

from

Vine Deloria, Jr. and Clifford M. Lytle.
American Indians, American Justice.

Austin: U of Texas P, 1983.

I. American Indians in Historical Perspective

American Indians are a unique branch of the human family possessing a wide variety of cultural expressions, origins, and traditions. The very diversity of Indian tribes has dampened efforts to treat Indians as a monolithic group although historians have often struggled to bring meaning and understanding to what the non-Indian community views as "the Indians." Almost all generalizations that have been constructed to explain the nature of Indian life have dissolved when the particularities of tribal existence have been noted. Complicating an analysis of Indian history is the fact that it has been written largely from the non-Indian point of view by advocates of that position. The perspective of the non-Indian, generally colored by the uncritical acceptance of cultural evolution as the definitive experience of our species, has rarely coincided with the view from the reservation. Some Indian advocates would argue against cultural evolution, feeling that it is not an accurate characterization of events that their traditions inform them have been most important in shaping their perception of the world.

It is impossible to understand American Indians in their contemporary setting without first gaining some knowledge of their history as it has been formed and shaped by the Indian experience with Western civilization. Many of the customs and traditions of the past persist in the minds and lives of Indians today and have been jealously preserved over several centuries of contact with non-Indians as the last remaining values that distinguish Indians from the people around them. This is particularly true in the case of Indian notions of law and justice. Indian judicial systems call upon a special blending of the past and the present in order to solve intra-tribal disputes. This blending has not been an easy task. Indians must continually choose to follow the dictates of their traditions or to accept the values of the outsider. History, therefore, cannot be divorced from an analysis of American Indian life. But it must be

tempered with a knowledge of the Indian perspective, which provides it with the substance for understanding the cultural conflict it represents.

The following historical examination will be divided into separate periods of federal Indian policy, each phase of which may be characterized by the impact of some kind of federal initiative in resolving the continuing problem of dealing with American Indians. With this tentative outline of policy development in hand, we will be better able to understand the development and operation of the contemporary Indian legal system. We will be able to see its historical roots and note the expedient compromises that both Indians and non-Indians made and must continue to make in order to ensure that the institutions that affect people today continue to grow and to serve people. Division of Indian history into six separate periods, then, is a convenient way of giving us sufficient data for reflection and orientation so that we can transcend mere information and come to our own conclusions about the future of Indian societies as exemplified in their contemporary institutions.

DISCOVERY, CONQUEST, AND TREATY-MAKING (1532—1828)

When the European settlers arrived in America, long before the establishment of the United States government, they were faced with a formidable problem. How were the newly arrived immigrants to deal with the native inhabitants of the land—the American Indians? The laws of discovery and conquest had been applied in different fashions throughout human history. Those who discovered and conquered other lands were entitled to them, their riches, and their spoils. The conquered people could be treated as slaves, banished to other lands, or assimilated into the society and institutions of the conquering people. Indeed, human history had been the story of conquest, assimilation or extinction, and yet more conquest. But the discovery of America was different. New continents had not been conquered before and the richness of the prize inspired the maritime powers of Europe to gain whatever advantages they might in the new hemisphere.

Felix Cohen traced the historical antecedents of Indian legal history back to 1532, when the popularly supported solution to the European dilemma on Indian relations was conceived. At that time the emperor of Spain, a devout Catholic monarch, in order to ensure

that his country followed the dictates of the religion it strongly professed, sought the advice of Francisco de Vitoria, a prominent theologian, as to the rights the Spanish should claim in the new world (Cohen, p. 46). Vitoria reached the conclusion that the natives were the true owners of the land. Since the Indians owned the land, the Spanish could not claim title through discovery, for title by discovery could only be justified where property is ownerless (Vitoria, p. 139). Furthermore, in the absence of a just war, which was defined with theological precision and could not be undertaken at a whim, only the voluntary consent of the aborigines could justify the taking of Indian land. "So long as the Indians respected the natural rights of the Spaniards, recognized by the law of nations, to travel in their lands and to sojourn, trade, and defend their rights therein, the Spaniards could not wage a just war against the Indians and therefore could not claim any rights by conquest" (as summarized by Cohen, pp. 46–47).

On this basis, the Europeans decided to adopt much, but certainly not all, of Vitoria's philosophy. The Indian tribes, at least in North America, were recognized as legitimate entities capable of dealing with the European nations by treaty. Since the first settlements were very small, mere outposts in a hostile land, and rarely contained more than a few hundred inhabitants, treaty-making was a feasible method of gaining a foothold on the continent without alarming the natives. Most early settlements in fact needed the protection of larger Indian tribes in order to survive threats made by smaller groups whose lands they invaded. Treating with the Indians, then, brought an air of civility and legitimacy to the white settlers' relations with the Indians and provoked no immediate retaliation by the tribes. Instead of the Indians being subjected to bondage or their lands merely seized through the use of force, which Spain eventually did, civility reigned in North America. Indian land and the rights to live in certain areas were purchased at formal treaty sessions.

The impact of Vitoria's view on European-Indian relations for the next two hundred years was very important because it encouraged respect for the tribes as societies of people. Treaty-making became the basis for defining both the legal and political relationships between the Indians and the European colonists. And when the young colonies finally became the United States, the treaty-making powers that earlier had been exercised by the European nations were assumed by the Americans with their independence. In 1778 the United States government entered into its first treaty with the Indians—the Delaware tribe. In the course of the next century over six

hundred treaties and agreements were made with the tribes and nations of North America. Not only were these treaties designed, as was the first treaty, to ensure peaceful relations with the Indians but, even more important, they were also a means of securing an orderly transfer of landownership from the tribes to the United States.

In 1823 in the case of *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), Chief Justice John Marshall both adopted and amended Vitoria's theory for the domestic law of the United States. He suggested that discovery did indeed give title to the land and that this title was recognized by the other European countries. It was a title that gave exclusive right to extinguish the Indians' title, which became, as a matter of course, something of an equitable title or occupancy. Thus Indian rights, according to Marshall, were not extinguished but merely "impaired" by European assertions. Since the Indians were unaware of the complexity of Marshall's revision and since there was no international forum in which such a claim could be challenged had the Indians known and objected, Marshall's definition in effect traded a vested property right for a recognized political right of quasi sovereignty for the tribes.

This judicial acknowledgment of Indians as recognized political bodies is also affirmed in the *Cherokee Nation Cases* (to be discussed at length in the next chapter). Marshall was again confronted with the necessity of making new law where none had previously existed. He characterized Indian nations as "domestic dependent nations" (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)). Though subject to the guardianship protection and superior political power of the federal government, Indian nations did possess some degree of sovereignty. Thus, while the tribes did not fall within the category of "foreign nations" that possessed full sovereignty, they did constitute legitimate legal and political entities that could manage their own affairs, govern themselves internally, and engage in legal and political relations with the federal government and its subdivisions. This notion was extended even further in the second of the *Cherokee Nation Cases*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Marshall, building on this foundation of domestic dependency, interposed a limited sovereignty enjoyed by the Indian nations to prevent the state of Georgia from extending its power over the Cherokee Nation's lands. Andrew Jackson's refusal to enforce Marshall's decision gave him mute testimony that, if the tribes had legal rights affirmed by the highest court in the land, their political status made it easy to void such rights.

Much of the legal history relating to the problems of Indian tribes was shaped by the events that occurred during this first period

of discovery, conquest, and treaty-making. Indian nations negotiated at least partially from a position of strength. As the white settlements moved west it became increasingly difficult to supervise, administer, and protect the Indian tribes that stood in their way, and frequent conflicts arose. The United States quickly learned in the Seminole wars of the 1830s that fighting Indians was a very expensive task, and many treaties were made as an alternative to a prolonged war, which the Indians were certain to lose but which would prove extremely costly and politically unsettling. The treaty-making era came to an end when Congress, through a rider to an appropriation bill in 1871, declared that no Indian nation would henceforth be recognized for the purposes of making treaties. This action was a bit premature since various commissions continued making treaties with the tribes until 1914, when the Ute Mountain Utes signed the last major agreement with the United States. But these treaties, because of the prohibition by Congress, had to be called "agreements" when being presented for ratification.

Although "treaty" seems to imply an equal bargaining position, the Indians were often at a clear disadvantage when negotiating such arrangements. The actual document was always written in English and was generally interpreted by people who had a stake in a successful outcome of the proceedings, so the Indians were not always told the truth during these sessions. Toward the end of the treaty-making period, when extensive debate on ratification became tedious, the Senate would often amend the treaties to change their meaning completely. Most often the term of years for annuities and the articles dealing with social services would be changed since the Senate had to negotiate the appropriation of funds with the House of Representatives whenever it agreed by treaty to provide benefits to the tribes. The amended form of the treaty would then be taken back to the tribe and a few chiefs would be found to "touch the pen," in effect ratifying the amended wording. More than one Indian war began because the wrong group of Indians agreed to altered treaty provisions.

Not all legal authorities on Indian matters agree with the popular notion that the Indians were cheated during the making of treaties. Felix Cohen has argued that, absent a few cases where the military took the land by duress, the price that the whites paid for the land was one that satisfied the Indians (Cohen, pp. 42-43). Cohen reasons that most of the treaties were fairly negotiated. In return for their land, Indians received such goods as knives, axes, cloth, and instruments of a new technology that provided them with capabilities they would not otherwise have had. More important, ac-

According to Cohen, Indians received the recognition that they had to be treated on a seller-buyer basis. The foremost authority on Indian affairs did admit that this history was not without its "dark pages," but he concluded that, in these real estate transactions, the whites had been "human, not angelic," and this was as much as could be expected. Subsequent claims against the United States filed by the tribes in the Indian Claims Commission for unconscionable dealings based on treaties gave the tribes more than \$600 million, which indicates that Cohen was reflecting the attitude of a government attorney when he made such statements.

REMOVAL AND RELOCATION (1828-1887)

During the early years of American history the white community felt that it could live peacefully with the Indians. People believed that over a period of time the Indians would be assimilated into the white culture and become Christianized in the European tradition. Indeed, the colony of Massachusetts divided its Indian relations into three separate categories: the praying Indians, who had already been converted and were living in towns specifically set aside for them; the Indians on its western frontier, who were virtually helpless and caused troubles but were not yet Christianized; and the stronger groups, such as the Iroquois, who were still a distinct military threat to the colony's existence.

The expectations that the colonists had were naïve and proved to be in error. An atmosphere of hostility developed between the two communities shortly after settlements were established because the cultural gap between the two groups was too wide to inspire confidence and trust. From Jamestown to Plymouth, within a generation after the colonists had landed, brutal wars had decimated the indigenous tribes and a pattern of frontier violence had been established. During the administration of Thomas Jefferson, a preview of future Indian policy was revealed when Jefferson proposed to move the Cherokee Indians out of the land obtained under the Louisiana Purchase. He, like so many others of his generation, rejected the idea that Indians and whites could live peacefully together in the same neighborhood and he saw removal as the most humane way to solve this problem. But it was Andrew Jackson who eventually seized on ✓ Jefferson's idea and turned it into an official government program.

Jackson won the election of 1828 and was pledged to support westward expansion. In his first message to Congress, on December 8, 1829, Jackson urged voluntary removal by the Indians as a means

of protecting both the tribes and the states. When no voluntary migrations began, Jackson's supporters in Congress, mostly southern and western congressmen, introduced a bill to compel the Indians to move. The Indian Removal Act was passed on May 28, 1830, after vigorous debate in which the eastern senators and representatives deplored the policy as a violation of American honor. It was, nevertheless, immediately put into force when the southern tribes were notified that they must meet U.S. treaty commissioners to begin discussing their removal across the Mississippi.

The 1830s witnessed the massive migration of Indian tribes from the Ohio and Mississippi valleys to the western plains. Nearly sixteen thousand Cherokees walked "silently and resigned" from Georgia to their new homes in what became eastern Oklahoma. This journey has been called the "Trail of Tears" because the Indians were leaving their ancestral lands under the most harsh conditions imaginable. But the Cherokees were not the only Indians who were pushed to western reservations. Pursuant to the treaty of Dancing Rabbit Creek, the Choctaws surrendered all their land east of the Mississippi, more than ten million acres, and moved west. Those Indians who remained behind in Mississippi lost their Choctaw citizenship and fared poorly as state citizens in spite of a federal guarantee that they could reserve a homestead of 640 acres and assimilate into southern society.

The relocation of eastern Indians to reservations in the west did not solve the problem of Indian-white relations; it merely postponed it. From an Indian perspective, life on the reservation was still dominated by white intrusions. The sustenance on many reservations was almost wholly dependent upon some kind of annuity assistance from the federal government. Christian missionaries and teachers flooded the reservations in an attempt to "civilize" and assimilate the Indians. The army was conspicuous in its attempts to provide security, but its efforts were almost always directed at keeping the Indians at peace rather than protecting them.

Removal and relocation as policy were doomed from the beginning. Expansionist forces beyond the government's control inevitably destroyed the effort to keep the Indian and white communities apart. The increasing sophistication of American technology enabled settlement where none was thought possible so that, as the Indians were pushed farther west, they were replaced by a civilization that could not easily be dislodged, a civilization that was intimately linked to eastern industrial society. The coming of the railroads meant the destruction of the great buffalo herds, the discovery of gold and its efficient exploitation meant the coming of industrial

corporations to the west, and the general movement of non-Indians to support these activities eventually enclosed the open spaces with boundary lines, roads, and settlements. If a policy of removal and isolation was impossible to bring about, what direction could the government move in order to deal with Indian problems? In the 1880s a radical reversal of thinking occurred: if you can no longer push Indians westward to avoid contact with civilization, and it is inhumane to conduct wars of extermination against them, the only alternative is to assimilate them.

ALLOTMENT AND ASSIMILATION (1887-1928)

Allotments of land were not a new idea in the history of Indian policy. The Pilgrim Fathers in Massachusetts had insisted that the praying Indians each take up a plot of ground and become farmers like their white neighbors. Indeed, farming was somewhat akin to the Christian life with its long hours of hard work and reliance on the rural community that watched over one's moral behavior. In the removal treaties tribal members had been given a choice of moving west or accepting land scripts that entitled them to take allotments within the areas they had ceded and to become state citizens. The 1854 treaty with the Omaha tribe had a provision (article 6) that at some future date the president could survey the reservation and distribute allotments to tribal members. But there was no firm federal policy on dividing up the tribal land estate. Some smaller tribes promised to accept the Omaha formula and the larger tribes who signed the famous 1867-1868 treaties on the plains had a tribal "Land Book" to register tracts of land that individual members might want. Apart from these provisions, which were administered in a haphazard manner, allotments were not a major feature of federal policy because no firm ideology undergirded them.

In 1881 the first indication was given that allotments might become a national policy when President Chester A. Arthur, in delivering his first annual message to Congress, proposed a plan by which Indians would be brought into the mainstream of American life. The solution to the nagging Indian problem, he felt, was simply "to introduce among the Indians the customs and pursuits of civilized life and gradually to absorb them into the mass of our citizens." Considering the times, it was a bold stroke that had a solid humanitarian base. Reconstruction was finished, the Hayes-Tilden deal had been struck and the white southerners were back in control of the South, and the Chinese Exclusion Act was on the horizon. To have sug-

gested that a dark-skinned minority, one that had resisted American overtures for centuries of hostility, might be peacefully assimilated with full citizen rights into the society of that day was a daring if somewhat idealistic move.

Congress responded to President Arthur's Indian policy by proposing the Coke Act of 1883, but it failed to achieve a majority in the Senate and inspired some vigorous debate since it appeared to favor railroads and land speculators rather than the Indians. But allotment was an idea whose time had come. Everyone could agree that the Indians owned too much land and that holding land in tracts of millions of acres unnecessarily impeded the orderly settlement of the western states.

Senator Henry Dawes of Massachusetts assumed leadership of the forces that sought to make allotment and assimilation the national policy and, with the help of such private interest groups as the churches and the newly formed Indian Rights Association, he was able to get a new law passed in 1887. The General Allotment Act, or Dawes Act as it was popularly called (25 U.S.C.A. § 331), authorized the president, whenever in his opinion it was advantageous for the Indians, to allot any reservation according to the following formula:

1. To each head of a family, one-quarter section.
2. To each single person over eighteen years of age, one-eighth section.
3. To each orphan child under eighteen years of age, one-eighth section.
4. To each other single person under eighteen years of age living, or who may be born prior to the date of the order to the president directing allotment of the lands, one-sixteenth section.

It goes without saying that the president generally found it was to the advantage of the Indians to allot their lands. A period of twenty-five years was established during which the Indian owner was expected to learn proper business methods; at the end of this time the land, free of restrictions against sale, was to be delivered to the allottee. With a free and clear title the Indian became a citizen and came under the jurisdiction of the state in which he or she resided. Through this simple formula and rather naive expectation federal officials believed they could solve the problems of the Indians in one generation. Private property, they believed, had mystical magical qualities about it that led people directly to a "civilized" state.

Underlying the allotment policy was the assumption that Indians wanted to become farmers and had the capacity to do so. This policy assumed that the routine work of agriculture would provide

the necessary training in thrifty habits that all "civilized" peoples possessed. In 1888, in anticipation of the change to farming and as part of the treaty annuities, \$30,000 was appropriated for seeds and equipment for some 3,568 allotments that had already been given under the treaties. This investment was less than \$10 per allotment (Otis, p. 428), which indicated that if the Congress believed in farming it also believed that it could be undertaken with virtually no capital. Not only did the allotment act breach numerous treaty provisions but also Indian agents, under orders from Washington, refused to issue rations and other annuities to Indians unwilling to work their allotments, making the policy exceptionally onerous to the plains tribes, who viewed farming with distaste.

As a consequence of the allotment policy, Indian landholdings were reduced from 138 million acres in 1887 to 48 million in 1934 (Collier, p. 16). Of this 48 million acres, nearly 20 million were desert or semiarid and virtually useless for any kind of annual farming ventures. Not all of this land loss occurred immediately upon the division of the land. In 1891 an amendment was made to the General Allotment Act (26 Stat. 794) that allowed the secretary of the interior to lease the lands of any allottee who, in the secretary's opinion, "by reason of age or other disability" could not "personally and with benefit to himself occupy or improve his allotment or any part thereof." In effect this amendment gave the secretary of the interior almost dictatorial powers over the use of allotments since, if the local agent disagreed with the use to which the lands were being put, he could intervene and lease the land to whomsoever he pleased.

As with all general legislation, difficulties in interpretation arose and each congress following the enactment of the legislation saw various proposals to modify the General Allotment Act so that by the first decade of this century it no longer resembled a national policy but an ad hoc arrangement because of the numerous exceptions and exemptions that had been attached to it. The situation was further complicated because Congress generally confused allotment and citizenship. The Burke Act of May 8, 1906 (34 Stat. 182), gave sole authority to the secretary of the interior to issue a patent in fee (a certificate like a deed vesting legal ownership) well before the expiration of the trust period if, in the secretary's opinion, the Indian allottee was competent and capable of managing his or her own affairs. This act produced rapid alienation of lands when the allottees discovered they could immediately sell their lands. Citizenship thereupon became a function of the patent-in-fee status of land and not an indication that Indians were capable of performing their duties as citizens.

While the allotment policy was designed to bring about rapid assimilation, other laws passed during this period also contributed to this goal. In 1885 Congress passed the Major Crimes Act (18 U.S.C.A. § 1153), which permitted the federal government to assume criminal jurisdiction over major felonies committed in Indian Country. Prior to the Major Crimes Act these offenses fell under the exclusive jurisdiction of the Indian tribes. The act was passed by Congress after the Supreme Court had held that an Indian named Crow Dog, who had killed Spotted Tail, a noted Brûlé Sioux chief, could not be tried by the federal government because the crime had been preserved to the Sioux tribe by treaty (*Ex Parte Crow Dog*, 109 U.S. 556 (1883)). When the Court overturned Crow Dog's conviction, releasing to tribal jurisdiction a "murderer" whom many people felt should have been hanged, the incensed legislators responded by stripping tribes of their right to handle crimes according to traditional customs. Criminal jurisdiction, Congress concluded, was a function too important to leave to the Indians and their "primitive" sense of justice.

Without tediously reviewing all the amendments and statutes that were passed during this period to bring about assimilation, two are important enough to mention specifically. The Indian Citizenship Act was passed in 1924 (8 U.S.C.A. § 1401 (a) (2)). This piece of legislation followed an earlier act of 1919 (41 Stat. 350), which gave citizenship to Indians who had served in the armed forces during the First World War and superseded all the citizenship provisions in treaties that had granted the status in what became a crazy-quilt pattern of qualifications. The Act of July 31, 1882 (22 Stat. 181), authorized the secretary of war to set aside vacant army posts and barracks for use as normal and industrial training schools for "youth from the nomadic tribes having educational treaty claims upon the United States." There had been, of course, other acts for the education of Indian children but this statute can be said to demonstrate a major commitment by the United States to Indian education by taking established federal installations and converting them to schools.

Indian education changed from a sporadic activity restricted to those tribes who had educational provisions in their treaties to a national program that policy-makers hoped would hasten the day of complete Indian independence from the government. The most famous army post to be used as an Indian school was, of course, the army barracks at Carlisle, Pennsylvania, but other posts were also used and by the end of the nineteenth century the Bureau of Indian Affairs had a large number of off-reservation boarding schools and many reservation day schools operating. Church societies also

worked in this field at the request of the government and for several years tribal appropriations were used by these groups to carry on their activities. By the mid 1920s, however, boarding schools were being closed and day schools were being consolidated. It was the first indication at the reservation level that the government knew its goal of assimilation had been a miscalculation of major proportions.

REORGANIZATION AND SELF-GOVERNMENT (1928-1945)

The adverse effect that the allotment policy had upon traditional Indian life was readily apparent by the first decade of this century but Congress was slow to admit its failure. As criticism of federal Indian policies mounted during the 1920s efforts were started to assess the conditions existing on Indian reservations. The Institute of Government Research in Washington, D.C., was authorized by Secretary of the Interior Hubert Work in June 1926 to conduct a survey of the social and economic status of Indians. The study, conducted by Lewis Meriam and associates, was published in 1928 under the title *The Problem of Indian Administration* and shocked the administration since it called for radical revisions in almost every phase of Indian affairs, including the appropriation of considerably more funds. The Meriam Report, as it came to be popularly called, was characterized by the American Indian Defense Association, the chief critic of the administration's Indian policy, as the "most important single document in Indian Affairs since Helen Hunt Jackson's *A Century of Dishonor*" (*American Indian Life*, p. 6).

The Meriam Report was an exhaustive examination of Indian life as it then existed, covering such topics as health, education, general economic conditions, family and community life, migrated Indians, legal aspects of the Indian problem, and missionary activities among the Indians. The report confronted the past with a healthy honesty unusual in government-sponsored reports: "The work of the government directed toward the education and advancement of the Indian himself, as distinguished from the control and conservation of his property, is largely ineffective. The chief deficiency in this work lies in the fact that the government has not appropriated enough funds to permit the Indian Service to employ an adequate personnel properly qualified for the task before it" (Meriam, p. 8). Of the allotment policy, the report bluntly noted: "When the government adopted the policy of individual ownership of the land on the reservations, the expectation was that the Indians would become

farmers. Part of this plan was to instruct and aid them in agriculture, but this vital part was not pressed with vigor and intelligence. It almost seems as if the government assumed that some magic in individual ownership of property would in itself prove an educational civilizing factor, but unfortunately this policy has for the most part operated in the opposite direction" (p. 7). The report outlined procedures for improving the Indian Service and made specific recommendations for the expenditure of funds for programs that it felt were badly needed. Although some of the recommendations did not become law until decades later, almost all of the Meriam Report's proposals were eventually adopted. ✓

The congressional response to the Meriam Report was not heartening. Outraged senators, certain that the report was slanted in favor of the bureaucratic apparatus of the Department of the Interior, authorized their own investigation of Indian affairs in Senate Resolution 79 (70th Congr. 1st sess. 1929). Crisply noting that "it is claimed that the control by the Bureau of Indian Affairs of the persons and property of Indians is preventing them from accommodating themselves to the conditions and requirements of modern life and from exercising that liberty with respect to their own affairs without which they can not develop into self-reliant, free, and independent citizens," and admitting that "numerous complaints have been made by responsible persons and organizations charging improper and improvident administration of Indian property by the Bureau of Indian Affairs" (*Survey of Conditions of the Indians in the United States*, p. 1), the Senate Indian Committee took upon itself the responsibility of verifying the conclusions of the Meriam Report. Devoting a major portion of their energies to extensive field hearings on specific subjects, the committee members traveled to many reservations and held hearings on many subjects in Washington. The Senate study lasted eight years and reached basically the same conclusions; the conditions of the Indians were believed only when the senators saw for themselves in the field on numerous trips the state of poverty to which Indians had been reduced by the existing policy.

Radical reform came with the election of Franklin D. Roosevelt and the inception of the New Deal in the midst of the Great Depression. John Collier, director of the American Indian Defense Association and the Interior Department's most persistent and energetic critic, was named Indian commissioner, and a superb group of legal minds, including Felix S. Cohen and Nathan Margold, was authorized to begin working on major legislation to solve Indian problems. The result was a four-titled bill presented to Congress early in

1934 that incorporated most of the recommendations of the Meriam Report and featured some of Collier's own ideas on cultural renewal and reorganization.

In order to gather Indian support for his ideas, John Collier organized a series of Indian congresses across the country to which all the major tribal delegations were invited. Although the Indians objected to some of the provisions of the legislation, on the whole there was sufficient Indian support to enable the administration to get an amended version of the legislation passed in June of 1934. This act, the Indian Reorganization Act (IRA), popularly known as the Wheeler-Howard Act after its sponsors in the Senate and House of Representatives (25 U.S.C.A. § 461), formally ended the government's policy of allotment. Section 1 stipulated that "no land of any Indian reservation . . . shall be allotted in severalty to any Indian." The first great experiment in social engineering was now officially disclaimed although the damage it had created remained to be repaired.

The act also prevented the alienation (transfer) of Indian land or shares in tribal corporations other than to the tribe itself. The secretary of the interior, however, was given some discretionary powers to authorize voluntary exchanges of land in order to bring about better consolidation of land resources for economic purposes. One of the most important provisions of the act established a revolving credit fund from which the secretary could make loans to tribally chartered corporations for purposes of economic development.

From the standpoint of government organization, the IRA enabled tribes to organize for their common welfare and to adopt federally approved constitutions and bylaws. It permitted the employment of legal counsel of the tribe's own choice and authorized the tribal councils established under the act to negotiate with federal, state, and local governments. The major thrust of the act was to minimize the enormous discretion and power exercised by the Department of the Interior and the Office of Indian Affairs. The focus of power was to be decentralized and moved from the Indian bureaucracy in Washington to the reservation governments. Formal tribal government was expected to become the rule rather than the exception.

The opportunities made available to the tribes under this act were immense. While the act did not provide them with powers they had not previously possessed, it did recognize these powers as inherent in their status and resurrected them in a form in which they could be used at the discretion of the tribe. This recognition, coupled with the promise of expanded social programs and federal funding of projects, was an exciting prospect. Before the IRA could be

made applicable to a tribe, however, the enrolled members had to vote within a two-year period to accept it. Within the time allocated, 358 elections were held in which 181 tribes (129,750 Indians) voted to accept the IRA provisions. Seventy-seven tribes rejected the act (86,365 Indians, including the large Navajo tribe of approximately 45,000 people). Some tribes voted to accept the act and then refused to organize under it, which made their status somewhat nebulous ("Tribal Self-Government and the Reorganization Act of 1934," p. 972).

While a number of opportunities for Indian revitalization were initiated under the IRA, its promise was never fully realized. The era of allotment had taken a heavy toll on the tribes. Many of the old customs and traditions that could have been restored under the IRA climate of cultural concern had vanished during the interim period since the tribes had gone to the reservations. The experience of self-government according to Indian traditions had eroded and, while the new constitutions were akin to the traditions of some tribes, they were completely foreign to others. The new constitutions called for election of council members and were based upon the old "boss farmer" districts, which had been drawn when the allotment policy dictated that the Indians would be taught to farm. Familiar cultural groupings and methods of choosing leadership gave way to the more abstract principles of American democracy, which viewed people as interchangeable and communities as geographical marks on a map.

Although there were some variations, in general the new tribal constitutions and bylaws were standardized and largely followed the Anglo-American system of organizing people. Traditional Indians of almost every tribe strongly objected to this method of organizing and criticized the IRA as simply another means of imposing white institutions on the tribes. In some of the constitutions the traditional Indians were able to protect themselves by insisting that the tribal government derive from the more ancient form of government and be subjected in its operation to the powers that the people had allocated to it. Other tribes rejected the idea of a formal, and small, tribal council governing them and demanded that the tribal council consist of the whole tribe meeting in concert. Experiences proved this approach to have its merits and its shortcomings.

TERMINATION (1945-1961)

The Second World War brought an end to the experiments in Indian regeneration. Domestic budgets were severely reduced in order to support the war effort, many agencies were closed or operated on a

minimal basis, and many people left the reservations to work in war industries or to serve in the armed forces. The Indian Bureau itself was moved to Chicago during the war years and acted more as a caretaker over programs until the war was brought to a successful conclusion. In 1945 John Collier, under continuing attack by his critics, who charged him with attempting to institute socialism on the reservations, resigned believing that his personality was now attracting as much opposition as his programs. He had served twelve years, more than any other person in history, and his accomplishments were numerous. He had radically shifted federal policy to an admission that Indian culture and ideas were as integral to the successful operation of programs as any policies promulgated by Congress.

Collier
res
Govt
1945
res

In 1947, with a conservative Republican Congress now in power, the Senate Civil Service Committee, desiring to find ways to reduce federal expenditures and dismantle the New Deal programs in the process, opened hearings on ways that government payrolls could be cut and expenditures curtailed. Acting Indian Commissioner William Zimmerman was asked to testify on the Bureau of Indian Affairs programs. Zimmerman was requested to bring an evaluation of tribal conditions and to list those tribes that could immediately succeed without further federal help, those that could be ready to live on their own within a reasonable time, and those that would need continued federal assistance. Zimmerman produced the lists but cautioned that significant and substantial changes and protections must be instituted before any tribe could successfully stand on its own feet.

In 1948 the Hoover Commission, authorized to review all government programs and recommend cost savings by reorganization of the federal government, made its report on Indian programs. Although the report was accompanied by a strong dissent declaring that the commission was not authorized to make policy recommendations, the majority signing the report recommended that the responsibility for Indians be transferred to the states as soon as it was practicable. By coincidence the National Council of Churches also issued a report recommending that Indians be given full citizenship by eliminating much of the discriminating legislation that bound them to the federal government. This report was deeply tinged with the same philosophical views that had been used to justify the allotment act: economic and religious Darwinism—the survival of the fittest, although phrased in traditional Protestant ethical clothing.

Clearly the tenor of the times was beginning to run against further Indian renaissance. A strange coalition of forces now called for the unilateral termination of federal assistance to Indians: conserva-

tives wanted the federal budgets cut and deeply believed that Indians, once freed from government restrictions, would experience a much more profound reawakening; liberals, now ashamed to realize that some of America's laws were reminiscent of the racial restrictions imposed on minorities by the Axis powers whom they had recently defeated, sought immediate release of America's racial minorities from the onerous burden of discriminatory legislation. In 1948 the Democratic liberals had forced a plank into the national platform advocating a strong civil rights position and, if the Democratic liberals could not immediately assist the blacks in their struggle, they could at least assist the Indians, over whom they had a more direct control.

cut
bud
lib
emp

In 1952, while the Democrats were still in control of the White House, a memo was sent out by Indian Commissioner Dillon Myer to all Bureau of Indian Affairs employees alerting them that the government was preparing to withdraw from its Indian programs. "At this point," Myer wrote, "I want to emphasize that withdrawal program formulation and effectuation is to be a cooperative effort of Indian and community groups affected, side by side, with Bureau personnel. We must lend every encouragement to Indian initiative and leadership. I realize that it will not be possible always to obtain Indian cooperation." The die was cast: "We must proceed," Myer declared, "even though Indian cooperation may be lacking in certain cases" (House Report 2503, p. 3). In December 1952 the House of Representatives issued a massive 1,800-page report on Indian conditions, House Report 2503, compiled as a modern version of the famous English "Domesday Book." Although not touching all aspects of the complicated task of withdrawing federal services to Indians, the report indicated many problem areas that appeared to be capable of resolution by the elimination of federal rules and regulations. The report did somewhat resemble the Domesday Book in that it was the most complete listing of Indian assets, treaties, statutes, and services ever assembled and gave as comprehensive a picture of Indian matters as any comparable federal effort.

The Republicans captured the White House and Congress in 1952 and, like the Democrats two decades before, immediately set about making drastic reforms in federal programs. In June 1953, Representative William Henry Harrison of Wyoming introduced House Concurrent Resolution 108 (67 Stat. B132), which articulated the new policy, declaring that it was "the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York and Texas, should be freed from Federal supervision and

control and all disabilities and limitations specifically applicable to Indians." This resolution, fraught with controversial implications, hardly caused a ripple in Congress. There was no opposition and virtually no debate. The resolution passed both houses of Congress and set the stage for the policy of terminating Indians from federal supervision.

House Concurrent Resolution 108 only evidenced a sense of Congress and a rather apathetic sense at that. The resolution did not initiate any specific action. To implement the "sense of Congress," specific proposals had to be taken up by the Congress. Then, as the second session of the Congress began in January 1954, a fire storm of activity arose. The Senate and House Indian subcommittees of the Interior Committees began meeting in joint sessions, an unprecedented change in procedures. Several bills were introduced to terminate the federal relations of a number of tribes, some of whom had been on Zimmerman's original list of tribes deemed capable of conducting their own business, others so obscure that few knew where they were located or when the federal government had assumed responsibility for them.

The leading congressional proponent of termination was conservative Republican Senator Arthur V. Watkins of Utah, who was firmly convinced that if the Indians were freed from federal restrictions they would soon prosper by learning in the school of life those lessons that a cynical federal bureaucracy had not been able to instill in them. Using the joint sessions to eliminate any differences in language between the Senate and House versions of the terminal legislative proposals, Watkins quickly pushed a number of bills into law. Two major tribes, the Klamath of Oregon and the Menominee of Wisconsin, and a number of minor tribal groups fell under the onslaught. Commentators differ on the number of tribes that were actually terminated during this period because some advocates insist on counting the number of antecedent tribes that were represented on some of the West Coast reservations. Thus the Siletz and Grand Ronde reservations in Oregon were terminated; these tribes represented a large number of Indians who derived their ancestry from a bewildering number of small coastal tribes who had all been placed on the reservations during the 1850s. Some small Paiute bands in southern Utah were also terminated and a number of California rancherias, created during the Depression as tracts of land for homeless Indians, were also phased out. On the whole, however, the large tribes with treaty commitments and political sophistication were not touched although they were nearly frightened into submission.

In August of 1953, Congress passed Public Law 280 (67 Stat.

588), another piece of controversial legislation. This statute permitted state governments to assume both civil and criminal jurisdiction over Indian reservations in the states of California, Minnesota, Nebraska, Oregon, Wisconsin, and the then-territory of Alaska. While the Indian tribes and their governments were not terminated, their authority was significantly diminished by stripping the tribal governments of their power to handle civil and criminal problems in Indian Country. Most important, however, hunting and fishing rights, a major concern of the Indians since the treaty days, were preserved to tribal and federal protections and states were not given the right to tax Indian lands or properties even though they were expected to provide funds to support law and order services on reservations over which they had extended their jurisdiction. Because the law was so hastily and vaguely written, it spawned a considerable amount of controversy and produced a record amount of litigation between the state governments and the tribes in a number of states.

Two other developments of note made the termination era one of puzzling contradictions. Indian reservations were made a part of the large federal educational programs created by Congress in 1950. In P.L. 815 (64 Stat. 967), Indians were included in the school construction programs and in P.L. 874 (64 Stat. 1100), Indians became eligible for the impact aid programs. These national programs grew out of the wartime necessity to provide some financial cushion for those school districts that had been severely affected by the increased federal activities the war brought. Funding under the two laws rapidly expanded as school districts continually sought ways of bringing themselves under their comfortable financial umbrella. The same Congress that passed H.C.R. 108 also made Indians eligible for these programs. The result was that by 1958 the federal government was more substantially involved in Indian education than ever. This activity was strange if it wanted to reduce and finally eliminate the federal budget for Indians.

The Act of August 5, 1954 (68 Stat. 674), transferred the hospital and health facilities, property, personnel, and budget funds of the Indian Health Service of the Bureau of Indian Affairs to the U.S. Public Health Service. The transfer was conceived as a first step in the eventual placement of Indian health problems under programs open to the other citizens of the country, but the uniqueness of the Indian situation meant that in solving the immediate problems the Public Health Service made its Indian program a permanent part of its national responsibilities. Alarming statistics in the incidence of trachoma, tuberculosis, and diabetes, the relatively isolated regions in which Indians lived, and the need for cultural understanding all

1953
hastily
fishery
by
↑ the

made the Indian programs substantially different from other programs administered by the Public Health Service.

The termination era was brought to a close as abruptly as it had begun. In 1958, after half a decade of controversy and Indian protests, Secretary of the Interior Fred Seaton announced that herein after no tribe would be terminated without its consent. This admission of failure, made casually on a Gallup, New Mexico, radio talk-show interview, proved embarrassing to the administration but was a welcome respite to the frightened tribes. H.C.R. 108 continued to be cited by proponents of the policy and during the early 1960s Senate hearings were perfunctory when plans to terminate the Colvilles of Washington state and the Senecas of New York were made. Presidents Kennedy and Johnson never activated the policy but were politically embarrassed when Democratic Senator Henry M. Jackson of Washington, chairman of the Senate Interior Committee, attempted to revitalize it. It was not until 1970 that the philosophy of termination was formally repudiated. President Richard Nixon, well aware that the Republicans had been instrumental in framing this tragic interlude between progressive periods of Indian history, announced in a message to Congress delivered on July 8, 1970: "Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to pass a new Concurrent Resolution which would expressly renounce, repudiate and repeal the termination policy as expressed in House Concurrent Resolution 108 of the 83rd Congress" (H.R. Doc. No. 363).

The impact of termination upon those tribes affected was unmistakable and significant. If the policy did not completely destroy Indian culture, it encroached substantially upon Indian attempts to remain Indian. Charles F. Wilkinson and Eric R. Biggs have catalogued some of the basic consequences of those terminations (Wilkinson and Biggs, pp. 92-93):

1. There were fundamental changes in land ownership patterns.
2. The trust relationship was ended.
3. State legislative jurisdiction was imposed.
4. State judicial authority was imposed.
5. Exemption from state taxing power was ended.
6. Special federal programs to tribes were discontinued.
7. Special federal programs to individual Indians were discontinued.
8. Tribal sovereignty was effectively ended.

One might also note that both the tribal corporations established as a result of termination and the removal of allotments from their trust status resulted in the imposition of federal taxes on the income of Indians, which proved to be a substantial burden in the task of assimilating Indians into the larger society with any degree of economic confidence and security.

In return for these very significant losses in services and protections, the benefit to individual Indians was small. In those instances where the federal government purchased large tracts of tribal lands, the tribes divided their funds held in the U.S. Treasury on a per capita basis while others received nothing in return. Among the Klamaths, for instance, those who chose cash received \$43,000 each in 1961 while the remaining members of the tribe, who kept their shares in a corporate trust until 1975, received approximately \$150,000 each. But the price was high. The Klamaths lost all federal recognition and assistance and were considered to be outcasts in the national Indian community. A particularly insightful opinion of the United States Supreme Court may have best summed up many Indian feelings: "It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life. The record does not leave the impression that the lands are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home—their ancestral home. There they, their children and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money and the costs of a new enterprise" (*Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960)).

SELF-DETERMINATION (1961-PRESENT)

Although termination was not formally repudiated by a federal official until July 1970 when President Nixon rejected it specifically in his message to Congress, a persistent strain of opposition to termination remained strong throughout the period when it was the official policy of Congress. As we have already seen, the educational benefits to Indians were increased throughout the 1950s and Indian health services were improved during the time when all other efforts seemed to indicate a withdrawal of federal services for Indians. In 1961 the first shift in emphasis occurred when, as Congress was debating the passage of the Area Redevelopment Administration Act (75 Stat. 47), consideration was given to making Indian tribes eligible

project sponsors under certain sections of the bill. Section 6 allowed Indian tribes to purchase or develop lands and facilities for industrial or commercial use; section 7, for public facilities. This inclusion signaled, at least in the minds of the executive branch, that Indians would be given a chance to develop their resources rather than sever their relations with the federal government.

With the passage of more socially oriented legislation, Indians became an integral part of the expanding human concern of the New Frontier and Great Society programs. Indians were given special consideration when the Economic Opportunity Act passed and was implemented in 1964, and finally, in 1968, President Johnson, in an address to Congress, proposed "a new goal for our Indian programs; a goal that ends the old debate about termination and stresses self-determination."

Indians participated in almost all of the social welfare programs of the sixties but as one segment of that massive but undefined portion of the American population known as "the poor." The first major piece of legislation dealing specifically with Indian matters was the 1968 Indian Civil Rights Act, which was one title in an Omnibus Housing Act passed that year in response to the King assassination, which marred that election year. Part of this title prohibited states from assuming jurisdiction over Indian Country under Public Law 280 without first securing tribal consent (25 U.S.C.A. § 1326). The Nixon speech of July 8, 1970, cited above, set the tone for a new articulation of federal Indian policy that had been a *fait accompli* since the early sixties and directed attention to specific legislative proposals that could be of assistance to the Indians.

Three pieces of legislation among the many statutes to be written into law during the 1970s stand out as characteristic of the federal change of direction. The Indian Education Act of 1972 (86 Stat. 334) provided a theoretical and programmatic base for moving more directly into Indian education at the local level. It was, unfortunately, based upon the hearings of nearly half a decade before, conducted by Senator Edward Kennedy's Subcommittee on Indian Education, so that several of the sections of the legislation assumed conditions that no longer existed and attempted to resolve them. The act provided for special educational training programs for teachers of Indian children, for fellowships for Indian students in certain narrowly defined fields, and for basic research in Indian education. Almost all these activities were already being conducted by Indians and educational institutions under programs funded by the Office of Economic Opportunity and its successor agencies. One might argue that the 1972 act formalized procedures and programs that had pre-

viously existed at the discretion of funding agencies. However, this informality had more strengths than weaknesses. With the formalizing of educational opportunities came increased bureaucratic involvement, serving at times to debilitate rather than facilitate progress in Indian education.

The Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C.A. § 450a-450n) directed the secretary of the interior, upon the request of any Indian tribe, to contract with the tribe to "plan, conduct, and administer programs" provided for under the IRA or any other program the secretary was authorized to administer. The act permitted Indian tribes, not the Bureau of Indian Affairs or any other branch of the federal government, to decide if they wished to participate in a given program. Veteran observers of Indian affairs noted that this statute was a thinly disguised version of Collier's original program for the tribes in 1934. It is astounding that in over forty-one years the goals of the IRA had not been realized or even well articulated for the tribes. More astonishing, and perhaps more depressing, hardly anyone realized that the act was merely a rehash of a policy nearly half a century old.

The final piece of legislation passed in the 1970s worthy of mention was the establishment of the American Indian Policy Review Commission, which was authorized by Senate Joint Resolution 4 (P.L. 93-580). This resolution established a two-year commission (popularly called the Abourezk Commission after its sponsor) charged with the responsibility of reviewing existing federal policy and making recommendations for positive change. Unfortunately, the commission was mired in the infighting of national Indian politics from the very beginning and never recovered from these fatal wounds it received while yet in its conception. The commission was composed of six members of Congress and five Indians chosen more or less according to the internal politics of the congressional representatives. The commission itself did not attend any field hearings as did the Senate investigation of 1928-1936 but instead delegated this responsibility to eleven "Task Forces," which were appointed to perform this function.

The Task Forces staggered from one end of the country to the other in search of data and some of them compiled a considerable amount of material in their search for an accurate picture of the conditions facing Indians. Staff work was haphazard and sporadic at best and toward the end of the commission's life, when the critical final report had to be drafted, employees of the Bureau of Indian Affairs were pressed into service to write up the findings that were submitted to Congress. Almost all the recommendations made by Indians

at the field hearings were ignored and a very fragmentary and highly political agenda was substituted in their stead. The final report contained some 206 different recommendations, which resembled a bureaucratic shopping list rather than a high-level investigation. No philosophical overview or ideology emerged in spite of a continuous recital of the misdeeds of the federal government and the assertion of the ultimate sovereignty of Indian tribes.

The extravagance of the Abourezk Commission seemed to exhaust the good will of Congress in extending a helping hand to Indians. Little of substance resulted from the commission's work even though the Senate Select Committee on Indian Affairs, established as a result of the commission's recommendations the year following the submission of the report, was filled with former commission members who assured the Indian tribes that their presence on the new committee virtually guaranteed that the commission's recommendations were going to be written into law. With the increasing conservative mood in the Congress and the election of Ronald Reagan, the halcyon days of self-determination ended. Major reductions in appropriations were instituted and experienced observers of Indian affairs likened the times to the retrenchment following the Second World War.

Yet it was clear also that significant changes had been wrought in Indian affairs since the Indian Reorganization Act was instituted. In spite of the brief fling with termination of federal supervision, tribal governments emerged in the closing decades of the twentieth century in a much better position and with higher status than they had entered it. Local institutions that served Indians were in a much stronger position even though they now resembled the local units of government that served other Americans and possessed little that was distinctively Indian. Indians themselves had assimilated to a significant degree from their former condition and thus the contemporary institutions were better suited to their needs than had they been able to return to wholly traditional ways. Unfortunately, the Reagan administration budget cuts short-circuited much of the progress Indians had made during the postwar period. Thus, one cannot determine if Indians would have made a successful transition from the isolated cultural and social condition in which they had lived for most of the century. Nevertheless, there were a sufficient number of sophisticated contemporary cultural expressions to keep alive the idea of independence from external pressures and interference that had proven a stumbling block in other periods of Indian history.

2. Federal Responsibility and Power over Indian Affairs

The lives of American Indians are interwoven with the federal government. Federal ownership of tribal and individual lands, the expansive array of governmental services, the control and investment of tribal funds, the assumption of criminal jurisdiction—lives of few tribal members are untouched by the Washington bureaucracy of the Interior Department. The contemporary surge toward self-government and self-determination has reduced this contact for some tribes, but as a general rule much of Indian life falls under the federal umbrella and is subject to its changes.

How did this comprehensive umbrella of federal responsibility over Indian affairs come about? More important, who is charged with the obligation of carrying out these responsibilities and from where is this power derived? The purpose of this chapter is to explore these areas of concern. Attention will focus first on an examination of the roots and theories of federal responsibility. With this background in mind, we shall then proceed to look at the political institutions charged with carrying out these responsibilities. In particular, the roles of the presidency, the bureaucracy, and the Congress will be reviewed. And while the American judiciary has assumed more of an "arbiter's" function with reference to the exercise of power in Indian affairs, this subject would not be complete without an assessment of the role of the federal courts in the promotion/frustration saga of Indian law and politics.

ROOTS OF FEDERAL RESPONSIBILITY

The turmoil that persisted between Indian and non-Indian communities during the embryonic days of our nation's development demanded that some type of action be taken to minimize if not resolve this conflict. This task was clearly a responsibility to be shouldered