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# THE EVOLUTION OF THE TERMINATION POLICY †

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and

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Virtually all federal Indian policy can be analyzed in terms of the tension between assimilation and separatism. Assimilationist pressures have persistently sought to limit or extinguish altogether the special federal-tribal relationship.<sup>1</sup> Among the most vulnerable elements of Indians' special status have been the separate land base, treaty rights, the governmental powers of tribes, federal health and education programs for Indians, and the tax-exempt status of reservation lands.

The forces behind assimilation are many and varied, for the special status of Indians touches diverse sectors within our society. Business interests often seek to acquire the land, timber, water, gas, and oil on the reservations. Some fiscal conservatives wish to trim the federal budget. Tax administrators in most western states resent the tax-exempt status of Indian lands, while other state officials push to extend the full range of state laws onto the reservation. There are philosophical objections, based on generalized notions of "reverse discrimination," to the special, separate status of Indians in our legal system. Many self-styled supporters of Indians believe that poverty and lack of opportunity on the reservations can be eliminated only if Indians will leave the reservations and move into the mainstream of American society.

The tribes, on the other hand, have consistently favored a measured separatism. It is founded upon a reservation system assisted by federal support and protection, but governed by Indian tribes free of most state and local controls. Thus Indians themselves have fought to preserve their separate land base, to protect their bargained-for treaty rights, and to maintain other elements of the special federal-Indian relationship.

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These opposing forces, in conflict for literally the entire life of the Republic, have continually placed one central question before Congress: should the measured separatism continue or should Indians be assimilated in whole or in part? The question has been answered in various ways by the Congresses of different eras.

The most extreme extension of assimilation was the termination policy, which dominated Congress during the 1950's and most of the 1960's. Termination may be defined simply as the cessation of the federal-tribal relationship, whether that relationship was established through treaty or otherwise.<sup>2</sup> The thrust was to eliminate the reservations and to turn Indian affairs over to the states. Indians would become subject to state control without any federal support or restrictions. Indian land would no longer be held in trust and would be fully taxable and alienable, just like non-Indian land in the states. Special federal health, education, and general assistance programs for Indians would end.

Termination, a term suffering at the outset from emotion-laden overtones,<sup>3</sup> has engendered two decades of bitter controversy in the field of Indian affairs. It has been denounced by some as vicious and racist,<sup>4</sup> while championed by others as the flowering of democracy and justice.<sup>5</sup> The arguments on either side have left unexplored much of the middle ground of plain fact, often preventing a clear perspective on the issues involved.

To understand the termination era, it is essential to view it in the context of Indian policy historically, not as an isolated aberration. This article, therefore, will first examine the historical development of assimilationist policies. Second, it will analyze the legislative and administrative actions during the termination era itself. The final section will assess the termination era and suggest actions Congress might take concerning the terminated tribes.

### *I. The Roots of Termination in Prior Federal Indian Policy*

Federal Indian policy has seldom been partisan in its origins.<sup>6</sup> The policy developed as a synthesis of the many diverse interests affected by federal-Indian relations. The termination era of the 1950's and 1960's, for example, was not the product of one political party or ideology.<sup>7</sup> Rather, termination was an outgrowth of 150 years of Indian policy preceding the termination movement, and was simply the farthest extension of the fundamental theory underlying Indian policy throughout most of those years.<sup>8</sup> Indeed, the termination movement's sponsors may have been motivated by sincere concern for the welfare of the In-

dian people.<sup>9</sup> Nevertheless, most observers have concluded that termination has failed.<sup>10</sup> To understand that failure, it is necessary to examine the historical precedents of the termination policy. As will be seen, assimilationist notions have played a crucial role in federal Indian policy from the beginning.

### *The Formative Years*

During its early years, the United States dealt with the tribes, usually by treaty, on a basis of relative international equality.<sup>11</sup> The idea was that tribes were indigenous governments entitled to retain distinct land bases.<sup>12</sup> Even so, the Indian Trade and Intercourse Acts, passed from 1790 to 1834, were oriented, among other goals, toward the "promotion of civilization and education among the Indians, in the hope that they might be absorbed into the general stream of American society."<sup>13</sup> These acts, which regulated the fur trade and liquor traffic with the tribes, were a cornerstone of federal Indian policy during the nation's first half-century.<sup>14</sup>

The removal policy came to dominate Indian relations in the 1830's.<sup>15</sup> Under the removal policy, Indian tribes were forced to migrate to unused lands elsewhere in the continent to allow the former tribal homelands to be opened to settlement and to the imposition of state law.<sup>16</sup> With the removal policy, as with termination, it is clear that the Indians themselves hardly favored it. Indian "consent" to removal was gained largely by brute force, bribery, corruption, and trickery.<sup>17</sup> Removal brought widely documented suffering to the tribes uprooted from their ancestral lands.<sup>18</sup>

Removal purported to provide a new land base and "a system of internal government which shall protect [Indian] property from invasion," but another goal was to provide for Indians a "transition from the [uncivilized] to the [civilized] state."<sup>19</sup> Thus removal's *end* (the eventual "civilization" of Indians) was assimilationist. However, the *method* employed (the creation of reservations) was separatist.

By the middle of the century, tribes were in danger of being pushed off their reservations entirely by non-Indian settlement of the midcontinent. The special status of tribes became increasingly inconvenient to the newcomers,<sup>20</sup> and unrelenting pressure was exerted by westerners.<sup>21</sup> Those interests sought rapid assimilation, especially in the form of the removal of restrictions on the transfer of Indian lands.<sup>22</sup>

Assimilation also came to be favored by those who sympathized with the tribes. By the 1880's, there were only two politically viable alternatives: gradual assimilation or the wholesale destruction of both Indian culture and Indian land.<sup>23</sup> What came to be known as the assimilation, or allotment, policy resulted in part from sentiment reacting to the second, more extreme, alternative.<sup>24</sup> Gradual assimilation, by incorporating the Indians into non-Indian life, would eliminate the reservations which, even in the 1880's, were becoming visible pockets of poverty; in addition, assimilation would open up reservation land to potentially profitable economic exploitation. The rationale behind assimilation seemed so beneficial to Indians that non-Indians often could not understand why most Indians rejected the idea.<sup>25</sup> The non-Indians apparently failed to realize that basic assimilationist precepts such as private ownership of land "tended to disintegrate Indian ethnic groups but did little to assist them in adapting to white society or in overcoming white racial discrimination and unregulated profit-taking."<sup>26</sup>

### *The Era of Allotment and Assimilation*

The major expression of assimilation in the nineteenth century came in the General Allotment Act of 1887 (Dawes Act).<sup>27</sup> Large amounts of Indian lands were divided into individual homesteads. Supposedly "surplus" lands were then sold by the government. After an initial 25-year trust period, allotted lands would become taxable, and could be bought or sold. The idea was to settle the Indians on homesteads, introduce them to farming, and make them members of the non-Indian society.<sup>28</sup>

Indians did not in fact adapt well to their newly designated roles as farmers.<sup>29</sup> The clamor for the transfer of Indian lands to non-Indians continued.<sup>30</sup> Millions of acres of land were lost through tax sales and sharp dealing.<sup>31</sup> Almost two-thirds of the Indian land base passed out of Indian hands as a direct or indirect result of the General Allotment Act; in all, the tribes relinquished some 86,000,000 acres.<sup>32</sup>

Assimilation was also furthered during the 1880's by laws other than the General Allotment Act. In *Ex parte Crow Dog*,<sup>33</sup> the Supreme Court held that the federal courts had no jurisdiction over the murder of one Indian by another Indian on the reservation. Congress was outraged by the fact that there was "no jurisdiction" and ignored the fact that the tribe had its own traditional punishment to cover such situations.<sup>34</sup> Congress passed the Major Crimes Act in 1885, an important piece of assimilationist

legislation which imposed non-Indian laws on the tribes by extending federal jurisdiction to certain major crimes in Indian country.<sup>35</sup>

Still other measures were employed to find a solution to the "Indian problem." Senator Henry L. Dawes, the sponsor of the General Allotment Act, and other legislators focused on immersing the Indian in white education and culture to promote assimilation.<sup>36</sup> Thus education, which had long been an assimilative tool,<sup>37</sup> became central to the assimilationist thinking of the late nineteenth century.<sup>38</sup>

Captain R. H. Pratt was recruited to be the first superintendent of the new Carlisle Indian Boarding School. He commented that "a great general has said that the only good Indian is a dead one . . . I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him and save the man."<sup>39</sup> Such attitudes of cultural superiority led to calls for the use of force in the schools to compel Indian acceptance of white ways and values.<sup>40</sup> The BIA boarding school system was expanded along the lines of the Carlisle model:

The children usually were kept at boarding school for eight years, during which time they were not permitted to see their parents, relatives or friends. Anything Indian—dress, language, religious practices, even outlook on life . . . was uncompromisingly prohibited. Ostensibly educated, articulate in the English language, wearing store-bought clothes, and with their hair short and their emotionalism toned down, the boarding school graduates were sent out either to make their way in a White world that did not want them, or to return to a reservation to which they were now foreign.<sup>41</sup>

During this era Indians were accorded full citizenship in the majority society. Citizenship was extended by individual treaties and acts,<sup>42</sup> and finally by general legislation in the form of the Indian Citizenship Act of 1924.<sup>43</sup>

To Indians, assimilation during the late nineteenth and early twentieth centuries produced several negative results, such as the loss of tribal land, the attenuation of tribal culture and religion, and the weakening of the family unit.<sup>44</sup> But the reservation system, which was posited as the alternative to complete assimilation, appeared to produce strong feelings of dependence and helplessness among Indians.<sup>45</sup> Assimilation seemed a simple and humane expedient to its supporters.

The premise for assimilation, then, was that a standard of living dramatically lower than that of average non-Indian society

proved that the form of the less privileged Indian society, *i.e.*, the reservation system, must be modified or eliminated. The missionizing of the frontier days was paralleled by more modern efforts to persuade or force Indians to adopt Anglo culture, because the latter lifestyle was seen as more conducive to a "successful" living standard.<sup>46</sup> Many viewed the persistent poverty prevalent on Indian reservations as an indication that the reservation system was inadequate. They ascribed the failure of federal policy to the existence of reservations and the special legal status of the Indians for which the Indian reservations stood.<sup>47</sup> These fundamental assimilationist notions survived until the 1950's and would become basic tenets of termination.

Only in the 1950's and 1960's was termination the official congressional policy to be applied to all tribes. Nevertheless, tribes were in fact "terminated" by Congress throughout the nineteenth and early twentieth centuries on an individual, ad hoc basis. Various treaties and statutes contained provisions calling for the termination of the tribes in question; in every known instance, however, those tribes were later restored to full federal recognition.<sup>48</sup>

The closest historical precedent for outright termination involves the Five Civilized Tribes, the Cherokee, Choctaw, Chickasaw, Creek, and Seminole. After their removal to Oklahoma from ancestral lands in the Southeast, those tribes were subjected to a series of acts and agreements from 1893 to 1906.<sup>49</sup> Taken together, those acts stripped the Five Civilized Tribes of most, but not all, governmental functions: their courts were abolished; tribal legislatures were forbidden to meet more than one month a year; state criminal and civil jurisdiction was imposed; all fiscal, educational, and social functions were ended or taken over by federal agencies; and their public buildings were ordered to be sold.<sup>50</sup> The status of those and other Oklahoma tribes has since been altered, and in some instances improved, by a complex set of statutes pertaining to Oklahoma.<sup>51</sup> As a result, the Five Civilized Tribes are now federally recognized tribes, but most of their tribal land is gone and it is doubtful that the other effects of those termination acts will ever be wholly eliminated.

### *The Period of Indian Reorganization*

The Indian Reorganization Act of 1934<sup>52</sup> (IRA) was an attempt to find a new direction for Indian affairs. In addition to the loss of some 86,000,000 acres of Indian land through the allotment policy, educational and economic efforts had brought "the

disorganization and disruption of Indian life and the demoralization of Indian character and personality."<sup>53</sup> The IRA reversed the thrust of the General Allotment Act by forbidding further allotment of Indian land, encouraging reestablishment of tribal organization and activities, and providing revolving loan funds, resource conservation, and an Indian preference system for BIA employment.<sup>54</sup>

Most of the IRA reforms had great potential. The provisions relating to tribal government basically called for "home rule" by the tribes.<sup>55</sup> There is no question that the ending of the allotment program, taken by itself, was a major reform. Still, shortcomings in the IRA and in its administration kept the promise from becoming a reality.<sup>56</sup> Charges of communism and antireligion plagued the IRA, multiplying as the war years developed the "America First" philosophy.<sup>57</sup> This conclusion is typical: "The general health, welfare, and educational level of Indians improved during the [IRA] period, but, for the most part, Indian economic conditions were not improved enough to reach even minimal standards of the white population."<sup>58</sup>

In spite of its partial reliance on self-government, even the IRA was founded on assimilationist premises. The IRA was a middle ground between full termination (*i.e.*, rapid assimilation) and full recognition of Indian tribes as permanent, essentially separate institutions. The IRA called for the strengthening of tribal political and economic institutions but only as necessary preparatory steps for assimilation in the future. In the long run, this "economic autonomy" approach would lead to inclusion of tribes in the state jurisdictional system, on the order of municipalities or county governments.<sup>59</sup> Ultimately, then, the IRA was based on the assimilationist notion that it would "attempt to assimilate the Indian by letting him use his own culture as a springboard for . . . integration."<sup>60</sup>

### *The Immediate Prelude to Termination*

#### *Congressional Activity*

Termination was not to become official policy until 1953. The clear movement in that direction, however, began in the mid-1940's when reaction against the IRA reform efforts became intense.

The Senate's *Survey of Conditions of the Indians of the United States* ended in 1943 after fifteen years of investigation. Participating senators were deeply critical of the IRA and BIA.<sup>61</sup> A



House investigation was launched in 1944.<sup>62</sup> Both sides of Congress criticized the administrative cost of the IRA policy and its slow rate of progress toward ultimate assimilation. Commissioner John Collier, since 1933 the main advocate of the IRA, resigned in 1945.<sup>63</sup>

In April and May, 1947, the Indian Affairs Subcommittee of the House Committee on Public Lands held hearings on bills to "emancipate" Indians from BIA control.<sup>64</sup> Similar hearings, although less comprehensive in scope, had taken place the year before in both houses of Congress.<sup>65</sup>

Also in 1947, the Senate Civil Service Committee directed Acting Commissioner Zimmerman to testify concerning the elimination of BIA services.<sup>66</sup> He identified tribes for which future BIA services could be eliminated in the context of a general reduction of the federal work force.<sup>67</sup> Zimmerman then specified four criteria for Congress to consider in implementing such a reduction: (1) degree of acculturation; (2) economic resources and condition of the tribe; (3) willingness of the tribe to be relieved of federal control; and (4) willingness of the state to assume jurisdiction.<sup>68</sup>

Although Zimmerman protested against taking his remarks out of context,<sup>69</sup> these criteria were later articulated as indicators of various tribes' readiness for termination.<sup>70</sup> However, some of those tribes and bands, such as the Turtle Mountain Chippewa, clearly did not meet the minimum standards of Zimmerman's criteria<sup>71</sup> and were deleted from termination legislation.<sup>72</sup> Other bands were found ready for termination despite noncompliance with the same standards.<sup>73</sup> This pattern of uneven application of the criteria was also reflected at hearings on a bill for "liquidation" of the Klamath Tribe.<sup>74</sup>

By early 1948, congressional pressure<sup>75</sup> caused Zimmerman to direct the development of reservation programs oriented toward "the eventual discharge of the Federal Government's obligation . . . at the earliest possible date compatible with the government's trusteeship responsibility."<sup>76</sup> This plan was based on criteria for similar programs reluctantly formulated by Commissioner Collier after congressional prodding in 1943.<sup>77</sup>

Various proposals to repeal the Indian Reorganization Act<sup>78</sup> and for "emancipation"<sup>79</sup> of Indians from the federal trust relationship were advanced in the post-war years. The purpose behind the proposals was a familiar one: "[B]eneath all of the rhetoric . . . both repeal and emancipation proposals were designed primarily to release Indian land from federal trust, much as the Dawes Act of

1887 had done."<sup>80</sup> Controversy over these proposals delayed concrete action until the 1950's.

In 1949, the Hoover Commission issued its *Report on Indian Affairs*, calling for "complete integration" of Indians "into the mass of the population as full, tax-paying citizens."<sup>81</sup> Three dissents, led by that of Vice-Chairman Dean Acheson, objected to the Commission's recommendation for rapid assimilation on the basis of existing data.<sup>82</sup>

There were scattered instances of progressive, nonassimilationist programs during the late 1940's and early 1950's. An unusually severe winter in 1947 brought widespread starvation and national attention to the Navajo and Hopi reservations.<sup>83</sup> The Navajo-Hopi Act, introduced in 1948, was passed and implemented in 1950.<sup>84</sup> However, programs initiated under this Act and other BIA policies focused on integration and relocation of Indians, not reservation development, in the pretermination and termination years.<sup>85</sup>

### *Administrative Action*

During the pretermination years, the BIA was a highly important force in the movement toward an extreme assimilationist policy. Dillon S. Myer, former director of the highly controversial War Relocation Authority, the detention camp program for Japanese-Americans during World War II, became BIA Commissioner in 1950.<sup>86</sup> He vigorously pursued the Hoover Commission's basic recommendation of "complete integration."<sup>87</sup> In 1951, he defined long-range BIA goals as (1) improvement of Indian standards of living, and (2) "step by step transfer of Indian Bureau functions" away from the BIA.<sup>88</sup> These objectives were to be accomplished through "citizenship participation" for individual Indians and "redefinition of the status" of Indians by termination of the federal trusteeship and tribalism itself.<sup>89</sup> It was suggested that the BIA might thus induce the "cooperation of persons of Indian descent" in "the present-day economic development of this country."<sup>90</sup>

The BIA emphasized the Voluntary Relocation Program<sup>91</sup> beginning in 1951-52. The goal of the Relocation Program was to encourage and assist "surplus" reservation residents, if they were employable,<sup>92</sup> to move to urban areas from the reservations. The assumption was that the reservations provided inadequate land bases for the support of the populations.<sup>93</sup>

Most Indians came to view relocation as another device, not

always voluntary,<sup>94</sup> to move Indians toward termination.<sup>95</sup> Many Indians who left on relocation returned to the reservation before long.<sup>96</sup>

Still, large-scale relocation was pressed during the early 1950's to "integrate [Indians] as quickly as we can" in permanent, off-reservation locations.<sup>97</sup> Senator Arthur Watkins noted that unless the relocations were permanent, rather than only seasonal, the Indians would "be in difficulty all of the time."<sup>98</sup> Watkins then went on to remark that "there are some 14,000 to 16,000 [Navajos] who are now without schools . . . In order to get the Navahos to the point of where they can take care of themselves, we must step up the educational activities."<sup>99</sup> Then BIA Commissioner Emmons promised to do so, saying, "the only way we can hurry this thing along is to push the process of integration, education and health . . . to accelerate the program of preparing these Indians to fend for themselves."<sup>100</sup>

The out-migration from the reservations facilitated further loss of Indian land. In spite of tribal wishes, reservation land was opened for sale and lease as tribal members went on relocation.<sup>101</sup> It is difficult to say whether Commissioner Myer affirmatively favored the Indians' loss of land. At any rate, Myer "did not advocate protecting the existing Indian lands."<sup>102</sup>

To Myer's credit, "he was responsible for a general 'tightening up' in administration."<sup>103</sup> In retrospect, however, the facts generally support a conclusion that many of the new programs were more counterproductive than useful; others were only partially successful; some were of dubious legality.<sup>104</sup> In 1952, a large newspaper discovered apparently fraudulent behavior by Bureau officials involved in an Indian land sale.<sup>105</sup> Alleged corruption was anything but new in the BIA,<sup>106</sup> however, and it was seen by Congress as yet another reason to terminate federal supervision.<sup>107</sup>

In the early 1950's, decision-making authority was centralized in five newly created Area Offices, thereby weakening local agency control.<sup>108</sup> This increased the power of the national BIA leadership, to which the area hierarchy was responsible.<sup>109</sup>

Tribal consent to administrative decisions came to be considered unnecessary;<sup>110</sup> BIA programs would "proceed though Indian cooperation may be lacking in certain cases."<sup>111</sup> The "stability of the administrative process" was given "greater weight" than "some important interest of the tribe."<sup>112</sup> The Departmental Board of Appeals, which reviewed BIA decisions, fell into disuse, and the Interior Secretary's Indian Advisory Committee was not consulted.<sup>113</sup>

In 1952, House Resolution 698 requested a complete report concerning BIA functions, Indian affairs, and "legislative proposals . . . to promote the earliest practicable termination of all federal supervision and control over Indians."<sup>114</sup> This study was continued by House Resolution 89 the next year.<sup>115</sup> The resulting reports by the Myer administration and the House Subcommittee laid a foundation for the termination bills to follow. The hurried studies were based on the similar Zimmerman undertakings of 1948,<sup>116</sup> although results were often contradictory.<sup>117</sup> The four criteria listed by Zimmerman to aid in determining the readiness of tribes for termination were expressly rejected because those criteria implied the continued existence of a tribal unit.<sup>118</sup> The attitude expressed in the second report to Congress was that such continuation of tribalism might serve to hinder the process of termination. The change of emphasis from the IRA was now complete, from long-range assimilation to short-term and total termination.<sup>119</sup>

In a sense, then, Indian policy was not truly changing directions when the termination era began. It was merely accelerating the long contemplated process of assimilation. The acceleration, however, was so rapid that it can best be characterized as a radical innovation.

## II. *The Termination Era*

The termination era of the 1950's and 1960's is often thought to consist of House Concurrent Resolution 108, which announced the general policy of termination, and a series of individual termination acts terminating the federal-tribe relationship with specific tribes.<sup>120</sup> While those congressional actions made an indelible mark on Indian affairs, the termination era went much further.

The termination era produced a comprehensive program, interweaving individual termination acts with many other congressional statutes and BIA policies. In addition to the acts terminating specific tribes, the total termination program included the following federal action: the transfer of civil and criminal jurisdiction over Indians from the tribes and the federal government to the states under Public Law 280; the transfer of many educational responsibilities from the tribes and the federal government to the states; other educational policies to promote assimilation; the transfer of Indian Health Service responsibilities from the BIA to the Department of Health, Education and Welfare; the authorization for sale and lease of restricted Indian lands to non-Indians;

legislative and administrative inaction regarding reservation economic development; and continued relocation programs to encourage Indian migration from the reservations to urban areas. Thus seen, termination amounted to a truly fundamental social restructuring.

### *House Concurrent Resolution 108*

The keystone piece of legislation was House Concurrent Resolution 108 (HCR 108), passed on August 1, 1953. HCR 108 declared termination to be official congressional policy and called for termination to be implemented with regard to individual tribes "at the earliest possible time." The full text of this signal statement of congressional purpose is as follows:

Whereas it is the policy of Congress, as rapidly as possible to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to grant them all the rights and prerogatives pertaining to American citizenship; and

*Resolved by the House of Representatives (the Senate Concurring)*, That it is declared to be 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, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: The Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Potawatamie Tribe of Kansas and Nebraska, and those members of the Chippewa Tribe who are on the Turtle Mountain Reservation, North Dakota. It is further declared to be the sense of Congress that the Secretary of the Interior should examine all existing legislation dealing with such Indians, and treaties between the Government of the United States and each such tribe, and report to Congress at the earliest practicable date, but not later than January 1, 1954, his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution.<sup>121</sup>

Legally, a concurrent resolution is a general policy statement

only and does not have even that limited effect on any future Congress.<sup>122</sup> Thus, technically HCR 108 had no further validity after the Eighty-third Congress adjourned in early 1955. Nevertheless, some commentators continue to emphasize that it has never been repealed even though no "repeal" is necessary because its legal effect is already spent.<sup>123</sup> Indians feel the political pressure still generated by HCR 108 and continue to urge that Congress adopt a statement disapproving it.<sup>124</sup>

### *The Individual Termination Acts and Plans*

Since HCR 108 was a statement of policy only, individual acts were needed to implement the policy in regard to specific tribes. The following table shows the individual acts in chronological order.

Group	Number	Acres	State	Authorizing Statute (date)	Effective Date
Menominee	3270	233,881	Wisc.	68 Stat. 250 (1954)	1961
Klamath	2133	862,662	Ore.	68 Stat. 718 (1954)	1961
Western Oregon*	2081	2,158	Ore.	68 Stat. 724 (1954)	1956
Alabama-Coushatta	450	3,200	Tex.	68 Stat. 768 (1954)	1955
Mixed-Blood Utes	490	211,430	Utah	68 Stat. 868 (1954)	1961
Southern Paiute	232	42,839	Utah	68 Stat. 1099 (1954)	1957
Lower Lake					
Rancheria	unk.	unk.	Cal.	70 Stat. 58 (1956)	1956
Peoria	unk.	unk.	Okla.	70 Stat. 937 (1956)	1959
Ottawa	630	0	Okla.	70 Stat. 963 (1957)	1959
Coyote Valley Ranch	unk.	unk.	Cal.	71 Stat. 283 (1957)	1957
California Rancheria					
Act**	1107	4,317	Cal.	72 Stat. 619 (1958)	1961-70
Catawba	631	834	S.C.	73 Stat. 502 (1959)	1962
Ponca	442	834	Neb.	76 Stat. 429 (1962)	1966
Wyandotte	984	94	Okla.	70 Stat. 893 (1956)	1959

\*61 tribes and bands. Figures listed are aggregates.

\*\*37 to 38 rancherias. Figures listed are aggregates.

This means that approximately 109 tribes and bands were terminated. A minimum of 1,362,155 acres and 11,466 individuals were affected. Statistics on Indian population are notoriously inaccurate, but no more than 3 per cent of all federally recognized Indians were involved.<sup>125</sup> The total amount of Indian trust land was diminished by about 3.2 per cent.<sup>126</sup>

After an individual termination act was passed, a third step was required before termination finally took effect. Each act directed

the Secretary of Interior to develop a detailed termination plan for the tribe. Usually the difficult questions in the plans revolved around the transfer of land from trust status into private ownership. As is seen from the above chart, plans were often completed for the smaller tribes within a year or two after the individual acts were passed. The three tribes with the largest land holdings—the Menominee, the Klamaths, and the mixed-blood Utes—all had plans with lengthy provisions for complicated trusts or private corporations. The Menominee plan, for example, was enormously complex: it was 30 pages long (miniscule type, three columns to a page) in the *Federal Register*.<sup>127</sup> Those three plans were not made final until 1961, seven years after the individual acts were passed.

The effects of the termination program can be best appreciated by analyzing these individual acts and plans. Those documents were very different from the glossy euphemisms used by Congress to describe termination: it was purportedly a program to “free” Indians from federal supervision and to eliminate “restrictions deemed discriminatory” against Indians.<sup>128</sup> In fact, termination did little to promote “freedom” or to root out “discrimination.” Termination ended the special federal-tribal relationship almost completely and transferred almost all responsibilities for, and powers over, affected Indians from the federal government to the states.<sup>129</sup> The historic special Indian status came to an abrupt end for terminated individual Indians and tribes.

More specifically, these basic elements were common to all of the individual congressional acts and administrative plans:

1. *Fundamental changes in land ownership patterns were made.* For most of the smaller tribes, all land was simply appraised and sold to the highest bidder, with the proceeds going to the tribe.<sup>130</sup> For the Klamaths, members were given a choice between immediate payment and participation in a private trust. Most Klamaths chose immediate sale and 600,000 acres were sold in 1961.<sup>131</sup> Most of the remaining private trust land has also now been sold.<sup>132</sup> For the mixed-blood Utes and the Menominee, state corporations were established.<sup>133</sup> The Ute land has now been sold. The Menominee land is now back in trust, as a result of the tribe’s restoration in 1973, but 9,500 acres were sold in the 1960’s to pay corporate bills.<sup>134</sup>

2. *The trust relationship was ended.* This means that federal expertise would be unavailable for land and resource management. There would no longer be federal protections against the sale of land.<sup>135</sup>

3. *State legislative jurisdiction was imposed.* With few excep-

tions, on federally recognized reservations only tribal councils and Congress have power to pass laws.<sup>136</sup> After termination, state legislatures and county boards would have broad authority over such basic matters as education, adoptions, alcoholism, land use, and other fundamental areas of social and economic concern.

4. *State judicial authority was imposed.* On federally recognized reservations, except for so-called "Public Law 280" reservations, federal and tribal courts hear almost all cases; state courts have extremely limited jurisdiction.<sup>137</sup> After termination, all criminal and civil cases went to state court. The imposition of state legislative and judicial authority is an especially crucial factor. Indians have argued for federal and tribal authority over reservation Indians because of long-standing discriminatory practices by local officials. Reliable authorities indicate that those claims of local hostility are warranted.<sup>138</sup> Termination took away the buffer of federal and tribal law.

5. *All exemptions from state taxing authority were ended.* The power to tax is part of the state's legislative jurisdiction, discussed above, but is so important that it deserves to be treated separately. Indian tribes and individuals enjoy almost total immunity from state tax laws when in Indian country, which usually means within the boundaries of a federally recognized reservation.<sup>139</sup> The states do not suffer financially—the federal government provides substantial *in lieu* payments to compensate for the lost tax revenue.<sup>140</sup> That immunity, which often resulted from federal treaties and meant much to Indian tribes and individuals, was abolished by termination.

6. *All special federal programs to tribes were discontinued.* There are an increasing number of federal programs available only to federally recognized tribes. They include training, housing, recreation, and business grants and contracts.<sup>141</sup>

7. *All special federal programs to individuals were discontinued.* These substantial programs provide members of federally recognized tribes much-needed health, education, and welfare assistance.<sup>142</sup> These programs, like the tribal programs, are available only to federally recognized Indians, not to the general non-Indian population. Neither are they available to terminated tribes and individuals.

8. *Tribal sovereignty was effectively ended.* Indian tribes have inherent sovereignty<sup>143</sup> and nothing in the termination acts expressly extinguished that governmental authority. Nevertheless, the loss of the land base meant that in most cases the tribe had no geographic area over which to exert jurisdiction. Regardless of the



fact that terminated tribes probably retain their status as sovereign governments, the practical reality is that, with one exception, no terminated tribe has continued to make laws or to maintain tribal courts to enforce any laws after termination.<sup>144</sup> Thus the terminated tribes were effectively stripped of their broad powers to act as governments. Tribal sovereignty, more than any single legal doctrine, has contributed to the exciting developments on Indian reservations in the 1970's; one writer has aptly described tribal sovereignty as a "cornucopia"<sup>145</sup> — but not for terminated tribes.

In return, individual tribal members received a check for the value of their land. In most instances, the payments amounted to little, although the withdrawing Klamaths received payments of \$43,000 in 1961.<sup>146</sup> The check did not compensate for the loss of federal benefits or the new tax burdens. It could not pay for the loss of tribal governmental authority, or compensate for the discrimination that followed in the state agencies and courts. Perhaps most tragic of all, the check could not possibly pay for the psychological costs of "not being an Indian any more."<sup>147</sup>

### *Congressional Leadership for Termination*

Termination was one of the most significant doctrines in the history of federal Indian policy. Yet the congressional resolution declaring termination to be federal policy was passed without controversy and nearly without comment.<sup>148</sup> The few congressmen still in favor of maintaining the special federal-tribal relationship apparently were unaware of the scope of HCR 108 or the rapidity with which it was to be implemented.<sup>149</sup> Moreover, "termination seemed inevitable at a time when pluralism of any kind was suspect" and when "an intellectual vacuum on Indian policy" had therefore developed among nonterminationists; lacking a real alternative to termination, they acquiesced in the basic concept, although they did not support it.<sup>150</sup> The only suggestion, other than objections to provisions in specific bills, was that tribal consent be required before termination occurred.<sup>151</sup>

Another reason for this near unanimous response to the confusing and complex field of Indian relations was the prevailing mood in Washington, D.C., in the early 1950's. President Eisenhower warned that "those who would stay free must stand eternal watch against excessive concentration of power in government."<sup>152</sup> Viewed in this perspective, some congressmen felt that "there is something un-American about the idea of reservations" and BIA trusteeship over them.<sup>153</sup> Thus 1953 brought "an extensive Congressional effort to reduce the involvement of the federal govern-

ment in Indian affairs," and to "free" the Indian people from federal control.<sup>154</sup>

The termination legislation was dominated by the work of a small number of congressmen. Although less the case today, in the 1950's Indian policy was a backwater area considered "unimportant" by most legislators.<sup>155</sup> The few men holding strong views on Indian affairs were able to shape basic policy almost singlehandedly.

The organizational structure of the two Houses also lent itself to domination by a few members. Impetus for HCR 108 and the individual termination bills centered in the Indian Affairs subcommittees of the Senate and House Interior Committees.<sup>156</sup> Both committees have been traditionally composed of members from the western states,<sup>157</sup> where the great majority of federal land is found. Politicians from these states are subject to pressures both from non-Indian majorities and special interests advocating parks, dams, and development projects.<sup>158</sup> Those pressures often conflicted with the preservation of tribal holdings in the post-war period; the prevailing atmosphere was one of energetic exploitation of natural resources.<sup>159</sup>

Partly because a sense of commitment dominated the subcommittee leadership,<sup>160</sup> the influence of the subcommittees became substantial in the full committees and in Congress, where most members were preoccupied with other matters. Congress seemed willing to pass any Indian legislation that was favorably reported out of the subcommittees in order to accomplish reform.<sup>161</sup>

Representative Berry of South Dakota was chairman of the House Indian Affairs Subcommittee. He apparently had a strong pro-business orientation.<sup>162</sup> With only two years' experience in Congress, he often yielded to the more experienced and dynamic chairman of the Senate subcommittee.<sup>163</sup>

Arthur V. Watkins of Utah was the single most important legislator during the termination era. Beginning his second term in the Senate, he was the chairman of the Indian Affairs Subcommittee.<sup>164</sup> Senator Watkins wielded the power at hand determinedly. Watkins alone of the five Senate members was present for more than one of the joint termination hearings. The typical hearing was attended by Watkins, Berry, another subcommittee member from the House, and Watkins' staff assistant; thus, "Watkins had little difficulty in dominating the hearings."<sup>165</sup>

Senator Watkins had long favored the policy of termination,<sup>166</sup> but he began to turn his most direct attention to the issue when the Eighty-third Congress convened. He met with Representative

William H. Harrison of Wyoming and Orme Lewis, Assistant Secretary of the Interior Department, on February 27, 1953, to map out and coordinate termination policy, tactics, and actions.<sup>167</sup> A four-point policy resulted:

(1) Rapid termination of federal administrative responsibility for tribes. This was to be accomplished by:

(a) Transfer of services to "proper public bodies of the political subdivisions."

(b) Distribution of tribal assets to tribes as groups or to individual members.

(c) Transfer of trust responsibility for Indian land to Indian individuals or groups.

(2) Pro rata disbursement of tribal income with set-offs for "a fair share of the cost of . . . services."

(3) Rehabilitation legislation.

(4) Prompt Interior Department action on termination bills under consideration.<sup>168</sup>

The fundamental Indian policy of the termination era was thus in large part "instituted . . . with no pretence of consultation with Indians."<sup>169</sup> Six months later, the passage of HCR 108 allowed Watkins to set about the active pursuit of terminationist goals.<sup>170</sup> Senator Watkins wished quickly to establish a precedent by the enactment of termination legislation in order to set a policy for the future.<sup>171</sup>

Senator Watkins saw termination as a great liberating force,<sup>172</sup> comparing it to the Emancipation Proclamation.<sup>173</sup> He was deeply convinced of the correctness of his policy and did not hesitate to use pressure when he thought it wise, including the withholding of tribal funds to force agreement to termination plans.<sup>174</sup>

Perhaps because he felt tribal assent to be superfluous,<sup>175</sup> Senator Watkins also resorted to other tactics in the drive toward termination. He gave witnesses misleading assurances<sup>176</sup> and erroneous information<sup>177</sup> concerning the intent of Congress. Watkins asked leading questions of accommodating BIA witnesses to create an optimistic picture of Indian competency for termination.<sup>178</sup> On the other hand, Watkins was critical and incredulous when tribal members or senators spoke against termination.<sup>179</sup> Watkins' apparently unbending faith in the justice of his cause<sup>180</sup> probably accounted for the discrepancy between the idealistic ends he professed and the very pragmatic means he used.<sup>181</sup>

There was some opposition by congressmen to the general concept of termination, as expressed in specific bills. Senators Mansfield, Smathers, Young, and Proxmire saw flaws in the ter-

mination policy, as it was set out in bills to terminate the Seminole, Turtle Mountain Chippewa, Menominee, and other tribes.<sup>182</sup> Representative Dowdy of Texas objected to the Alabama-Coushatta termination bill.<sup>183</sup> Melvin Laird, whose district included the Menominee Tribe, also voiced opposition to termination, to no avail.<sup>184</sup> This scattered opposition had little effect.

Due to all of these factors, the termination programs moved ahead "with great rapidity."<sup>185</sup> For example, Public Law 280<sup>186</sup> was "passed at the end of the session and sent . . . to the President, allowing virtually no time for revision."<sup>187</sup> Its accompanying report "was so hastily submitted that it had not been cleared with the Bureau of the Budget, which meant that President Eisenhower had not known about the amended bill before he was asked to sign it."<sup>188</sup> Eisenhower did sign the bill into law, but asked that Congress amend it to provide for "consultation" with the Indians.<sup>189</sup> This action was not taken during the termination years.<sup>190</sup> Thus, it is fair to say that "Congress rushed the whole process so much that systematic study and preparation had not been given to the legislation by Congress, the [BIA], or the tribal councils."<sup>191</sup>

BIA officials showed "firm commitment to the basic policy" of termination throughout the hearings called for by HCR 108.<sup>192</sup> Although tribal consent was not considered necessary, questionable tactics were sometimes used to obtain tribal acceptance of termination. It has been suggested that the Bureau refused to recommend congressional distribution of a \$2,600,000 judgment to the Western Oregon Indians unless they agreed to the termination principle; at the very least, there seemed to be direct relation between "slowness in getting funds distributed" and tribal attitudes "about this [termination] legislation."<sup>193</sup>

During the 1954 Joint Hearings on Termination, Commissioner Emmons was asked by Representative Berry whether Emmons had "contacted the Indian tribes themselves to get their consent on all these [termination] bills."<sup>194</sup> Emmons replied that his contacts had been "for discussion purposes. The consent was, of course, not obtained."<sup>195</sup> Earlier he said that his policy would be "to get the consent and to let [Indians] know what is expected and so forth."<sup>196</sup> Later, commenting on the planned removal of Indian property from federal trust in termination proposals,<sup>197</sup> Emmons mentioned that he thought "they are going to feel all right about it if we could do two or three little things which they want to have done,"<sup>198</sup> referring to the removal of federal restrictions over the amounts of wheat the Indians were allowed to grow.<sup>199</sup>

Representative Dowdy was outraged at BIA tactics in connec-

tion with the Alabama-Coushatta bill.<sup>200</sup> To gain tribal agreement, a BIA official had said the bill concerned forest management and that no more timber would be sold unless the tribe agreed to termination. The department ignored tribal and state requests for different arrangements.<sup>201</sup>

Commissioner Emmons frequently mentioned four goals other than termination that were basic to BIA programs in the 1950's: (1) health improvement, (2) education, (3) relocation and vocational training, and (4) economic development.<sup>202</sup> Actually, those goals were seen by the BIA as being part and parcel of the termination process: health and education policy were both directed toward transfer to state control, a central tenet of termination; relocation was itself an example of extreme assimilationist policy; and economic development was given a low priority, to be encouraged only if relocation efforts failed.<sup>203</sup> There is no question that termination was pursued relentlessly within the BIA, to the virtual exclusion of any inconsistent goals.<sup>204</sup>

By 1956, it was clear to many Indians that the overall effect of termination's "hasty legislation and wide-ranging official actions" rivaled the sweeping changes wrought by the General Allotment Act.<sup>205</sup> Believing that they had been deceived by the administration, most Indians developed a deep and lasting fear of termination.<sup>206</sup>

### *Public Law 280 and Other Legislative and Administrative Programs of the Termination Era*

The preceding material is a summary of the termination statutes per se. Although that series of acts was the central force of the termination era, they were only part of the extreme assimilationist policies dominating Congress during the 1950's and most of the 1960's. The other major programs of that era did not amount to outright termination. Nevertheless, they embodied many of the basic elements of the individual termination statutes.

Perhaps the major piece of assimilationist legislation during this era, other than the termination acts themselves, was Public Law 83-280 (Public Law 280), enacted soon after the passage of HCR 108.<sup>207</sup> In this act, Congress took the extreme—and unprecedented<sup>208</sup>—step of passing general legislation extending state jurisdiction to federally recognized reservations. It amounted to many steps down the road of replacing tribal customs and laws with local, non-Indian customs and laws.

Public Law 280 extended state criminal and civil jurisdiction to

reservations in five (later six) states.<sup>209</sup> The statute also allowed for similar assumptions of jurisdiction by other states in the future.<sup>210</sup> Rights under treaties, agreements, and statutes were expressly protected.<sup>211</sup> Both House and Senate reports noted the lack of law and order on the reservations as the main motivation for imposing state criminal jurisdiction.<sup>212</sup> Perhaps illogically, jurisdiction was shifted from the tribes to the states because Indians had "reached a stage of acculturation and development" in which they "were just as socially advanced as other state citizens."<sup>213</sup> Nevertheless, this paradox<sup>214</sup> did not deter the passage of Public Law 280. The Act may have been perceived to have advantages, such as its compatibility with the termination policy,<sup>215</sup> its convenience and economy,<sup>216</sup> and its supposed ability to meet state interests in regulating reservation industries and other activities.<sup>217</sup>

However, states often found Public Law 280 jurisdiction to be neither convenient nor inexpensive,<sup>218</sup> with responsibilities far outweighing added revenue.<sup>219</sup> Financial difficulties meant inadequate law enforcement,<sup>220</sup> leading to the extremes of inequitable enforcement or none at all.<sup>221</sup>

There was substantial Indian opposition to this assimilationist legislation. Indian objections emphasized the lack of a tribal consent provision,<sup>222</sup> perhaps motivated by congressional desires for haste<sup>223</sup> in imposing state law.<sup>224</sup> Many Indians felt that tribal sovereignty had been slighted by this omission.<sup>225</sup> In addition, they recognized that state jurisdiction could result in practical discrimination against Indians.<sup>226</sup> This concern was later shown to be justified.<sup>227</sup>

As was the case in earlier days,<sup>228</sup> education became a basic element of extreme assimilationist policy during the 1950's and 1960's. The method this time would be to end most of the special federal responsibility to educate Indian children. That responsibility would be transferred to state school districts.

In 1952, all federal schools in four states—Idaho, Michigan, Washington, and Wisconsin—were closed down by the BIA.<sup>229</sup> In 1953, 19 federal boarding and day schools were closed,<sup>230</sup> and Indian students were transferred to state schools.<sup>231</sup> Moreover, "federal boarding schools still in operation utilized a 'forced assimilation' approach by educating the children far from their homes (Navajo children in Oregon, Northwest Indians in Oklahoma)."<sup>232</sup>

Assumption of state educational control was also encouraged through the allocation of federal funds. For example, a 1953 amendment to the School Facilities Construction Act provided

construction funds for state schools attended by Indians.<sup>233</sup> These funds, however, were often diverted by the states to facilities serving non-Indian students.<sup>234</sup> Similarly, during the 1950's Congress appropriated greatly increased funds under the Johnson-O'Malley Act, which permitted the BIA to contract with the states for Indian education.<sup>235</sup> Many states used Johnson-O'Malley funds for general expenditures benefiting all students, in spite of the fact that the monies could legally be used only for special programs for Indian children. Those illegalities continued into the 1970's, when two court orders and new BIA guidelines finally halted the practice in most states.<sup>236</sup>

The Navajo Emergency Educational Program of 1954 established schools in trailers and quonset huts on the reservation, and integrated older Indian children into nearby public schools.<sup>237</sup> The emergency status of educational programs derived directly from the termination impetus: "Congress allocated funds for crash programs to assist withdrawing tribal members in gaining the training needed to earn a living [off the reservation] . . . . Unfortunately, the training was largely ineffective."<sup>238</sup>

It is no wonder, then, that the Special Senate Subcommittee on Indian Education concluded in 1969 that "our Nation's policies and programs for educating American Indians are a national tragedy."<sup>239</sup> That tragedy resulted in part from the government's use of Indian education as a terminationist tool.<sup>240</sup>

Another aspect of the termination era was the transfer of Indian hospitals and health facilities from the BIA to the Department of Health, Education and Welfare (HEW). The move was motivated by two basic premises of the termination era. First, the transfer was justified by the desire to eliminate "laws which set Indians apart from other citizens";<sup>241</sup> acts repealing special limitations on Indians concerning intoxicants<sup>242</sup> and firearms<sup>243</sup> were similarly motivated. Second, the transfer was "in line with the policy . . . to terminate duplicating and overlapping functions provided by the Indian Bureau."<sup>244</sup> Furthermore, federal health care for Indians had been criticized for years and in the opinion of many it was time for a change.<sup>245</sup>

Despite warnings from Indians,<sup>246</sup> health officers,<sup>247</sup> and legislators<sup>248</sup> that rapid transfer of health service responsibility could impair the already precarious state of Indian health care, Public Law 568 was passed on August 5, 1954, providing for transfer of Indian health responsibilities to the Public Health Service.<sup>249</sup> The Secretary of HEW was authorized to contract with states that wished to assume Indian health service duties, and to

remove any employees from the transferred staffs who were found "to be in excess of the personnel necessary for the administration" of the facilities involved.<sup>250</sup> A proviso added that "hospitals now in operation for a specific tribe or tribes of Indians shall not be closed prior to July 1, 1956" without tribal consent.<sup>251</sup>

The accompanying Senate Report commented that recent BIA "policy...has been to discontinue the operation of Indian service hospitals where contractual service can be obtained from private hospitals or from those which are State or locally operated."<sup>252</sup> Transfer to the Public Health Service, the report later mentioned, would put the health service administration more "in a position to know the State programs . . . and determine to what extent the Indian is receiving the services available to him as a citizen to a degree that could not be attained in the Indian Bureau without needless duplication of staff and expenditures."<sup>253</sup> Thus, the focus was apparently as critics had feared—on a reduction of federal services, not an improvement in them.<sup>254</sup>

The management of Indian lands still in trust continued to be a significant question in the termination era. Indians charged that BIA policy was intended to "force more of their trust lands onto tax rolls, opening it for sale to whites while tribal governments stood helplessly by."<sup>255</sup> The Indian Long-Term Leasing Act of 1955 (ILTLA)<sup>256</sup> authorized Indian tribes and individuals to lease allotments of deceased Indians for the benefit of the heirs,<sup>257</sup> a provision to sidestep the effects of the General Allotment Act and other existing laws governing leasing of Indian lands.<sup>258</sup> The thrust of the ILTLA was to increase the productivity of Indian land, *as leased*, usually to non-Indians. This purpose was implicit in Section 2 of the Act, which authorized the Secretary of the Interior to lease allotted lands where the allottee was deceased and the heirs could not be completely determined or located.<sup>259</sup> The underlying terminationist purpose was made express in Section 5 of the ILTLA, which prohibited the Secretary from approving any lease that would "prevent or delay a termination of Federal trust responsibilities" regarding the land involved.<sup>260</sup>

Efforts to encourage Indians to leave their reservation homes for urban employment through relocation and employment assistance programs were expanded radically in the early and mid-fifties.<sup>261</sup> While relocation initially may have appeared attractive,<sup>262</sup> the disparity between the euphoric BIA promises and the harsh, slum-level realities of relocation led to Indian bitterness and despair.<sup>263</sup> Some studies on relocation showed a high rate of return to the reservation by relocatees in some tribes, and an absence of ac-



culturation among those who did not return.<sup>264</sup> The rate of returnism, as measured by studies critical of relocation, varied from 60 per cent to as high as 90 per cent and even 100 per cent.<sup>265</sup> BIA studies in 1953, 1955, and 1956 reported returnism at 30 per cent, 24 per cent, and 26 per cent, respectively.<sup>266</sup>

One reason for this failure was that the new relocation plan largely placed Indians in seasonal railroad and agricultural work, among the poorest and most insecure jobs in the nation.<sup>267</sup> Moreover, BIA funds were not always available to assist the urban transplants in making the transition to a strange new life.<sup>268</sup> In addition, Indians remained suspicious of relocation programs.<sup>269</sup> Relocation was at best a mixed blessing to most Indians.<sup>270</sup>

Finally, a major element of the termination era was not an affirmative program at all, but a pattern of administrative and legislative inaction in regard to programs for tribal economic development. Although it is less true now, there was almost no economic development on the reservations in the 1950's; the BIA did "not encourage the tribes to develop their own [resources], and the tribes [had] neither the expertise nor the capital to do so alone."<sup>271</sup> Even such necessary beginnings as the Navajo Rehabilitation Program were not further developed in the direction of tribal autonomy during the termination era.<sup>272</sup> The Indian Point IV Program, proposed in Senate Bill 809, was not enacted by the Eighty-fifth Congress (1956). One historian reported that:

During the 85th Congress . . . hearings were held on S.809, a bill to provide economic assistance to the American Indians; Senate Concurrent Resolution 3 which was to be a new statement of policy by the Congress to replace House Resolution 108 . . . and S.331, which would have reversed the effect of Public Law 280 . . . None of this proposed legislation was enacted at that time.<sup>273</sup>

The other side of the story of what did *not* occur during the termination years concerned the debilitating effect of the threat of termination on nonterminated and soon-to-be-terminated tribes alike. Progressive tribes with active development programs were forced to shift gears and spend most of their limited resources staving off termination.<sup>274</sup>

### III. *Contemporary Responses to the Termination Policy*

The Congresses of the late 1960's and 1970's have rejected the extremes of termination and federal paternalism. Taken as a

whole, present policy is directed toward recognizing tribes as permanent governmental institutions. A measured separatism, or "self-determination," in Indian country will be assisted, but not dominated, by federal support. In the main, tribes are viewed as discrete governmental units largely free of state and local controls. The focus is on methods to strengthen and expand, not to abandon, the special federal-tribal relationship. At this writing, the very important final report of the American Indian Policy Review Commission will not be complete until May, 1977, but it will almost certainly be premised upon those notions. Although terminationist attitudes persist in some quarters,<sup>275</sup> Congress itself seems to be moving in a very different direction.

This section will analyze the primary events which led to Congress' abandonment of the termination policy and the adoption of the "self-determination" approach.

In 1958, after five years of turmoil and bitterness, Interior Secretary Seaton made the first official statement against termination. He declared that termination without tribal consent was "unthinkable."<sup>276</sup> This had little immediate effect, even in Seaton's own department: "the BIA attitude toward . . . termination remained unchanged"<sup>277</sup> in the late 1950's and early 1960's. In 1961, Stewart Udall, new Secretary under the Kennedy Administration, approved final administrative termination plans for the large terminated tribes.<sup>278</sup> However, the Kennedy Administration did de-emphasize termination<sup>279</sup> and 'no new termination acts were passed. During the Johnson years the tribes were treated with a measure of permanency: many of the Great Society programs were extended to the tribes.<sup>280</sup>

One definite indication of the passing of the termination era emerged from Indian country in the late 1960's. The Colville tribal elections turned into a well-publicized referendum on the issue of the potential termination of the tribe. The pro-termination slate was roundly defeated by an anti-assimilation ticket headed by Lucy Covington, who became tribal chairperson.<sup>281</sup>

In 1969 Alvin M. Josephy conducted a study on Indian issues for the incoming administration. Its first priority was a recommendation that "the Administration, hopefully through the President himself" respect an earlier campaign promise that the termination policy would be abandoned.<sup>282</sup> Also in 1969, the Special Senate Subcommittee on Indian Education, chaired first by Senator Robert Kennedy and then by his brother Ted, criticized the effects of termination on Indian education.<sup>283</sup>

In 1970, President Nixon addressed Congress and formally set

out the Administration's Indian program.<sup>284</sup> He called for "self-determination without termination."<sup>285</sup> In addition, he advocated the return of the Blue Lake lands to the Taos Pueblo, the right of Indian people to control and operate federal programs, increased aid for economic development, improvement of Indian education, help for urban Indians, and increased trust responsibilities of the federal government to Indian tribes.<sup>286</sup>

In June, 1973, the Senate Subcommittee on Indian Affairs held hearings on S. 1017, the Indian Self-Determination and Assistance Act.<sup>287</sup> Those hearings proceeded on a strong, upbeat note of self-determination and of an increased federal financial commitment to the tribes.<sup>288</sup>

Perhaps the most striking indication of congressional reversal of the termination policy, however, was the passage of the Menominee Restoration Act of 1973.<sup>289</sup> Both committee reports noted that the Menominee faced a disastrous and probably untenable situation after termination. Tribal land had been sold to meet financial obligations, the tribal lumber mill was antiquated, the tribal corporation had a serious cash flow problem, and basic social services were not being provided to tribal members.<sup>290</sup>

In the Senate Subcommittee hearings on the Menominee Restoration Act, Dr. Gary Orfield testified that "it would be a mistake to move from the existing situation back to a situation that existed before termination."<sup>291</sup> Orfield proposed instead that the tribe's "assets would be a lot better off under the management of Menominee leadership,"<sup>292</sup> leaving the BIA in a consulting role. Orfield suggested that such a restoration would not only "play a key role in restoring the future of Menominee people," but would also have a wider effect: "Since Congress has never really explicitly renounced [the termination] policy . . . nothing could be a more clear symbol of a new period in Indian affairs . . . [than] to actually begin to restore some of the rights of the people who were the first and perhaps the principal victims of this policy."<sup>293</sup>

Congress seems clearly to have intended that the Menominee Restoration Act should have the symbolic effect suggested by Orfield. Literally every major figure connected with the legislation announced that the Menominee Restoration Act was intended to be a repudiation of the termination policy. Unequivocal statements to that effect were made by Lloyd Meeds, House Subcommittee chairman and perhaps the most effective advocate of the bill;<sup>294</sup> David R. Obey, Wisconsin congressman and original primary sponsor when the bill was first introduced during the Ninety-second Congress;<sup>295</sup> Harold V. Froehlich, Wisconsin con-

gressman and primary sponsor during the Ninety-third Congress;<sup>296</sup> Senator Henry M. Jackson, chairman of the Senate Interior Committee;<sup>297</sup> Senators Gaylord Nelson<sup>298</sup> and William Proxmire,<sup>299</sup> the two primary sponsors in the Senate; Senator James Abourezk, chairman of the Senate Indian Affairs Subcommittee;<sup>300</sup> Governor Patrick J. Lucey of Wisconsin;<sup>301</sup> and President Nixon.<sup>302</sup>

The repudiation of termination and the beginnings of the policy of self-determination have continued apace since the passage of the Menominee Act. Congress has enacted the Indian Self-Determination and Education Assistance Act of 1975,<sup>303</sup> and other important legislation.<sup>304</sup> The outlines of a new congressional direction for Indian affairs have begun to take shape. What remains to be accomplished is the articulation and implementation of an acceptable kind of self-determination for the terminated tribes who have not yet been restored.<sup>305</sup>

### *Conclusion*

Perhaps the most appropriate action for bringing self-determination to the terminated tribes is the formulation of a national restoration policy. Congress' power to restore tribes flows from its well-established plenary power over Indian affairs.<sup>306</sup> In the century preceding the Menominee restoration, there are several examples of the reestablishment of federal control over certain Indian tribes after all such control had been relinquished.<sup>307</sup> Thus, there is no serious doubt as to Congress' power to repeal the existing termination acts and to restore the terminated tribes.

Many different legislative alternatives are available to restore the terminated tribes. The alternatives range from a blanket repeal of all termination acts to legislation permitting the Secretary of Interior to restore individual tribes on a tribe-by-tribe basis if specified criteria are met.<sup>308</sup>

While this article does not directly address the question of whether the terminated tribes should be restored, it does suggest that the termination acts were passed under highly questionable circumstances. The concept of termination was not widely debated. The individual acts were acted on with uncharacteristic congressional haste. All termination legislation was handled mostly in subcommittee and mostly by a small number of legislators. Many of the tactics employed are not ones that would be duplicated today.

The circumstances surrounding the passage of the termination legislation call for a searching reappraisal.<sup>309</sup> If that reappraisal

calls for restoration of the terminated tribes, it would seem especially appropriate that Congress enact comprehensive restoration legislation as decisively as the termination legislation was enacted during the 1950's.

#### NOTES

1. Indian Law is an inordinately complex field and any brief summary of the federal-tribal relationship is inevitably an oversimplification. Many of the intricacies of the relationship should become apparent upon further reading of this article. Nevertheless, as a starting point, it can be said that the federal-tribal relationship is premised upon these basic notions: (1) Indian tribes are sovereigns and have governmental authority over their land and persons on that land; that inherent authority can be taken away only by an express act of Congress. *See, e.g.*, 168 (1973); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1831); F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1948, 1972) [hereinafter cited as *FEDERAL INDIAN LAW*]. (2) The United States has the high duty of acting as a trustee toward federally recognized tribes and trust assets. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1830); Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 *STAN. L. REV.* 1213, 1230-46 (1975). (3) Congress has plenary power over Indian affairs. *See, e.g.*, *McClanahan v. Arizona Tax Comm'n*, *supra* at 172 n.7; *United States v. Kagama*, 118 U.S. 375, 383-84 (1886). Congress' power is very broad, but is not literally absolute or total, as the word "plenary" implies. There are limits on Congress' plenary power over Indian affairs, such as the requirement that a tribe or individual Indian is entitled to be compensated when vested rights are taken, *see, e.g.*, *United States v. Creek Nation*, 295 U.S. 103 (1935). In addition, Congress' plenary power is subject to the protections set forth in the Bill of Rights, *see, e.g.*, *FEDERAL INDIAN LAW supra*, at 91. (4) Indian treaties are the "supreme Law of the Land" and remain in effect until expressly abrogated by Congress. *See, e.g.*, *United States v. Washington*, 384 F. Supp. 312, 338 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975); *United States v. White*, 508 F.2d 453, 456 (8th Cir. 1974); Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?* 63 *CAL. L. REV.* 601, 644-45 (1975). (5) State laws, including tax laws, do not apply to Indian country, 18 U.S.C. § 1151, unless Congress expressly so provides. *See e.g.*, *Bryan v. Itasca County*, 96 S.Ct. 2102, 2111-12 (1976); *Worcester v. Georgia, supra*, at 560 (6) Congress has established a comprehensive statutory framework to provide special programs for Indians in the fields of education, health, business development, federal hiring preference, welfare, job training, and others. *See, e.g.*, the statutes discussed in Israel, *The Reemergence of Tribal Nationalism and its Impact on Reservation Resource Development*, 47 *U. COLO. L. REV.* 617, 624-29 (1976).

This special relationship has been challenged in court as constituting racial discrimination in favor of Indians. The relationship has been upheld by the Supreme Court. The Court's reasoning is that the federal-tribal relationship is political, not racial, because it exists between governments, *i.e.*, the United States and the tribes. *See, e.g.*, *Fisher v. District County Ct.*, 424 U.S. 382, 386-88 (1976); *United States v. Mazurie*, 419 U.S. 544, 557-58 (1975); *Morton v. Mancari* 417 U.S. 535, 553 n.24 (1974).

2. W. BROPHY & S. ABERLE, *THE INDIAN, AMERICA'S UNFINISHED BUSINESS* 183-84 (1966) [hereinafter cited as *BROPHY & ABERLE*].

3. "Termination," with its ominous tone of finality, apparently developed as an alternative to the even more sinister-sounding term, "liquidation." *See, Hearings on S. 1222 Before the Subcomm. on Indian Affairs of the Senate Comm. on Public Lands*, 80th Cong., 1st Sess. (1974) [hereinafter cited as *Hearings on S. 1222*] When "termination" gained exclusive currency in official circles, the other expression was still used by Indians and others, despite Bureau protestations that the two terms were not the same.

4. *See, e.g.*, R. BURNETTE, *THE ROAD TO WOUNDED KNEE* 16-17 (1974). *See generally* Cohen, *The Erosion of Indian Rights, 1950-1953; A Case Study in Bureaucracy*, 62 *YALE L.J.* 348 (1953) [hereinafter cited as *Cohen*].

5. See, e.g., Watkins, *Termination of Federal Supervision of Indians*, 311 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 47 (1957) [hereinafter cited as Watkins].

6. Margold, Introduction, in FEDERAL INDIAN LAW, *supra* note 1, at viii-xiii; S. TYLER, A HISTORY OF INDIAN POLICY 8 (1973) [hereinafter cited as TYLER].

7. La Farge, *Disintegration and the American Indians*, 311 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 41 (1957). The participation of both political parties during the termination era is discussed in part II, *infra*.

8. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, *codified at* 25 U.S.C. 331-34, 336, 339, 341, 342, 348, 349, 381 (1970). See also FEDERAL INDIAN LAW, *supra* note 1, at 429-30 (termination of tribal governments in Oklahoma from 1898 to 1906); W. WASHBURN, RED MAN'S LAND—WHITE MAN'S LAW 61 (1971) [hereinafter cited as WASHBURN]; S. TYLER, A STUDY OF THE CHANGES IN POLICY OF THE UNITED STATES TOWARD INDIANS 4 (1964) [hereinafter cited as TYLER, CHANGES]; Oliver, *Legal Status of American Indian Tribes*, 38 ORE. L. REV. 193, 241 (1959). See generally Axtell, "Through A Glass Darkly: Colonial Attitudes Toward Native Americans" (Sarah Lawrence College Faculty Papers, 1973).

9. See Watkins, *supra* note 5.

10. See the authorities discussed in part III, *infra*. See also BROPHY & ABERLE, *supra* note 2, at 187-296; WASHBURN, *supra* note 8, at 96; Orfield, "A Study of the Termination Policy," ch. 2, at 15 (National Congress of American Indians, Washington, D.C. 1966) (lithograph) [hereinafter cited as Orfield]; Trulove & Bunting, "The Economics of Paternalism: Federal Policy and the Klamath Indians," 21 (research paper presented at 46th Annual Conference, Western Economics Ass'n, Simon Fraser Univ., Burnaby, British Columbia, Canada, Aug. 30, 1971) [hereinafter cited as Trulove & Bunting]; STAFF OF AMERICAN INDIAN POLICY REVIEW COMM'N, 94TH CONG., 2D SESS., REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS (Comm. Print 1976) [hereinafter cited as TASK FORCE TEN].

Gary Orfield's superb "Study of the Termination Policy," *supra*, remains the definitive text on the events leading up to the Menominee Termination Act of 1954. It was printed in 4 STAFF OF SUBCOMM. ON INDIAN EDUCATION, SENATE COMM. ON LABOR AND PUBLIC WELFARE, 91ST CONG., 1ST SESS., THE EDUCATION OF AMERICAN INDIANS, THE ORGANIZATION PROBLEM 673 (Comm. Print 1969). Throughout this article, citations refer to the National Congress of American Indians lithograph.

11. See, e.g., F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 1-50 (1962) [hereinafter cited as PRUCHA, AMERICAN INDIAN POLICY]; S. MORISON, H. COMMAGER & W. LEUCHTENBURG, THE GROWTH OF THE AMERICAN REPUBLIC 362-64 (6th ed. 1969); B. DeVOTO, THE COURSE OF EMPIRE 335-36 (1952); G. HARMON, SIXTY YEARS OF INDIAN AFFAIRS 320-25 (1945).

12. See FEDERAL INDIAN LAW, *supra* note 1, at 40.

13. PRUCHA, AMERICAN INDIAN POLICY, *supra* note 11, at 2.

14. The leading work on the Indian Trade and Intercourse acts is PRUCHA, AMERICAN INDIAN POLICY, *supra* note 11. See also FEDERAL INDIAN LAW, *supra* note 1, at 69-78; Deloria, *Legislative Analysis of the Federal Role in Indian Education*, (U.S. Office of Education, Dep't of HEW 1973).

15. See FEDERAL INDIAN LAW, *supra* note 1, at 59; R. COTTERILL, THE SOUTHERN INDIANS 231 (1954). See generally G. FOREMAN, INDIAN REMOVAL (1932).

16. FEDERAL INDIAN LAW, *supra* note 1, at 53-62. See generally the authorities cited in note 15, *supra*.

17. *Creek Nation v. United States*, 77 Ct. Cl. 226, 260-61 (1933), *quoted in* FEDERAL INDIAN LAW, *supra* note 1, at 60; T. WILKINS, CHEROKEE TRAGEDY 304-15 (1970). See W. HAGAN, AMERICAN INDIANS 72-81 (1961); A. DEBO, AND STILL THE WATERS RUN 5 (1940) [hereinafter cited as DEBO]; FOREMAN, *supra* note 15.

18. See generally FOREMAN, *supra* note 15, a skillfully researched work which collects information on each of the southern tribes subjected to removal. *cf.* S. BECKHAM, REQUIEM FOR A PEOPLE (1971).

19. President James Monroe, *Special Message* (Jan. 27, 1825), *quoted in* PRUCHA, AMERICAN INDIAN POLICY, *supra* note 11, at 270.

20. See, e.g., H.R. REP. No. 1401, 46th Cong., 2d Sess. 2-3, *quoting* SEC. INTERIOR REP.

- 16-19 (1879), *discussed and quoted in* PRUCHA, *AMERICAN INDIAN POLICY*, *supra* note 11, at 238-39; BOARD OF INDIAN COMM'RS ANN. REP. 11-12 (1879), *quoted in* PRUCHA.
21. DEBO, *supra* note 17, at 92-125; H. MINER, *THE CORPORATION AND THE INDIAN* 1-163 (1976) [hereinafter cited as MINER].
22. *See, e.g.*, S. TYLER, *A WORK PAPER ON TERMINATION* iii (1964) [hereinafter cited as TYLER, *WORK PAPER*]: "[T]he desire of the United States has been that the Indian would become more like us, that is like the predominant culture, or, failing this, that he would at least become enough like us so that he could live among us without giving us a guilty conscience. Besides this, our acquisitive nature would not allow us to see the Indian in possession of unused resources that might be used for our enrichment or, as recreational areas, for our government." *See also, e.g.*, TYLER, *HISTORY*, *supra* note 6, at 48-50; FEDERAL INDIAN LAW, *supra* note 1, at 62-66; A. JOSEPHY, *THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST* 285-332 (1971).
23. H. FRITZ, *THE MOVEMENT FOR INDIAN ASSIMILATION, 1860-1890*, 169 (1963) [hereinafter cited as FRITZ].
24. *Id.* at 17-19.
25. Indians, like minority immigrants, would be integrated into the great American melting-pot; correspondingly, lands and resources reserved to the Indians by treaty or otherwise would become available for private or public resources, thus better allocating available resources to the society as a whole. Moreover, the federal bureaucracy dealing with Indians could be discarded, a goal seemingly popular among Indians and non-Indians alike. On the other hand, Indian skepticism toward assimilation was summarized by one Indian writer through a quote from Gen. George A. Custer: "If I were an Indian, . . . I would greatly prefer to cast my lot among those of my people who adhered to the free open plains rather than submit to the confined limits of a reservation, there to be the recipient of the blessed benefits of civilization, with its vices thrown in without stint or measure." *Quoted in* BURNETTE, *supra* note 4, at 7.
26. Hasse, "Termination and Assimilation: Federal Indian Policy 1943 to 1961," 13 (1974) (unpublished Ph.D. dissertation in Washington State University Library) [hereinafter cited as Hasse]. *See generally* MINER, *supra* note 21.
27. 25 U.S.C. §§ 331-34, 336, 339, 341, 342, 348, 349, 381 (1970).
28. Dawes, *Solving the Indian Problem*, BOARD OF INDIAN COMM'RS ANN. REP. 69-70 (1883), *reprinted in* AMERICANIZING THE AMERICAN INDIANS (F. Prucha Ed. 1973) [hereinafter cited as AMERICANIZING THE AMERICAN INDIANS]; PRUCHA, *AMERICAN INDIAN POLICY*, *supra* note 11, at 214: "The process of civilization was to be marked by—indeed it was to be brought about by—transition from the nomadic life of the hunter. . . to the settled life of the farmer." For a summary of the act's provisions, *see* FEDERAL INDIAN LAW, *supra* note 1, at 207-36.
29. H.R. REP. No. 1576, 46th Cong., 2d Sess. 7-10 (1938) (House Comm. on Indian Affairs, Minority Report on Land in Severalty Bill, 1880), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 28, at 124-25. *See also* the authorities cited in FEDERAL INDIAN LAW, *supra* note 1, at 210-17.
30. TYLER, *HISTORY*, *supra* note 6, at 97, 104-107.
31. R. MARDOCK, *THE REFORMERS AND THE AMERICAN INDIANS*, 223-26 (1971); J. COLLIER, *INDIANS OF THE AMERICAS*, 227 (1947); FRITZ, *supra* note 23, at 211-15; Hasse, *supra* note 26, at 12-13.
32. *See, e.g.*, the authorities cited in FEDERAL INDIAN LAW, *supra* note 1, at 215-17.
33. 109 U.S. 556 (1883).
34. *Cf.* G. HYDE, *SPOTTED TAIL'S FOLK: A HISTORY OF THE BRULE SIOUX* 152, 307 (1961) (payment by the killer, or a representative, of "blood money" as compensation to the victim's relatives). Co-author Biggs has independent oral verification of the Lakota system of compensatory justice, which reportedly could amount to a duty to care for the victim's family for the rest of the killer's life. Hyde's work is open to challenges of unreliability on other issues. *See* 9 HARV. J. LEGIS. 557, 562 (1972).
35. 18 U.S.C. § 1153 (1970).
36. "I never expect to see the present Bureau of Indian Affairs done away with until the Indian as an Indian passes away. . . . [W]orking for themselves [as inspired by the

possession of private property] . . . will be of very little use to [Indians] unless there is carried along with it the power of . . . Christian teaching." Dawes, *quoted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 28, at 104, 108. For a discussion of assimilationist pressures in Indian education during the late 1800's, see Rosenfelt, *Indian Schools and Community Control*, 25 STAN. L. REV. 489, 493-95 (1973) [hereinafter cited as Rosenfelt, *Community Control*].

37. Rosenfelt, *Community Control*, *supra* note 36, at 492-93; COMM'R INDIAN AFFAIRS ANN. REP. 3 (1877).

38. "Undoubtedly our chief hope is in education of the young . . . I would advise the establishment of a rule making it compulsory upon all Indian children . . . to attend schools, and requiring English alone to be spoken and taught therein; and . . . as many of them as possible should be placed in boarding-schools. [T]he eventual civilization of the Indians may be reached through the education of their children; and further . . . it can be brought about more speedily by that method than by any other." COMM'R INDIAN AFFAIRS ANN. REP. xxv (1888).

39. *Quoted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 28, at 260-61.

40. *See generally id.*, especially at 253-54. *See also* FRITZ, *supra* note 23, at 72, 204.

41. P. FARB, MAN'S RISE TO CIVILIZATION AS SHOWN BY THE INDIANS OF NORTH AMERICA, *quoted in* Rosenfelt, *Community Control*, *supra* note 36, at 494.

42. *See* FEDERAL INDIAN LAW, *supra* note 1, at 153-54.

43. Act of June 2, 1924, 43 Stat. 253.

44. *Indian Resources Development Act of 1967, Hearings before the House Subcomm. on Indian Affairs, Comm. on Interior and Insular Affairs*, 90th Cong., 1st Sess. 48 (1967); OUR BROTHER'S KEEPER—THE INDIAN IN WHITE AMERICA 123-39 (E. Cahn ed. 1970) [hereinafter cited as Cahn]; Orfield, *supra* note 10, ch. 4 at 4; *Education of Indian Children, Hearings Before the Subcomm. on Indian Education of the Senate Comm. on Labor & Public Welfare*, 90th Cong., 1st and 2d Sess. pt. 1 at 35-36 (1967).

45. Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1842 (1968).

46. Compare FRITZ, *supra* note 23, at 161, 221, with Trulove & Bunting, *supra* note 10, at 23-24.

47. Trulove & Bunting, *supra* note 10, at 22-23.

48. For example, 1843 and 1875 statutes were intended to terminate the Stockbridge-Munsee and Wisconsin Winnebago tribes through the allotment process. 5 Stat. 645, 18 Stat. 420. *But see* United States v. Nice, 241 U.S. 591 (1916) (act of allotment, despite contemplation of eventual tribal termination, not in itself a termination without a further showing of legislative intent). The Ottawa, Kickapoo, and Wyandotte tribes were parties to various treaties which provided for termination. 13 Stat. 623; 12 Stat. 1237; 15 Stat. 513; Schrimpscher v. Stockton, 183 U.S. 290, 294-97 (1902). All of the above tribes were later restored to full federal recognition by treaty or statute. *See Menominee Restoration Act, Hearings on H.R. 7421 before the Subcomm. on Indian Affairs of the House Comm. on Interior & Insular Affairs*, 93d Cong., 1st Sess. 313-23 (1973) (statement of V. Deloria).

49. This legislation is summarized in FEDERAL INDIAN LAW, *supra* note 1, at 429-30. The two most important acts were the Curtis Act of 1898, Act of June 28, 1898, 30 Stat. 495, and the "Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," Act of Apr. 26, 1906, 34 Stat. 137. The groundwork for this legislation was laid by the Dawes Commission, established in 1893 and headed by former Senator Dawes, the sponsor of the General Allotment Act. The purpose of the Commission was to negotiate with the Five Civilized Tribes to allot their lands and to dissolve their governments and tribal existence. The Commission's work is described in Woodward v. DeGraffenreid, 238 U.S. 284 (1915). For other authorities on this important era, see A. GIBSON, THE CHICKASAWS (1973); DEBO, AND STILL THE WATERS RUN, *supra* note 17; A. DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC (1934).

50. *See generally* Southern Surety Co. v. Oklahoma, 241 U.S. 582 (1916). After those acts became effective, the Oklahoma land rush occurred and non-Indians flooded into the former Indian Territory, now the new state of Oklahoma. *See, e.g.*, TYLER, HISTORY, *supra* note 6, at 105. As Debo put it, "the orgy of exploitation that resulted is almost beyond belief." DEBO, *supra* note 17, at x. The Five Civilized Tribes then continued with very



minimal governmental functions and limited federal contact. FEDERAL INDIAN LAW, *supra* note 1, 430, 439-42; TYLER, HISTORY, *supra*.

51. The Oklahoma Indian Welfare Act of 1936, 25 U.S.C. 501 *et seq.* (1970), extended the provisions of the Indian Reorganization Act (see text accompanying notes 52-55, *infra*), to the Five Civilized Tribes and other Oklahoma tribes. Thus many powers of self-government were restored to the tribes. See FEDERAL INDIAN LAW, *supra* note 1, at 455. The Five Civilized Tribes thus partially overcame their "termination," but their land was not restored. For the special laws applying to the Five Civilized Tribes and other Oklahoma tribes, see generally FEDERAL INDIAN LAW, *supra* note 1, at 425-55.

52. Now codified as 25 U.S.C. § 461 *et seq.* (1970).

53. W. Kelly, Introduction, in INDIAN AFFAIRS AND THE INDIAN REORGANIZATION ACT, THE TWENTY YEAR RECORD ii (Kelly ed. 1954) [hereinafter cited as TWENTY YEAR RECORD].

54. *Id.* at 35-36. The provisions of the IRA are summarized in FEDERAL INDIAN LAW, *supra* note 1, at 83-87. The IRA was inspired in part by the famous Meriam Report of 1928. See THE PROBLEM OF INDIAN ADMINISTRATION (L. Meriam ed. 1928). The Meriam Report, among other things, criticized the allotment system, called for economic development programs, and recommended improved health and education programs. The Meriam Report itself was assimilationist in part. It began by stating that Indians "are not adjusted to the economic and social system of the dominant white civilization." *Id.* at 1. A major theme of the Report seemed to be that the "Indian problem" was largely one of poor federal administration; when the delivery of services improved, Indian poverty would disappear and Indians could take their place in the "economic and social system" of non-Indian America. See, e.g., D. McNICKEL, THEY CAME HERE FIRST 235 (rev. ed. 1975).

55. BROPHY & ABERLE, *supra* note 2, at 182. See Report of the Committee on Indian Affairs to the Commission on Organization of the Executive Branch of the Government 72-73 (Mimeographed, Oct., 1948); TYLER, WORK PAPER *supra* note 22, at 21-22, n.36; TYLER, HISTORY, *supra* note 6, at 152-53 n.2. See also Wesley, *Tribal Self-Government Under IRA*, in TWENTY YEAR RECORD, *supra* note 53, at 28; COMMISSION ON THE RIGHTS, LIBERTIES AND RESPONSIBILITIES OF THE AMERICAN INDIAN, A PROGRAM FOR INDIAN CITIZENS 8 (Jan., 1961).

56. TYLER, HISTORY, *supra* note 6, at 132; TWENTY YEAR RECORD, *supra* note 53, at 13: "The Indian Bureau has not generally been diligent in encouraging tribes to seek diminution of [federal] supervisory powers . . . Some administrative mistakes were made in implementing the act," citing Haas & Jay, *Toward Effective Indian Government*, 6 THE AMERICAN INDIAN, 71 (1951). See also Kelly, *Indian Adjustment and the History of Indian Affairs*, 10 ARIZ. L. REV. 559, 569 (1968) (haste in implementation of statute). Most tribes were offered standard-form constitutions based on English common law precedents rather than tribal custom. This caused much organizational confusion, although tribes have since been allowed to amend these standard constitutions or replace them entirely with provisions more meaningful to the particular tribes. See W. FARBER, P. ODEEN & R. TSCHETTER, INDIANS, LAW ENFORCEMENT AND LOCAL GOVERNMENT 10 (1957).

57. TYLER, HISTORY, *supra* note 6, 136.

58. Hasse, *supra* note 26, at 58.

59. See generally, TWENTY YEAR RECORD, *supra* note 53.

60. BROPHY & ABERLE, *supra* note 1, at 182. The assimilationist premises of the IRA are explained in part by the fact that the IRA was greatly influenced by the Meriam Report of 1928: although the Meriam Report called for many progressive reforms to benefit Indians, it too was built on assimilationist precepts. See note 54, *supra*.

61. S. REP. No. 310, 78th Cong, 2d Sess. (1943). "Members of the special investigating subcommittee . . . protested subsequently that they allowed their names to be used without knowing what was in the report. Nevertheless, the document was never recalled . . . [It] called for *inter alia*:

1. The immediate elimination of all research . . . ;
2. Elimination of rehabilitation programs for Indians;
3. The transfer of the management of forests, irrigation works, hospitals, schools, to other agencies . . . ;
4. Immediate cessation of all land purchases;
5. The division of all trust funds . . . and removal of Indian lands from trust status;

6. The reduction of (B.I.A.) staff to the absolute minimum."

H. FEY & D. MCNICKEL, *INDIANS AND OTHER AMERICANS* 124-25 (1969) [hereinafter cited as FEY & MCNICKEL,]. See also TYLER, *HISTORY*; *supra* note 6, at 140. A supplemental report was filed the following year concurring with S. REP. No. 310, but in milder terms. STAFF OF SENATE COMM. ON INDIAN AFFAIRS, *SURVEY OF INDIAN AFFAIRS, SUPPLEMENTAL REPORT* (Comm. Print 1944).

62. *Investigate Indian Affairs, Hearings on H. Res. 166 Before the House Comm. on Indian Affairs*, 78th Cong., 1st Sess. (1943). These hearings contain a revealing exchange concerning bringing assimilation to the pueblos of the Southwest. *Id.*, pt. 4 at 169-71.

63. TYLER, *HISTORY*, *supra* note 6, at 143, 147.

64. *Emancipation of Indians, Hearings on H.R. 2958, H.R. 2165, and H.R. 1113, Before the Subcomm. on Indian Affairs of the House Comm. on Public Lands*, 80th Cong., 1st Sess. (1947).

65. *Removal of Restrictions on Indian Property and for the Emancipation of Indians, Hearings on H.R. 3680, H.R. 3681, and H.R. 3710, Before the House Comm. on Indian Affairs*, 79th Cong., 2d Sess. (1946); *Removal of Restrictions on Property of Indians Who Served in the Armed Forces, Hearing on S. 1093 and S. 1194, Before the Senate Comm. on Indian Affairs*, 79th Cong., 2d Sess. (1946).

66. See, *Officers and Employees of the Federal Government Hearings on S. Res. 41 Before the Subcomm. on the Post Office and Civil Service*, 80th Cong., 1st Sess. (1947), cited in, e.g., TYLER, *HISTORY*, *supra* note 6, at 164 n.17. See also H.R. REP. No. 2503, 82d Cong., 2d Sess. 164-65 (1953) (groupings of tribes according to presumptive readiness for termination, reprinted from 1947 hearings).

67. *Id.* at 15. See Zimmerman, *The Role of the Bureau of Indian Affairs Since 1933*, 311 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 31, 36 (1957) [hereinafter cited as Zimmerman]: "When Assistant Commissioner William Zimmerman presented his report to the Committee, the questions of the Committee's counsel revealed the object of the investigation. How many personnel would be released by the proposal? Zimmerman estimated 500. How much money would be saved? He did not know, but he doubted that it would be \$5,000,000." See "The Development of the Klamath Termination Policy," 25 (T. Stern, unpublished ms., copy on file at University of Oregon Law School) [hereinafter cited as Stern]; TYLER, *HISTORY*, *supra* note 6, at 163-64. These lists were apparently drawn up in the one-day interval between the Committee's demand and Zimmerman's subsequent reappearance and testimony. FEY & MCNICKEL, *supra* note 61, at 133. *C.f.* Hasse, *supra* note 26, at 139: "[I]ronically, while one of the original purposes of termination was to reduce expenses, it rapidly proved to be one of the most costly Indian policies in history . . . as Congress became convinced that termination would be carried out within a few years, generous appropriations were granted. A budget increase from \$37,000,000 in 1947 to \$87,000,000 by the end of . . . 1953 reveals just how willing Congress was to finance the policy."

68. See, *Hearings on S. Res. 41, supra* note 66, at 544-45; TYLER, *HISTORY*, *supra* note 6, at 163. These criteria were later rejected. See note 118, *infra*.

69. Zimmerman, *supra* note 67.

70. H. R. REP. 1904, 83rd Cong, 2d Sess. 1-3; *Termination of Federal Supervision over Certain Tribes of Indians, Joint Hearings on S. 2670 and H.R. 7674, etc., Before the Subcomm. on Indian Affairs of the Comm. on Interior & Insular Affairs*, 83d Cong., 2d Sess. 17 (1954) [hereinafter cited as *Joint Hearings on Termination*].

71. *Joint Hearings on Termination, supra* note 70, at 42: "As far as we can determine, the Turtle Mountain group has no visible resources at all." Despite this extreme poverty, the named band was soon considered for termination, apparently with the rationale that the involved Indians would be relocated en masse away from their former lands. *Id.* at 46. The band, however, was never terminated.

72. *Id.* at 1-2.

73. *Id.* at 7. One band considered ready for termination consisted of 24 families, none of which were self-supporting. The average income of the band was "about one third of the estimated income of non-Indian families in the area adjacent to the reservation." *Id.* See also *id.*, pt. 6, at 655-56: "[Senator Watkins.] Seven years ago this tribe was designated by

the then Acting Indian Commissioner as ready for a termination. Now he had some conditions added. It is not necessary to go into them for the moment . . . Somewhere, sometime, we have to terminate [federal-tribal relations]."

74. *Hearings on S. 1222, supra* note 3. Senator Ecton questioned the desirability of allowing the tribe power to consent or object to termination, "if we as a Congress feel that the Klamath would be better off if we did liquidate them." Senator Watkins of Utah commented that "what we would like to begin to do is put the people on their own feet—to manage their own business." Mrs. Dorothy McAnulty testified that she was anxious to preserve the hospital and agency buildings for the use of elderly tribesmen in the event of liquidation. Senator Watkins assured her that "liquidation means to give use of all facilities here to the Indians, not to take anything away from them." The reply: "Mrs. McNulty [*sic*]. In that case I think it would be wonderful." Senator McFarland then commented, "I presume that is where they get the impression this bill provides for sale of the property." Quoted in Stern, *supra* note 67, at 36. Stern cites Section 4(a) of S. 1222: "Sec. 4(a) The Secretary of the Interior is authorized and directed, upon receipt of the report of the appraisal board, to purchase from the Klamath tribe all such tribal property, including timber and lands, at the fair market value thereof as determined by the appraisal board." *Id.*

75. The impetus for termination and assimilation was expressed in the 80th Congress, 1st Session (1947), by the introduction of 133 private bills directing the Secretary of the Interior to issue fee patents to Indian land or to sell specific pieces of the Indian land base to non-Indian buyers. WASHBURN, *supra* note 8, at 82. Thirteen other bills were introduced to provide for Indian "emancipation," that is, the liquidation of tribal property of certain tribes. *Id.* at 82-83. The power of the purse was also exercised by Congress in pursuit of its objectives, both in fiscal years 1947 and 1948. TYLER, WORK PAPER, *supra* note 22, at 33; TYLER, HISTORY, *supra* note 6, at 165; Schifter, *Trends in Federal Indian Administration*, 15 S.D.L. REV. 1, 4 n.11 (1970), *citing* Act of June 17, 1948, ch. 496, 2(a), (d), 62 Stat. 476. Indian Bureau budgets suffered "substantial" cuts in each of the two years, the reduction amounting to \$9,000,000 in 1948. *See* Schifter, *supra*.

76. A series of conferences was set up between the central Indian Bureau Office and regional offices to develop individual programs for each reservation or area. Acting Comm'r's Circular No. 3762 (May 5, 1948). *See* TYLER, HISTORY, *supra* note 6, at 166; TYLER, WORK PAPER, *supra* note 22, at 35. Specific instructions concerning the conferees' purpose included the following directions: "What is desired is the assembly in concise form of existing factual data as to the social and economic status of each group or tribe and, after a careful analysis and evaluation of these data, the projection of a comprehensive long-range program. The objective of the program should be the eventual discharge of the Federal government's obligation, legal, moral, or otherwise, and the discontinuance of Federal supervision and control at the earliest possible date compatible with the government's trusteeship responsibility." Acting Comm'r's Circular No. 3675 (May 28, 1948). TYLER, HISTORY, *supra* note 6, at 166; TYLER, WORK PAPER, *supra* note 22, at 35.

77. Comm'r's Circular No. 3537 (Nov. 14, 1943), *referring to* Circular No. 3514. Basic tribal programs called for by the latter circular were to include the following:

1. Inventories of tribal resources;
2. Appraisals of agency services;
3. Estimates of future tribal needs;
4. Long-term plans for preserving tribal resources and for adapting them to meet tribal needs;
5. Statements outlining how services rendered by the Indian agencies might be perpetuated (a) by other agencies, or (b) through the efforts of the Indians themselves. TYLER, HISTORY *supra* note 6, at 144.

78. *E.g., Repeal of the Wheeler-Howard Act, Hearings on S. 978 Before the Senate Comm. on Indian Affairs*, 79th Cong., 2d Sess. (1946).

79. *See* notes 64 and 65, *supra*.

80. Hasse, *supra* note 26, at 81.

81. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, INDIAN AFFAIRS: A REPORT TO CONGRESS (Mar. 1949).

82. *Id.* at 77-80. As indicated by the Hoover Commission's full title, that group was

authorized to report on executive branch reorganization, but had received no specific authorization to mandate or recommend a sweeping change in the federal-tribal relationship.

83. *Id.* at 59: "The Navajo Nation, comprising some 55,000 Indians in New Mexico, Arizona, and Utah, is in severe financial straits that have caused widespread malnutrition and starvation. This has occurred at a time when the United States as a whole is enjoying prosperity . . . . Many other Indian groups . . . face similarly severe conditions . . . ."

84. Navajo-Hopi Rehabilitation Act of 1950, Pub. L. No. 81-474, 64 Stat. 44 (1950), reprinted in [1950] U.S. CODE CONG. & AD. NEWS 44.

85. "Following a major airlift, the government reacted in the longer term with a 10-year economic development program and a theory of surplus Indian population . . . that was to become the source of the relocation program . . . . Since the government had ignored the possibilities of economic development on the reservation for so long, [the idea of relocation] was perhaps inevitable." STAFF OF AMERICAN INDIAN POLICY REVIEW COMM'N, 94th Cong., 2d Sess., REPORT ON URBAN AND RURAL NON-RESERVATION INDIANS 46 (Comm. Print 1976) [hereinafter cited as TASK FORCE EIGHT].

86. Myer was, in Gary Orfield's words, "an aggressively innovating commissioner with no experience in Indian Affairs." Orfield, *supra* note 10, ch. 4 at 3. See also Zimmerman, *supra* note 67, at 35 ("Mr. Myer was not informed about Indians, but he had experience with the Japanese as Director of the War Relocation Authority.") and FEY & McNICKEL, *supra* note 61, at 150 ("The methods [Mr. Myer] used in bringing about resettlement of the Japanese were forceful, and at times coercive. Some critics of Mr. Myer's Indian policies accused him of transferring to the Indian situation the same thinking, if not the same methods, that had served in moving people out of the Japanese relocation [internment] camps. Mr. Myer denied these accusations and insisted that his was a more realistic appraisal of Indian needs and aspirations than that of the men who had preceded him in recent years.") Many of Myer's wartime subordinates followed him into the Indian Service, causing critics to comment that energy had been substituted for experience and expertise in Bureau administration. See, e.g. Cohen, *supra* note 4, at 383, 384 n.137: "Assistant Commissioner Zimmerman . . . was swiftly replaced by a former WRA official who knew nothing of Indians. Shortly thereafter, the Bureau's Chief Counsel . . . was removed and replaced by another ex-WRA official . . . . A superintendent suspected of being too 'soft' towards the Blackfeet Indians of Montana was replaced by a former warden of a W.R.A. detention camp." Myer himself was the object of a great deal of controversy in his role as head of the Indian Bureau. See, *id.* at 389 n.158 (Rep. Toby Morris calling Myer "a man of unimpeachable integrity" and "a very able administrator," versus Harold L. Ickes, who had recommended Myer for the Indian Commissionership, calling him "a blundering and dictatorial tin-Hitler.") But see *id.* at 389-90: "[T]he problem of bureaucratic aggrandizement has deeper roots than one will find who looks only to the personality or background of individual administrators."

87. See, e.g., H.R. REP. NO. 2503, 82d Cong., 2d Sess. 3-4, 14-45 (1952).

88. COMM'R INDIAN AFFAIRS ANN. REP. 353 (1951), quoted in TYLER, HISTORY, *supra* note 6, at 167.

89. H.R. REP. NO. 2680, 83d Cong., 2d Sess. 7, 11 (1954).

90. *Id.* at 11. Apparently, this remark referred to the potentially available Indian manpower after relocation had occurred, as well as the "cooperation" involved in making available previously restricted reservation resources to special interests interested in exploiting those resources. Cf. note 256, *infra*, and accompanying text.

91. La V. Madigan, The American Indian Relocation Program 3 (Report for Assoc. on American Indian Affairs, Inc., December 1956) [hereinafter cited as Madigan]. According to Fey and McNickel, the first Indian employment centers in urban areas were established in 1931. See FEY & McNICKEL, *supra* note 61, at 149. See also TYLER, HISTORY, *supra* note 6, at 155-59. Beginning in 1950, the Navajo Rehabilitation Act and other programs emphasized relocation efforts, although its thrust initially seemed to provide an alternative to relocation. See note 85, *supra* and accompanying text.

92. Madigan, *supra* note 91, at 7: "Urban areas were regarded as providing generally available employment. Applicants to the program were accepted on the basis of whether they could 'be expected to succeed'."

93. Letter from the Commissioner of Indian Affairs to Rep. Sadlak, Mar. 9, 1956, *reprinted in Madigan, supra* note 91, at 3: "We must face facts and one of the most important facts is that there is a definite physical limit to resource development on the reservations. The Navajo Reservation . . . is a good illustration. Under the most optimistic estimate the resources of this reservation, after full development, might be expected to provide a decent livelihood for about 45,000 people. Yet the present Navajo population is about 78,000 and, if present growth trends continue . . . will reach . . . approximately 350,000 by the year 2000."

94. Madigan, *supra* note 91, at 17. *See also* Hasse, *supra* note 26, at 130: "In practice, the [relocation] program was less than voluntary since it prodded Indians to leave the reservation by offering immediate financial assistance for moving while reservation economic programs offered only marginal benefit."

95. *Id.* at 8. One criticism of this type was that relocation drained off the strength of the Indian population, leaving the old, the young, and the sick to face reservation poverty alone. A corresponding argument was that relocation immersed Indian families in an alien culture with inadequate preparation for the new experience, and expected them to act like immigrants and "make it on their own." The results of the program were mixed, but they seemed to indicate that mere change of circumstances was not sufficient to change basic cultural attitudes and personality traits.

96. *See* notes 264-266 and accompanying text, *infra*.

97. *Joint Hearings on Termination, supra* note 70, pt. 1 at 45. *See also*, STAFF OF HOUSE COMM. ON INTERIOR & INSULAR AFFAIRS, SURVEY REPORT ON THE B.I.A., 83d Cong., 2d Sess. 22-23 (Comm. Print 1954).

98. *Joint Hearings on Termination, supra* note 70, pt. 1 at 45.

99. *Id.*

100. *Id.* at 46.

101. *See* STAFF OF SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, 85th Cong., 2d Sess., INDIAN LAND TRANSACTIONS xvii-xxi, 1-17 (Comm. Print 1958); Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN L. REV. 1061-64, 1074-75 (1974).

102. Hasse, *supra* note 26, at 143.

103. Zimmerman, *supra* note 67, at 35.

104. *See* Cohen, *supra* note 4, at 359: "A bill to authorize employees of the Indian Bureau to carry arms and to make arrests, searches, and seizures without warrant, for violation of Bureau regulations [was introduced under Myer's administration] . . . Commissioner Myer . . . gave the proposal his full support . . . charging that critics of the measure were either dishonest or dupes of dishonest agitators." Federal funds were used to influence tribal elections. *Id.* at 353-54. The Bureau directly and forcefully interfered with some tribal elections during this period. *Id.* at 354-55. Commissioner Myer's proposed regulations to control the selections of tribal attorneys and their activities were rejected by the Secretary of the Interior, but the practice was followed and defended as already existing procedure. According to Cohen, "during more than a decade before Mr. Myer took office no Indian tribe had ever been denied the right to retain as its attorney any lawyer in good standing at the bar. Since Mr. Myer took office more than forty Indian tribes have complained of Bureau interference in this right." *Id.* at 355-56. Cohen also noted that "when the Oglala Sioux Tribe . . . petitioned Congress to cut wasteful expenditures of the Indian Bureau in its so-called 'extension service,' in South Dakota, the Indians were advised that \$140,000 of credit funds allocated to the tribe would be 'frozen' until the tribe withdrew its criticisms." *Id.* at 356, *citing Appropriations for 1952 for the Department of the Interior, Hearings Before the House Comm. on Appropriations*, 82d Cong., 1st Sess. 1243, 1263 (1951).

105. *See* Cohen, *supra* note 4, at 356.

106. H.R. REP. No. 2680, 83d Cong. 2d Sess. 10 (1954). *See also* BROPHY & ABERLE, *supra* note 2, at 29 ("Contrary to widespread popular belief, the government has not always cheated the Indians"); Cohen, *supra* note 4, at 375 n.101 ("Mounting evidence of the misuse of tribal funds . . . by the Indian Bureau [was] brought to light . . . in 1928").

107. *See* H.R. REP. No. 2680, *supra* note 106, at 8.

108. Cohen, *supra* note 4, at 382 n.135.
109. *Id.* at 379-82.
110. "[T]he position of the government was voiced by Interior Secretary Douglas McKay: 'Now let me say a few words about the principle of Indian 'consent' . . . It seems to me that the principle of Indian 'consent' . . . has most serious Constitutional implications. With full respect for the rights of the Indian people, I believe it would be extremely dangerous to pick out any segment of the population and arm its members with authority to frustrate the will of Congress which the whole people has elected.'" TYLER, HISTORY, *supra* note 6, at 184-85, quoting Douglas McKay, Letter to Oliver LaFarge, President of the Association of American Affairs, Inc. (Nov. 30, 1955). In point of fact, "there had been no official congressional declaration on the matter of consent." TYLER, HISTORY *supra* at 185.
111. Cohen, *supra* note 4, at 376.
112. *Id.* at 380, quoting OP. SOL. DEPT INT., July 2, 1951.
113. Cohen, *supra* note 4, at 380.
114. The resolution is set out in the resulting report, H.R. REP. No. 2503, 82d Cong., 2d Sess. (1952).
115. The resolution is set out in the resulting report, H.R. REP. No. 2680, 83d Cong., 2d Sess. v-vi (1954).
116. See note 76, *supra*. See also TYLER, HISTORY, *supra* note 6, at 166-68.
117. See TYLER, HISTORY, *supra* note 6, at 172.
118. H.R. REP. No. 2680, 83d Cong., 2d Sess. 8-9, 11 (1954). See also Watkins, *supra* note 5, at 51 ("Secluded reservation life is a deterrent to the Indian . . . Self-reliance is basic to the whole Indian-freedom program."); Stern, *supra* note 67, at 30. The four Zimmerman criteria are specified in the text accompanying note 68, *supra*.
119. See, e.g., Cohen, *supra* note 4, at 390. See generally Zimmerman, *supra* note 67; Orfield, *supra* note 10.
120. House Concurrent Resolution 108 is quoted in full in the text accompanying note 121, *infra*. The individual acts are listed in Part II *infra*.
121. 67 Stat. B132.
122. See, e.g., 1A C. SANDS, SUTHERLAND'S STATUTORY CONSTRUCTION § 29.03, at 337-38 (1972); *American Indian and Alaska Natives Policy, Hearings on S. Con. Res. 26 Before the Senate Comm. on Interior & Insular Affairs*, 92d Cong., 1st Sess. 98-99 (1971). See also C. ZINN, HOW OUR LAWS ARE MADE, H.R. DOC. No. 509, 94th Cong., 2d Sess. 7-8 (1976).
123. Martone, *American Indian Tribal Self-government in the Federal System*, 51 NOTRE DAME LAW., 600, 616 n.136 (1976); BROPHY & ABERLE, *supra* note 2, at 182; *Hearings on S. Con. Res. 26, supra* note 122, at 98.
124. E.g., *Hearings on S. Con. Res. 26, supra* note 122, at 44-46 (California Indian Legal Services Draft Bill on National Indian Policy; American Indian Chicago Conference, Declaration of Indian Purpose (June 19, 1961), reprinted in STAFF OF AMERICAN INDIAN POLICY REVIEW COMM'n, 94TH CONG., 2D SESS., REPORT ON FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS 186 (Comm. Print 1976).
125. Oliver LaFarge, president of the Association on American Indian Affairs, estimated the Indian population in the United States to be 400,000 in 1950. LaFarge, AAIA Restatement of Program and Policy in Indian Affairs, in Papers of Phileo Nash, Truman Library (Feb. 8, 1950), quoted in Hasse, *supra* note 26, at 114. A total of 12,000 terminated individuals would be slightly less than 3 per cent of the 1950 estimate.
126. In 1953, approximately 43 million acres of land were held in trust for Indians. H.R. REP. No. 2503, 82d Cong., 2d Sess. 60-74 (1953).
127. 26 Fed. Reg. 3726-3755 (1961). See also 26 Fed. Reg. 7362 (1961) (Klamath Termination Plan); 26 Fed. Reg. 8042 (Mixed-blood Ute Termination Plan).
128. H.R. REP. No. 841, 83d Cong., 1st Sess. (1953); H.R. REP. No. 2680, 83d Cong., 2d Sess. (1954); Watkins, *supra* note 5, at 47; H.C.R. 108, 83d Cong. 1st Sess. (1953), 67 Stat. 3132.
129. The elements of the special federal-tribal relationship are summarized in note 1, *supra*. The relationship was not "terminated" in all respects because Congress retained a "continuing partial guardianship" in regard to some questions of property and competency. See *Otradovec v. First Wisconsin Trust*, 454 F.2d 1258 (7th Cir. 1972); *Crain v. First Nat'l*

Bank, 324 F.2d 532 (9th Cir. 1963). In addition, both the Menominee and Klamath tribes established that their treaty hunting and fishing rights were not taken away by their termination acts. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), *overruling Klamath & Modoc Tribes v. Maison*, 338 F.2d 620 (9th Cir. 1964).

130. See, e.g., *TASK FORCE TEN*, *supra* note 10, at 27.

131. *Trulove & Bunting*, *supra* note 10, at 15.

132. *Id.* at 17; *TASK FORCE TEN*, *supra* note 10, at 24.

133. The state corporations for the two tribes are discussed in *Menominee Tribe v. United States*, 391 U.S. 404, 408-10 (1968), and *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 132-40 (1972).

134. See, e.g., *FREEDOM WITH RESERVATION* 27. 30 (D. Shames ed. 1972) (a report and analysis of the Menominee termination from Menominee perspective).

135. See generally *Chambers*, *supra* note 1.

136. See generally *United States v. Mazurie*, 419 U.S. 544 (1975); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *FEDERAL INDIAN LAW*, *supra* note 1, at 122. For the effect of Public Law 280, discussed in the text accompanying notes 207-227, *infra*, on state legislative jurisdiction, see the authorities cited in notes 207, 217, *infra*.

137. *Fisher v. District County Ct.*, 424 U.S. 382, 386-91 (1976); *FEDERAL INDIAN LAW*, *supra* note 1, at 120. The effect of Public Law 280 on state jurisdiction is discussed in notes 207-212, 217 and accompanying text, *infra*.

138. See, e.g., *United States v. Kagama*, 118 U.S. 375, 384 (1886); 5 *UNITED STATES COMM'N ON CIV. RIGHTS REP.* 146-48 (1961); *STAFF OF AMERICAN INDIAN POLICY REVIEW COMM'N*, 94th CONG., 2d SESS., *REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION* 15-24, 32 (Comm. Print 1976).

139. See, e.g., *Moe v. Confederated Salish & Kootenai Tribes*, —U.S.—, 96 S.Ct. 1634, 1643-44 (1976).

140. E.g., 20 U.S.C. §§ 236-41(1) and 631-47 (1970), the "Impact Aid" laws. Rosenfelt, *Toward a More Coherent Policy for Funding Indian Education*, 40 *LAW & CONTEMP. PROB.* 190, 195-96 (1976) [hereinafter cited as Rosenfelt, *Indian Education*]. See also notes 233-234, *infra*, and accompanying text.

141. See, e.g., *Israel*, *supra* note 1, at 624-51. Although termination cut off programs to federally recognized tribes, terminated tribes remain eligible for some programs available to Indians generally. See *TASK FORCE TEN*, *supra* note 10, at 1665-70. See also, e.g., *The Indian Education Act of 1972*, 20 U.S.C. §§ 241aa, 887c, 2111a (Supp. III, 1974) (definition of "tribe" for eligibility purposes); 20 U.S.C. § 1221h (Supp. III, 1974), (expressly includes terminated tribes).

142. See generally Rosenfelt, *Indian Education*, *supra* note 140; *STAFF OF AMERICAN INDIAN POLICY REVIEW COMM'N*, 94TH CONG., 2D SESS., *REPORT ON INDIAN HEALTH* (Comm. Print 1976). As is the case with federal programs to tribes, individual Indians remain eligible for some programs even after termination. See note 141, *supra*.

143. *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 168 (1973); *Talton v. Mayes*, 163 U.S. 376, 382-85 (1896); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 551, 557 (1832); *FEDERAL INDIAN LAW*, *supra* note 1, at 122-26. See *Moe v. Confederated Salish & Kootenai Tribes*, to —U.S.—, 96 S.Ct. 1642 (1976) ("the 'backdrop' of the Indian sovereignty doctrine" underlies modern preemption analysis); *Fisher v. District County Ct.*, 424 U.S. 382, 386 (1976) ("The right of the Northern Cheyenne Tribe to govern itself has been consistently protected by federal statute"); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (Indian tribes "possess . . . independent authority over matters that affect the internal and social relations of tribal life"). But see Martone, *supra* note 123, at 632-33, who argues that Indian tribes do not possess inherent sovereignty. He gives only superficial treatment to the very important recent cases, *supra*, perhaps due to publishing deadlines.

144. The one known exception is the Klamath Tribe, which has developed a comprehensive fish and game management plan. *Klamath Tribal Wildlife Management Plan*, June 14, 1976 (copy on file at *American Indian Law Review Office*). A common misconception is that federal termination of services to a particular tribe caused that tribe to "cease to exist." The fallacy of that assumption is shown by the opinions in two recent federal cases:

"The Termination Act did not abolish the *tribe* or its membership. It merely terminated federal supervision . . ." (emphasis in original). *Menominee Tribe v. United States*, 388 F.2d 998, 1000-1001 (Ct. Cl. 1967), *aff'd*, 391 U.S. 4040 (1970). "[T]he Passamaquoddies were a tribe before the nation's founding . . . The absence of specific federal recognition in and of itself provides little basis for concluding that the Passamaquoddies are not a 'tribe' . . ." Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 378 (1st Cir. 1975). *Accord*, *Otradovec v. First Wisconsin Trust*, 454 F.2d 1258 (7th Cir. 1972); *Crain v. First Nat'l Bank*, 324 F.2d 532 (9th Cir. 1963). A California tribe has also been held to survive termination. *Duncan v. Kleppe*, Civil No. C-71-1572, R.F.P C-71-1713 R.F.P. (N.D. Cal. 1976) (approximately 15 similar cases pending in California).

145. See *Bean, The Limits of Tribal Sovereignty: The Cornucopia of Inherent Powers*, 49 N.D.L. REV. 303 (1973).

146. Typical of the amounts received by the smaller tribes for their land is the \$500 received by most members of the Siletz Tribe of western Oregon. TASK FORCE TEN, *supra* note 10, at 27. The \$43,000 received by withdrawing members of the Klamath Tribe in 1961, *Trulove & Bunting*, *supra* note 10, at 15, 17, was based on an appraisal which underestimated the value of the land, as established in a later court case. TASK FORCE TEN, *supra* at 55. Remaining members of the Klamath Tribe (about 22 per cent of the tribal membership) received approximately \$103,000 in 1973, *id.* at 57, the increased amount probably being due as much to inflation as to the appreciation of the value of the former tribal land. For a discussion of the unfair business practices by the local non-Indian community which resulted in the loss of some of the 1961 distribution, see the authorities cited in note 178 *infra*.

147. See generally T. STERN, *THE KLAMATH TRIBE: A PEOPLE AND THEIR RESERVATION* (1966); TASK FORCE TEN, *supra* note 10, at 62-65; V. DELORIA, *CUSTER DIED FOR YOUR SINS* 60-82 (1969); CAHN, *supra* note 44, at 16-23.

148. See the extensive discussion in Orfield, *supra* note 10, ch. 1, at 2 *et seq.* See also notes 185-191, *infra*, and accompanying text.

149. Hasse, *supra* note 26, at 181.

150. *Id.* at 181-82. See also notes 182-184, *infra*, and accompanying text.

151. Hasse, *supra* note 26, at 181. For objections to specific bills, see notes 182-184, *infra*, and accompanying text.

152. See Orfield, *supra* note 10, ch. 1, at 1, *citing* Grodzins, *Centralization and Decentralization in the American Federal System*, A NATION OF STATES 5 (R. Goldwin ed. 1961).

153. Orfield, *supra* note 10, ch. 1, at 1.

154. *Id.* See also note 128 and accompanying text.

155. Orfield, *supra* note 10, ch. 1, at 2.

156. *Id.* at 3.

157. *Id.* at 2.

158. See J. FREEMAN, *THE POLITICAL PROCESS* 98-101 (1965).

159. CAHN, *supra* note 44 at 163-73; TYLER, *HISTORY*, *supra* note 6, at 154-59. Cf. notes 20-22, 50, *supra*, and accompanying text; Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 536 (1975).

160. See notes 162-174, *infra*, and accompanying text.

161. See notes 148-155, *supra*, and accompanying text.

162. Orfield, *supra* note 10, ch. 1, at 4.

163. See *id.*

164. Watkins had been chairman of the Indian Affairs subcommittee of the Senate Committee on Public Lands before the Senate Reorganization in 1947. See, e.g., [1947] U.S. CODE CONG. & AD. NEWS at lv (listing subcommittee members of the Senate Public Lands Committee).

165. Orfield, *supra* note 10, ch. 1, at 4.

166. See generally, Watkins, *supra* note 5.

167. Hasse, *supra* note 26, at 176.

168. *Id.* at 176-77.

169. *Id.* at 177. See note 174, *infra*, for examples of the use of questionable tactics to obtain tribal "consent." See also notes 195-196 and accompanying text, *infra*.



170. See notes 175-181 *infra* and accompanying text.

171. See generally Orfield, *supra* note 10; Stern, *supra* note 67.

172. "Even though they [the Indians] don't like it," said Watkins, "I think it is better for them to have more and more control of their properties." Orfield, *supra* note 10, at 44.

173. Watkins, *supra* note 5, at 47.

174. When a bill providing for per capita payment of a judgment of \$8,500,000, for a 50-year-old Menominee claim against the Forest Service, passed the House of Representatives in 1953, Senator Watkins held the bill in committee. Watkins explained to the Menominees at a tribal hearing that they could not obtain their funds unless they agreed to termination. The tribe voted to agree in principle. The bill as amended by Watkins was rejected by a later meeting of the tribe, but it easily passed the Senate. The Conference Committee accepted the Senate bill, refusing to hear either tribal delegates or Representative Laird, the original sponsor of the bill. The Conference Report was defeated on the floor of the House, mainly because Laird had been denied a fair hearing. Many Menominees now viewed termination as inevitable, and tribal members wanted their judgment shares. The tribe voted to support a draft termination bill that included a \$1,500 per capita payment. As amended, this bill later became law. Watkins' efforts had been successful. Orfield, *supra* note 10, ch. 2, at 2. Watkins' "threat" was also condemned by the House Interior Committee during the passage of the Menominee Restoration Act. See H.R. REP. NO. 572, 93d Cong., 2d Sess. 3 (1973).

The Colvilles had a similar experience, though Watkins' role in the matter was less clear. The Colville Tribe had been attempting for years to regain over 800,000 acres of land, taken from the tribe by mistake. Hasse, *supra* note 26, at 141-142. The 1956 act restoring the land contained a rider requiring the tribe to submit a plan for termination within five years. The plan was submitted, but the termination bill was never passed. See *Colville Termination Hearing on S. 282 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior & Insular Affairs*, 90th Cong., 1st Sess. 1-2 (1967).

175. Orfield, *supra* note 10, at 14. See also Stern, *supra* note 67, at 36; Watkins, *supra* note 4, at 44.

176. *Joint Hearings on Termination*, *supra* note 70, pt. 4, quoted in Stern, *supra* note 67, at 67-72. See note 74, *supra*, and accompanying text.

177. *Joint Hearings on Termination*, *supra* note 70, pt. 4, quoted in Stern, *supra* note 67, at 72. When one witness found the sudden emphasis on termination "just a bit peculiar," Watkins stated that "the State itself suggested the idea that it ought to terminate, and we assumed that the State had been working on it." *Joint Hearings on Termination*, pt. 6 at 655. Orfield remarked that "this assertion was false, but it was not challenged." Orfield, *supra* note 10, ch. 2, at 4.

178. "Senator Watkins. The fact of the matter is that most of the whites [in the area of the Klamath Reservation] would have a business experience far above the average white man in the United States. Is that not true?"

"Mr. Pryse. I expect so."

"Senator Watkins. And they would be reputable people, who could give [the Indians] good sound advice?"

"Mr. Pryse. Yes, sir." *Joint Hearings on Termination*, *supra* note 70, quoted in Stern, *supra* note 67, at 68. In fact, the opposite of what Watkins had suggested occurred at termination; the Klamaths lost most of their per capita payments, largely through the highly questionable business practices of non-Indians in the area. See TASK FORCE TEN, *supra* note 10, at 59. These unfair business practices by the local non-Indian community at the time of the Klamath termination were documented by the Federal Trade Commission during hearings in Klamath Falls in 1972. FEDERAL TRADE COMM'N, SEATTLE REGIONAL OFFICE, A REPORT OF THE CONSUMER PROBLEMS OF THE KLAMATH INDIANS: A CASE FOR ACTION (1973).

179. See Orfield, *supra* note 10, ch. 1, at 13.

180. See notes 172-173, *supra*.

181. See notes 172-180, *supra*, and accompanying text.

182. Orfield, *supra* note 10, ch. 1, at 7.

183. See notes 200-201, *infra*, and accompanying text.

184. *Joint Hearings on Termination*, *supra* note 70, pt. 6 at 594-605.

185. Hasse, *supra* note 26, at 184. See also Goldberg, *supra* note 159, at 543-44.
186. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90 (now codified as amended in 18 U.S.C. §§ 1151, 1162 and 28 U.S.C. §§ 1331, 1360 (1970)). See also notes 207-227, *infra*, and accompanying text.
187. Hasse, *supra* note 26, at 189.
188. *Id.* TYLER, HISTORY, *supra* note 6, at 183-85.
189. *Id.* at 191. On the "tribal consent" issue, see generally Goldberg, *supra* note 159, at 535-51.
190. In 1968, Congress finally passed legislation providing that Public Law 280 cannot be imposed on any tribe without its consent. 25 U.S.C. §§ 1321(a), 1322(a), 1326 (1970).
191. Hasse, *supra* note 26, at 206.
192. Orfield, *supra* note 10, ch. 1, at 5, 6.
193. Oregon Indians assented to the termination policy after the Bureau of Indian Affairs refused to recommend passage of a bill distributing the Indian Claims Commission award. "I think they are a little unhappy at the present time," the Associate Commissioner said, "because of the slowness in getting their judgment funds distributed. Mr. Chairman, you will recall that you had a hearing on that bill last week; and I think, if that particular problem is wound up with fair dispatch, they will feel a little better about this legislation." *Joint Hearings on Termination, supra* note 70, pt. 3 at 187. See also *id.* at 179-81. Other tribes, including the Menominee, Klamath, and Colville, were similarly persuaded. See note 174, *supra*, and accompanying text; STERN, *supra* note 147, at 251-52.
194. *Joint Hearings on Termination, supra* note 70, pt. 1 at 17.
195. *Id.* at 46.
196. *Id.*
197. The various kinds of control over tribal land after termination are discussed at notes 130-134, *supra*, and accompanying text.
198. *Joint Hearings on Termination, supra* note 70, pt. 1 at 44.
199. *Id.* at 49.
200. Orfield, *supra* note 10, ch. 1, at 7.
201. *Id.* See also STERN, *supra* note 147, at 252.
202. TYLER, HISTORY, *supra* note 6, at 179; TYLER, WORK PAPER, *supra* note 22, at 51-52.
203. For the transfer of health and education functions to the state, see text accompanying notes 228-254, *infra*. Relocation as an assimilationist device is discussed in the text accompanying notes 91-100, *supra*, and notes 261-270, *infra*. The low priority given to economic development is discussed in *Joint Hearings on Termination, supra* note 70, pt. 1 at 41.
204. See, e.g., H.R. REP. No. 2680, 83d Cong., 2d Sess. 15 *et seq.* (1954); *Hearings on S.C.R. 26, supra* note 122, at 96-98. See generally Cohen, *supra* note 4; Orfield, *supra* note 10; Hasse, *supra* note 26.
205. Hasse, *supra* note 26, at 261.
206. TYLER, HISTORY, *supra* note 6, at 174-76; CAHN, *supra* note 44, at 16-23; V. DELORIA, CUSTER DIED FOR YOUR SINS 60-82 (1969); D. McNICKEL, THEY CAME HERE FIRST 257 (rev. ed. 1975).
207. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90 (now codified as amended in 18 U.S.C. §§ 1151, 1162, 28 U.S.C. §§ 1331, 1360). Public Law 280 was enacted two weeks to the day after the passage of H.C.R. 108. See notes 186-191, *supra*, and accompanying text. See generally Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975) [hereinafter cited as Goldberg]. Goldberg's comprehensive and extraordinarily analytical work has been repeatedly relied upon by the courts. See, e.g., *Bryan v. Itasca County*,—U.S.—, 96 S.Ct. 2102 (1976); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975). See also STAFF OF AMERICAN INDIAN POLICY REVIEW COMM'N, 94TH Cong., 2D Sess., REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION 4-33 (Comm. Print 1976).
208. See Goldberg, *supra* note 207, at 540. Goldberg distinguishes Public Law 280 from earlier transfers of jurisdiction to the states, and lists the six pre-1950 statutes giving some or all reservation jurisdiction to individual states. *Id.* at n.20. These isolated assimilationist statutes, however, were not general policy, but rather ad hoc actions affecting par-

tical areas, such as those acts discussed in footnotes 48-51, *supra*. See New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1882) (recognizing state jurisdiction over crimes by non-Indians against non-Indians in Indian country). Moreover, previous transfers had taken place after consultation with the state and tribe or tribes. *Id.* at n.21. Such consultation was notably lacking for a decade and a half following the enactment of Public Law 280. See notes 186-190 and 192-201, *supra*, and accompanying text. More recently, the Supreme Court has moved away from "the easy conclusion of state . . . jurisdiction" to an analysis of whether state jurisdiction would impinge on "the tribe as sovereign." M. PRICE, LAW AND THE AMERICAN INDIAN 66 (1973). See, e.g., Williams v. Lee, 358 U.S. 217 (1959) and the authorities cited in note 143, *supra*.

209. The original states were California, Nebraska, Minnesota, Oregon, and Wisconsin. 28 U.S.C. § 1360 (1970). Specific reservations were exempted in the latter three states. The sixth state was Alaska, added in 1958. Act of Aug. 8, 1958, Pub. L. No. 85-615, § 2, 72 Stat. 545.

210. Act of Aug. 15, 1953, ch. 505, §§ 6,7, 67 Stat. 588-90.

211. 18 U.S.C. § 1162(b) (1970); 28 U.S.C. § 1360(b) (1970). The legislative history suggests that the exemption for rights under treaties, agreements, statutes, and implementing regulations was intended to be broad. See Goldberg, *supra* note 207, at 583-93. *C.f.* Bryan v. Itasca County, —U.S.—, 96 S.Ct. 2102 (1976).

212. "As a practical matter, the enforcement of law and order among the Indians in the Indian country has been largely left to the Indian groups themselves. In many states, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law enforcement authority that could best be remedied by conferring criminal jurisdiction on states . . ." H.R. REP. NO. 848, 83d Cong., 1st Sess. 6 (1953); S. REP. NO. 699, 83d Cong., 1st Sess. 5 (1953), *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 2412-13. *But see* NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N, JUSTICE AND THE AMERICAN INDIAN 6, 50 (1974) [hereinafter cited as NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N]: "About half of the Indians feel they are treated poorly or indifferently by state, county and local police . . . The Indian communities are both willing and able to handle their own legal systems. Every effort should now be made . . . to remove state jurisdiction from those reservations that wish to operate their own judicial and law and order systems."

213. Goldberg, *supra* note 207, at 543.

214. *Id.* The concept of advanced Indian acculturation seemed to contradict the notion that criminal jurisdiction was necessary because of Indian disorderliness and incapacity for self-government. Both alternatives, of course, ignored the possibility that nonacculturated Indians could have capacity for self-government in their own right.

215. *Id.* at 562.

216. *Id.* at 544.

217. But Public Law 280 did not in fact extend state regulatory control to the reservations. In Bryan v. Itasca County, —U.S.—, 96 S.Ct. 2102 (1976), the Supreme Court declared that Public Law 280 was concerned mainly with criminal jurisdiction, and extended state civil jurisdiction to adjudicate civil "causes of action," but did not include such state regulatory powers as taxation. 96 S.Ct. at 2107-13. The Court concluded that "if Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers . . . over reservation Indians, it would have expressly said so." *Id.* at 2112.

218. Goldberg, *supra* note 207, at 551.

219. See *id.* at 551-52 nn.87-89. New resources such as fines and court costs, available to the states under Public Law 280, paid only about 10 per cent of expenses. Mandatory Public Law 280 states had no choice but to accept jurisdiction once the bill was passed; thus, these states were the hardest hit. *Id.* at n.90.

220. *Id.* at 552; 5 COMM'N ON CIV. RIGHTS REP. 148 (1961).

221. 5 COMM'N ON CIVIL RIGHTS, *supra* note 220, at 146. See generally 5 NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N, *supra* note 212.

222. TYLER, HISTORY, *supra* note 6, at 183-85. President Eisenhower expressed deep discomfort with lack of provisions in the bill for consultation with tribes on state assertion

of jurisdiction, and he recommended that Public Law 280 be amended to include such a provision. Indian leaders regarded the principle of consultation as a sham and demanded a consent provision. *Id.* See notes 187-190, *supra*, and accompanying text.

223. See notes 185-191, *supra*, and accompanying text.

224. See S. REP. No. 699, *supra* note 212, at 5.

225. Goldberg, *supra* note 207, at 545 n.49. The departure from prior practice of consulting with the Indians before transfer of jurisdiction was considered a deliberate slight.

226. 5 COMM'N ON CIV. RIGHTS REP. *supra* note 220, at 146.

227. *Id.* at 148. See generally 5 NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N, *supra* note 212. See also STAFF OF AMERICAN INDIAN POLICY REVIEW COMM'N, 94th CONG., 2d SESS., REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION 15-24, 32 (Comm. Print 1976).

228. See, e.g., AMERICANIZING THE AMERICAN INDIANS, *supra* note 28, at 191-292 (fourteen writings on assimilative Indian education, 1880-1900); notes 36-41, *supra*, and accompanying text.

229. Rosenfelt, *Community Control*, *supra* note 36 at 501; Brightman, *An Historical Overview of Indian Education*, 1 INDIAN EDUCATION CONFRONTS THE SEVENTIES 57 (1974).

230. Rosenfelt, *Community Control*, *supra* note 36, at 501.

231. Brightman, *supra* note 229.

232. *Id.* citing, *Indian Education, Hearings Before the Special Subcomm. on Indian Education of the Senate Comm. on Labor & Public Welfare*, 90th Cong., 1st and 2d Sess., pt. 1 at 19-20. (1969).

233. Rosenfelt, *Indian Education*, *supra* note 140, at 201, citing 20 U.S.C. §§ 631-647 (1970).

234. *Id.* at 201; *Natonabah v. Board of Educ.*, 355 F. Supp. 716, 721-22 (D.N.M. 1973).

235. See, e.g., *Natonabah v. Board of Educ.*, 355 F. Supp. 716, 726-28 (D.N.M. 1973). The Johnson-O'Malley Act is codified as 25 U.S.C. §§ 452-54 (1970).

236. The two cases were *Natonabah v. Board of Educ.*, 355 F. Supp. 716, 729 (D.N.M. 1973); *Denetclarence v. Board of Education of Independent School Dist. No. 22*, Civil No. 8872 (D.N.M., Filed Feb. 14, 1974), (incorporating Agreement of Parties dated Dec. 14, 1973). For the revised regulations, see 25 C.F.R. § 33 (1975), as amended, 40 Fed. Reg. 51282 (Nov. 4, 1975).

237. Hasse, *supra* note 26, at 255.

238. *Id.* at 256-57.

239. SENATE COMM. ON LABOR AND PUBLIC WELFARE, INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S. REP. No. 501, 91st Cong., 1st Sess. xiv (1969).

240. *Id.* at 14, 163. See generally Brightman, *supra* note 229; Rosenfelt, *Community Control*, *supra* note 36, at 500-502.

241. S. REP. No. 1530, 83d Cong., 2d Sess. (1954), reprinted in [1954] U.S. CODE CONG. & AD. NEWS at 2918, 2919, 2925.

242. Act of Aug. 15, 1953, Pub. L. No. 277, 83d Cong., 1st Sess., ch. 502, 67 Stat. 586.

243. Act of Aug. 15, 1953, Pub. L. No. 281, 83d Cong., 1st Sess., ch. 506, 67 Stat. 590.

244. See note 241, *supra*.

245. *Transfer of Indian Hospitals and Health Facilities to Public Health Service, Hearings on H.R. 303 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior & Insular Affairs*, 83d Cong., 2d Sess. 4-5, 18-19, 50-53 (1954).

246. E.g., *id.* at 963-65.

247. E.g., *id.* at 15-16, 45, 134-50; S. REP. No. 1530, *supra* note 241, at 15-19.

248. See generally, *Hearings on H.R. 303*, *supra* note 245.

249. Act of Aug. 5, 1954, Pub. L. No. 568, 67 Stat. 674, reprinted in [1954] U.S. CODE CONG. & AD. NEWS 779-80.

250. *Id.* at § 4.

251. *Id.* at § 1. See Hasse, *supra* note 26, at 253: "Watkins assured Indians that their hospitals would not be closed until they were ready for it. Representative Edmondson challenged this statement by predicting that this action would be a convenient ruse to cover

the planning out of institutions providing Indian health care. Edmondson's prediction proved to be true, but the Public Health Service did arrange for Indians to use public facilities where Bureau hospitals were closed. Nevertheless, neither tribal leaders nor congressmen knew for sure whether or not the services would be improved. And complicated problems, inherent in the situation where impoverished Indians were forced to use facilities designed for the general public, remained to be solved. [Citations omitted]."

252. S. REP. No. 1530, *supra* note 241, reprinted in [1954] U.S. CODE CONG. & AD NEWS at 2921.

253. *Id.* at 2927.

254. In spite of the motives behind the transfer of Indian health from the BIA to HEW, the realignment has been seen by many as resulting in improved health services for Indians. See generally STAFF OF AMERICAN INDIAN POLICY REVIEW COMM'N, 94th CONG., 2d Sess. REPORT ON INDIAN HEALTH 32, 85-87 (Comm. Print 1976). Most criticism by Indians of the Indian Health Service is based on inadequate funding, not on the transfer from the BIA to HEW. *Id.*

255. Hasse, *supra* note 26, at 247-48. Hasse also reports that "when land had to be withdrawn from the tribal estate and sold, the tribes wanted to be given first opportunity to buy it. But they had only limited finances and it was against bureau policy to make funds available for such purposes. The bureau could make loans to individuals for land purchase from revolving funds, but not to tribes for increasing their estates." *Id.*

256. Act of Aug. 9, 1955, Pub. L. No. 255, ch. 615, 69 Stat. 539 (codified at 25 U.S.C. §§ 415-415d (1970)). The act is discussed in Price & Chambers, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN L. REV 1061, 1074-75 (1974).

257. 25 U.S.C. § 415.

258. There is no doubt about the need for reform of laws governing the leasing of Indian lands. One major problem was, and is, the fractionation of heirships resulting from the General Allotment Act. See generally Price & Chambers, *supra* note 256, especially at 1071-74.

259. 25 U.S.C. § 425a (1970).

260. 25 U.S.C. § 415c (1970).

261. Hasse, *supra* note 26, at 257. See generally, LA V. MADIGAN, THE AMERICAN INDIAN RELOCATION PROGRAM (report for Association on American Indian Affairs, Inc., December 1956).

262. See J. JORGENSEN, THE SUN DANCE RELIGION: POWER FOR THE POWERLESS 125 (1972).

263. *Id.* at 125-27. See also D. McNICKEL, THEY CAME HERE FIRST 253 (rev. ed. 1975) and the authorities cited in note 265, *infra*.

264. See, e.g., *id.* at 125. The most frequent alternative to returning to the reservation was said to be suicide.

265. MADIGAN, *supra* note 261, at 18; TYLER, HISTORY *supra* note 6, 159; JORGENSEN *supra* note 262, at 125, 127.

266. MADIGAN, *supra* note 261, at 18; TYLER, HISTORY *supra* note 6, at 159.

267. Hasse, *supra* note 26, at 257.

268. *Id.* at 258.

269. *Id.* at 258-59. "An official at the Colville Reservation reported Indian feelings there on relocation: 'They seem to feel that the program is a government means to move the Indians from the reservation [to allow non-Indians] to exploit the reservation and eventually force all Indians from the reservation areas.'"

270. *Id.* See BURNETTE, THE ROAD TO WOUNDED KNEE 18 (1974) (discussing the "disaster" of relocation). See generally TASK FORCE EIGHT, *supra* note 85, and the authorities cited in note 265, *supra*.

271. JORGENSEN, *supra* note 262, at 124.

272. See generally BROPHY & ABERLE, *supra* note 2. See note 85, *supra*.

273. TYLER, HISTORY, *supra* note 6, at 204 . . . See *Federal Indian Policy, Hearings on S. 809, S. Con. Res. 3, and S. 331 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior & Insular Affairs*, 85th Cong., 1st Sess. (1957).

274. See, e.g., Orfield, *supra* note 10, at ch. 3.

275. See, e.g., Memorandum to Mr. Mitchell from Harold Borgstrom (Apr. 19, 1976)(The White House, Executive Office of the President, Office of Management and Budget), reprinted in TASK FORCE TEN, *supra* note 10 at 1690-92 (discussing choice between policies of forced termination and "influenc[ing]" Indian "perceptions and motives . . . to change," in the context of self-determination, toward assimilation); *Hearing on S. 282*, *supra* note 175, at 25-27, reprinted in CAHN *supra* note 47, at 20-21 (testimony of R. Bennett, BIA Commissioner, regarding "gradual" termination of Indian tribes on a "group" basis). See also Schmidhauser, *The Struggle for Cultural Survival: The Fishing Rights of the Treaty Tribes of the Pacific Northwest*, 52 NOTRE DAME LAW. 30, 33, 36 (1976) (listing state court decisions favoring non-Indian interests over Indian treaty rights); Finnigan, *Indian Treaty Analysis and Off-Reservation Fishing Rights: A Case Study*,

276. Orfield, *supra* note 10, ch. 4 at 14.

277. *Id.*

278. See, e.g., the plans cited in note 127, *supra*.

279. Hasse, *supra* note 26, at 301.

280. E.g., Economic Opportunity Act of 1964, Pub. L. No. 88-452 §603(a)(2), 78 Stat. 508 (1964) reprinted in [1964] U.S. CODE CONG. & AD. NEWS at 585, 612. Programs under the Kennedy Administration had made a beginning in this direction. E.g., Area Redevelopment Act, Pub. L. No. 87-27, §5(b), 75 Stat. 47 (1961), reprinted in [1961] U.S. CODE CONG. & AD. NEWS at 50, 52. See TYLER, HISTORY, *supra* note 6, at 205-206.

281. Telephone interview with Barry Ernstoff, Colville Tribal attorney, Mar. 31, 1977. See also V. DELORIA, CUSTER DIED FOR YOUR SINS 78-79, 82 (1969).

282. Josephy, *The American Indian and the Bureau of Indian Affairs, a Study with Recommendations* (Feb. 11, 1969), reprinted in RED POWER 105-39 (H. Josephy ed. 1971).

283. E.g., S. REP. No. 501, *supra* note 239; *Hearings on Indian Education*, *supra* note 232, at 20. Cf. *id.* at 16 ("Indian students who come from the most unacculturated homes succee[d] best in college . . . because these people have a positive self-image and are not lost between two worlds").

284. President's Message to Congress, The American Indians, 116 CONG. REC. 23131 (July 8, 1970).

285. *Id.*

286. *Id.*

287. *Indian Self-Determination and Assistance Act, Hearings on S. 1017 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior & Insular Affairs*, 93d Cong., 1st Sess. (1973).

288. See generally, *Hearings on S. 1017*, *supra* note 287.

289. 25 U.S.C. §§ 903-903f (Supp. 1975).

290. See, e.g., S. REP. No. 604, 93d Cong., 1st Sess. 9 (1973); H.R. REP. No. 572, 93d Cong., 1st Sess. 3 (1973). The latter report noted that termination "has brought the Menominee people to the brink of economic, social and cultural disaster." *Id.* See generally FREEDOM WITH RESERVATION (D. Shames ed. 1972).

291. *Menominee Restoration Act, Hearings on S. 1687 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior & Insular Affairs*, 93d Cong., 1st Sess. 288 (1973) [hereinafter cited as *Senate Menominee Hearings*].

292. *Id.*

293. *Id.* at 290.

294. *Menominee Restoration Act, Hearings on H.R. 7421 Before the Subcomm. on Indian Affairs of the House Comm. on Interior & Insular Affairs*, 93d Cong., 1st Sess. 6 (1973) [hereinafter cited as *House Menominee Hearings*]: "Termination, as a means of fulfilling the obligations and commitments of the federal government to the Indians has, beyond question, proven a failure. Termination, as a means of making the Indians first-class citizens and confirming self-determination on the Indian people has, beyond question, proven a disaster to the Indian tribes and people . . . [The BIA Report on the Menominee Tribe] must stand as an effective indictment of termination as a national approach to Indian affairs." See also, e.g., *id.* at 248-49.

295. *Id.* at 16, 265 ("I think if this legislation passes the word will truly go out across the country that the policy . . . of self-determination rather than termination is really more than just words.")

296. *Id.* at 11, 250 (one objective of the bill "is to mark the repudiation of the termination policy of the U.S. Government. This latter objective may make H.R. 7421 the most significant Indian legislation to come before the 93d Congress").

297. *Senate Menominee Hearings, supra* note 291, at 24-25 ("of all the past failures of the federal government in its relationship with the American Indian, none has been more obvious than the termination policy embodied in House Concurrent Resolution 108 . . . This policy has worked a serious injustice to the American Indian people. As a statement of national policy it is inaccurate and misleading").

298. *Id.* at 23 ("the fact is that the whole policy of termination has been set aside now . . .").

299. *Id.* at 27-28 ("The disillusion which has followed the policy of termination has been a good thing. It has enabled us to see the reality behind the illusions. Now is the time for us to acknowledge our mistake and take positive action to correct it").

300. *Id.* at 1 ("The present status of the Menominee illustrates the magnitude of the error perpetuated in the name of termination").

301. *House Menominee Hearings, supra* note 294, at 277 ("At the time it was first proposed, termination was thought to be the answer to the 'Indian problem' in this country. Today we know this not to be the case. Termination, like so many of the policies which preceded it, has proved to be—at least in the case of the Menominees—a bankrupt approach.").

302. Statement by the President (upon the signing of the Menominee Restoration Act), Dec. 22, 1973 (copy on file with *American Indian Law Review*: "By restoring the Menominee Indian Tribe to Federal trust status, the United States has at last made a clear reversal of a policy which was wrong, the policy of forcibly terminating Indian tribal status. I indicated my strong opposition to such termination in my Message to the Congress of July 8, 1970. I continue to believe that the Congress should rescind the outmoded House Concurrent Resolution 108 of 1953 in which this ill-advised termination policy was first set forth.")

303. Pub. L. No. 93-638, 88 Stat. 2203 (1975).

304. Other recent legislation by Congress, especially during the Ninety-third Congress, is discussed in Israel, *The Reemergence of Tribal Nationalism and its Impact on Reservation Resource Development, supra* note 1, at 624-29.

305. Several terminated tribes have had restoration bills introduced. Senate hearings have been held on the Siletz Restoration Act, which is expected to be passed during the Ninety-fifth Congress. See *Siletz Restoration Act, Hearings on S. 2801 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior & Insular Affairs, 94th Cong., 2d Sess.* (1976).

306. In *Otradovec v. First Wisconsin Trust*, 454 F.2d 1258, 1261 (7th Cir. 1972), the Seventh Circuit held that Congress still had a "continued partial guardianship" over the affairs of the Menominee Tribe. The same result was reached in regard to the Klamath Tribe in *Crain v. First Nat'l Bank*, 324 F.2d 532, 536 (9th Cir. 1963). It would seem clear that Congress could, in the proper exercise of its plenary power over all Indians, extend federal trust status to various Indian tribes even if no federal-tribal relationship presently existed; Congress' power over Indians extends to "all dependent Indian communities within the United States' borders." *United States v. Sandoval*, 231 U.S. 28, 45 (1913). See also *United States v. Candelaria*, 271 U.S. 432, 439 (1926). For other authorities on Congress' plenary power, see, e.g., FEDERAL INDIAN LAW, *supra* note 1, at 95-96; *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685 (1965).

307. See notes 48-51, *supra*, and accompanying text. See also *House Menominee Hearings, supra* note 294, at 313-23 (historical summary, by Vine Deloria, of early "restorations").

308. The alternatives are discussed, and a proposed "American Indian Restoration Act" is set out in draft form, in TASK FORCE TEN, *supra* note 10, at 1705-11.

309. That reappraisal seems already to have occurred, at least in the minds of many leading congressmen. See, e.g., notes 294-302, and accompanying text. See generally, Part III. *supra*. The upcoming Final Report of the American Indian Policy Review Commission will adopt the recommendation of Task Force Ten that a comprehensive restoration policy be adopted. See note 308, *supra*.