ABORIGINAL SELF-GOVERNMENT IN THE UNITED STATES

Douglas Sanders

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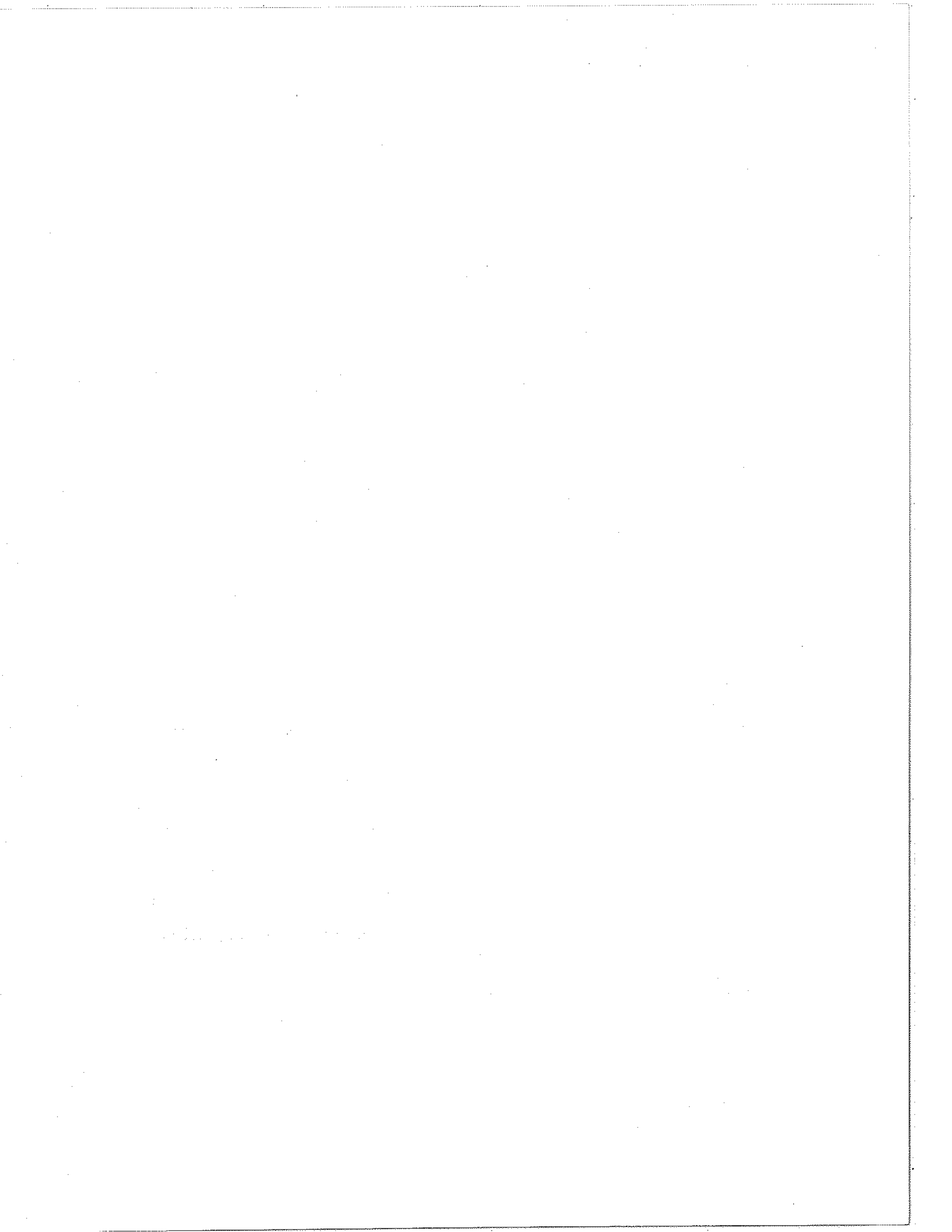


PREFACE

The constitutional reform process, as it relates to aboriginal peoples, has come to focus on one major agenda item -- aboriginal self-government. At the First Ministers' Conference in March 1984, aboriginal peoples' leaders were calling for self-government, while many federal and provincial ministers were openly questioning "What does it mean?" The aim of Phase One of the Institute's project on Aboriginal Peoples and Constitutional Reform, which is subtitled "Aboriginal Self-Government: What Does It Mean?", is to shed some light on this question, by examining attitudes toward the principle of aboriginal self-government, and by examining alternative concepts and models of aboriginal self-government.

Aboriginal peoples, being no more homogeneous than non-aboriginal Canada, have no single model in mind. It would appear,

from those models proposed to date, that any formula will have to be flexible enough to accommodate diverse structures and allocations of policy responsibility. The wide variety of views as to what aboriginal self-government means -- ranging from "nationhood" to local school boards -- have yet to be clearly articulated and fully elaborated. This situation has led some observers to express alarm at the yawning gap between the expectations of aboriginal peoples, and the political wills of federal and provincial governments.

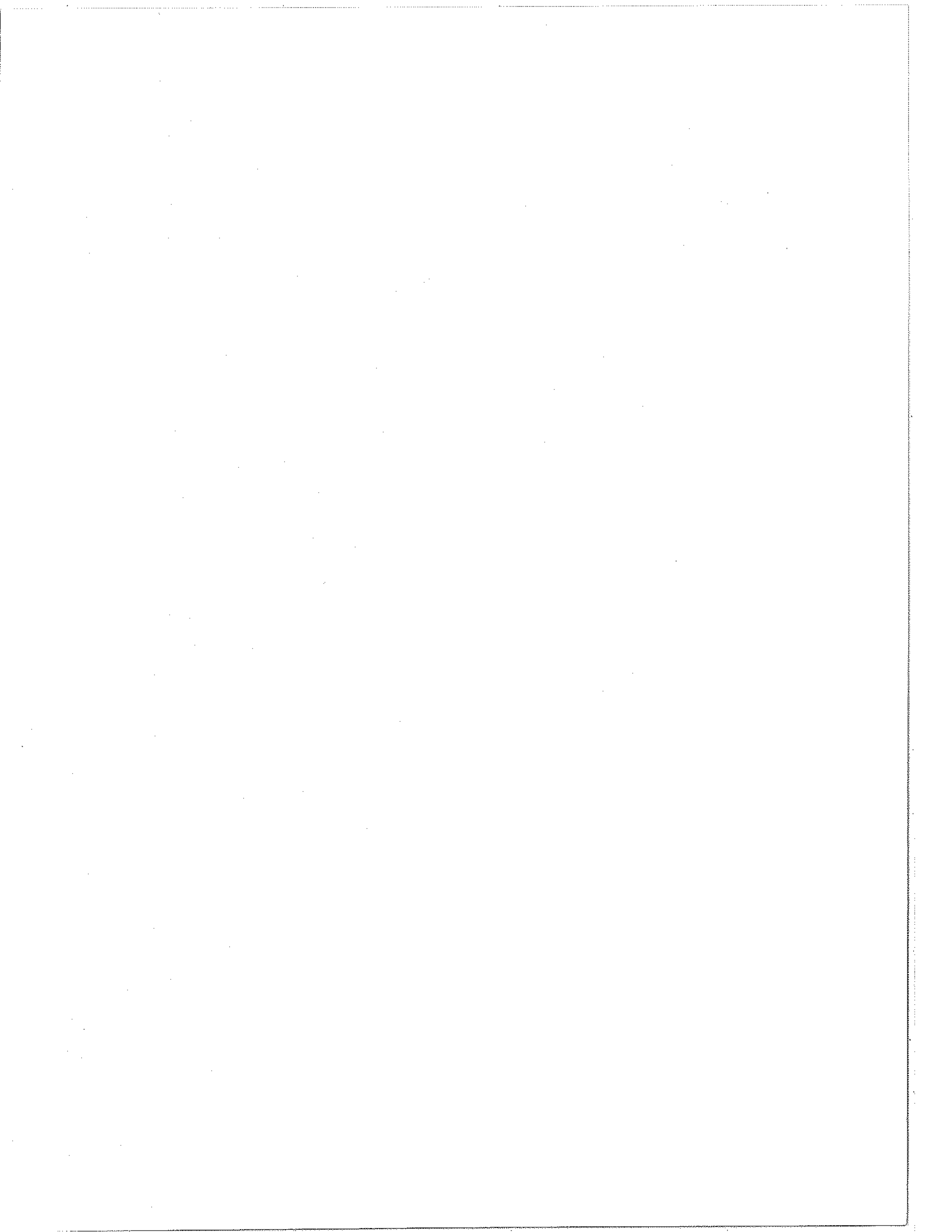
Diverse and conceivably conflicting views cannot be accommodated without a clear understanding and shared perceptions of what is at issue. Phase One of the project, including this series of papers, is designed to help take the first step toward developing such an understanding. This useful and important role can only be played by a body which does not have a vested interest in the outcome of the constitutional negotiations, and which is not a party to the debate. The Institute of Intergovernmental Relations, which is at arm's length from all of the parties, is ideally placed to perform the role of clarifying and extending public knowledge of the issues.

We are not alone in this viewpoint. The Institute has received support, encouragement and full cooperation from all parties to the negotiations -- federal, provincial and territorial governments, and aboriginal peoples organizations. I would also like to acknowledge the financial support which the Institute has received for the project, in particular the generosity of the Donner Canadian Foundation, the Government of Ontario, the Government of Alberta, the Government of Quebec, the Government of New Brunswick, and the Government of Yukon.

The principal objective is to identify and operationalize alternative models of self-government, drawing upon international experience, and relating that experience to the Canadian context. Douglas Sanders, in his paper on "Aboriginal Self-Government in the United States", explores the experience of Indian tribal government and its relevance to the Canadian context. He exposes the "major myth" of American Indian law -- the doctrine of continued tribal sovereignty -- through historical analysis of Indian -- U.S. government relations, and through a review of the various government policies of removal, allotment and termination. In his examination of modern legislation in the post 1960 era of self-determination, Professor Sanders describes how Indian self-government in America currently operates. He brings clarity to a complex situation in which Indian tribal jurisdiction is being fundamentally redefined.

Professor Douglas Sanders is a member of the Faculty of Law at the University of British Columbia, and recent recipient of the Bora Laskin National Fellowship in Human Rights Research.

David C. Hawkes
Associate Director
Institute of Intergovernmental Relations
January 1985

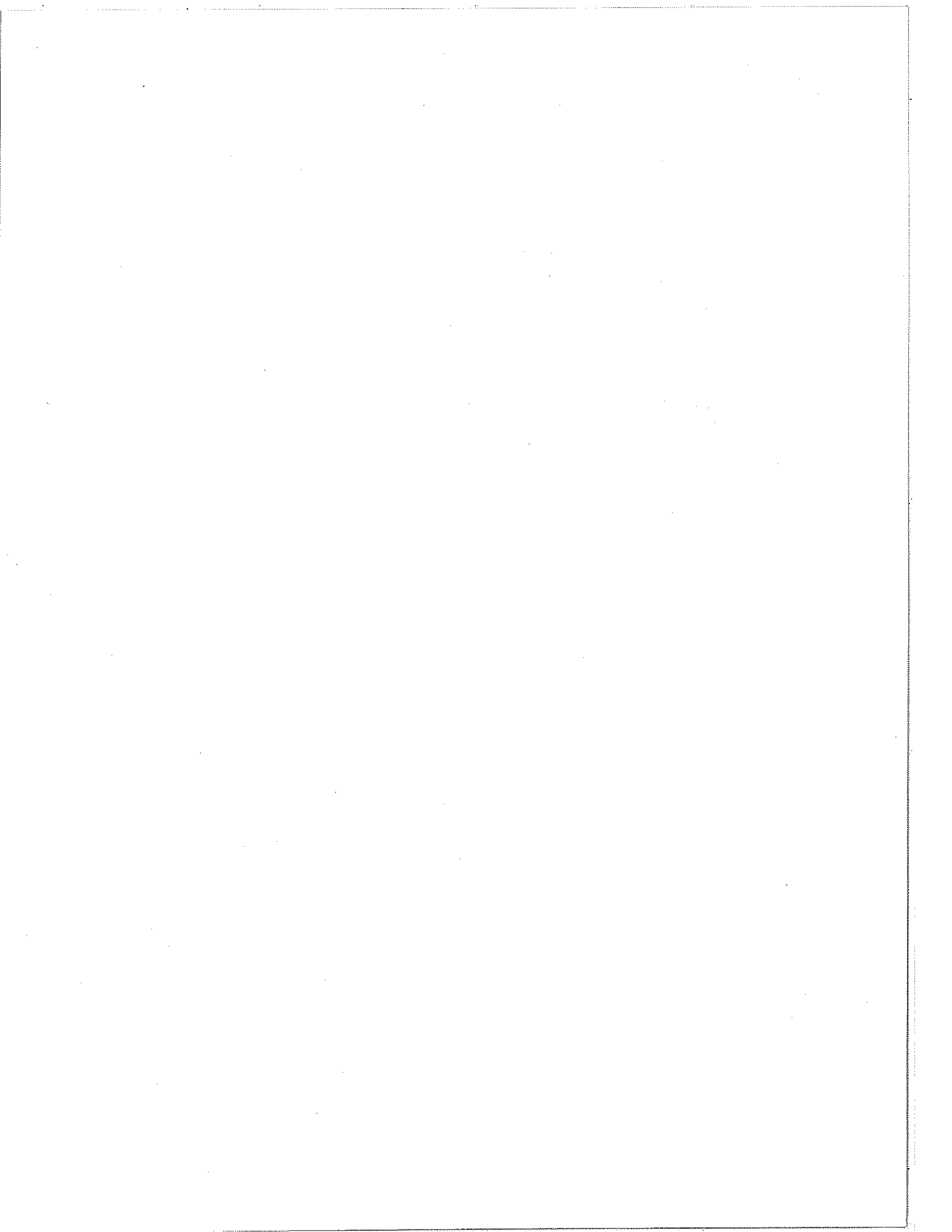


ABSTRACT

United States Indian law recognizes an inherent Indian right to self-government, deriving from the original sovereignty of the tribes before colonization. This recognition is found in the treaties, the trade and intercourse acts and the decisions of the United States Supreme Court in the early 19th century. It was seriously undercut by the policies of removal and allotment, but was re-invoked in the Indian New Deal reforms of the 1930s. After the brief termination policy of the 1950s, it has been recognized as a central concept in the current policy of Indian self-determination.

SOMMAIRE

Les lois autochtones des Etats-Unis reconnaissent un droit inhérent aux indiens quant à leur autonomie gouvernementale qui a ses origines dans la souveraineté originelle des tribus avant la colonisation. On retrouve cette reconnaissance dans les traités, les lois concernant le commerce et les rapports commerciaux et les décisions de la Cour suprême des Etats-Unis au début du dix-neuvième siècle. Après avoir été gravement piétiné par les politiques de déplacement et de lotissement, mais fut invoqué de nouveau dans les réformes indiennes du New Deal des années trente. Après la brève politique de résolution des années cinquante, cela a été reconnu comme étant un élément essentiel de la politique actuelle, c'est-à-dire le droit des peuples autochtones de disposer d'eux-mêmes.



INTRODUCTION

Indian law and policy has been more dramatic in the United States than in Canada. United States law has been more conceptual, talking of sovereignty and inherent rights. It has been more volatile, with dramatic reversals. The early treaty period gave way to policies of removal and allotment; the New Deal was followed by the termination policy; self-determination has ebbed with a reduced commitment to the funding of Indian delivery of programs and services.

Canadians interested in Indian questions have had a familiar uneasy sense that we lagged behind U.S. policy innovations. A major criticism of the Canadian white paper on Indian Policy of 1969 was that it resurrected the discredited United States "termination" policy of 1953-1958. And even worse, we had not yet copied the positive Indian New Deal reforms of the 1930s. A closer examination of United States experience gives a rather different picture. Indian issues are more marginal in U.S. political life than in Canada, with the result that swings in policy (like the current de-funding) can occur without effective political opposition. The 1930s New Deal reforms, on examination, were seriously flawed and in the end were another non-Indian answer to Indian realities. Most tellingly, the last twenty-five years have been the real reform period on Indian policy in both the United States and Canada, a period in which we have been moving on roughly parallel tracks. With some translation, the following comment by a United States legal academic on the situation in his country could be a description of Canada:

> The twenty-four years since 1960 have seen as much litigation in the field of Indian law as the prior 180 years...Indians no longer rely exclusively on the services of government

> attorneys...Prior to 1960 only a handful of attorneys knew much about the unique principles and doctrines of the Indian law field...In response to Indian demand for better legal representation during the self-determination era many lawyers now have become expert in this specialized field. The caliber of legal representation of Indians and Indian tribes has increased markedly.[1]

A recent study commissioned by the Bureau of Indian Affairs stated:

> In general, the changes within tribal organizations have been dramatic. What were often little more than social clubs a decade ago have been transformed into governments.[2]

While Indian courts go back to the late 19th century, they could only become tribal courts after 1934. A decade ago, only about half the tribes in the United States had courts and their work was confined to petty criminal matters. Today, nearly all tribes have courts and they are assuming major civil jurisdiction over Indians and non-Indians in matters occurring on the reservations. This is very new and major jurisdictional issues are currently in the courts.

A major myth in United States Indian law is the concept that elements of inherent tribal sovereignty have continued from the point of first contact with Europeans. I call it a myth, for it is difficult to see how the concept was respected in the periods of removal, allotment and termination. It is a myth in the most positive sense of being a concept designed to instruct and give meaning to people and institutions. The myth has allowed the transformation of institutions. The Indian courts were established for paternalistic reasons as institutions for the assimilation of Indian tribes. They were reinterpreted as being part of a system of indirect rule and now, have been reborn as instruments of inherent tribal sovereignty. By the use

of the myth, parts of the oppressive history of marginalization of Indian peoples have been overcome. This is the most striking aspect of United States Indian law for Canadians.

THE EARLY TREATY PERIOD

The various European powers which established colonies in the new world after 1492 did not begin with any theory of colonialism or any established law on the rights of indigenous populations. The Spanish debate on indigenous rights occurred after territories were captured. British theory came after British practice. The early British grants on the east coast of North America were silent on the question of indigenous rights and even on the fact of indigenous populations. A pattern of purchasing lands developed in what is now New England, encouraged by the colonial competition between the English, the Dutch and even the short-lived Swedish presence. The first written land transaction may have occurred in 1633, but had been preceded by unwritten transactions.

Jennings refers to the "oft-repeated assertion" that all of New England was purchased at one time or another from Indian landholders.[3] As the process was formalized, it became more clearly a transaction between colonial authorities and Indian authorities, not a private transaction between individuals. Private transactions came to be explicitly prohibited, first at the level of individual colonies, and later, with the Royal Proclamation of 1763, for the entire area claimed by the British.

The treaty policy took on an orthodoxy, both before and after the revolution:

> When the United States won its independence from Great Britain, it became heir to an established procedure in Indian relations and in the acquiring of Indian lands. The theory and practice it strengthened by its own actions. It made treaties with the Indian tribes as independent nations at the close of hostilities; in most formal terms it guaranteed the boundary lines separating the Indian lands from the settlements of the whites; it waived the right of conquest in the gaining of Indian lands and continued to seek Indian approval, with compensation paid for lands given up. Despite the ever-increasing encroachment of settlers and speculators onto the Indian lands - and the evident inability of the government to prevent it - there was no official denial that the Indian rights to their lands were inviolate.
>
> In treaty after treaty, both under the Articles of Confederation and under the Constitution, the traditional principles were followed. A formal meeting between the plenipotentiary commissioners of the United States and the leading chiefs and headsmen of the tribes, a solemn document detailing the compensations, grants, and guarantees, then the approval or ratification by the Senate - this was the established procedure.[4]

The established treaty process was confirmed by the Royal Proclamation of 1763. The Proclamation formally stated a Crown monopoly on acquiring lands from the "nations or tribes of Indians with whom we are connected, and who live under our protection..." While the Royal Proclamation became a basic reference document on Indian rights in Canada, it was superseded in the United States by the trade and intercourse acts, the Northwest Ordinance, and the Marshall judgments. Nevertheless, for the United States, the Proclamation was the first official delineation and definition of "Indian country", a concept fundamental to later developments.

The Articles of Confederation of 1777 provided for central control over Indian affairs:

> The United States in Congress assembled shall also have the sole and exclusive right and power of...regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.

But unauthorized western settlement continued, in spite of new attempts to delineate the boundaries for Indian country. States did not understand or wilfully defied the exclusive federal jurisdiction. Congressional ordinances in 1786 and 1787 reasserted federal jurisdiction and tried to bring order to Indian policy. In 1787, the famous Northwest Ordinance provided:

> The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

The Constitution of 1787 gave Congress the power

> ...to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Trade and intercourse acts were passed by the United States Congress between 1790 and 1834.[5] These acts involved the licensing of traders with the Indians and the prohibition of any acquisition of lands from Indians other than by the national government. Unceded lands formed "Indian country" and the trade and intercourse acts were concerned with protecting the integrity of those lands. The Indian department in Canada traces back to the centralized

administration established by Britain in 1755. But in the United States, Indian administration was established, under the Department of War, to enforce the trade and intercourse acts. Beginning in 1796, the acts authorized the military to remove illegal settlers from Indian lands. The concern with the integrity of Indian reserve lands is the major initial reason for Indian legislation in Upper and Lower Canada in the mid-19th centry. In Canada the legislation, as it evolved, became concerned with the internal regulation of reserve life. In the United States, the legislation remained concerned only with external relations of the tribes.

In spite of the history of the trade and intercourse acts, United States history repeats the patterns of unauthorized western settlement, with its risk of Indian wars:

> Bloody as the frontier was in many instances, where the rapacious whites came up against the Indians making one last stand after another, and unjust and ruthless as some of the expropriation of Indian land was - conditions would still have been disastrously worse had it not been for the federal government and its insistence on maintaining the integrity of the Indian Country.[6]

On the frontier, a counter-thesis developed to that of the federal government, denying much of the substance of Indian title. It suggested that no group (such as the Indians) had the right to keep excess lands from another group (such as the Europeans) who had need of it and would use it productively. This was, in the end, a thesis of the superiority of agriculturalists over hunters and gatherers. The view was expressed that Indians were merely "tenants at will."[7] It was perhaps also possible to question federal government actions on

the basis that the constitution did not expressly give the national government a sweeping mandate over Indian affairs.

The assumptions and practices of the national government were endorsed in the Marshall judgments of 1823, 1831 and 1832.[8] The major case, Worcester v Georgia, has been cited more frequently in United States case law than any other decision, with the single exception of Marbury v Madison. The case is widely known for the confrontation involved between the judicial and executive branches of government. President Andrew Jackson was supposed to have said of the judgment: "John Marshall has made his decision, now let him enforce it."

The decisions are significant for a number of reasons. They confirm the legal character of the Indian title to traditional lands. They uphold a sweeping federal jurisdiction over Indian affairs. Chief Justice Marshall noted that the Consitution

> ...confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions; the shackles imposed on this power, in the confederation, are discarded.[9]

In Cherokee Nation v Georgia, the Cherokees invoked original jurisdiction in the United States Supreme Court to hear cases between nations. The Cherokee who, under United States law were aliens, argued that they were an independent sovereign nation seeking to have their rights to land and self-government (matters dealt with in their treaty

with the United States) upheld by the Supreme Court. Chief Justice Marshall described the tribes as "domestic dependent nations" whose relationship to the United States resembled that of a "ward to his guardian."[10] The tribe could not, therefore, invoke the original jurisdiction of the Supreme Court. It was, nevertheless,

> ...a distinct political society separated from others, capable of managing its own affairs and governing itself...[11]

Two other judges belittled the political and property rights of the Cherokee, but two dissenting judges held they represented a foreign state and had established certain valid claims.

The substantive issues were reheard in 1832 in _Worcester_ v _Georgia_. Chief Justice Marshall described United States respect for Indian self-government:

> Certain it is, that our history furnishes no example, from the first settlement in our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. They also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only.[12]

He described the treaty of Holston of 1791 as

> ...explicitly recognizing the national character of the Cherokees, and their right of self government...[13]

The trade and intercourse acts were held to

> ...manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within

> which their authority is exclusive, and having a right to all the lands within those boundaries...[14]

In summation:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation", so generally applied to them, means "a people distinct from others". The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[15]

A basic principle of international law, said Chief Justice Marshall, was that

> ...a weaker power does not surrender its independence - its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state."[16]

The Treaty between the Cherokees and the U.S. was upheld against attempts by the State of Georgia to open up Cherokee lands to white settlers. Federal policy was ambivalent in the period and, in

effect, the judgment upheld one federal policy, embodied in the treaty, against a competing federal policy of removal of the tribes west of the Mississippi, something the federal government had promised Georgia in 1802.[17]

For our purposes, the significance of the Marshall judgments is the extent to which they formalized one particular element of the existing federal treaty policy - that of dealing with the tribes as distinct political entities, whose internal self-government continued unaffected by the treaties or the trade and intercourse acts.

REMOVAL AND ALLOTMENT

> The proposal to move the Indians to a permanent reservation west of the Mississippi...had been gradually gaining momentum in governmental circles. It had originated with Thomas Jefferson in 1803, when the addition of the vast Louisiana Territory created conditions that would make removal feasible. Before the end of Jefferson's administration there was gentle pressure put upon the Cherokees - to introduce to them at least the notion of exchanging their present country for lands west of the Mississippi.[18]

Removal was first accomplished by provisions in treaties, beginning in 1817. For the next thirty years, Indian treaty making was concerned primarily with moving tribes west.[19] Bills were introduced into Congress in 1825, 1826 and 1829 dealing with removal. The Indian Removal Act was enacted in 1830, providing for voluntary relocation. The act was highly controversial and only passed by a small majority.[20] While removal was to be voluntary, refusal to migrate could mean the end of federal protection and the imposition of state law.[21] Clearly very strong political and military pressure was

brought to bear on particular tribes to move west. The Cherokee became the most famous symbol of the removal policy. A treaty was signed in 1835 with a faction of the Cherokee tribe which provided for voluntary removal. But in 1838, the military carried out a forced removal known as the "trail of tears", during which more than four thousand Cherokee died. Other tribes to be relocated were the Creek, Choctaw, Chickasaw, Deleware, Kickapoo, Quapaw, Shawnee, Kaskaskias, Peoria, Piankashaw, Wea, Winnebago, Sac, Fox, and the Chippewa-Ottawa-Potawatomi. The removal period had no parallel in Canada. The first half of the 19th century in Canada was a period of small scale treaty making in what is now southern Ontario. Sir Francis Bond Head had proposed relocating Indian tribes onto Manitoulin Island and obtained two surrenders for the stated purpose of the Manitoulin Island relocation, but the project was never attempted.

The idea of permanent Indian jurisdictions west of the Mississippi gradually crumbled as the 19th century advanced. The Oregon trail was established and in 1848, gold was discovered near Sacramento, California. Removal ceased to be the solution to the Indian problem. Treaties were entered into in the west and reservations established. In 1849, treaties were signed with the Navajo and the Ute and the major treaty with the Sioux, Northern Cheyenne and Arapaho was signed in 1868.

At this time, the allotment policy developed designed to break up the communal nature of the Indian reservations by alloting title to specific tracts to individual Indian families. In the

process, "surplus" reservation lands would become available to non-Indians. As with the removal policy, allotment first took form in treaties negotiated with the Indian tribes. A series of treaties, beginning in 1854, contained allotment provisions. In the same period, the policy of promising permanent annuities on the surrender of Indian land was discontinued:

> A policy of rapid distribution of tribal funds was substituted; it paralleled the rapid distribution of tribal lands that allotment would entail. Underlying the policy of accelerated distribution was the assumption that tribal existence should be terminated.[22]

The policy of treaty making was also attacked by reformers. The Commissioner of Indian Affairs stated in 1869 that the tribes were not

> ...sovereign nations, capable of making treaties, as none of them have an organized government of such inherent strength as would secure a faithful obedience of its people in the observance of compacts of this character.[23]

Treaty making was terminated by a provision in an appropriations act in 1871:

> Provided, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty;
> Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.[24]

The section seems contradictory as it affirms past treaties while prohibiting future treaties. If it seriously attempted to curtail the treaty making procedures set forth in the constitution, it would be unconstitutional. It is, however, understood to have been a directive to the executive which has since been followed. A major result of the

provision is that agreements with tribes must now be implemented by legislation (which involves both houses of Congress) rather than through treaties (which need only be ratified by the Senate to come into legal force in domestic United States law). The 1982 edition of Cohen's text on Indian law explains the enactment in terms of this competition between the House of Representatives and the Senate[25], though, of course, the enactment was part of the larger attack on self-government and special status that occurred in the last decades of the 19th century.

A major curtailment of Indian autonomy occurred in the wake of the United States Supreme Court decision in Ex Parte Crow Dog in 1883.[26] The Court held that neither the federal nor territorial courts had jurisdiction to try an Indian for the murder of another Indian on a reservation. This led to the Indian Major Crimes Act of 1885, in which Congress unilaterally (that is without treaty negotiations) gave federal courts jurisdiction over seven major crimes when committed by Indians in Indian country. Since criminal law is, in general, a matter of state jurisdiction, a special federal criminal law was created in the process. The Major Crimes Act was challenged in the Kagama case,[27] but the Supreme Court enunciated a "general" congressional power to legislate on Indian matters. In other words, the United states did not have to obtain jurisdiction by the consensual political process of making treaties. There was a legislative supremacy which had been established by which Congress could unilaterally alter the relationship between the United States and the

tribes. It was that power which was invoked in the General Allotment Act of 1887 to impose an allotment policy in Indian country, in violation of the provisions of many treaties.[28]

The General Allotment Act, commonly called the Dawes Act, was backed by many well intentioned reformers who saw the individualization of Indian property as a boon to Indian initiative:

> The first section authorized the President to allot tribal lands in designated quantities to reservation Indians. The second section permitted Indian allottees to select their own lands, so far as was practicable, in order to retain prior improvements. Section 4 permitted "any Indian not residing upon a reservation, or for whose tribe no reservation has been provided" to secure an allotment upon the public domain.
>
> Section 5 of the Dawes Act provided that title to allotments be held in trust by the United States for twenty-five years, or longer if the President so desired. During the trust period, encumbrances or conveyances were void...Section 6 of the Dawes Act subjected the allottees to civil and criminal jurisdiction of the state or territory in which they resided.[29]

Legislation in 1891 allowed allotments to be leased[30] while legislation passed in 1906 allowed allotments to be sold, if the holder were deemed "competent". The process of assessing competence was given to a competency commission which functioned from 1917 to 1920,[31] significantly increasing the amount of Indian lands being sold to non-Indians. In 1921, the policy shifted and the amount of land being sold decreased.[32] In 1919, the leasing of tribal mineral rights was authorized with no requirement for tribal consultation or consent. The leases were treated similarly to mineral leasing on federal public lands.[33]

The allotment policy was not applied in a manner consistent with its own assumptions:

> The basic aim of the Dawes Act was to transform the Indian into a homesteader. But most reservations were in the arid plains region where small scale farming was virtually hopeless. These lands were better suited to large-scale farming or ranching. Ironically, allotment was carried out most thoroughly on the reservations of the Northern Plains and the Northwest Coast, where tribes had traditionally hunted and fished. In the Southwest, where Indians had long successfully practiced dry farming and ranching, reservation lands were not allotted, primarily because the surplus lands were too desolate to attract neighbouring white landowners.[34]

The major fact of the allotment period was the extent of Indian land loss. Indian lands were reduced from 138 million acres in 1887 to 48 million acres by 1934.[35] Often the best lands were lost. It was estimated that 80 percent of the value of the 1887 holdings was gone by 1934.[36] The Meriam report of 1928 concluded that the allotment policy had laid the foundation for 20th century Indian poverty.[37]

A second major consequence of the allotment process was to impair the territorial integrity of Indian country. As part of the assimilative goal of the allotment policy, Indian allotments were not contiguous, but often alternated with lands which passed to non-Indians. The result was a checkerboard pattern of Indian and non-Indian lands within the exterior boundaries of the reservation. This created particular jurisdictional problems for tribal courts and governments.

A third consequence of the allotment process was the "heirship" problem. Allotments of marginal lands often passed on intestacy to multiple heirs. Within a few decades, the title to various allotments was fractionalized among numerous first or second generation heirs. There was neither sufficient value involved nor a sufficiently responsive legislative and administrative system to prevent a completely unworkable situation of multiple ownership. In parts of the United States, the "heirship" problem continues to the present day.

The impact of the allotment policy on tribal self-government has not been adequately assessed. Certainly the goal was to end self-government in favour of an individualized system of private property. The tribal government had no role in the allotment process. The best it could hope for would be to avoid the effects of the policy, as much as possible, and survive. The literature does not address whether tribal governments ended completely as a result of the allotment policy. Indeed, there seem some examples of tribal governments surviving though the whole reservation land base was privatized. No general picture of the nature of Indian self-government in the period is available in the literature but it was probably of a very limited institutional character. At least that would explain why the allotment period is described in terms of its attack on the reservation land base and not as an attack on self-government (though clearly it was both).[38]

A significant piece of assimilative political symbolism was completed in 1924. All Indians were recognized as citizens of the United States:

> The Citizenship Act of 1924 made "all non-citizen Indians born within the territorial limits of the United States" American citizens. The Act conferred citizenship on Indians who had not become citizens under other acts, particularly the Dawes Act. Rights to tribal property were unimpaired. Indian consent or application for naturalization was not required; citizenship was simply bestowed. Not all Indians welcomed it, since many feared it might alter tribal membership.
>
> State suffrage did not automatically follow the granting of citizenship. Several states denied Indians the right to vote, either because they were not taxed or because they were under guardianship.
>
> Citizenship did not alter the individual Indian's status as a ward or tribal member. In 1916 the Supreme Court held in United States v Nice that citizenship was not incompatible with tribal membership or continued wardship.[39]

The British tradition, established shortly after the American revolution, had been to regard the aboriginal populations as subjects, not aliens. The United States tradition, seen as linked to the sovereignty of the tribes and the character of the treaties, was to see the Indians as aliens. Indians in the United States became citizens and voters in national elections in 1924. Indians in Canada were citizens from the start of colonial assertions of jurisdiction, but could not vote in national elections until 1960.

The allotment period involved a number of attacks on Indian collective life. Boarding schools run by churches received government support after 1870.[40] In 1883, the Interior Department banned

"certain old heathen and barbarous customs". Engaging in specified dances and ceremonials was made punishable in 1921:[41]

> During the allotment era extensive government supervisory power over the everyday life of Indians was essentially unchecked. For example, in 1872 Congress prohibited most contracts between non-Indians and tribes or Indians who were not citizens unless approved by the Secretary of the Interior and the Commissioner of Indian Affairs. Contracts between individual Indians or between a tribe and its attorney were subject to departmental approval. In effect, the Indian Office controlled litigation by approving or disapproving attorney contracts and fees.
>
> The allotment policy touched most aspects of Indian life. It was a systematic attempt to eradicate Indian heritage and tribalism. President Roosevelt described the allotment process in his message to Congress in 1906 as "a mighty pulverizing engine to break up the tribal mass."[42]

THE NEW DEAL

The New Deal reforms followed innovations of the 1920s. In 1921, the Bursum bill was introduced in Congress. A vigorous public fight against the bill ensued on the basis that it threatened the land rights of the New Mexico Pueblos. The continuing controversy over the Pueblo lands question together with issues of Indian religion and mineral leasing on executive order reservations, involved John Collier as adviser to the General Federation of Women's Clubs. The controversies led to the formation of the American Indian Defense Association in 1923 headed by Collier.[43]

The Secretary of the Interior in 1926 requested the Institute for Government Research, a private think-tank, to survey the work of the Indian department. The report, "The Problem of Indian

Administration", was completed in 1928 and is commonly referred to as the Meriam report after its primary author.[44] The report focused on the economic and social conditions of the Indian populations, bringing to public attention the deplorable conditions on the reservations. It advocated economic planning, better Bureau personnel, and better education. While it did not challenge general assimilationist assumptions, it sought to strengthen local Indian reservation economies by encouraging Indian use of Indian lands and proposed a system of government loans to that end. It criticized the allotment policy for the massive loss of land and for creating an extremely complicated administrative system. It recommended the consolidation of fractionalized "heirship" lands and proposed a special commission to hear Indian claims. Little or nothing in the report, though, addressed the strengthening of Indian self-government.

There were some reforms after the Meriam report, but the Indian New Deal, as such, began in 1933 when President Franklin Roosevelt appointed John Collier as Commissioner of Indian Affairs.[45] Collier organized lobbying for any one of three candidates, including himself and Lewis Meriam. A petition signed by 600 of the nation's leading educators, physicians, churchmen, social workers and Indian reformers was sent to Roosevelt in January, 1933, urging a major reform of Indian policy. Collier was endorsed by the board of the American Indian Defense Association and by the All Pueblo Council. The key event proved to be the appointment of Harold Ickes as Secretary of the Interior, for Ickes and his wife had been among the

founding members of the American Indian Defense Association. His wife spoke Navajo and was a recognized authority on the Indians of the Southwest. A small group around Collier played key roles in the New Deal, including three lawyers who had worked for the American Indian Defense Association. One of them was Felix Cohen whose book on Indian law became the undisputed authority in the field.

Indian Reorganization Act

The centrepiece of the Indian New Deal was the **Indian Reorganization Act** of 1934, commonly called the **IRA.** The **IRA** was designed to strengthen Indian reservation communities by expanding their land base, providing development capital and strengthening local self-government. But, the **IRA** was optional, applying to a reservation only if approved in a tribal referendum. The second major part of Collier's reforms was the extension to Indians of various New Deal programs, such as the Civilian Conservation Corps and the Temporary Emergency Relief Administration. These programs brought money into reservation communities and sometimes funded programs with lasting impact on tribal self-identity.

Collier did not have either the traditional hope for assimilation or a goal of protecting Indians from cultural change. He believed that a positive adaptation by Indian societies to their situation could only occur if they were healthy - socially and economically. The goal of reviving and strengthening Indian collective life was to allow healthy accommodation to occur, involving some degree

of Indian acculturation or assimilation. But Collier saw adaptation as a two-way street. He believed there were fundamental social and economic problems in non-Indian society. The genius of Indian society was its balancing of individual and collective life, a lesson which non-Indians needed to learn. For Collier this was not rhetoric. As a person, he had searched for some larger meaning and his own quest had brought him to the Pueblos and would underlie his initiatives in the Indian New Deal. He spoke of the philosophy of the **IRA** as

> ...an affirmative experimental search for the power abiding within Indians, waiting for release through the enfranchisement or the recreation of Indian grouphood.[46]

Collier proposed a 48 page bill but what emerged from Congress were 19 relatively short sections with no conceptual preamble or quotable phrases. For the centerpiece of a dramatic reform, it is a surprisingly mundane statute. The major elements of the **IRA** are land, self-government, economic development and provisions dealing with the Bureau of Indian Affairs.

Land

Under the **IRA** further allotments were prohibited. Unallotted and unsold "surplus" reservation lands were restored to tribal ownership. The act authorized the acquisition of additional lands for tribal communities to expand the reservation land base. The Act authorized expenditures of $10 million over five years to purchase land, but only $4 million was appropriated by Congress. The **IRA** and the appropriations did not allow either a full resolution of the

"heirship" lands problem or an ending of the "checkerboard" patterns by purchases and land exchanges. Much of the limited land added to reserves in the period was of marginal productivity.

Self-government

As Indian scholar Vine Deloria Jr. has pointed out, the self-government reforms in the **IRA** obscured any understanding of the state of tribal government before 1934. Collier, it seems, understood that he was substituting "indirect rule" along the British colonial model, for "direct rule" by the Bureau of Indian Affairs (BIA).[47] The **IRA** came to be widely understood as the foundation for tribal self-government. It even came to support self-government, by analogy or by administrative practice, for tribes like the Navajo who rejected the **IRA**.

There are elements of self-government which were indisputably in tribal hands before 1934. The formal power to decide on membership in tribes was a tribal function, confirmed by many judicial decisions.[48]

There was no uniform pattern before 1934 for the structure of tribal government. The Canadian Indian Act gave an appearance of uniformity to band government from the latter part of the 19th century, though it allowed "traditional" governments to survive until the Indian Act provisions on local government were made to apply to particular reserve communities. But no such appearance of uniformity existed in the United States. Tribal government had not been structured by

national legislation. One had to look to tribal tradition, treaty provisions and local BIA administrative innovations to understand the structure of self-government for any tribe. For instance, the Pueblos in the southwest lived in compact, highly organized farming villages. The fact that they were self-governing was obvious to the least perceptive European eyes. Their isolation meant that self-government had continued without major modification. The Pueblos all voted to come under the IRA although they may have been influenced by their prior contact with Collier and the fight over the Pueblo lands legislation. Certainly another of the well-organized self-governing groups, the Iroquois of New York State, went the opposite direction and uniformly voted against the IRA.[49] They were already confident of their own sovereignty and were suspicious of a reform which tried to give them what was already theirs. They were conscious of Canada's imposition of an elective system on the largest Iroquois reserve north of the border and did not want to concede that Congress had the power to grant (or take away) self-government rights.

The large Navajo tribe did not, traditionally, have a tribal level governmental structure. The population was widely dispersed and was organized on a local and fairly informal basis. The impetus to alter these patterns did not come from the Navajo but from the Bureau of Indian Affairs and the need to deal with outside forces. Early in the 20th century, the Bureau of Indian Affairs created five agencies as administrative districts within Navajo country. At the same time, the

Bureau created a Court of Indian Offences with three Navajo judges.[50] The first Navajo Tribal Council was established in 1923 at the instigation of the BIA in order to validate leases of Navajo resources. These judicial and legislative institutions, while initiated by the BIA, came to be understood as exercising the inherent powers of the Navajo tribe. The tribe rejected the **IRA**, to a large degree because of the disputes over stock reduction, an issue not directly connected to the Reorganization Act. This was a serious political defeat for Collier and his program, but to the Navajo it was not a rejection of self-government.

In 1947, the Indian Service listed 195 tribes under the **IRA**. Thirteen tribes which had rejected the **IRA**, nevertheless operated under constitutions (including the Navajo tribe). Four tribes which had accepted the **IRA** operated under constitutions adopted prior to 1934.[51]

The operative section of the **IRA** on tribal self-government was section 16:

> Any Indian tribe or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Collier had included a section providing statutory authority and procedural direction for Indian courts with appeals to a federal court of Indian Affairs but that section was eliminated in committee.

The question of the relationship of tribal constitutions under the **IRA** to aboriginal rights of self-government was unclear in 1934. To an outsider, a simple reading of the **IRA** would not suggest a pre-existing and continuing right of self-government. Indeed Collier's initial draft of the **IRA** clearly involved a granting or delegation of power by Congress to the tribal governments. Collier was not able to get his original draft. In a fascinating coup, the New Deal lawyers used the concept of pre-existing sovereignty to turn the mundane words of the **IRA** into a confirmation and continuation of tribal powers. This creative revisionism became orthodoxy. Felix Cohen stated that the **IRA** had "little or no effect upon the substantive powers of tribal self-government vested in the various Indian tribes..." Instead it regularized the "procedures" of tribal

government and modified the relationship with the Interior Department.[52]

Economic Development

Section 17 of the IRA allowed the establishment of a tribal business corporation and Section 10 authorized a revolving loan fund of $10 million.

Bureau of Indian Affairs

Section 12 stated preference for the hiring of Indians as employees in the Bureau of Indian Affairs. The employment preference provisions were upheld by the United States Supreme Court in 1974 in Morton v Mancari.[53] The tribal constitutions under section 16, after approval by a tribal vote and by the Secretary of the Interior, could only be revoked or amended by tribal vote. A tribal business corporation, established under section 17, could only be revoked or surrendered by an Act of Congress. Both these provisions were designed to curtail the power of the Bureau of Indian Affairs and the Secretary of the Interior in tribal life.

Implications

The Indian New Deal is usually seen as the great Indian reform period in the United States in this century. It had no parallel in Canada. It is remembered today in mixed terms. Its concern with a reconsolidation of the Indian reservation land base and the focus on self-government are broadly applauded. But current views see the

Indian New Deal as seriously flawed. The problems with the Indian New Deal can, perhaps, be summarized in relation to Indian involvement, continuing paternalism, assumptions about Indian life, the role of Congress and the role of the BIA.

Indian involvement - One month before the initial draft of the **IRA** was introduced in Congress, Collier convened a conference with representatives of organizations such as the American Indian Defense Association, the Indian Rights Association and the National Association on Indian Affairs. It was only after the initial draft of the **IRA** encountered hostility in Congress that Collier attempted consultations directly with the reservation communities. Collier held ten regional conferences with tribal representatives to "gain Indian support before returning to Congress."[54] The consultations were hurried, for less than three months passed between the initial introduction of the **IRA** in Congress and the introduction of a modified bill in April, 1934. The new bill still met opposition, but Collier was able to get President Roosevelt to intervene in support of the legislation. In May the House Indian Affairs Committee completely redrafted the bill, changing "every provision except the title."[55] After further amendments in the Senate, the bill was passed and signed by the President in June, 1934.

Later it would be claimed that the Indian conferences were a "new precedent" and "symbolized a new relation between the Indians and the Indian Office."[56] But it is clear that the legislative

package was decided at a closed conference in Washington. The regional consultations with Indians only occurred after hostility to the legislation surfaced in Congress and the legislation enacted had been massively changed from the bill Collier described to the Indians in the regional meetings. Collier and the sponsors of the bill had responded to the politics and pressures in Congress, and only incidentally to a need to consult with the Indian constituency. It no doubt can be argued that Collier had to move in the early period of the Roosevelt administration if he had any hope of getting major legislation enacted. But, in the end, neither Congress nor the Indians were adequately convinced. Within three years, there were attempts to repeal the **IRA** in Congress. The rejection of the **IRA** by the Navajo and the Iroquois and other tribes raised serious questions about the legislation.

There was a second major problem with Indian participation. Collier did not see the legislation as optional legislation, which would only apply to a tribe if the tribe agreeed. The requirement for a tribal vote before the **IRA** would apply was inserted in Congress. But the section on the tribal vote was peculiar. It required

> ...a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior...

to vote against its application. The BIA under Collier interpreted this to mean that if a majority abstained from voting, the **IRA** was automatically approved even if it had been rejected by a majority of the votes cast. This caused considerable confusion and was, of course,

in conflict with the normal democratic assumptions in U.S. life. It led traditional Iroquois in New York State, who steadfastly refused to vote in any other non-traditional context, to cast votes to ensure that the **IRA** would be defeated. This part of the **IRA** was altered by Congress in 1935.

Continuing Paternalism - The **IRA** did not begin with clear or stated premises of Indian aboriginal rights. Today, it is startling to realize that Collier saw the **IRA** in terms of ending "direct rule" in favour of "indirect rule." The continuing paternalism in the act is not blatant. In the main, it arose in the administration of the Act. The tribal constitutions, which were to embody the structure and substance of self-government, had to be approved by the Secretary of the Interior. That requirement was inconsistent with an independent right of self-government, but could have been administered so as to minimize the conflict. Instead, the constitutions which were approved required Secretarial approval for various tribal laws. In terms of a right of self-government, it was a move towards federal government control. But it was an advance given the dominance of the BIA before 1934. Not all tribal decisions were subject to veto and the tribal constitution could not be ended without tribal (or congressional) approval.

The **IRA** was supposed to be a pluralistic document. Not only did it allow Indians to organize separately from non-Indians, it permitted each reservation community to structure its own government.

But the **IRA** constitutions have been criticized for their uniformity and for the degree to which they impose United States legal assumptions on tribal government. This perversion of the stated goal occurred as a result of three related factors. First, any constitution had to be approved by the Secretary of the Interior. Second the **IRA** imposed a one year deadline for votes to come under the Act (later extended by another year), confirming a climate of rushed reform. Finally, the BIA prepared a model constitution which was widely copied:

> A major objective of the Act was to restrict pervasive federal administrative power. Supervisory authority continued, however. Tribal constitutions and corporate charters were subject to detailed examination before Secretarial approval was granted. Although some constitutions were individualized, many were standard "boilerplate" constitutions prepared by the Bureau of Indian Affairs and based on federal constitutional and common law notions rather than on tribal custom. The Commissioner of Indian Affairs also retained many discretionary powers. On occasion Commissioner Collier used strong Bureau pressure, bordering on coercion, to secure tribal compliance with administrative policies.[57]

Assumptions about Indian life - Two studies of the Indian New Deal, by Parman and Taylor, suggest that Collier's view of the state of Indian tribalism in 1934 was unrealistic and led to problems with the **IRA**:

> Collier's early perceptions of the Pueblos determined much of his approach to other vastly different Indian nations. Despite his work for the national American Indian Defense Association, where he was exposed to the problems of most Indians, Collier was stubbornly southwestern oriented. In this respect, his romanticism was glaringly apparent. Few Indians were as untouched by white encroachment and retentive of language and ceremonials as were the Pueblos. Consequently, to Collier, other Native Americans were somehow

> less "Indian". After all, how could others match the splendid isolation of the Pueblo pristine existence. As Berkhofer has observed: "In this sense, all Indians became Pueblos in his vision, regardless of Collier's belief that his program allowed for the multiplicity of tribal cultures and conditions." Hence, Collier's efforts were seen as condescendingly rehabilitational to those who could not match his Pueblo ideal.[58]

Vocal Indian reaction to the **IRA** differed greatly. Iroquois activist Alice Lee Jemison opposed the reform, arguing that it would strengthen the BIA. The slogan "the only good Bureau is a dead Bureau" symbolized this pro-autonomy opposition to the **IRA**.[59] At the other extreme, there were Indians who had accepted the assimilationist goals which had dominated government actions for half a century. They wanted to defend the private property system of the allotments and thought Indians had to be allowed to make it on their own as individuals within United States society. The Indian Rights Association opposed the **IRA** on the basis that it perpetuated segregation and reversed "the incentive which the authors of the allotment law had in mind for individual ownership of property leading toward citizenship."[60]

But Indian reaction to the reform proposals was complex. It cannot be summarized simply in terms of assimilated Indians versus traditional Indians or by any other simple polarity. The **IRA** was not responsive to the regionalism of Indian life in the United States, which reflected not only substantial traditional tribal differences, but widely varying experience with removal and allotment. This diversity required a much more elaborate process for constructing a

reform package and much more flexible reform legislation than the **IRA**.

Role of congress - The **IRA** had a difficult time getting through Congress and Collier's initial draft was massively altered in the process.[62] Problems with Congress continued immediately after passage, during the period in which tribes were voting on whether to come under the Act:

> While the ratification campaign was proceeding, Collier had to deal with other pressing problems, notably an effort by the House Committee on Indian Affairs to abort the Indian Reorganization Act by denying necessary funds to put it into operation. Since the act had not passed until the end of the session in June, 1934, no funds were available to finance tribal organization work and land purchases until Congress reconvened. In the new session, early in 1935, the House committee sought to cut the appropriations for these two programs to one-fourth the amount authorized in the act, and requested additional appropriations to maintain the boarding schools. These shifts would jeopardize any serious effort to redirect Indian policy. Collier's lobbying managed to force the allocations up to one-half of the authorized appropriations for the credit and land purchase funds, and $175,000 of the allowed $250,000 per year for tribal organization; but it was a sobering experience and portended further difficulties from congressional critics.[63]

Hearings began early in 1935 by the House Indian Affairs Committee; under Representative Murdock from Utah, the committee became a focus of anti-New Deal sentiment. Indians opposing the **IRA** were given a platform from which to condemn the Act and Collier, who was attacked as an athiest, a socialist and a member of the American Civil Liberties Union:[64]

> Despite Collier's pleading, the drive to curtail the effectiveness of the IRA proved successful. This became

> apparent at hearings before the House Sub-Committee on Interior Department Appropriations during April, 1935. Led by Jed Johnson, a Democrat from Oklahoma who considered Collier a subversive and was unimpressed with the small number of tribes who adopted constitutions and charters, it cut even further Bureau of the Budget recommendations that Congress fund only half of the money authorized by the IRA. Johnson slashed the credit fund to $2.5 million, the annual land purchase fund to $1 million, the sum for organizing tribes to $100,000, and education loans to $175,000.[65]

In February, 1937, Senator Burton Wheeler, one of the sponsors of the Indian Reorganization Act (often called the Wheeler-Howard Act), introduced a bill recommending repeal of the **IRA**.[66] While the bill was defeated, Collier continued to face opposition in the Congress. In 1945, he submitted his resignation, in part because of his perception that he had become increasingly ineffective as Commissioner and a symbol for opponents of the **IRA**.

Role of the BIA - One of the problems with the Indian New Deal was the continuation of the Bureau of Indian Affairs personnel who had administered the paternalistic system that was now being criticized:

> Many of the local officials upon whom the burden of these changes depended regarded the new tribal councils much as they had the business committees of the preceding decade, as at best a meaningless addition to the agency and at worst an obstacle to the efficient administration of the reservation. Disputes between the Washington divisions and local agents over the scope of tribal authority and the role of the councils in decision making were frequent and abrasive. During the twelve years of the Collier administration some of the more authoritarian representatives of the old guard were replaced, but the basic divergence in viewpoint between Washington and some local officials remained in 1945.[67]

TERMINATION

The Indian New Deal never fully took hold in national political life. It was attacked in Congress and underfunded. Indian Affairs appropriations reached a peak in 1939, decreasing markedly in subsequent years:

> World War II increased pressures for termination. Ideological attacks increased, further budget cuts were made, and large numbers of Bureau personnel were lost in the war effort. The federal government focussed on the international situation, and BIA operations were moved to Chicago. Indian interests were no longer a political issue significant enough to command the attention of the President or the Secretary of the Interior.
>
> During the early 1940's the Senate and House Indian Affairs Committees issued major reports criticizing the administrative cost of Bureau policies and the slow rate of progress toward either economic development or assimilation. The Senate Committee was particularly hostile to Collier, and sought to reverse the direction of Indian policy.
>
> The Senate Survey of Conditions Among the Indians of the United States ended in 1943 after fifteen years of investigation. The Partial Report issued that year contained harsh criticisms of the IRA, the BIA, and Commissioner Collier.[68]
>
> In 1946 Congress passed the <u>Indian Claims Commission Act</u>:
>
> Its intention was to end federal guardianship towards Indians by permitting them to submit claims for past wrongs committed with government approval. Once cash awards had been granted, the United States could wash its hands of Indian affairs.[69]

This seemingly controversial analysis of the <u>Indian Claims Commission Act</u> is confirmed by other writers:

> Although Congress acted partly in response to considerations of justice and a desire to save time and money, it also intended the move as a final settlement between old antagonists so that federal responsibility could be ended.[70]

In 1947, acting Indian Commissioner William Zimmerman was pressured by both Democratic and Republican members of the Senate Committee on Indian Affairs to draw up a list of tribes ready to be released from federal care. The list established an agenda for termination. The process began with the use of executive orders.

In 1953, Congress formally adopted the policy of termination:

> Concurrent Resolution 108 declared it the intent of Congress to end all federal responsibility for tribes located in the states of California, Florida, New York, and Texas. Individual tribes such as the Flatheads, Klamaths, Menominees, Potawatomies of Kansas and Nebraska, and the Chippewas on the Turtle Mountain Reservation also were singled out for termination. Public Law 280, another piece of legislation passed in 1953, further reduced tribal sovereignty by subjecting Indians living on reservations in California, Minnesota, Nebraska, Oregon, and Wisconsin to state civil and criminal laws. Under Public Law 280, other states, at their own discretion, could substitute state laws for tribal custom without Indian consent.[71]

Concurrent Resolution 108 passed both Houses of Congress without opposition. This signified less an overwhelming consensus than pervasive disinterest:

> ...few members of Congress showed any interest in it, or in Indians. Arthur V. Watkins, Chairman of the Indian Affairs subcommittee from which the Resolution emanated, was a 66 year old Utah Senator, a deeply religious man, and a member of the Old Guard conservative bloc. He firmly believed that the wardship status of the Indians should be ended as rapidly as possible so "These people shall be free."[72]

Indians opposed the policy, but Congress proceeded with numerous termination bills:

> Some 109 tribes and bands were terminated, involving about 1,362,155 acres of land, and 11,500 individual Indians. The total amount of Indian trust land was diminished by about 3.2%. Two tribes with large landholdings were disestablished, the Menominee in Wisconsin and the Klamath in Oregon.[73]

Philp has recently argued that the move to termination must be understood, at least in part, as a response to the failure of the New Deal programs. He notes that the economic position of Indians was only "slightly better" in 1945 than in 1928 when the Meriam report was issued:

> In reality, Congress decided to jettison the Indian New Deal in favor of termination because tribal reorganization, land acquisition, and federal credit programs under the Indian Reorganization Act had, for the most part, proven unsuccessful. New Deal reformers, like others before them, had made the mistake of imposing their image of what was desirable upon all Indians. Once again, tribesmen had been required to follow the cadence of drums other than their own. Tired of broken pledges and weary of continued bureaucratic control, many Indians joined with federal officials and legislators in looking toward termination for a measure of self-rule.[74]

While termination was strongly pushed in Congress and by the Bureau after 1953, opposition developed rather quickly and by 1958 the policy retreat was clear. In September of 1958, the Secretary of the Interior, in a speech on the Navajo reservation, stated that hereafter no group would lose federal services or supervision unless the group clearly demonstrated that it was fully prepared and understood and supported the action:[75]

> The policy of rapid and coercive termination was abandoned in 1958. The federal government has gradually moved away from the policies that guided federal Indian policy during the termination era, returning to and expanding the basic philosophies of the Indian reorganization period. Congress

> did not develop comprehensive legislation for reform of major federal service programs until the early 1970's, however. These new programs evolved in response to the demands of Indians and to the officially expressed support of five presidents for self-determination by Indian people.[76]

There were two ambiguous legislative actions between 1958 and the self-determination legislation of the mid-1970s. In 1968, in the aftermath of the killing of Dr. Martin Luther King Jr., Congress passed a major civil rights act. The issue of civil rights for Indians had arisen and been the subject of some hearings. Traditionally the Bill of Rights had not been applied to tribal governments because their source of authority lay outside the constitution. It seemed that this exemption might be breaking down on the basis that federal funding of reservation governments made them into agents of the federal government. Any significant judicial movement in that direction was overshadowed by the enactment of the Indian Civil Rights Act (or the Indian Bill of Rights) in the 1968 Civil Rights Act:

25 U.S.C., s. 1302 Constitutional rights.

No Indian tribe in exercising powers of self-government shall -

> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for the redress of grievances;
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
> (3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;
(5) take any private property for a public use without just compensation;
(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favour, and at his own expense to have the assistance of counsel for his defense;
(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
(9) pass any bill of attainder or ex post facto law; or
(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Section 1303, Habeas corpus.

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

These provisions are very significant. They clearly impose fewer legislative restrictions on tribal governments than the Constitution imposes on state and federal governments. There is no requirement for a republican form of government, no prohibition on established religion, no requirement of free counsel for an indigent accused and no right to a jury trial in civil cases. This was a deliberate modification of constitutional limitations. But the message is ambiguous. Tribes cannot escape constitutional standards completely; they will be subject, though, to a modified and lessened version of those standards. This may be seen as a step down an assimilationist

road, but it put a halt to a possible judicial trend to make the constitutional bill of rights apply to the tribes.[77] A less ambiguous part of the legislation was an amendment to Public Law 280 to require tribal consent for all future state acquisitions of jurisdiction over Indian country. Public Law 280 had been part of the termination legislation of 1953.

The second major legislative innovation in the years between 1958 and 1975 was the Alaska Native Claims Settlement Act of 1971. Alaska had traditionally been outside the mainstream of United States Indian policy. No treaties had been signed in Alaska which was purchased only four years before treaty making was ended in 1871. The reservation policy was inappropriate and, in general, was not extended to the territory. Alaska was initially excluded from the **IRA**, but the Alaska Reorganization Act of 1936 allowed Alaska native communities to organize with constitutions and business charters. The aboriginal title issue became significant with the discovery of oil and gas. The Alaska Native Claims Settlement Act was designed to end native aboriginal rights in return for almost $1 billion in compensation and large areas of land to be held by native owned corporations. At the end of 20 years, the shares in those corporations would become freely transferable. In the words of the legislation, the settlement would settle the claims

> ...without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the

> legislation establishing special relationships between the United States Government and the State of Alaska...

This was termination but in the period when the termination policy was at an end. However, the Alaska settlement set no precedent for below the 49th parallel.[78]

SELF-DETERMINATION

The self-determination period can be traced back to the election of President Kennedy in 1960. Candidate Kennedy, along with his rival Richard Nixon, had pledged that there would be no change in treaty or contractual relationships with the tribes without their consent.[79] Indian communities were included in the Great Society programs of President Johnson, programs which in general were to involve the maximum feasible community control. The war on poverty legal programs had significant impact on tribal courts by bringing federally funded legal services programs onto the reservations. In 1968, President Johnson made a formal statement on Indian policy in which he said he wanted to replace "termination" with "self-determination," "paternalism" with "partnership and self-help."[80]

But the major statement endorsing "self-determination" was that of President Nixon in 1970. While rejecting paternalism, he argued against termination either in the short term or as the long range goal:

> Self-determination among the Indian people can and must be encouraged without the threat of eventual termination.

It was necessary "to strengthen the Indian's sense of autonomy" without any threat of ending "Federal concern and Federal support." Nixon asked Congress to repeal House Concurrent Resolution 108, which had stated the termination policy. His other specific recommendations included the return of Blue Lake to Taos Pueblo, the transfer of control over Indian schools to Indian communities, legislation to foster economic development, and the creation of an Indian trust counsel authority to advocate Indian interests independently of other interests in the Interior Department or the national government.

Various pieces of legislation have been enacted since the Nixon statement. The 1972 Indian Education Act established a comprehensive program of federal financing of Indian education. The 1973 Menominee Restoration Act repudiated the termination policy by restoring the terminated Menominee tribe to federal status. The 1975 Indian Self-Determination and Educational Assistance Act was designed to shift the administration of existing federal programs from the auspices of the BIA and the Indian Health Service to the tribes. That same year Congress appointed the American Indian Policy Review Commission, a joint Indian-Congressional project, which reported in 1977. Two legislative initiatives flowing from the Commission's work were enacted in 1978 - the Indian Child Welfare Act and the Joint Resolution on American Indian Religious Freedom.

The Indian Self-Determination Act is the most general of the statutes passed in the last fifteen years. The introductory language on self-determination is worth quoting:

Congressional Findings

> Sec. 2 (a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that -
>
> (1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and
>
> (2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons....

Declaration of Policy

> Sec. 3 (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.
>
> (b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

Inexplicably, after this stirring opening and a routine definitions section, the legislation immediately deals with reporting, auditing, penalties and wage and labor standards. The thrust of the Act is that the Secretary of the Interior is directed to contract with tribes to perform Bureau programs. The Secretary may refuse to contract if tribal performance will not be satisfactory, trust assets would not be

adequately protected, or the contract proposed is not adequate to complete or perform the program. The Secretary is required to give written reasons for rejection of a contract and assist the tribe in overcoming the problems which led to rejection.

The initial problem with the legislation is reconciling the grand language on self-determination with the fact that the act only deals with tribal contracting of existing Bureau programs. The second problem with the Act, for a Canadian, is understanding why legislation was thought necessary. Contracting already occurs in Canada for a number of program and administrative functions of the Department of Indian Affairs without any equivalent to the Indian Self-Determination Act. Indeed, contracting in the United States existed before the Act. But, in the United States, specific legislative authority for contracting was seen as necessary to avoid the application of Title 41 of the United States Code of Federal Regulations, dealing with public contracts and property management. Before the Self-Determination Act, BIA contracting either had to comply with Title 41 or be justified under earlier special statutes providing Indian exceptions to the general regulation of federal government contracting, purchasing and property management. The Self-Determination Act gave a clear blanket authority for the contracting of the Indian programs of the BIA and the Indian Health Service. As well as giving authority for contracting, it established a legislative mandate in favour of contracting, unless the Secretary was able to state and defend good grounds for a refusal.

No one seems to regard the implementation of the Indian Self-Determination Act as notably successful. It required the Bureau of

Indian Affairs to convert, in part at least, from a delivery agency to a supervisory agency. There was a natural threat to Bureau employees, though the Act made provisions to minimize the effect on employee security. A recent study saw the Bureau as insufficiently committed to the new policy:

> Bureau personnel are not driven by a broad, overriding sense of mission to make self-determination a reality.[81]

The same study asserted there was low morale within the Bureau and concluded that the current management structure of the BIA precluded "effective implementation" of the Self-Determination Act.[82] The study and three earlier studies by the General Accounting Office,[83] focus on criticisms of the Bureau of Indian Affairs. The available literature does not include any analysis of problems with tribal response to the Act or tribal management of contracts.

Contracting has increased notably since the Self-Determination Act was passed, though it has levelled out since 1979. At present, about 25 per cent of the Bureau of Indian Affairs budget is contracted out, or about $250 million. The following problems have arisen in the experience under the Act:

- the costs of programs increase when they are contracted to tribes, because the Bureau of Indian Affairs retains a supervisory function. The cost of supervision comes out of the money allocated to the program, reducing the funding for the program. Certain costs associated with the programs, notably first time start up costs of acquiring office equipment, are not covered under the contracts.

- in a number of situations, audits have disclosed costs which do not accord with Bureau criteria. These are not situations of corruption or even, necessarily, of wastage. They represent a failure to meet federally established criteria for permissible expenditures. If the tribe has no

independent source of revenue, it will not be able to reimburse the program for the unallowable costs, blocking the continuation of the contract relationship. The problem reflects the limited discretion given the tribes to make financial decisions under the contracting arrangements.

- federal law provides that no money can be paid under a contract unless there is a budgetary allocation covering the sum. There have been instances of contractual obligations of the federal government not being paid for this reason.

- A fear of termination has inhibited a number of Indian tribes from using the Self-Determination Act. They fear that after they take over programs, federal funding and the federal trust relationship will be ended.

- the Act requires the Bureau of Indian Affairs to assist the tribes both in preparation of contract proposals and in revision and implementation of contracts. There have been complaints about a lack of technical competence within the BIA to assist tribes in particular program areas.

- the Act gives tribes a right to return programs to the BIA, and requires the BIA to resume those programs within 120 days. This has been described as an unrealistically short period for programs of any size.

- the total amount of monies available for BIA programs has not been growing, but indeed has shrunk (though, apparently, not to the extent of other areas of federal programs). This has meant that the amounts of money the BIA has been spending on particular programs (and that is available to tribes for contracting) is unrealistically low. The Navajo Tribe announced in 1984 that it was returning law and order to the BIA because the amounts offered under contracting required very substantial subsidization from other tribal revenue sources.

Frustration with the workings of the Self-Determination Act (known as PL 638) led to an attempt at reform in 1978:

> The proposal would make it possible for Indian tribes to obtain a single block grant for multi-faceted tribal programs replacing existing BIA or IHS services or for new programs the tribes might design. If they wished, the tribes could continue the contracting procedures set forth in Title 1 of PL 638. But the block grants would greatly reduce the amount of proposal writing and revision, the separate accounting, the duplication of effort, bureaucratic delays, and other obstacles reported in the implementation of PL 638. The tribes would be required to submit comprehensive plans for

> use of the grants, and the proposals would have to be approved for funding by the secretary of the interior or HEW, depending upon which departments' programs the grants would cover.[84]

The legislation would also have dealt with problems of contract overhead costs. The bill did not get reported out of the Senate committee in the rush of an election year.

The Indian Child Welfare Act of 1978 was a significant codification of certain judicial decisions on tribal jurisdiction over children of the tribe. Family law matters on the reservation had long been accepted as within tribal jurisdiction. In the 1970s, tribal jurisdiction over child placement and adoption even when the child had been living away from the reservation began to be accepted. The Indian Child Welfare Act provides that when an Indian child comes before a non-tribal court, the tribal court must be notified. If the tribal court chooses to take jurisdiction, the non-tribal court must defer to the tribal court. The Act specifically provided that tribes which did not have a general court system could establish courts simply to deal with child welfare matters. When the legislation was passed in 1978 there appeared to be a genuine effort to fund adequately the institutions, both judicial and social, which would make the new system effective. That funding has largely ended in the last four years.

In January, 1983, President Reagan made a major statement on Indian policy. The statement featured familiar language endorsing self-determination and rejecting termination. It referred to the relationship between the United States and the tribes as a "government to government" relationship. It also indicated concern for Indian

reservation economies. The opening paragraphs of the statement establish its tone:

> This Administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to state and local governments, but also to federally recognized American Indian tribes.
>
> When European colonial powers began to explore and colonize this land, they entered into treaties with sovereign Indian nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-government basis. Throughout our history, despite periods of conflict and shifting national policies in Indian affairs, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this Administration pledges to uphold.
>
> In 1970, President Nixon announced a national policy of self-determination for Indian tribes. At the heart of the new policy was commitment by the federal government to foster and encourage tribal self-government. That commitment was signed into law in 1975 as the Indian Self-Determination and Education Assistance Act.
>
> The principle of self-government set forth in this Act was a good starting point. However, since 1975, there has been more rhetoric than action. Instead of fostering and encouraging self-government, federal policies have by and large inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decision-making, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency.
>
> This Administration intends to reverse this trend by removing the obstacles to self-government and by creating a more favorable environment for the development of healthy reservation economies.

The President appointed a Commission on Indian Reservation Economies which held hearings in various parts of the United States during 1984 and reported on December 1. The largely Republican commission

confirmed aspects of the President's statement, condeming "excessive regulation" and calling for greater private sector involvement. As well there were familiar criticisms of the BIA:

> The commission said the agency's technical assistance and asset management programs were "incompetent". ...In "tne bureau's organizational structure," the report said, "functioning and operational deficiences are such that the cost of doing business on Indian reservations is raised considerably when Indian business development is required to involve the B.I.A..." The report cited a "Byzantine" system of over regulation that led to a situation where "the B.I.A. consumes more than two-thirds of its budget on itself, contracting only 27 percent of its programs to Indian tribes".
>
> "Bureau personnel are either underqualified to manage their present responsibilities, or unable to provide expert technical assistance for business development," the report said.[85]

HOW SELF-GOVERNMENT WORKS IN THE UNITED STATES

Self-Government and the United States Constitution

Self-government powers are aboriginal, inherent or pre-existing. They derive from the original sovereignty of the tribes, a sovereignty which has been limited, both geographically and substantively, but never ended. Because powers of self-government derive from a source outside the Constitution, it has long been held that the constitutional Bill of Rights does not apply to the actions of tribal governments. The leading decision, Talton v. Mayes,[86] decided by the United States Supreme Court in 1896, held that the criminal courts of the Cherokee Nation were not subject to the fifth amendment requirement of indictment by a grand jury. This doctrine of "retained sovereignty" was confirmed by the United States Supreme Court in 1978 in United States v. Wheeler,[87] in a ruling that double

jeopardy did not bar both a federal and tribal conviction for the same criminal action. This exclusion of tribal government actions from the constitutional Bill of Rights was the reason for the enactment of the Indian Bill of Rights by Congress in 1968.

While the retained sovereignty of the tribes is outside the United States constitution, nevertheless it is not "entrenched" or protected from the legislative power of Congress. Congress has a "general" power to alter unilaterally relations with the tribes. That power has been upheld in relation to the Major Crimes Act and the General Allotment Act.

The power of Congress to legislate in relation to Indians does not appear to be constrained by any constitutional limitations. A leading United States scholar has explained that the equal protection clause is not contravened by legislation directed at Indians because the laws

> . . . depend upon a classification of Indians as members of political groups (tribes), rather than as members of a single racial class.[88]

The Structure of Government

The treaty process and the establishment of reservations, in both the United States and Canada, had great impact on the structure of Indian political units. Removals and relocations in the United States resulted in many examples of differing tribal groups living on a single reservation, an unusual pattern in Canada. Nevertheless, the treaty process, the trade and intercourse acts and the establishment of reservations did not explicitly form or dictate the structure of tribal

government in the United States. No equivalent of the band council sections of the Canadian *Indian Act* occurs in United States legislation. To understand the nature of tribal government for a particular tribe, it is necessary to examine the history of the tribe. A number of tribes had clearly structured governments from the point of first contact. Other hunting tribes had extended kinship systems, but had no need for a "tribal" level or centralized authority. The large Navajo tribe had no tribal level government until the 1920s, when one was established at the initiative of the Bureau of Indian Affairs to deal with the leasing of reservation minerals. The Bureau had assumed the power to establish (and to dis-establish) tribal governments. There appears to have been no legislation explicitly giving the national government such power. Perhaps it derived simply from the guardian-ward conceptual framework. One of the major purposes of the Indian Reorganization Act of 1934 was to curtail this broad discretionary power of the Bureau. A tribal constitution drawn up under the **IRA** and approved by the Secretary of the Interior was protected from change by Secretarial fiat. This, logically, left non-**IRA** governments in a more vulnerable position:

> A tribe or village that organizes itself outside the **IRA** necessarily operates on the basis of inherent sovereignty. The federal government may "recognize" such a traditional government, and may choose to deal with it, however the Secretary has virtually unfettered discretion in deciding whether and to what extent to deal with Non-**IRA** tribes. Secretarial approval is not necessary to change the constitution or bylaws of a traditional government.[89]

But the **IRA** constitutions typically provided that many tribal laws would only be effective if approved by the Secretary of the Interior.

This was not written into the **IRA** itself, but was a common part of the **IRA** "boilerplate" constitutions which were approved under the legislation. It now appears that tribes which chose to organize outside the **IRA** avoided that limitation on tribal sovereignty. This issue is currently before the United States Supreme Court where the validity of a taxation law by a non-**IRA** tribe has been challenged on the basis that it did not have the approval of the Secretary of the Interior. The position of the Secretary was that the law was valid without his approval, that he had no authority either to approve or disapprove the enactment.

Membership

One of the basic powers of tribes is their authority to determine their own membership:

> The courts have consistently recognized that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership. A tribe has power to grant, deny, revoke, and qualify membership. Membership requirements may be established by usage, by written law, by treaty with the United States, or even by intertribal agreement.
>
> The power of an Indian tribe to determine questions of its own membership derives from the character of an Indian tribe as a distinct political entity. In Patterson v. Council of Seneca Nation, the Court of Appeals of New York reviewed the many decisions recognizing the Indian tribe in question as a "distinct political society, separated from others, capable of managing its own affairs and governing itself." In reaching the conclusion that mandamus would not lie to compel the plaintiff's enrollment by the defendant council, the court of appeals declared:
>
> > Unless these expressions, as well as similar expressions many times used by many courts in various jurisdictions, are mere words of flattery designed to soothe Indian sensibilities, unless the last vestige of separate

> national life has been withdrawn from the Indian tribes by encroaching state legislation, then, surely, it must follow that the Seneca Nation of Indians has retained for itself that prereequisite to their self-preservation and integrity as a nation, the right to determine by whom its membership shall be constituted. . . .

In the Cherokee Intermarriage Cases, the Supreme Court considered the claims of certain white persons, intermarried with Cherokee Indians, who wanted to participate in the common property of the Cherokee Nation. Such persons were permitted by tribal law to be tribal citizens with limited rights in tribal property. The tribe had also provided for the revocation of citizenship rights of a white person who intermarried with a Cherokee if the Cherokee spouse were abandoned or if a widower or widow married a non-Cherokee. The Court found that the Cherokee Nation had authority to qualify the rights of citizenship which it offered to its "naturalized" citizens.[90]

Tribal Courts

There are at present 117 tribal courts in the United States including several regional courts representing more than one tribe. As well, there are 23 Code of Federal Regulations (CFR) courts. In total, there are approximately 270 judges in these courts. CFR Court judges are appointed by the BIA while tribal courts judges are appointed by the tribes. The history of these courts demonstrates how a paternalistic or assimilationist institution has been transformed into a basic part of tribal self-government:

> Until the late 19th century Indian reservations were controlled by the military. Indian agents summarily sentenced those they believed guilty. In 1883 the Commissioner of Indian Affairs authorized creation of Courts of Indian Offenses to operate under rules and procedures created by the Bureau of Indian Affairs. By 1890 most of the judges of these CFR courts, and the police who enforced the laws, were handpicked Indians. This system gradually supplanted military control on the reservations. Although these early CFR courts were designed to encourage assimilation (by prohibiting Indian dances and other customs

> thought to be offensive to Non-Indians) as well as provide law and order on the reservations, their principal impact was in maintaining order and regulating the conduct of avaricious Non-Indians trespassing on reservation lands . . .
>
> During the first part of the 20th century, CFR courts waned in importance and were little more than tools of the Indian agents who had to approve all court decisions. The New Deal era and the Indian Reorganization Act of 1934 brought the first thoughtful consideration of Indian self-government, including courts.[91]

This study identifies "tribal courts" as beginning with the **IRA** constitutions which converted CFR courts into tribal courts. The institutions were modest. Little money was budgeted for these courts and the initial tribal codes often followed the BIA code closely, limiting jurisdiction to simple misdemeanors. Paradoxically, the Indian Civil Rights Act of 1968, which seems to an outsider a limitation on tribal sovereignty, is credited with a "significant enhancement of tribal courts."[92] The "enhancement", however, seems to have flowed more from new funding for the training of Indian judges and the on-reserve legal services programs of the war on poverty:

> In 1970 the National American Indian Court Judges Association initiated a training program for Indian Court Judges, mostly nonlawyers. In 1981 NAICJA combined with the American Indian Lawyer Training Program to create the National Indian Justice Center. This Center offers approximately 80 days of training a year for Indian Court judges (both CFR and Tribal court judges), as compared to about one day per year prior to 1968.[93]

Jurisdiction

Tribal jurisdiction has been expanding over the last two decades. This is as a result of tribal governments and courts

asserting broader jurisdiction than they had claimed in the past. This has required the question of the scope of tribal powers to be defined, largely for the first time.

The old CFR courts had their jurisdiction defined by federal regulations, which excluded any criminal jurisdiction over non-Indians. As well, criminal jurisdiction over "major crimes" committed by Indians was with the federal courts under the Major Crimes Act. Tribal codes enacted after 1934 tended to follow the jurisdictional provisions in the federal regulations, thus excluding criminal jurisdiction over non-Indians and largely avoiding civil jurisdiction. As tribal governments have developed over the last two decades, they have enacted a fuller body of substantive law, leading to litigation on the substantive scope of tribal powers.

In relation to criminal jurisdiction, it must be remembered that the Indian Civil Rights Act of 1978 limits penalties in tribal courts to imprisonment for six months or a fine of $500 or both. This is a very substantial limitation, leaving tribes with what Canadians would regard as summary conviction offence jurisdiction. The United States Supreme Court in Oliphant v Suquamish Indian Tribe in 1978[94] ruled that even this limited criminal jurisdiction did not apply to non-Indians on a reservation.

There is a wide range of civil jurisdiction which the tribe can exercise in relation to its members on the reservation: marriage, divorce, child welfare, estates, taxation, licensing, real property and commercial transactions.[95] The extent to which these powers can be exercised in relation to non-Indians on the reservation is currently

being determined. In Babbit Ford v Navajo Nation,[96] the 9th circuit ruled that a non-Indian seeking to repossess a car on the Navajo Reservation was subject to tribal laws on the question. In Merrion v Jicarilla Apache Tribe[97] the Supreme Court ruled that the tribe had an inherent power to impose a severance tax on non-Indian mining activities on the reservation. The major negative decision on tribal jurisdiction in recent years is the decision of the 10th circuit in Dry Creek Lodge v Arapahoe and Shoshone Tribes.[98] The court held that the tribal government could not block non-Indian development of land held by the non-Indian in fee within the exterior boundaries of the reservation. This kind of fact situation can arise because of the checkerboard patterns of land ownership in Indian country resulting from the Dawes Act. Normally tribal jurisdiction extends to such lands within the reservations' exterior boundaries, but in Dry Creek Lodge the non-Indian both had an exemption from tribal control and an ability to seek judicial review in federal courts, not simply in tribal courts. The decision is widely regarded as incorrect and has not been followed in subsequent cases.[99] It appears that a comprehensive tribal civil jurisdiction is being established over non-Indians on the reservations, without a monetary limitation.

The United States Supreme Court has formulated a general thesis on tribal jurisdiction over non-Indians:

> Also the tribe retains inherent authority over Non-Indians when their conduct threatens or has some direct effect on the political integrity, economic security, or health and welfare of the tribe.[100]

This test, involving a balancing of Indian and non-Indian interests, has been frequently quoted in recent cases.

The relationship of the tribal courts to the federal court system was unclear. Since courts like those on the Navajo Reservation began as federal courts of Indian offences, an appeal into the federal court system would not have been illogical. When the courts were re-established as vehicles of tribal sovereignty, by analogy to state courts in the United States system, an appeal to the federal courts was illogical. Matters within state legislative jurisdiction are to be determined by state courts, unless a constitutional issue arises to justify an appeal to the United States Supreme Court. By analogy, did the 1968 Indian Bill of Rights give rise to judicial review in the federal courts for compliance with its provisions? The Act permitted judicial review in **habeas corpus** proceedings. The Supreme Court ruled against a broader review capacity of the federal courts in Martinez v Santa Clara Pueblo in 1978.[101] The Act is an important part of the law administered by tribal courts. A Navajo judge commented that it was invoked in virtually all cases coming before him. But as with substantive matters of state law, there is no appeal into the federal court system (except by way of **habeas corpus**). The Martinez case is of interest to Canadians for it sustained a tribal membership system virtually identical to the Indian Act membership system sustained by the Canadian Supreme Court in 1973 in the Lavell case.[102]

Reservations, like other jurisdictional units, can enact laws which give particular advantages to businesses locating within their

borders. Indian lands in both the United States and Canada are, in general, exempt from non-Indian zoning laws. Frequently mobile home parks are located on reservation lands when they are prohibited on adjacent lands by state or local laws. Over the last few years tribal jurisdiction has been used to authorize the selling of tax-free cigarettes and liquor and to permit bingo.[103] There are continuing legal disputes in these areas. Revenue sharing agreements for on-reservation cigarette or liquor sales have been reached with tribes in at least two states, Washington and Wisconsin. A major on-reservation gambling industry has developed. On-reservation bingos do not have to comply with state restrictions on the size of the operations, the frequency or hours of games or limits on prizes. The United States Court of Appeals for the Fifth Circuit ruled in 1981 that Florida laws on bingo did not apply on the Seminole Reservation.[104] Public Law 280 applied to reservations in Florida, but the United States Supreme Court had ruled that it did not grant the states general civil regulatory powers over the tribes. If the Florida law had been prohibitory (as laws in Washington and California had been held to be in earlier cases) then it would have applied. Since it was regulatory it did not. The United States Supreme Court denied leave to appeal in March, 1982. The federal Department of Justice drafted legislation to bring on-reservation gambling under state regulation. Interior Secretary Watt stopped that initiative and established a joint Department of Justice - Bureau of Indian Affairs task force which met twice in 1983. It dissolved in favour of the pro-gambling National Council Task Force on Gaming on

Indian Reservations, which represents 65 to 70 tribes.[105] Reservation bingo halls in a number of states can accommodate over a thousand people. Mohawks in New York State are planning to offer prizes up to $100,000.00. Several states have indicated an intention to try to limit on-reservation gambling by attempting to restrict non-Indian players:[106]

> Just how many of the nation's reservation tribes now operate bingo games is unknown, but the department of the Interior estimated in June that close to 80, nearly half, were conducting gambling operations, chiefly bingo, on reservations. About half of them, including some of the bigger ones, have opened in the past two years.
>
> One of them, the Sandia Pueblo in New Mexico, has held two large games since opening in April and grossed $212,000 in one of them. The Sandias kept $61,000, non-Indian investors who built the facilities got $28,000. The rest went for prizes and expenses.
>
> The Otoe Missouria tribe at Red Rock, Okla., runs what is described as the world's biggest bingo game, giving away close to $1 million in prizes a month and grossing a great deal more.[107]

Apparently five to seven thousand people attend the Otoe Missouria bingos every night. A federal bill designed to protect Indians against outside criminal elements in this new gambling industry was introduced in Congress in 1984, but died in committee. It is expected to be reintroduced but would not limit hours or prizes. Courts have, as well, been concerned with Indian partners in these gambling operations:

> Two Federal courts have ruled within the past year that tribal bingo management contracts were not valid without review by the Bureau of Indian Affairs. The bureau believes the court decisions are erroneous but has implemented guidelines, as ordered, to protect tribes against possible exploitation or criminal manipulation.[108]

Funding

The New Deal did not establish a sound financial base for tribal governments. On most reservations there was no local tax base. Few reservations had natural resource revenues. The national government did not adequately fund the Indian New Deal reforms. Any real self-government was still in the future for most Indian communities.

The financial history of Indian communities and governments in the years since the Second World War is similar in both Canada and the United States. There was a surge of "soft" program monies in the 1960s. In Canada a generation of young Indians spent their summers on band administered OFY, LIP and LEAP projects. The Company of Young Canadians sent middle-class whites to Indian communities. CYC graduates in Yellowknife established the Indian Brotherhood of the Northwest Territories. In the United States, the Great Society programs of the war on poverty changed Indian country. The funding of the legal services programs by the federal government forced changes in the tribal court system. On the Navajo reservation, Peter MacDonald, a tribal employee, put the Office of Navajo Economic Opportunity (ONEO) together to link with the Office of Economic Opportunity (OEO), the key funding institution of the war on poverty. By 1967, ONEO employed 2,720 people. In 1970 MacDonald became tribal chairman and, for over a decade, the single most influential Indian politician in the United States.[109] MacDonald was a Republican and publicly supported

Reagan for President. Paradoxically, he later blamed Reagan's cuts in Indian funding for his defeat as tribal chairman in 1982.

In both Canada and the United States, a satisfactory pattern of funding of Indian communities and governments has yet to develop. In both, there is a complex existing pattern of both untied and program funding from the national government. In both countries, Indian governments can contract with the national government to perform certain administrative or program functions. In both, there is an uneven pattern of Indian revenues from the leasing of reservation lands or from natural resource production. In both, there is current discussion of moving more to a pattern of "block funding", to reduce the extent of federal bureaucratic control over transferred monies and thereby increase the authority and discretion of the local Indian administration.

CONCLUSIONS

To an outsider, United States Indian law and policy has not simply internal contradictions but a distinct disorderliness. Collier's initial draft of the **Indian Reorganization Act** was intended to consolidate federal Indian law into one comprehensive statute. That goal could not be attained and a pattern of sectoral reform continued. Not only is one confronted with a multitude of separate statutes, it is common for the individual statutes to specify that they only apply in certain states, or even that they apply or do not apply to specific reservations. Even the current state of bingo law in the United States means that Indian bingos can flourish in some states and not in others.

To the complexity of federal statute law is added the major fact that Indian tribal jurisdiction is in a period of fundamental definition. The expansion of civil jurisdiction for tribal governments and courts has created uncertainties about the substantive civil law to be applied. There is work underway to adapt the Uniform Commercial Code for enactment by the Navajo Tribe. In the meantime, the legal context for on-reserve investment is confusing, a factor which inhibits economic development. An official of the Colville Tribe testified in April, 1984:

> The Colville Tribes have one major barrier to development of their territory. That is the jurisdictional maze that operates on the reservation. Few non-Indian companies, lenders or investors, want to buy uncertainty and lawsuits. Yet, that is exactly what they do when the invest in Colville projects.
>
> The unsettled questions of state, federal, Tribal regulatory, commercial and tax jurisdictions eat up millions of Tribal dollars, exhaust Tribal representatives and staff and defeat Tribal development efforts.[110]

The point about disorderliness can be overstated. In any period of institutional transition there will be confusion and uncertainty. Development on Canadian Indian reserves has also been inhibited by uncertainty about aspects of the legal regime on reserves. What is important is that these transitional problems be adequately addressed, so that the problem is indeed only transitional and not permanent.

United States Indian law and policy is marked by high levels of rhetoric but greater political marginality for Indians than is the case in Canada. One is reminded of Collier's modest praise for Canada

in the 1930s. He said that Canada had promised the Indians very little but had delivered what it promised. While Canadian Indians would contest both elements of his statement, the fact remains that the level of rhetoric in the United States is higher and is not matched by funding, political recognition in national life or actual reform of federal agencies like the Bureau of Indian Affairs. Nevertheless it is clearly important that the jurisdictional rights of the tribes are recognized as inherent sovereign rights. As a founding principle, a grundnorm or an organizational myth, the doctrine of continuing sovereignty has provided a non-patronizing way of making some sense out of the history and judging the merits of reform proposals. It makes tribal reality the first premise, not Congressional power.

In both Canada and the United States, there has been little serious focus on economic development in the last two decades. There is at present no economic development component in the programs of the Bureau of Indian Affairs. Indian economic development programs were handled in the Economic Development Administration, which is separate from the department of the Interior (where the BIA is housed). That money has largely disappeared in the financial cut-backs of the last few years (along with Housing and Urban Development funding). President Reagan has said that the reservations must look to the private sector for economic development. The de-funding over the last four years has had major impact on reservation life, though there has been no change in rhetoric. While President Reagan established a Commission on Indian Reservation Economies, he told it that it must not request new budgetary allocations. The failure to deal seriously with

the questions of Indian economies is the single most glaring failure of national policy in both the United States and Canada.

Footnotes

1. Johnson, "Alternative Approaches to Alaska Native Land and Governance," December 1, 1984, unpublished, p. 30.

2. TCI, "Indian Self-Determination Study," May, 1984, p. 29 (copy obtained from the Bureau of Indian Affairs).

3. Jennings, The Invasion of America, University of North Carolina Press, 1975, Chapter 8 and, specifically, pages 133-34 and 137-38.

4. Prucha, American Indian Policy in the Formative Years, University of Nebraska Press, 1962, pp. 142-43.

5. Prucha, Chapter 3.

6. Prucha, p. 147.

7. Prucha, pp. 227-28.

8. See Burke, "The Cherokee Cases: A Study in Law, Politics and Morality," (1968-69) 21 Stanford Law Review, 500-531.

9. Johnson v. McIntosh (1823) 21 U.S. (8 Wheat.), p. 543.

10. 30 U.S. (5 Pet.), p. 17.

11. P. 20.

12. P. 547.

13. P. 56.

14. P. 557.

15. Pp. 559-560.

16. P. 561.

17. Burke, p. 503.

18. Prucha, pp. 225-56.

19. Cohen, Handbook of Federal Indian Law, 1982 Edition, Richie Bobbs-Merrill, p. 79.

20. Prucha, pp. 243-44.

21. Cohen, p. 81.

22. Cohen, p. 99. The 1907 and 1918 Acts to allot and distribute tribal funds are described at pages 138-39.

23. Cohen, p. 106.

24. 25 U.S.C., s. 71.

25. Pp. 105-107.

26. (1883) 109 U.S., p. 556.

27. *U.S.* v. *Kagama* (1886) 118 U.S., p. 375.

28. The *Allotment Act* was upheld in *Lone Wolf* v. *Hitchcock* (1903) 187 U.S., p. 553.

29. Cohen, p. 131.

30. Cohen, p. 135; 25 U.S.C., s. 336.

31. The competency commission apparently proceeded on racist assumptions, issuing patents to Indians of less than one-half blood. This led to later conflicts in the New Deal period between mixed-bloods without land and full-bloods with land: Taylor, *The New Deal and American Indian Tribalism*, Nebraska, 1980, p. 5.

32. Cohen, pp. 136-37; 25 U.S.C., s. 347; Taylor, *The New Deal and American Indian Tribalism*, Nebraska, 1980, p. 44.

33. Cohen, pp. 135-36.

34. Taylor, pp. 4-5.

35. Cohen, p. 138.

36. John Collier, "Memorandum," Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73rd Congress, 2d Session, pp. 16-18, 1934.

37. Institute of Government Research, *The Problem of Indian Administration*, John Hopkins Press, 1928.

38. Hoxie, *A Final Promise*, Nebraska, 1984, has no index listing referring to self-government.

39. Cohen, p. 143.

40. Cohen, p. 139.

41. Cohen, p. 141.

42. Cohen, p. 143.

43. Philp, John Collier's Crusade for Indian Reform, University of Arizona Press, 1977, Chapter 2.

44. See footnote 37.

45. Philp, Chapter 6.

46. Kelly, Indian Affairs and the Indian Reorganization Act, the Twenty Year Record, University of Arizona Press, 1954, p. 5.

47. Philp, "Termination: A Legacy of the Indian New Deal," 1983, Western Historical Quarterly, p. 165 at 172.

48. Cohen, pp. 20-21.

49. Hauptman, The Iroquois and the New Deal, Syracuse University Press, 1981, Chapter 4.

50. Iverson, The Navajo Nation, University of New Mexico Press, 1981, pp. 17-18.

51. Haas, "Ten Years of Tribal Government under IRA," United States Indian Office, 1947, pp. 3, 32 and 34.

52. Cohen, Handbook of Federal Indian Law, U.S. Government Printing Office, 1941, pp. 129-130. Another New Deal lawyer, twenty years later stated:

    > The constitutions add to, but do not detract from the powers of an Indian tribe, which is an independent political body possessing all the powers of self-government of any sovereignty, except insofar as those powers have been extinguished by a Congressional statute or a treaty.

    Haas, "The Indian Reorganization Act in Historical Perspective," in Kelly, opus cit., p. 9 at 12.

    A recent study describes the revisionism as a deliberate strategy: Deloria, Lytle, The Nations Within, Pantheon, 1984, Chapter 11, particularly p. 160.

53. (1974) U.S., 41 L. Ed. 2d, p. 290.

54. Philp (1977), p. 145.

55. Philp (1977), p. 158.

56. Haas (1947), p. 1.

57. Cohen, pp. 149-50.

58. Hauptman, p. 29.

59. Hauptman, Chapter 3.

60. Philp (1977), p. 155.

61. Philp (1977), p. 170.

62. Philp (1977), Chapter 7.

63. Taylor, pp. 33-34.

64. Philp (1977), pp. 170-74.

65. Philp (1977), p. 176.

66. Philp (1977), p. 198.

67. Taylor, p. 93.

68. Cohen, pp. 154-55.

69. Philp (1983), p. 167.

70. Burt, Tribalism in Crisis, University of New Mexico Press, 1982, p. 5.

71. Philp (1983), p. 165.

72. Johnson, p. 19.

73. Johnson, p. 20.

74. Philp (1983), p. 180.

75. Burt, Tribalism in Crisis, University of New Mexico Press, 1982, p. 113.

76. Cohen, p. 180.

77. Cohen, pp. 664-70.

78. Cohen, Chapter 14, Section A.

79. Cohen, p. 182.

80. Cohen, p. 185.

81. TCI, "Indian Self-Determination Study," May, 1984, p. 22 (copy obtained from the Bureau of Indian Affairs).

82. Pp. 50 and 61.

83. Comptroller General, "Controls Are Needed Over Indian Self-Determination Contracts, Grants, and Training and Technical Assistance Activities to Insure Required Services are Provided to Indians," February 15, 1978; Comptroller General, "The Indian Self-Determination Act - Many Obstacles Remain," March 1, 1978; Comptroller General, "Still No Progress in Implementing Controls over Contracts and Grants with Indians," September 10, 1981.

84. Bee, The Politics of American Indian Policy, Schenkman, 1982, p. 99.

85. U.S. "Indian Bureau Assailed in Report," New York Times, Saturday, December 1, 1984, p. 9.

86. (1896) 163 U.S. 376.

87. (1978) 435 U.S. 313.

88. Johnson, p. 39.

89. Johnson, p. 17.

90. Cohen, pp. 20-21.

91. Johnson, p. 36; and see Zion, "Harmony among the people: Torts and Indian Courts," (1984) 45 Montana Law Review, p. 265.

92. Johnson, p. 37.

93. Johnson, p. 37.

94. (1978) 435 U.S., p. 191.

95. Cohen, pp. 249-50.

96. (1983) 710 F. 2d., p. 587; leave to appeal to the United States Supreme Court denied.

97. (1982) 102 S. Ct., p. 894.

98. (1980) 623 F. 2d., p. 682; leave to appeal to the United States Supreme Court denied.

99. Cohen, p. 668, n. 52.

100. <u>Montana</u> v. <u>United States</u>, (1981) 450 U.S. 544.

101. (1978) 436 U.S., p. 49.

102. (1974) S.C.R., p. 1349.

103. The issue has spread to blackjack as well; "Legal Problems Arise in Ute Gambling Plan," Navajo Times Today, Wednesday, November 21, 1984, p. 4.

104. <u>Seminole Tribe</u> v. <u>Butterworth</u>, (1981) 8 Indian Law Reporter, p. 2168; leave to appeal denied by the United States Supreme Court.

105. See testimony of Mark Powless, Chairman, National Council Task Force on Gaming on Indian Reservations, hearing of the Presidential Commission on Indian Reserve Economies, San Francisco, May 15, 1984, beginning at p. 109.

106. "Mohawks to offer $100,000 at Bingo," New York Times, Wednesday, July 11, 1984, p. 11.

107. "Indians ask homeland bingo games," New York Times, Thursday, December 11, 1984, p. 10.

108. See footnote 107.

109. Iverson, <u>The Navajo Nation</u>, New Mexico, 1981, pp. 89-91.

110. Testimony of Mr. Eddie Pamanteer, Fiscal Resources Department Director of the Colville Tribe, Hearings of the President's Commission on Indian Reservation Economies, Spokane, Washington, April 26, 1984, p. 215.