsky](#) told the judge, "that the tribe was informed that he land would come out of trust and Interior would disestablish the reservation."



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The Trump administration's point person on Indian policy took a brutal beating as tribal leaders warned about dire threats to their sovereignty. indianz.com

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The reservation in Massachusetts consists of about 321 acres. It includes 151 acres in the town of Mashpee, the location of tribal headquarters, and another 170 acres in the city of Taunton, where a gaming establishment is in limbo as a result of the changes in policy at Interior.

The [Bureau of Indian Affairs](#) acquired the [land in trust](#) in September 2015, during the Obama administration. The [action was taken in keen awareness](#) of a U.S. Supreme Court decision, known as [Carcieri v. Salazar](#), that injected [uncertainty in the tribal homelands process](#).

In response to litigation initiated by non-Indian opponents of the casino, a federal judge eventually ruled that Interior did not adequately consider Carcieri in placing the land in trust. When it came time for another action, the Trump administration wasn't as welcoming as the Mashpee were to the Pilgrims back in 1620.

"I walked into this decision," [Assistant Secretary for Indian Affairs Tara Sweeney](#) told [hundreds of tribal leaders](#) in explaining why she determined that Mashpee would not be able to reclaim its homelands because it was not "under federal jurisdiction" in 1934, as dictated by [Carcieri](#).

But in response to inquiries from Indianz.Com at the time, Interior said it did not have authority to take the land -- which had been [declared a reservation](#) in January 2016 -- out of trust.

"BIA does not have a regulatory process to take land out of trust for tribes," the agency told Indianz.Com as a [rally in the nation's capital](#) drew attention to the controversy.



At one point, the Trump administration was considering regulatory changes that would have authorized a method to take tribal land out of trust. But the proposal was [scrapped by Secretary Bernhardt himself](#) in light of opposition from Indian Country.

The lack of a formal process, however, hasn't stopped Interior from telling Mashpee leaders that their land would be taken out of trust. A more recent statement claimed the mandate from the 1st Circuit requires the disestablishment of the reservation.

"On March 19th, the court of appeals issued its mandate, which requires Interior to rescind its earlier decision," the [department said in a statement](#) after news of the decision generated even more attention amid the COVID-19 pandemic. "This decision does not affect the federal recognition status of the tribe, only Interior's statutory authority to accept the land in trust."

"Rescission of the decision will return ownership of the property to the tribe," the statement continued.



The tribe owns the land in the town of Mashpee in fee, attorney Azorksy confirmed during the hearing on Wednesday. Besides the governmental headquarters, the [property includes](#) historic sites, burial grounds and a museum that was recently [highlighted by the Federal Emergency Management Agency](#) to promote the Trump administration's "whole-of-government" response to COVID-19.



The land in the city of Taunton is another story. Azorksy said the tribe could lose it since the mortgage is owned by a third party.

"If it is returned to fee, they can," Azorksy said, "foreclose on the land."


"How exactly that happens and how the deeds get recorded and what happens -- it's an unknown to us," Azorksy said of the unprecedented situation facing the tribe.


Azorksy was presenting rebuttal arguments when the public participation line suddenly went silent with nearly 200 listeners on board. The operator of the teleconference -- it was AT&T -- attempted to reconnect with the court but was unable to do so. It's not clear how much longer the hearing went on for.

Following inquiries placed by Indianz.Com, the court said it would not release audio of the hearing. A clerk directed any interested parties to purchase a transcript for an official document from the proceeding.

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Sorry, folks. The federal court will not make available the audio of today's [#StandWithMashpee](#) hearing even though public wasn't able to listen to it in full. Best bet is to purchase transcript when it's ready or contact the parties. [@MWTribe](#) [#COVID19](#)



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