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Stephen J. Herzberg

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Part I

Introduction

This is the second of two works in which the major withdrawal programs of the 1950's—termination and Public Law 280—are studied in the context of a history of the Menominee Tribe of Wisconsin. The reason for this approach is set forth in the introduction to the first piece:

> The passage by Congress of the Menominee Restoration Act of 1973 constitutes a significant and in some respects a dramatic reversal of American Indian policy. By thus repealing the Menominee [Termination] Act of 1954, the federal government rejected its avowed policy of the 1950's—forced assimilation through termination of tribal status—and reconferred upon one of Wisconsin's historic Indian tribes the perquisites of recognition as a tribe. Expressly and symbolically, the Restoration Act reaffirmed the principles of Indian self-determination and self-government, and, to a degree, redressed two decades of economic and social distress suffered by a Native American people whose wants, needs, and aspirations had largely been ignored or misrepresented by the United States government. Yet welcome as this reversal of previous policy is, because the Restoration Act applies only to the Menominee Indians the new policy must be implemented at a time when vestiges of the discredited program of termination seem to survive.
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> Restoration of tribal status is an issue which has attracted a great deal of public attention. Recent events have led to an hour-long national television program, to strings of daily front page newspaper stories, and to numerous works by journalists, scholars, and pamphleteers. However, in the rush to answer some questions raised by restoration, Menominee history should not be lost sight of. To begin with, one cannot answer questions about the Menominee without reference to the previous pattern of inconsistent In-

*Associate Professor of Law, University of Wisconsin.

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dian policies and governmental practices that initially led to the termination of the Menominee's tribal status, and, later, to its restoration. A look at Menominee history gives meaning to the goals of restoration, and may help to predict its chances for success. In short, the Restoration Act cannot be understood or interpreted outside the context of Menominee History.[1]

The significance of the historical approach goes beyond its importance to those charged with effectuating the Restoration Act. The study of national Indian policy in the context of one tribe's history adds a dimension that is often missing in the analysis of Indian legislation: it shows the impact that the programs have had on the people that they have affected. There are still some who believe in the assimilationist goals of the 1950's; is there a better way to pierce their rhetoric than by telling them the terrible tale of Menominee termination? And, there are those who acknowledge the mistake of the discredited withdrawal policy; is there a better way to explain the promise of restoration than in the context of the story of a people who have successfully struggled to survive the government's mistakes?

Finally, the historical approach presents a means to look beyond the substance of Indian policy to study the procedures by which it is formulated. Menominee history shows a clear contrast between two such processes—that of the 1950's, which was characterized by paternalism, and that of the 1970's, which reflects the government's attempt to encourage the Indian to play a meaningful role in determining the path of his future. The real promise of the new Indian policy of the 1970's may well be found in the procedures that have been developed to formulate it.

The first article discusses a period of Menominee history that ends, in 1954, with the termination of the tribe. This article begins with the story of the second withdrawal program, Public Law 280, and ends with a case study of the implementation of the Menominee Restoration Act.

I. *The "Other" Withdrawal Program—Public Law 280*

Legislative History

Due to the complex relationship between the tribes and the federal and state governments, congressional action was required

1. Herzberg, *The Menominee Indians: From Treaty to Termination*, 60 WISCONSIN MAGAZINE OF HISTORY 267 (1977) [hereinafter cited as Herzberg].

to achieve one of the major goals of the withdrawal proponents—the transfer of jurisdiction over the Indian country from the federal to the state courts.[2] This action was necessary because, in early decisions, the Supreme Court had held that the tribes were beyond the jurisdiction of the states within whose borders their reservations existed. By characterizing the tribes as "domestic dependent nations,"[3] "distinct political communities,"[4] and "nation(s) of people" beyond the power of the states,[5] and by interpreting the Constitution and the treaties between the tribes and the United States, the Court found that the federal government held the exclusive power to regulate the tribes; however, the Court also found that the United States could delegate this power to the states. Such legislation, transferring the powers over criminal and civil jurisdiction from the federal to state governments, became a major part of the withdrawal program.

During the century prior to the termination era, many states had petitioned Congress for legislation delegating to them the right to exercise jurisdiction over the reservations within their borders. In the face of strong tribal opposition most of these requests were denied.[6] By the 1940's, but several states had been given limited grants of jurisdiction.[7] However, in the midst of a forthcoming major shift in Indian policy, Congress was to abandon this piecemeal approach to delegation, lose its sensitivity to tribal wants, and enact Public Law 280.

This change in national Indian policy was a product of consistent, intense opposition to the New Deal programs that fostered the preservation of cultural differences and encouraged tribal independence and self-government. This antagonism was nurtured by a post-World War II conservatism that feared the "communistic tendencies" of reservation life and abhorred the burgeoning bureaucracy of the Indian department. In Congress, a steady

2. For a comprehensive discussion of the jurisdictional relationship between the tribes and the state and federal governments, *see* F. COHEN, FEDERAL INDIAN LAW (1958), at ch. IV.

3. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 178, 181 (1831).

4. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

5. The Kansas Indians, 72 U.S. (5 Wall) 737, 760 (1866).

6. Cohen, *The Erosion of Indian Rights*, 62 YALE L.J. 364 (1953).

7. Limited grants were given California, New York, Iowa, North Dakota, and Kansas. Comment, *The Extension of County Jurisdiction Over Indian Reservations in California: Public Law 280 and the Ninth Circuit*, 25 HASTINGS L. REV. 1451, 1468 (1974); H.R. REP. No. 2503, 82d Cong., 2d Sess. 16 (1952), Report with Respect to the House Resolution Authorizing the Committee on Interior and Insular Affairs to Conduct an Investigation of the Bureau of Indian Affairs [hereinafter cited as H.R. REP. No. 1503].

stream of bills was introduced to repeal the keystone of the New Deal approach, the Indian Reorganization Act of 1934.[8]

In 1944, congressional committees began investigating the Indian Bureau, seeking a means for its liquidation.[9] The House Committee on Indian Affairs surveyed the tribes to determine their attitudes toward a transfer of jurisdiction to the states.[10] The removal of Bureau responsibility for this important phase of reservation life was clearly within the scope of the withdrawal program Congress was developing.

At a hearing of the Senate Committee on Civil Service,[11] in 1947, Acting Commissioner of Indian Affairs William Zimmerman was asked to present a plan transferring many of the Bureau's duties to the states within whose borders the reservations existed. His testimony, calling for the elimination of some tribal services provided by the federal government, and a long-range schedule for the removal of formal tribal recognition and status, became the basis of that part of the withdrawal program that included the passage of termination legislation and the enactment of Public Law 280.[12]

Although Zimmerman did not mention the transfer of criminal jurisdiction to the states during his testimony, it was clear that he intended to end the federal government's contributions to the maintenance of reservation law and order. On April 15, 1947, in a paper discussing Zimmerman's new policies, which was presented in San Francisco, Assistant Commissioner of Indian Affairs John Provinse stated, "congressional action is necessary to give the States adequate jurisdiction on Indian reservations."[13] He also said, "In this area of law enforcement the State should undoubtedly be given and should assume greater responsibility."[14] The Bureau was an early supporter of the transfer of its responsibility for maintaining reservation law and order to the states.

8. Wheeler-Howard Act (Indian Reorganization Act), Act of June 18, 1834, 48 Stat. 984, ch. 576, 25 U.S.C. §§ 461 *et seq.* (1970).

9. House Select Committee to Investigate Indian Affairs and Conditions, An Investigation to Determine Whether the Changed Status of the Indian Requires a Revision of the Laws and Regulations Affecting the American Indian, H. REP. 2091, 78th Cong., 2d Sess. (1944).

10. H.R. REP. No. 2503, *supra* note 7, at 144.

11. *Hearings Before Senate Comm. on Civil Service, Officers and Employees of the Federal Government*, 80th Cong., 1st Sess. (1947).

12. For a thorough treatment of the political climate that brought about the enactment of the withdrawal programs, *see* Herzberg, *supra* note 1, at 301 *et seq.*; ORFIELD, A STUDY OF TERMINATION POLICY (1964) [hereinafter cited as ORFIELD]; Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977) [hereinafter cited Wilkinson & Biggs].

13. H.R. REP. No. 2503, *supra* note 1, at 183.

14. *Id.*

Congress did not take immediate action to implement Zimmerman's call for a comprehensive withdrawal program. His requests lay dormant until 1949 when a report calling for the rapid assimilation of the Indian into white society and the transfer of federal responsibilities to the states once more stimulated congressional interest in formulating a coordinated legislative proposal.[15] During that period, Congress continued to deal with the states' requests for reservation jurisdiction on an ad hoc basis. In 1949, it passed a bill transferring jurisdiction over the Navajo and Hopi reservations.[16] In what may have been the last major application of the New Deal philosophy, President Truman vetoed the bill; he noted that it had been passed without the tribes' consent and that Congress' actions had violated "one of the fundamental principles of Indian law accepted by our Nation, namely, the principle of respect for tribal self-determination in matters of local government."[17] In the years to come, few were to adhere to these fundamental principles.

In 1952, Congress assigned a higher priority to the enactment of withdrawal legislation.[18] On July 1, the House of Representatives passed a resolution calling for a congressional investigation of the Indian Bureau.[19] It asked that legislation be drafted to promote "the earliest practicable termination of all federal supervision and control over Indians."[20]

One of the ways the House intended to get the federal government out of the Indian business was the transfer of responsibility for the maintenance of law and order to the states. The resolution asked the committee to study the Bureau's role in the area of law and order with an eye toward transferring the job to the states. The committee was to study the effectiveness of the then current systems and report on the attitudes of the tribes, states, and counties toward a federal transfer to state jurisdiction.[21]

When the congressional committees were not given sufficient resources to carry out a quick, thorough study, they turned to the Bureau and asked it to perform the task and to make the necessary legislative proposals. The Bureau acted quickly. In December, it

15. ORFIELD, *supra* note 12, at ch. 2, p. 2.
16. S. 1407, 81st Cong. 1st Sess. (1949).
17. 95 CONG. REC. 14785 (1949).
18. For a more complete discussion of the government's actions during this period, *see* Herzberg, *supra* note 1. at 304 *et seq.*
19. H.R. 698, A Resolution to Authorize the Committee on Interior and Insular Affairs to Conduct an Investigation of the Bureau of Indian Affairs, 82d Cong., 2d Sess. (1952).
20. *Id.*
21. H. REP. 2503, *supra* note 7.

filed a massive report which called for a complete withdrawal program.[22] In a major proposal it called for legislation to transfer its law and order functions to the states.[23]

In the same year, a busy House Subcommittee on Indian Affairs held hearings[24] to determine whether Congress should continue its ad hoc treatment of state requests[25] for jurisdiction or whether it should enact a comprehensive enabling statute which would allow states to assume jurisdiction without further federal action. In both its report to the House and in the testimony of Commissioner Myer, the Bureau opposed the comprehensive approach. This was to become a point of conflict between the Bureau and the legislature in the hearings that were to follow.

With the passage of House Concurrent Resolution 108,[26] Congress took its first step toward the implementation of a withdrawal program. Rooted in both the language and philosophy of the Zimmerman testimony and the Bureau report, the resolution expressed the sense of Congress that "certain tribes of Indians should be freed from federal supervision."[27] In it, the House and Senate Indian Affairs subcommittees asked Congress to pass legislation "terminating certain services provided by the Indian Bureau for Indians by transferring responsibility for such services to other governmental or private agencies."[28] In addition, they asked for action "terminating federal responsibility for administering the affairs of individual Indian tribes as rapidly as circumstances will permit."[29] The Menominee were one of six tribes expressly mentioned for immediate termination.

Widely known as the basis of the termination legislation, H.C.R. 108 actually had a far greater impact; it became the foundation for the enactment of a broad program of withdrawal legislation that included Public Law 280.[30] In the "Background

22. *Id.* at 12.

23. *Id.* at 32.

24. *Hearings on H.R. 459, 3235, 3624 Before the Subcomm. on Indian Affairs of the House Comm. on Interior & Insular Affairs, on State Legal Jurisdiction in Indian Country*, 82d Cong., 2d Sess. xx (1952).

25. At the time, Congress was considering H.R. 3624, which provided for the extension of California state criminal jurisdiction to all of the reservations within the state. At the request of the Bureau, the bill was amended to contain an additional grant of civil jurisdiction. After failing to clear the Senate, the legislation was reintroduced in 1953 (as H.R. 1063), and became the vehicle for the hearings on and enactment of Public Law 280.

26. H.C.R. 108, Concurrent Resolution Expressing the Sense of Congress that Certain Tribes of Indians Should be Freed from Federal Supervision, 83d Cong., 1st Sess. (1953).

27. *Id.*

28. The subcommittee reports have the same title as H.C.R. 108. They are H. REP. 841 (1953) and S. REP. 794 (1953).

29. *Id.*

30. For a listing of the components of the withdrawal program, *see* Wilkinson & Biggs, *supra* note 12, at 149.

Report" on the Resolution, the Subcommittee on Indian Affairs stated that legislation in five major areas was to be presented to Congress. The legislation had "[two] coordinated aims: First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and, second, termination of the subjection of Indians to Federal laws applicable to Indians as such."[31] (Both the goals stated and the "Background Report" were identical to those submitted with the legislation that was enacted as Public Law 280.) To accomplish the goals of H.C.R. 108, Congress was asked to transfer both civil and criminal jurisdiction over Indians to the states. Furthermore, the legislation, which was amended to become Public Law 280 (H.R. 1063), was expressly mentioned in the Report: "In addition, H.R. 1063, reported to the House as of this printing, has as its purpose the conferring of civil and criminal jurisdiction over Indians upon certain States, wherever abolishment of exclusive Federal jurisdiction is deemed practicable at this time."[32] Congress would not wait long to heed this call for transfer legislation.

During the First Session of the 83d Congress in 1953—the same session in which H.C.R. 108 was passed—Congress was faced with a stream of bills to confer jurisdiction over Indian territory in California, Wisconsin, Minnesota, Nebraska, South Dakota, and Washington.[33]

However, pursuant to the emergence of the strong withdrawal movement, and bolstered by the passage of H.C.R. 108, the House Committee on Interior and Insular Affairs, Subcommittee on Indian Affairs opposed the continuation of the piecemeal legislative approach and, instead, suggested the passage of legislation whereby the states could assume jurisdiction without further congressional action. After extensive hearings,[34] the Committee amended the California bill to expand its provisions to those it contained when enacted as Public Law 280.

In order to understand the nexus between Public Law 280 and the other manifestations of the withdrawal program, one must study the legislative proceedings surrounding its passage.

31. H. REP 841 (1953).
32. *Id.*
33. The bills were H. REP. 1063 (California); H. REP. 1551 (Wisconsin); H. REP. 4546 (South Dakota); S. 1219 (Minnesota); S. 956 (Nebraska); S. 1077 (Washington).
34. The record of the hearings was not published.

However, because there is no published record of this debate, one must look to the record of comparable hearings held in 1952.[35]

During the 1952 hearings on state legal jurisdiction in Indian country, three bills were discussed. The first proposed a transfer of jurisdiction over all of the Indian country in California.[36] Originally limited to confer criminal jurisdiction, it was later amended to include a corresponding grant of civil jurisdiction. As previously noted, this bill was amended to become Public Law 280. Two other bills were introduced by Congressman Wesley A. D'Ewart of Montana. In the first, he proposed a grant of criminal jurisdiction to Montana.[37] The second was broader in scope; in it, he suggested that the federal government and the states share concurrent criminal jurisdiction over the nation's Indian country.[38] None of the three bills required the consent of the tribes that were to be affected. At the opening session of the hearings, in the face of certain tribal opposition, Congressman D'Ewart moved to amend his bills to (1) expressly preserve tribal hunting and fishing rights; (2) require tribal consent to a proposed transfer of jurisdiction to a state; and (3) grant jurisdiction only when requested to do so by an individual state.[39] The latter two amendments were to become the focal points of the debate.

Both the legislative goals presented and the general rhetoric used by the proponents of the legislation closely resemble those used to support the passage of H.C.R. 108 and the termination legislation that was soon to be enacted.[40] Once more, the legislators were called upon to "free the Indian" and to guarantee his "equality." Once more, this rhetoric was skillfully used to maneuver the withdrawal programs through a Congress that was neither sufficiently knowledgeable about, nor interested in, Indian legislation to look behind the oratory of the proponents to determine the substance of the proposals. The carefully understated goal of these cries for freedom and equality was the forced assimilation of the tribes into the white cultures that surrounded the reservations, a goal that required the elimination of the cultural differences protected by

35. *Hearings on H. Rep. 459, 3235, 3624, Before the Subcomm. on Indian Affairs of the House Comm. on Interior & Insular Affairs, on State Legal Jurisdiction in Indian Country*, 82d Cong., 2d Sess. (1952) [hereinafter cited as 1952 Hearings].

36. H. REP 3624.

37. H. REP 3235.

38. H. REP. 459.

39. 1952 Hearings, *supra* note 35, at 5.

40. For a more complete description of the rhetoric used to secure the passage of withdrawal legislation, *see* Herzberg, *supra* note 1, at 307.

tribal control over reservation jurisdiction. Once more, a theme of the 1947 Zimmerman testimony was resurrected when Congress was called upon to pass legislation which, it was said, would save the federal government money by getting it out of the Indian business. However, as with the termination legislation, no one really knew whether the transfer of jurisdiction would actually save money; in fact, one look at the Bureau's history would have indicated that it did not support legislation that would, in the long run, diminish either its budget or its authority.[41] The transfer bills shared a common goal with their brethren withdrawal legislation—the forced assimilation of reservation Indians into the surrounding white culture.[42]

But not all of those who voted for Public Law 280 were strong assimilationists. Many believed in the freedom and equality rhetoric; others found significant tribal benefits in the bills. If assimilation and dollar saving were the understated objectives of some proponents, the improvement of reservation law and order was the express goal of many others who supported the legislation.

However, the need for transfer legislation to improve tribal law and order was probably overstated. The record contains unsupported references to an increase in reservational crime.[43] The Indian country was called a jurisdictional "no man's land"[44] within which Indians could commit crimes with immunity from prosecution. In addition, it was alleged that neither the tribes nor the federal government were enforcing the law effectively in those areas in which they had authority.[45] The concern was not limited to the enforcement of the criminal law: in addition, proponents

41. *Id.* at 306.

42. The Report on Public Law 280 sets forth its assimilationist philosophy: "Similarly the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to ajudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable." S. REP. No. 699 (July 29, 1953).

43. At least one author did not believe that the reservation crime problem was so severe as to require the shift to state jurisdiction. *See* Abourezk, *South Dakota Indian Jurisdiction*, 11 S.D.L. REV. 101 (1966). The Bureau itself had taken positions inconsistent with its characterization of the reservations as lawless, dangerous places. In a report on the Bureau's programs in Wisconsin, it is stated:"The fact that there is relatively little serious lawlessness in most Indian communities where there are limited or no facilities for protecting persons or property is a tribute to the stability of the members of these communities." U.S. Bureau of Indian Affairs Program in Wisconsin, U.S. Dep't of Interior, Bureau of Indian Affairs, Minn. Area Office, May, 1952, p. 27.

44. 1952 Hearings, *supra* note 35, at 5.

45. *Id.* at 14.

complaied that the reservations were not subject to public health,[46] election,[47] marital,[48] and probate regulations. The solution was simple; by passing the proposed legislation, Congress would fill the "void" by delegating the power to regulate these matters to the states.

The jurisdictional void existed, if at all, only in the minds of confused legislators, bureaucrats, and scholars[49] who did not seem to understand the complex relationship between the federal, state, and tribal law enforcement agencies. Felix Cohen, a noted Indian law scholar who appeared before the subcommittee representing several tribes and Indian organizations, attempted to explain that far from being a "no man's land" the Indian country was actually subjected to a myriad of federal and state laws and regulations. He said:

> What I want to say fundamentally is not that there is a no man's land on the Indian reservation; that is very far from the case. Not only are Indians subject generally, except in their dealings among themselves, to state laws at the present time, under section 13 of title 18, not only are they subject to all the Federal laws that you and I are subject to, they are also subject to about 800 special Federal laws that apply to Indians just because they are Indians, and in addition to these 800 special laws that apply to Indians just because they are Indians, there are at the present time about 2,200 Federal regulations that apply to Indians just because they are Indians, in addition to all the Federal regulations that apply to all of us as citizens.[50]

Cohen was correct; the law, if difficult to find, was clear. An Indian could not commit a crime (as defined by tribal, state or federal codes) in Indian country and be immune from either federal or tribal prosecution.[51] In addition, federal legislation had already granted the states the authority to apply their public

46. *Id.* at 9.
47. *Id.* at 6.
48. *Id.*
49. For an example of one scholar's misunderstanding of state criminal jurisdiction, *see* Comment, 30 N.D. L. REV. 54, at 56 (1954).
50. 1952 Hearings, *supra* note 35, at 43.
51. The allocation of jurisdiction between the tribal, federal, and state governments is controlled by the following statutes: the Major Crimes Act, 18 U.S.C. § 1153; the General Crimes Act, 18 U.S.C. § 1152; and the Assimilative Crimes Act, 18 U.S.C. § 13. For an excellent discussion of criminal jurisdiction, *see* Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV 503 (1976).

health laws to the reservations.[52] If there was a gap in reservation law enforcement, it was the product of a failure of the federal government to fulfill its responsibility to prosecute; some evidence was presented to indicate that this failure was based upon the prosecutors' reluctance to crowd federal court calendars with Indian cases.[53] This reluctance can hardly be equated with a jurisdictional void.

Actually, there was little discussion of the need for the legislation; what conflict there was during the hearings was centered on two of the mechanical aspects of transfer. The first question raised was whether Congress should continue its piecemeal approach to jurisdictional grants. Opponents of this policy wanted Congress to pass a comprehensive transfer bill which would allow any state to assume jurisdiction without further congressional action. The second issue focused on a vestige of the New Deal policy that preserved tribal autonomy by requiring tribal consent to major changes in policy. Opponents did not want to give the tribes veto powers over proposed state grants.

The Department of the Interior and the Commissioner of Indian Affairs joined together in opposing the proposed comprehensive approach. As noted previously, it was Congressman D'Ewart who precipitated this conflict by advocating a general grant of jurisdiction. No specific reasons for this proposal appear in the record. Congressman D'Ewart supported his position with two rhetorical questions: "Why continue to enact piecemeal legislation? Why not enact a comprehensive bill such as H.R. 459 which would confer jurisdiction on all the states that have indicated a desire for such legislation?"[54] Perhaps, because his subcommittee was facing an ever-increasing number of state requests for legislation, he favored an approach that would conserve congressional resources.

The Department of the Interior opposed a comprehensive bill. Assistant Secretary Dale E. Doty wrote the committee supporting an ad hoc approach. In his letter, he called upon Congress to respect tribal sovereignty. He noted that many tribes had effective law and order systems and questioned the wisdom of granting jurisdiction to states that did not necessarily want it.[55] However, the Department's position was taken, and Doty's letter sent, before Congressman D'Ewart had tendered his three amendments

52. *See* 25 U.S.C. § 231, ch. 216, 45 Stat. 1185 (Feb. 15, 1929); ch. 930, 60 Stat. 962 (Aug. 9, 1946); 1952 Hearings, *supra* note 35, at 39.
53. 1952 Hearings, *supra* note 35, at 42.
54. *Id.* at 11.
55. *Id., et. seq.*

to the original bills. Referring to them, D'Ewart stated that no tribe would be subjected to state law and order without its consent and that no state would be granted jurisdiction without first having taken steps to request it.[56]

Commissioner Myer also opposed the general legislation. He preferred an ad hoc system under which the Bureau, after surveying the tribes and states, made recommendations to Congress for specific legislative grants. However, rather than fight with Congressman D'Ewart, the Commissioner offered the following compromise:

> On all of these States, where we have had a chance to make the survey, I think it is possible to consolidate in one bill, and then leaving out for the time being, if we are agreed, those reservations that have asked exception rather than to have six or eight bills, and still stick to the pattern of having a reasonably simple code that will do the job.[57]

As will be seen later, a form of Myer's compromise was enacted.

On the issue of tribal consent, the Commissioner would not compromise; he found himself opposed not only by tribal representatives but also by the Department of the Interior and Congressman D'Ewart. Myer's position was simple; the tribes should be consulted, but they should not be given the power to block a proposed transfer.[58] His philosophy was consistent with his overall approach to tribal governance. He eliminated the New Deal's requirement that tribes consent to proposed actions that would affect tribal status; instead, he instituted a system of consultation under which the tribes were to be convinced of the benefits of a proposed change; however, the changes were to be made even if the Bureau could not convince the tribes as to their value.[59] Although tribal representatives, the Department, and D'Ewart strongly favored a tribal consent provision, the Commissioner's position prevailed.

As might be expected, most of the tribal testimony was focused on the consent provision. Some of the California bands agreed with the Commissioner; they favored a bill which unilaterally subjected the tribes to state jurisdiction; they opposed the amendment which allowed for tribal referenda.[60] As shown in their testimony, they were highly assimilated into the surrounding white culture.

56. *Id.* at 12.
57. *Id.* at 26.
58. *Id.*
59. Herzberg, *supra* note 1, at 304.
60. 1952 Hearings, *supra* note 35, at 104, 105.

There are approximately some 20,000 native California Indians. Of this number only about 5,000 or less actually reside on their reservations or restricted lands. The remaining some 15,000 or more do not now nor have they ever resided on reservation or restricted lands, but these Indians live among the general population through the State, most of them owning their own homes. All of these Indian citizens live as individual responsible people, making their living, and so on, and asking nor receiving no special favors. They have long ago earned the right to live on equal terms with their fellowmen.

And further, many of the men and women included in the 5,000 listed are residing on reservations, make their living off the reservations where they are compelled to go in seeking work. From the record made over the years by the Indian race in California, it must be admitted that these people are just as capable as any other race, not excepting the "best" of the white race.[61]

Already subjected to state jurisdiction because they did not live in Indian country, they had little to lose from the enactment of transfer legislation. Perhaps an insight into their advocacy on behalf of these bills can be found in their support of the entire withdrawal program. Disgusted with the role the Bureau was playing in their lives,[62] they asked to be terminated.[63] The members of these bands were not representative of the vast majority of Indians who were to be subjected to Public Law 280.

What would have been strong tribal opposition to the proposed bills was dissipated by D'Ewart's early actions to amend them to include a consent provision. Representing Indian organizations and tribes, Felix Cohen said:

> I came here yesterday with a difficult and distasteful instruction from all my clients, which was to oppose Congressman D'Ewart's H.R. 459. That was an extremely distasteful assignment for me to have, because Congressman D'Ewart has done a great deal toward freeing the Indians from oversupervision and from regulations which make their lives very difficult.

61. *Id.* at 64-65.
62. *Id.* at 66.
63. *Id.* at 65.

> Fortunately, Congressman D'Ewart has freed me from that responsibility of speaking in opposition to H.R. 459, because, it seems to me, the amendments which he has placed before this committee now remove at least 99 percent of the Indian objections which I was asked to present, as well as 100 percent of the non-Indian objections.[64]

In addition to statements of support for the consent provision,[65] other testimony expressed tribal concern over loss of autonomy and the power to self-govern,[66] discrimination against Indians in state courts,[67] and a lack of faith in the states' ability to enforce the law fairly in the Indian country.[68] However, the proffered amendments seemed to allay these fears, and the tribal opposition was not intransigent. At the end of the 1952 hearings, there was little reason for tribal concern over the nature of transfer legislation. It seemed widely accepted that if any bill were to be passed, it would include a consent provision. No legislation was enacted during that session.

In 1953, after another set of hearings[69] (which were not reported), a transfer bill was passed.[70] The product of some obvious compromises and curious omissions, it did not reflect the assurances the tribes thought they had been given during the previous year.

Congress seems to have accepted the compromise, offered by Commissioner Myer, between an ad hoc and comprehensive approach. Five named states (including Wisconsin) were given both civil and criminal jurisdiction over all or part of the Indian country within their borders. Exceptions were made for three tribes that had requested exclusion (including the Menominee).[71] In addition, Congress gave a general grant of jurisdiction to any state which would, in the future, act to assume it.[72]

One omission was prominent—the bill did not contain a tribal consent provision. The tribes in the named states could not block the transfer. In a like manner, the unnamed states could unilaterally assume jurisdiction over the Indian country within their

64. *Id.* at 36.
65. *Id.* at 87, 89-90.
66. *Id.* at 3-4,
67. *Id.* at 3-4, 84.
68. *Id.* at 82.
69. The hearings were held in June, 1953. In July, the House and Senate submitted identical reports [S. REP. No. 699, July 29, 1953 and H. REP. No. 848, July 16, 1953].
70. Pub. L. 280, 67 Stat. 505 (Aug. 15, 1953).
71. *Id.* §§ 2, 4.
72. *Id.* §§ 6, 7.

borders; the tribes had no right to veto the transfer; the bill did not even require that they be consulted; and the federal government need not approve of the states' actions. In this respect, the bill was similar to the one President Truman had criticized and vetoed.[73]

President Eisenhower was not pleased with the Act, but he signed it. He expressed "grave doubts as to the wisdom of certain provisions," particularly those sections which permitted "other states to impose on Indian tribes within their borders the criminal and civil jurisdiction of the State, removing the Indians from Federal jurisdiction and, in some instances, effective self-government." He criticized the failure to include "a requirement of full consultation in order to ascertain the wishes and desires of the Indians and of final Federal approval." He called for an immediate amendment to require consultation with the tribes and the approval of the federal government before a state could assume jurisdiction.[74] This call was not to be heeded for fifteen years.

Unfortunately, there is no written record from which to discern the reasons for the omission of the consent provision from the 1953 legislation. However, even if there were such a record, it is more likely that the omission was the product of political factors[75] than the result of reasoned debate. Although there had been concerted conservative opposition to the consent requirements of the New Deal Indian programs, it was not until the Republican election victories, in 1953, that the opponents of tribal autonomy were able to gain the positions of power necessary to eliminate them.

It is not difficult to understand why the participants in the 1952 hearings (which were held before the national elections) assumed that the bills would include consent provisions. President Truman had clearly and strongly stated that they were a precondition to presidential approval of any transfer legislation.[76]

However, after the major personnel changes brought about by the 1953 elections, respect for tribal sovereignty ceased to be the touchstone by which the validity of proposed legislation was tested. In control of both the presidency and the legislature, the Republicans were able to control both the membership and chairmanships of the Indian Affairs committees. Two conservatives,

73. See text accompanying note 17.

74. S. ABERLE & W. BROPHY, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 186 (1966) [hereinafter cited as ABERLE & BROPHY].

75. For a more complete discussion of the political changes that enabled the passage of the withdrawal legislation, *see* Herzberg, *supra* note 1, at 305 *et seq.*

76. See text accompanying note 17.

Senator Arthur Watkins of Utah,[77] and Representative E.V. Berry of South Dakota, were appointed to chair the respective subcommittees that were to shape the withdrawal legislation. These two committee chairmen were inordinately powerful. There was usually very little interest in Indian legislation; few committee members made an effort to understand the intricacies of the proposed legislation; deference was given the positions taken by the chairmen and the legislation's sponsors; and so little controversy surrounded these bills that cross-party consensus was usually achieved. Senator Watkins and Congressman Berry used this power to bring about the passage of a broad withdrawal program.

In a like manner, in the executive branch, Commissioner Myer was able to consolidate his power. A proponent of the withdrawal legislation, he strongly opposed tribal consent provisions.

This combination of political factors created the atmosphere in which the often harsh and retrogressive withdrawal legislation was enacted; none of these changes in policy was made subject to tribal approval. The last, and perhaps most important vestige of the New Deal policy—the respect for tribal sovereignty and self-determination—had been eliminated, a victim of political change.

The Menominee and Public Law 280

The Menominee, who were to be subjected to both of the major manifestations of the withdrawal program—termination and Public Law 280—entered the 1950's a relatively prosperous, self-sufficient tribe.[78] One of a very few tribes to hold assets communally, the Menominee owned a heavily wooded 233,092-acre reservation, a lumber mill, power plants, schools, and medical facilities. Members of the tribe received a broad spectrum of health, education, and welfare services. Unlike most other tribes, the Menominee paid, either directly or indirectly, for these benefits. Most Menominee were able to find jobs on the reservation; the tribe's mill was run so as to maximize employment rather than profits. The recent recipients of an $8.5 million legal settlement,[79] the Menominee looked forward to a period of growth and prosperity.

77. More than any other person, Senator Watkins shaped and brought about the passage of the withdrawal legislation. His behavior during this time was not exemplary. To evaluate the role he played in terminating the Menominee, *see* Herzberg, *supra* note 1, at 311 *et seq.*

78. For a complete discussion of the tribe's pretermination status, *see id.* at 295 *et seq.*

79. The settlement was the result of years of litigation against the United States, *id.* at 290 *et seq.*

As the tribe entered the 1950's, its major weakness was its inability to adapt the white institutions of government to its deeply divided, factioned membership.[80] As required by federal law, the Menominee adopted a written constitution which created legislative bodies that were to advise the Indian Bureau on issues of tribal government. The Advisory Council was elected every two years. Responsible for the daily operations of the tribe, it was dominated by an elite, highly acculturated faction.[81] The ultimate tribal authority was vested in the General Council which, theoretically, was composed of all adult Menominee, but which was, in reality, ignored by the traditional factions and the majority of the tribe. This lack of interest in, and respect for, the General Council, when combined with periodic, hostile fighting between those factions that did attend the meetings, led to the failure of the attempt to impose a town meeting form of government on the tribe. Therefore, the Menominee lacked a government that could act quickly, decisively, and with the confidence of the tribe.[82] Perhaps, given time and support, this major weakness could have been eliminated; but, the Menominee government was to be given neither the time nor the opportunity to improve.

For the Menominee, the 1950's were not to be years of growth and prosperity; instead, an early target of the withdrawal program, the tribe was to be terminated. The story of the termination of the Menominee is a long tale told elsewhere.[83] However, the events of the termination period are so tightly tied to those surrounding the application of Public Law 280 to the tribe that a short summary, to place both in context, is necessary. Identified in Acting Commissioner Zimmerman's 1947 testimony as an "excellent possibility for termination," the Menominee inadvertently placed themselves before a withdrawal oriented Congress when they asked for special legislation to allow a per capita distribution of a portion of their $8.5 million settlement; in both 1951 and 1952, the proposed legislation failed to clear Congress. In 1953, a

80. For a more thorough description of social and cultural divisions within the tribe, *see id.* at 298.

81. Many of the Advisory Council members held the better reservation jobs that were doled out by the local Bureau agents. They were, therefore, somewhat susceptible to Bureau pressure. That the Bureau knew of and used this leverage is seen in the following portion of a report filed by R.W. Quinn, Program Officer of the Menominee Agency. He described the Advisory Council as "an organizational device which the Indian Bureau uses to activate its policies and programs." Memorandum to Melvin L. Robertson from R.W. Quinn, Nov. 21, 1955. Wisconsin State Historical Soc'y, BIA File, Box 1.

82. For a discussion of the tribal government, *see* Herzberg, *supra* note 1, at 298.

83. *Id.* ORFIELD, *supra* note 12.

similar bill was brought before Senator Arthur V. Watkins' subcommittee on Indian affairs. The senator used his control over the subcommittee to turn the appropriation proposal into a termination bill. Surprised, the Menominee invited Senator Watkins to visit the reservation to explain his actions. At a General Council meeting, held on June 20, 1953, Senator Watkins took a hard line. The Menominee were to be terminated—it was inevitable. If they were wise, and if they wanted their per capita distribution, they would cooperate with the senator and the withdrawal forces. In the heat of the moment, without a full understanding of the concept of termination, and acting under the influence of the senator's threats, a small number of Menominee passed a resolution accepting, in principle, the amorphous idea of termination. Within a month, the tribe recognized that in its haste it had made a mistake. It voted to rescind its support for the withdrawal program, knowing fully that this antitermination position would eliminate its chance of receiving the per capita payments. Congress chose to ignore this latter resolution; instead, Senator Watkins repeatedly told the legislators that the Menominee had consented to their termination. The tribe, knowing this, assumed that the withdrawal program would inevitably be applied to them; instead of continuing what would have been futile opposition, the Menominee asked Congress for nothing but some additional time and financial assistance so that they could prepare to function without federal support. They received little of either. In addition, the major planning responsibilities were placed on the tribe; it was to get little help from the federal government. When President Eisenhower signed the Menominee Termination Act, on June 1, 1954, a heavy burden was placed on a tribal government that was already severely strained and in many ways incapable of responding quickly and decisively.

The Menominee were more successful in their early resistance to that part of the withdrawal program that proposed jurisdictional transfer legislation. In 1951, when it became clear that the state of Wisconsin and the counties surrounding the reservation favored the transfer of federal and tribal jurisdiction to the state,[84] the Menominee passed a resolution which took a position against the transfer.[85] The Bureau, in its 1952 report that became the basis of the withdrawal legislation, stated that the tribe's opposition was

84. H. REP. 2503, *supra* note 7, at 108.
85. Resolution of the General Council, Feb. 3, 1951.

based on two factors: first, the Menominee had a highly acclaimed law and order system;[86] second, the tribe wanted to maintain the autonomy and power of self-government fostered by tribal jurisdiction.[87] Both of these factors were later cited by Congress as the basis for the Menominee exemption from the coverage of Public Law 280,[88] the only exemption granted a Wisconsin tribe. However, one cannot explain the exemption as a product of congressional deference to the tribe's autonomy in the area of law enforcement; at the same time, the same congressmen were striking the ultimate blow against tribal independence by passing the Menominee Termination Act. It is more likely that the Menominee were freed from Public Law 280 not because of their desires, and not because they were proficient in law enforcement, but because the congressmen knew that as a terminated people, the individual Menominee were soon to be subjected to state jurisdiction anyway. For whatever reason, the Menominee had won a significant, if short lived, victory.

The Menominee were not to reap the benefits of this triumph. Within months, under the pressure of imminent termination, the General Council passed a resolution asking Congress to amend Public Law 280 so as to put the Menominee Reservation within the coverage of its provisions. Congress acted immediately. On August 24, 1954, just two months after the passage of the Menominee Termination Act, the tribe was placed within the jurisdiction of Wisconsin's law and order system.

The resolution was not a reversal of the Menominee's near unanimous opposition[89] to state jurisdiction; instead, the vote represents the tribe's attempt to cope with the realities and responsibilities of termination. When terminated, the Menominee were to be subjected to state law and order. In the period between the passage of the Termination Act and its implementation, the tribe was required to submit a plan for the transfer of Bureau programs to the state;[90] among the roles to be transferred was the responsibility for tribal law enforcement. Feeling the heavy planning burden, and knowing that the tribe's financial resources were to become dear, the Menominee questioned the wisdom of spending

86. H. REP. 2503, *supra* note 7, at 108. For a description of the Menominee Law and Order Program, *see* Herzberg, *supra* note 1, at 299 *et seq.*

87. U.S. Bureau of Indian Affairs Program in Wisconsin (1952), at 7.

88. S. REP. 699, H. REP. 848, *supra* note 69, at 2412.

89. Letter from Department of Interior to Members of the Menominee Tribe, p. 5, Nov. 12, 1954.

90. 25 U.S.C. § 896 (1970).

their limited funds to continue a tribal law and order system that they would soon be forced to abandon. But for the spectre of termination on the horizon, the Menominee would have maintained their opposition to Public Law 280 and retained their exemption from it.

The passage of the resolution is but another example of the difficulty with which the General Council functioned under pressure; in fact, the meeting on Public Law 280 is strikingly similar to one at which the Menominee "consented" to termination.[91] At neither meeting was evidence presented to show the social or financial impact of the proposals presented. At both meetings the debate was rushed; consensus—the traditional tribal mechanism for decision-making—was not attained; requests for delays, to allow for a cooling-off period and later debate, were ignored. Both votes were influenced by the presence and performance of white men who dominated the meetings. The termination vote was a product of Senator Watkins' visit; the Public Law 280 vote reflected the influence of the tribe's attorney and a Bureau representative. In both cases, only a small minority of Menominee attended the meeting and voted. Perhaps the greatest similarity is the tribe's attempt to recant both resolutions; within six weeks of the Public Law 280 vote, the General Council unanimously passed a resolution asking Congress to repeal the amendment so that the reservation would no longer come within Wisconsin's jurisdiction. Just as their attempt to repeal their "consent" to termination was ignored, so too was their request to repeal the amendment to Public Law 280.

The issue of Menominee acceptance of state law and order was presented at the April 24, 1954, General Council meeting by Mr. Davis, a white Bureau representative. He was supported by the tribe's white attorney, Mr. Andrews. Each played an important role in obtaining the tribe's "consent" to Public Law 280.

Whereas the proponents of termination often used rhetoric calling for Congress to "free the Indian," Davis chose the rhetoric of another American right, "equality," to convince the tribe to accept the resolution. He told the Council that the question was whether "the Menominees would like to accept the State court jurisdiction and be treated the same as other Indian people in this state."[92]

91. For an analysis of the termination vote, *see* Herzberg, *supra* note 1, at 315-16.

92. Minutes of the Menominee General Council Meeting, Apr. 24, 1954, at 28 [hereinafter cited as Minutes].

Attorney Andrews approached the issue from another perspective. Noting that the tribe would be subjected to state law and order upon its termination, he questioned the wisdom of waiting until that time. He said:

> Now I think we all know and all recognize that within a matter of a few years, three, four, or five—whatever comes out of Washington either on the Watkins Bill or the tribal bill—[referring to the termination legislation] this tribe and this reservation will definitely be under the jurisdiction of the State of Wisconsin. Therefore, in bringing this to you now, the one sole issue presented to you for consideration this afternoon is this: Should the Menominee Tribe ask for an immediate amendment to this Bill I have just discussed, which will bring the tribe in under State Law and Order as soon as such an amendment might be passed by the Congress; or, in the alternative, shall the tribe wait until the Watkins Bill, or some form of the Watkins Bill, puts you under State Law and Order in the next three, four, or five years. That is the issue presented here for discussion and debate this afternoon.[93]

Later, during the debate, Andrews took a clear position favoring the resolution when he said:

> We know and realize that we are going to become a part of the State of Wisconsin—we can't help ourselves on that—and so long as that will happen to us eventually in the next four or five years at the most, we might as well adopt this principle now and have some experience under it and be better prepared for it.[94]

To the tribe it was clear. Termination was inevitable. State jurisdiction was inevitable. The only question remaining was when both were to occur.

Some Menominee thought there was a good reason to act immediately to accept state law and order; they wanted to save the tribal dollars that were supporting their own law enforcement program. They knew this money would be needed when the federal government withdrew its support from the reservation. Picking up on this, Davis led them to believe that the move to state law and order would result in significant savings—a position that was later to prove to be untrue. A member of the tribe noted that the

93. *Id.* at 30.
94. *Id.* at 31.

Menominee had been spending $40,000 a year on law and order. He asked Davis, "If we go under State Law and Order, what will that cost us?"[95] Davis, who had previously stated that the Menominee were paying "much more than [was] normally paid" for their system, answered:

> The cost of a misdemeanor is paid by the offending person, or paid by public moneys. In other areas where State Court Jurisdication has gone into effect—take Odanah they have a township organized and have a constable. Other than that, the sheriff takes over. In others, they have two men besides the sheriff. *Tribal money is not used.* The Cherokees in North Carolina, it costs about *$15,000.* They maintain four police officers that are hired by the tribe under a program they have developed.[96]

The implication was clear. Public Law 280 would save the tribe money.

The improvement of reservation law and order was a third, albeit minor, theme used to support the resolution. When asked whether the tribe's law and order was costing too much, Davis responded that he thought it was, and that it was his opinion that "the inadequacy of this court [the tribal court] to properly deal with offenders [was] responsible for the continuance of crime on the reservation."[97] At another point he argued that Public Law 280 would improve tribal law and order by providing state institutions for the incarceration of juveniles, and state extradition law to bring back parents who had moved from the reservation while leaving their children behind.[98]

Apparently, Davis, who was from the Minneapolis Bureau office, was not familiar with either the successful Menominee law and order system, or the cultural differences between white and Indian treatment of juveniles and families. As previously noted, both the Menominee police force and the tribe's courts had won the praise of all who had evaluated them. Davis seemed to be unaware of the Bureau's previously taken position that there was not a serious crime problem on the reservation. In suggesting that the tribe use state institutions for the incarceration of juveniles, he failed to respect an important cultural difference. If possible, Indians preferred to keep juvenile offenders in the reservation com-

95. *Id.* at 32.
96. *Id.* at 33 (emphasis added).
97. *Id.* at 32.
98. *Id.* at 28.

munity; putting young people in jail was disfavored.[99] Even if the tribe had wanted to incarcerate its juvenile offenders, it could have used state institutions without subjecting itself to state jurisdiction. Davis failed to tell the Menominee that they could contract with the state for the use of its facilities. Davis was insensitive to Indian family practices; he applied a white set of values to family law when he said, "I believe that people who desert their families should be brought back and made to assume their obligations."[100] Traditionally, Indians recognized a broader sense of family; it was not a tribal offense for a parent, who was leaving the reservation, to place a child in the custody of a family member or trusted friend.[101] In suggesting that Public Law 280 was needed to improve reservation juvenile and family law, Davis was insensitive to the tribe's customs and needs.

Finally, both Davis and Andrews told the Menominee that Public Law 280 might help protect the soon-to-be-terminated tribe's hunting and fishing rights. However, neither offered a reasoned analysis as to this possible reason for supporting the resolution.[102]

Some Menominee did not think they knew enough about the consequences of the resolution; they wanted to postpone the decision. An early attempt to table the issue was ignored by the chairman.[103] After this, another Menominee complained about the haste with which the tribe was being asked to act. He said:

> We don't want to have anything brought in here and shoved down our throats whether we like it or not. We want to discuss this a little further. We have no time now. We have big business before us. I think the best thing to do is to table the question and put it aside for a while.[104]

99. For a discussion of the special relationship between the Indian child, his parents, and his tribe, *see* Jarvis, *The Theft of Life*, 9 AKWESASNE NOTES 31 (1977). The removal of Indian children from their families, for either educational or disciplinary purposes, is such a serious threat to the Indian community and its way of life that it has recently received special attention. *See, Hearings Before the Subcomm. on Indian Affairs of the Comm. on Interior & Insular Affairs, On Problems that Indian Families Face in Raising their Children and How These Problems are Affected by Federal Action or Inaction*, 93d Cong., 2d Sess. (Apr. 8, 9, 1974); The Indian Child Welfare Act of 1977, S. 1214, 95th Cong., 1st Sess. (1977) (passed by the Senate on Nov. 4, 1977).

100. Minutes, *supra* note 92, at 28.

101. Indians have long recognized the concept of the extended family. *See Harvis, The Theft of Life*, 9 AKWESASNE NOTES 31 (1977). The concept is now being recognized by both courts [Wisconsin Potowatomies v. Houston, 393 F. Supp. 719 (W.D. Mich. 1973)] and Congress, S. 1214, *supra* note 99.

102. Minutes, *supra* note 92, at 31, 33.

103. *Id.* at 35.

104. *Id.*

The debate continued. Eventually the following resolution was formally placed before the Council:

> RESOLVED by the Menominee Indian Tribe assembled in General Council this 24th day of April, 1954, that the delegation in Washington, D.C., and the tribal attorneys, are hereby authorized to seek an amendment to Public Law 280, removing the provision excepting the Menominee Reservation from the application of this law.[105]

After it was seconded, the discussion continued.

After several questions were asked to which complete, concrete answers could not be given, a Menominee asked that a committee of five be appointed to work with the Bureau to gather the necessary information.[106] He, too, was ignored.

Finally, a vote was precipitated by the challenge of a supporter of the resolution, who said, "You people seem to be afraid of the law. Why don't we vote on Mr. Dickie's resolution now?"[107] Another argued for an immediate vote, saying, "Eventually we will go under it anyway. I don't know what you are afraid of. Why should we wait?"[108] From the floor came the call, "Question! Question!"[109] Without further discussion, the Menominee voted. Of the 99 Menominee present, 78 favored the resolution and 11 voted against it. [110] The tribe's near unanimous position opposing Public Law 280 and state jurisdiction had been formally reversed.[111]

Congress acted quickly to place the Menominee under state law and order. The Assistant Secretary of the Interior, in a letter to the Chairman of the House Interior and Insular Affairs Committee,

105. *Id.* at 38.
106. *Id.* at 42.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. It is tempting, indeed, to speculate as to how a small minority of the Menominee Tribe were able to bring about a complete reversal of the tribe's deeply held opposition to state jurisdiction. The minutes are replete with indications of a conflict between tribal factions. One is tempted to assume that the proponents were a highly organized portion of the assimilated faction. However, this conclusion cannot be supported by the minutes alone, and corroborative data is not available. At least one scholar has attempted an explanation. In his Ph.D. thesis on the "Field Administration of the Bureau of Indian Affairs in Minnesota and Wisconsin," John J. Hebl, citing as a source an interview with James L. Frechette, says: "It should be noted that the leadership of the Menominee Reservation sought to prevent transfer of jurisdiction to the state, but during the absence of the Chairman of the Advisory Council in Washington, a rival group obtained action by the General Council requesting that jurisdiction be given to the state." Hebl, Field Administration of the Bureau of Indian Affairs in Minnesota and Wisconsin, 434 (1959).

noted that formal legislative procedures were not being followed because the matter was of such an"urgency" that it required immediate attention.[112] Although the record does not indicate why the legislation was being rushed through, perhaps it was because the government knew that the Menominee were unhappy with their resolution and were moving to rescind it. The amendment became law on August 24, 1954.[113]

Almost immediately, tribal opposition to Public Law 280 began to surface. On October 9, 1954, the General Council voted to seek the repeal of the amendment that subjected them to state jurisdiction.

The issue was raised by a Menominee, who said:

> I would like to make a resolution at this time to strike out Public Law 280 for the simple reason that the Menominee people were not informed of what that law meant. They did not understand just in what way they would jeopardize themselves. I think that at the time this Public Law came to the General Council, there should have been more discussion. We should have talked it over a lot more. That is my reason for making a resolution to strike out Public Law 280.[114]

She was not alone in her dissatisfaction with the resolution.

Another member thought he had been misled. He had understood that Public Law 280 would save the tribe a significant amount of money. He was upset because "about three weeks later I saw where our attorney had a meeting with the District Attorney [of Shawano County] and was making concessions to them so we would have to pay."[115]

In fact, the Menominee did have to make a significant payment toward the provision of state law and order services; in giving up their successful tribal system, the tribe saved but $6,792.93.[116]

At the October 9 meeting, the following resolution was presented to the General Council:

112. S. REP. 2223, Aug. 5, 1954 and H. REP. 2322, July 20, 1954 (to accompany H.R. 9821), at 3172.

113. Act of Aug. 24, 1954, 68 Stat. 795, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1970). The record indicates that the amendment was passed at the request of the Menominee. It was also noted that its purpose was to "provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." H.R. 9821, 83d Cong., 2d Sess., 100 CONG. REC. 13115 (1954).

114. Minutes of General Council Meeting, Oct. 9, 1954, at 42.

115. *Id.*

116. Minutes of General Council Meeting, Oct. 31, 1954, at 19.

> A resolution to strike out the public law 280 because our Menominee people did not understand what it all meant, and did not know that they would jeopardize themselves in any way, and therefore I move on this 9th day of October, 1954 to appeal to the Congress and the President of the United States to repeal the *law* to give it further consideration on the part of the Menominees.[117]

A Menominee, concerned that Public Law 280 was not in fact saving the tribe money, moved the following amendment: "That no Menominee Indian funds be appropriated to Shawano or Oconto counties, or the State of Wisconsin, for Law & Order."[118] The amendment passed by a vote of 80-0. The amended resolution was adopted by a vote of 70-0.[119]

However, Congress did not deem action on this resolution "urgent." Instead, it was ignored. From January 1, 1955, until the date of their termination, April 30, 1961, the Menominee were subjected to state law by Public Law 280.

Once more, under the pressures of their imminent termination, the Menominee cast and uninformed vote that would later be characterized as an indication of their consent to a withdrawal program. Once more, upon taking a sober second look, they passed a resolution seeking to rescind their previous actions. (The subsequent vote to rescind was a practice established by years of traditional tribal government.[120]) Once more, Congress chose to ignore a resolution that was not consistent with its plans for the Menominee. And, more, the Menominee were to pay dearly, both economically and socially, for their actions.

The application of Wisconsin law to the Menominee and the extension of the state's criminal and civil jurisdiction to their reservation extinguished important tribal rights and subjected the Menominee to additional assimilation pressures that encouraged the elimination of the remaining vestiges of the cultural differences which were preserved by the tribal courts and codes.

Most obvious was the loss of tribal sovereignty and autonomy which was manifested in an important area of self-government—the maintenance of reservation law and order. Derived from original concepts of tribal sovereignty, the United States had

117. Minutes of General Council Meeting, Oct. 9, 1951, at 13.
118. *Id.* at 64.
119. *Id.*
120. Herzberg, *supra* note 1, at 316.

long recognized the tribe's right to regulate its own internal affairs.[121] This right included the power to operate its own law and order systems—systems that were to reflect tribal customs,[122] traditions, and mores. State jurisdiction was clearly inconsistent with this tribal right.[123]

The application of Public Law 280 denied the Menominee the benefits of the tribal/federal jurisdiction system which was designed, in great part, to protect Indians from discrimination at the hands of the states' white citizens.[124] In those cases where Indians were to be prosecuted outside of the tribal courts, they were entitled to the benefits that accompanied a trial in a federal court that was established pursuant to Article III of the United States Constitution. Central to these benefits was a trial before an independent federal judge who, protected by grants of life tenure and assured compensation, was somewhat insulated from the pressures and prejudices of his white neighbors.[125] As has been noted, many tribes resisted Public Law 280 both because they did not want to give up these federal protections and because they were afraid their white neighbors would not treat them fairly. The Menominee had reason to join this opposition to state jurisdiction. The state courts surrounding the Menominee reservation were dominated by their white neighbors; the judges were white; the prosecutors were white; the lawyers were white; and the jurors were white.[126] State jurisdiction eliminated the insulation and protection from prejudice afforded the Menominee by the tribal/federal system.

121. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Williams v. Lee, 358 U.S. 217 (1959); United States v. Kagama, 118 U.S. 375 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

122. *Ex parte* Crow Dog, 109 U.S. 556 (1883).

123. Williams v. Lee, 358 U.S. 217, 223 (1959).

124. In discussing the protective aspects of federal jurisdiction, the Supreme Court said, "Local interference in such cases generally results in the punishment of the Indian and the acquittal of the white man.... No white man ever hung for killing an Indian, and no Indian tried for killing a white man ever escaped the gallows." United States v. Kagama, 118 U.S. 375, 383-84 (1886).

125. The importance of these protections was argued by Alexander Hamilton in the 78th and 79th *Federalist Papers*. "That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from Judges who hold their offices by a temporary commission." Hamilton argued the need for independence as a general principle; its importance is magnified when the court is called upon to deal with the prosecution of a member of a minority group.

126. The Menominee were placed within the jurisdiction of the Shawano County court system. For many years they could neither vote for the district attorney nor serve on the county's juries; they later won these rights through litigation. Otradavec v. Dickinson, Cir. Ct. Menominee County, Wis. (Sept. 5, 1972). The Menominee were not treated fairly in the

Finally, the transfer of jurisdiction caused by cultural, social, and psychological losses which, if intangible, are no less meaningful than the more ascertainable losses previously discussed. It is difficult to assess the impact of the application of a new legal system, based on different cultural values, to the more traditional, less assimilated, Menominee. It is equally difficult to assess the psychological damage done to those Menominee who were tried in alien state courts. The Menominee had been proud of their acclaimed law and order system; it is difficult to measure the loss of pride they must have felt when their power to control this important aspect of reservation life was taken from them and transferred to the state. Although subtle and not easily assessed, perhaps these losses were felt as deeply as any of those brought about by the withdrawal programs.

II. *The Impact of Termination on the Menominee Tribe*

No matter how great the tribal losses suffered as a result of Public Law 280, they pale when compared to the destruction of the Menominee way of life brought about by the application of the other major withdrawal program—termination.[127] Because the passage of the Menominee Restoration Act was a direct response to this terrible tale of tribal losses, it deserves to be told here.[128]

Shawano courts. *See* RAY, THE MENOMINEE TRIBE OF INDIANS, 1940-1970, Plaintiff's Exhibit No. R-1, Menominee Tribe of Indians v. United States, Ct. Cl. No. 134 -67 (1971) [hereinafter cited as RAY, MENOMINEE TRIBE]; RAY, FREEDOM WITH RESERVATION—THE MENOMINEE STRUGGLE TO SAVE THEIR LAND AND PEOPLE 40 (1972) [hereinafter cited as RAY, FREEDOM]; *Hearings, S. 1687, on the Menominee Restoration Act, Before the Senate Subcomm. on Indian Affairs, Comm. on Interior & Insular Affairs,* 93d Cong., 1st Sess. 237 (1973) [hereinafter cited as Hearings on S. 1687].

127. When the termination act became effective, on Apr. 30, 1961, the Menominee lifestyle underwent a transformation so complex as to be beyond the scope of this article, but some of the details must be summarily stated. The reservation ceased to exist; Menominee County was created to take its place. All of the tribe's communally held assets were transferred to a corporation, Menominee Enterprises Incorporated (MEI). In exchange for his interest in the communal property, each Menominee was given an income bond and 100 shares of MEI common stock. The actual shares were held by a voting trust. The individual Menominee were granted certificates of beneficial interest which limited their power to manage their assets to the performance of one function—the election of the voting trust. For further information, *see* The Menominee Termination Plan, 26 Fed. Reg. 3727 (1961); RAY, FREEDOM, *supra* note 126; Hearings on S. 1687, *supra* note 126, at 252 *et seq.*

128. *See* RAY, FREEDOM, *supra* note 126, at ch. IX; ABERLE & BROPHY, *supra* note 74, at 199 *et seq.*; ORFIELD, *supra* note 12, ch. 6, p. 11 *et seq.*; *Hearings on S.C.R. 26 Before the Senate Comm. on Interior & Insular Affairs, 92d Cong., 1st Sess. (1971);* Hearings on S. 1687, *supra* note 126; *Hearings on H.R. 7421, the Menominee Restoration Act, Before the House Subcomm. on Indian Affairs, Comm. on Interior & Insular Affairs,* 93d Cong., 1st Sess. (1973) [hereinafter cited as Hearings on H.R. 7421].

The passage of the Menominee Termination Act brought about an immediate, rapid decline in both the success of the tribe's enterprises and the well-being of the individual Menominee. This should not have been a surprise. The Menominee prosperity, more apparent than real, was the product of two factors, both of which were eliminated by the termination legislation.[129] First, the enterprises were exempt from both state licensing requirements and the attendant state standards and regulations; after termination, the hospital, the mill, the utility plants, and the schools required extensive improvements to qualify for the state certification essential to their continued operation. Second, an exemption from state, federal, and local taxes created the artificial business context within which the mill was run so as to maximize employment opportunities rather than profits; when faced with the payment of these taxes, the mill management had to change its employment and business practices. The tax exemption had also applied to the income and property of the individual Menominee; many families could not subsist on their incomes when they were diminished by these taxes. Once these exemptions, the cornerstone of the apparent Menominee prosperity, were eliminated by the termination legislation, the tribe faced immediate economic and social crises.

Of all the termination losses suffered by the Menominee, the depletion of the tribe's cash reserve is most easily observed. When the termination act was passed, the government held $10,437,000 in the Menominee treasury accounts.[130] This apparently secure cash position was an important factor in Congress' decision to withdraw federal support from the tribe.[131] A rapid cash drain began immediately. With little federal support, the Menominee had to pay for expensive pretermination studies.[132] In addition, with little help, the tribe had to improve its facilities so they would qualify for state licensing. For the first time, the Menominee were forced to use a system of deficit spending.[133] By 1960, they had spent $12,265,424.[134] In 1961, on the termination day, the tribal accounts contained $1,750,000;[135] by 1964, they held $300,000;[136] and

129. Herzberg, *supra* note 1, at 296.
130. 1966 Report of the Menominee Indian Study Commission, 18 [hereinafter cited as 1966 Report].
131. Herzberg, *supra* note 1, at 309.
132. *Id.* at 323-26.
133. 1966 Report, *supra* note 130, at 19.
134. *Id.* at 18.
135. *Id.*
136. WILKINSON, KNIGHT, & PRELOZNIK, THE MENOMINEE RESTORATION ACT: LEGAL ANALYSIS 6 (1973).

in 1972, the reserves were down to $58,795.[137] The weakened financial position had its greatest impact on the tribal enterprises. The depletion of capital eliminated an important source of tribal income—the interest payments received on the treasury accounts. The Menominee had previously used these payments to voluntarily reimburse the state and federal governments for services performed on the reservation.[138] With termination, the tribe would have to both provide and pay for these services. No longer able to rely on this traditional source of funding, the Menominee had to place this burden on the struggling tribal enterprises. In a like manner, the effects of the loss of the cash position were felt in all areas of tribal life.[139]

The Menominee health care system was completely destroyed by the termination program. Perhaps this destruction of a key tribal institution, and its effect on the individual Menominee, best exemplifies the impact of the withdrawal legislation. The system had been run by the Menominee; it was reservation based, comprehensive, and inexpensive. On the reservation, the tribe owned and maintained both a hospital and a clinic. Each member was entitled to complete medical, surgical, and dental care. And, in sharp contrast to the cost of nonreservation health care, each Menominee family paid only $38 per year for complete coverage.[140] With the removal of federal assistance, and the application of Wisconsin's licensing standards, the tribe had to abandon its system. The Menominee were forced to turn, unsuccessfully, to the commercial medical market in the surrounding, non-Indian communities. Although predictable, the loss was not necessary.

On January 1, 1961, the 45-bed Menominee hospital, the symbolic center of the health care program, was closed, a victim of the tribe's inability to comply with state licensing standards. This loss, too, should not have been a surprise. Although characterized by

137. *Id.*

138. Herzberg, *supra* note 1, at 296.

139. Examples of termination related capital expenditures are:

(1) in 1954, $4,881,000 in per capita payments to Menominee (payments made pursuant to the Termination Act) [1966 Report, *supra* note 130, at 19];

(2) in 1955, $2,268,240 in supplemental per capita payments, ORFIELD, WAR ON MENOMINEE POVERTY, 59];

(3) from 1955-1960, $2,116,184 in stumpage payments to individual Menominee [1966 Report, *supra* note 130, at 19];

(4) from 1954-1959, $2,400,000 to pay for tribal and federal agency operations and some school construction, *id.* and

(5) at least $600,000 was spent on hospital and school renovations, *id.*

140. Herzberg, *supra* note 1, at 296.

the state in a pretermination report as a "modern institution, recently reconstructed,"[141] the hospital needed extensive improvements to qualify for state certification. The Menominee made a real effort to save the hospital; they spent more than $300,000 on renovation projects. After the work was completed, the building was inspected and found to have at least ten major code violations. In July, 1960, nine months before they were to be terminated, the General Council asked the Department of the Interior for help. Two months later, a Department official reported that the hospital could be brought into compliance at a cost of $50,000. When the federal government refused to give the assistance necessary to finish the repairs, the Menominee were forced to close the hospital. It was not until four months after the closing that the Acting Commissioner of Indian Affairs, John O. Crowe, responded to the tribe's initial request for help. He wrote:

> It is our opinion that it would not have been practical or economically feasible to bring the existing hospital building within the standards of the State of Wisconsin . . . . In view of the absence of a directive or an understanding that the building would comply [with state standards] this office has no alternative but to reject the Council's request "that the deficiencies be remedied."[142]

The government would not spend the $50,000 necessary to preserve the keystone of the Menominee health program. The government would not spend the $50,000 necessary to give meaning to the tribe's investment. At a time when tribal resources were severely depleted, the Menominee had wasted $300,000.[143] However great the financial loss, it did not compare to the health crisis and drop in tribal morale that followed the closing of the hospital.

In a like manner, termination brought the close of the other reservation medical and dental facilities.[144] With no resident doctors in Menominee County, the people had to go to the private doctors in Shawano County for treatment. This created several problems. The first was financial; once eligible for complete care

141. Report to the Menominee Indian Study Committee, Joint Legislative Council, State of Wisconsin, on County and Local Government for the Menominee Indian Reservation, Bureau of Government, University of Wisconsin Extension Division , Madison, 3 (1956).

142. RAY, MENOMINEE TRIBE, *supra* note 126, at 84.

143. With the closing of the hospital, the tribe sold its medical equipment at a substantial loss. 1966 Report, *supra* note 130, at 24.

144. RAY, MENOMINEE TRIBE, *supra* note 126, at 55.

at a minimal cost, for the first time the Menominee were forced to pay for medical services. Although some who worked for the mill or the county had health insurance, and others received medical care cards from the welfare department, many Menominee fell in between and could not afford health care. Reliance on facilities in adjoining counties created logistic problems; few Menominee had cars reliable enough to make the long trip to the doctors. The tribe ended up contracting with an ambulance service, at a substantial cost, to transport these members. Many Menominee were not sufficiently acculturated to feel comfortable seeking help in the non-Indian communities. They feared discrimination; they did not think the white man's medicine was sufficiently sensitive to the important role Indian culture played in shaping the Indian's perception of his medical needs. Because of the cost, the distance, and the fear, many Menominee did not seek medical treatment.[145]

The Menominee were not a people whose health could withstand the lack of care. Soon after termination, a tuberculosis epidemic swept the reservation. In a pilot testing program of county employees,[146] it was found that one-third of those Menominee tested had the disease. In a later test, more than 25 per cent of the Menominee reacted postively. Although at least 20 per cent needed drug treatment, not all of them received it.[147] In like manner, the Menominee suffered, at a disproportionate rate, from other diseases.[148]

The lack of on-reservation health care had a devastating impact on the physical well-being of the Menominee.

The closing of the hospital also had a detrimental impact on the tribe's psychological well-being. The communally owned hospital had been an important social and cultural center—an institution for which no post-termination equivalent was to be found. Many poor Menominee had used the building as a shelter from the harsh cold of the Wisconsin winters; they were made to feel welcome and no stigma was attached to the use of the hospital for this purpose. The hospital served as a convalescent or short-term nursing home for the older Menominee. A meeting place for many, the

145. For a more complete discussion, *see* RAY, FREEDOM, *supra* note 126, at 41-45.

146. It can be assumed that these employees, whose incomes and standards of living were higher than those of most of their brethren, were healthier than other Menominee.

147. In the first year after termination, the Menominee spent more than $80,000 fighting tuberculosis; subsequent years required equivalent expenditures. ORFIELD, *supra* note 12, at ch. 6, p. 17. *See also* 1966 Report, *supra* note 130, at 31-32.

148. In 1965 the reported rate of heart disease, stroke, cancer, influenza, pneumonia, diabetes, and diseases of early infancy was much greater than that of the communities surrounding the reservation. *See* 1966 Report, *supra* note 130, at 29.

hospital was described as "a friendly place where people looked out for each other. When people were asked about their stays in the hospital and their friendships with the doctors and nurses who worked there, many warm memories were kindled."[149] The loss of the hospital was felt deeply.[150]

Forced to sell their utility plants, the Menominee lost control over the production and delivery of power and water on the reservation. This brought about a further decline in the tribe's standard of living; few other American families, in the 1960's, had to relearn how to live without electricity. Before termination the tribe owned and operated three power plants. Each Menominee household received free electricity and water. Not regulated by the federal government, and exempt from state control, the plants were never licensed. Termination would end the exemption. To conform with the state's standards, the Menominee would have had to spend at least $40,000 on physical plant improvements.[151] Had they the money to make these changes, they still could not have complied with two other state regulations: utility companies had to post a sizeable cash bond, and Wisconsin prohibited the operation of a utility company at a financial loss.[152] To make the improvements, to post the bond, and to operate at a profit, the small-scale Menominee power companies would have had to charge very high rates. In the face of this reality, the Menominee sold their power plants to the Wisconsin Power and Light Company. In addition to $75,000, the tribe received the company's promise to deliver power at a rate lower than that at which the tribe could have provided it. The transaction caused a bitter conflict among the Menominee. One of the first sales of communally held property, many Menominee strongly opposed the loss of tribal control over an essential service.[153] Their fears were later confirmed. Many Menominee were not able to pay their power bills. The private power company discontinued their service. Once a relic, the kerosene lamp became a fixture in many Menominee homes.[154]

149. RAY, FREEDOM, *supra* note 126, at 43.

150. The magnitude of the symbolic loss was made greater by the conversion of the hospital building into a county courthouse, from which state law and order was dispensed.

151. 1966 Report, *supra* note 130, at 24.

152. ORFIELD, *supra* note 12, at ch. 6, p. 13.

153. *Id.*

154. General Economic Situation of the Menominee Indian Tribe of Wisconsin, BIA, A REPORT TO THE HOUSE COMM. ON APPROPRIATIONS & THE HOUSE INTERIOR & INSULAR AFFAIRS COMM. 14 (1973) [hereinafter cited as BIA REPORT]. In a like manner, other services provided by the tribe were threatened by state regulation. The tribe had to renovate its sewage system. The water system required improvements. Finally, when faced with state control, the once flexible Menominee loan fund [see Herzberg, *supra* note 1, at 296] played a less meaningful role in tribal life.

One of the central assumptions that dominated the rhetoric of the bureaucrats and congressmen who supported the termination of the Menominee was that the tribe's lumber industry would provide an economic base capable of supporting both individual Menominee and a new, reservation-based county.[155] There was no factual support for this assumption. That it was without merit became clear soon after the withdrawal program took effect. Forced to comply with state regulations, taxed on its income and property, and placed in a highly competitive market in which it was asked to turn a profit, the mill foundered and threw the tribe and the county into a period of economic chaos.

A pretermination inspection of the 50-year-old mill disclosed 132 violations of state codes.[156] Even though it knew that the mill was to be the cornerstone of the terminated tribe's economy, the Bureau did not act to correct the deficiencies. After termination, the tribe spent more than $100,000[157] to make the mill eligible for a license. The Menominee soon found that it took more than an improved physical plant to guarantee success.

Serious management and personnel problems prevented a successful transition into the post-termination, competitive market. After many years of Bureau paternalism in which few Menominee received either the education or the experience necessary to qualify for the positions directing mill operations,[158] the tribe was forced to hire new managers to replace the departing Bureau employees who had governed the business.[159] The first president was a part of a management group hired away from a large, western mill. The new managers tried, unsuccessfully, to adapt western methods to the small-scale, tribal industry. For example, they placed a high priority on the efficient transport of cut logs from the forest to the mill. As they had in the west, they purchased several expensive, large trucks to replace the smaller ones the tribe

155. In 1947, Commissioner Zimmerman first proposed the withdrawal program. In establishing criteria to determine the tribe's readiness for termination, he looked to its economic condition. The Commissioner was certain that the tribe's economy, without federal support, would allow the Menominee to attain a decent standard of living. *See* Herzberg, *supra* note 1, at 303. However, his conclusion was based on conjecture, not fact. *Id.* at 308. The same assumptions about the viability of the Menominee economy were made during the Menominee termination hearings. Once more, no facts were introduced to support the congressmen's conclusions. For a discussion of the Menominee termination hearings, *see id.* at 321.

156. RAY, MENOMINEE TRIBE, *supra* note 126, at 92.

157. 1966 Report, *supra* note 130, at 23.

158. *See* Herzberg, *supra* note 1, at 297.

159. In the ten years following termination, the enterprise had six presidents; only one was a Menominee. BIA REPORT, *supra* note 154, at 38.

had been using. It was not until after the new trucks were delivered that the managers found that they were too wide for the reservation roads. Undaunted, they had the roads widened. But the trucks still could not be used; when loaded to near capacity, they were so heavy they sank into the roads. Similar attempts at innovation failed.[160] Not able to improve the efficiency of the operation with physical changes, the management attempted to increase the productivity of the work force. This significantly changed the role the mill had played in the reservation economy. Once run as a *quasi*-public service, to maximize employment, the new operation was run like any other private business, to maximize profit.[161] Orfield describes the change:

> The new president felt that the creation of an effective business operation required a revolution in Menominee attitudes and procedures. There had been no cost control system, but now an accountant was employed. New methods were adopted and a strenuous effort was made to persuade long-experienced workers to change their procedures. Those who "couldn't adjust" were replaced. The feeling of tribal members that the mill owed them a job was attacked by a policy of tough management, firing for infringements which would have been tolerated without comment in the past.[162]

Even with the tough new management and personnel policies, the mill operation could not generate a high enough profit to carry the burdens that were placed upon it.

The new enterprise entered and had to compete in an unstable, depressed market. During the termination hearings, it was assumed that the high demand market of the early 1950's would continue. The assumption was wrong. By 1958, there was a sharp decline in the demand for the mill's products. To make matters worse, the mill had accumulated a huge inventory; production cutbacks, with an attendant cutback in the labor force followed. During its

160. A decision was made to adopt the western method of measuring lumber by its weight rather than its dimensions. When it was found that the system encouraged the transport of useless material to the mill, the old system was reinstated.

161. Just six weeks before termination became effective the mill management laid off one-third of the mill workers. *Id.* at 10.

162. ORFIELD, *supra* note 12, at ch. 6, p. 11.

first three years, the Menominee enterprise—a business that had always been profitable—ran in the red.[163] As the mill failed, so sank the hopes and plans for Menominee prosperity.

The hopes and plans for prosperity were not realized because they were built upon an inaccurate assumption—that the Menominee, who had, in essence, paid for the federal and state services on the reservation, would be able to provide those services, without assistance, after termination. It soon became clear that this would not be the case. The tribe could not balance its first, post-termination budget. Even with the elimination of several costly services for which the tribe had paid (health care, utility service, and education), the projected expenses totaled more than $600,000.[164] This required a budget 50 per cent greater than that of the previous year.[165] The Menominee were boxed in by spending requirements they could not control; a large portion of this budget was not to be directed toward the provision of essential services, but rather, was to be used to make the physical improvements of the tribe's facilities that have been discussed earlier. For the first time, the Menominee had to institute a county tax system to garner the revenue needed for these expenditures.[166]

Menominee Enterprises, Inc., which held 90 per cent of the reservation's taxable property,[167] could not carry the heavy tax burden.[168] The mill, the reservation's principal business, stood out, a lonely target for the tax collector. However, the mill's projected earnings for the first year after termination were but $240,000,[169] a sum clearly insufficient to generate the tax income the budget required. Few thought it would meet the projection. When it did not, its failure was felt by both the county and its employees, both of whom were depending upon it for support. In the end, the budget was balanced and the services provided, but only with the assistance of the federal and state governments.[170] A cycle was started; as the county failed to support itself, the Menominee had

163. The mill was run at a loss until 1965. During that year and the five that followed, net earnings increased to the point of showing a net profit. However, in at least three of those years the profit came from the sale of reservation land, not the sale of mill products. BIA REPORT, *supra* note 154, at 5.

164. ORFIELD, *supra* note 12, at ch. 6, p. 4.

165. *Id.* at 10.

166. As a tribe, the Menominee had never exercised their taxing power. Herzberg, *supra* note 1, at 296.

167. ORFIELD, *supra* note 12, at ch. 6, p. 10.

168. To compound the burden, the county was forced to use a tax rate that approached the maximum allowed by state law.

169. ORFIELD, *supra* note 12, at ch. 6, p. 10.

170. *Id.* at 17.

to turn to the state and federal governments for help. The termination goal of an independent, self-sustaining tribe was never to be achieved.

Perhaps more than any other factor, the lack of reservation employment opportunities led to the sharp decline in the quality of Menominee life. After termination, the mill ceased to be the employer of last resort; there were no sure sources of reservation jobs. In fact, the mill, the reservation's major employer, was laying off people. From 1954 to 1964, the number of reservation jobs decreased.[171] Moreover, the Menominee did not fare well in the competition for jobs in the neighboring communities. The statistics for the period clearly set forth a rate of unemployment disproportionate to that of the entire state.[172] Spokeswoman Ada Deer best gave meaning to those numbers when she testified about the impact the high unemployment rate was having on the Menominee:

> Let us tell you about our people's far-reaching poverty, which extends beyond mere income levels to practically all other areas of our life.
>
> Today, Menominee County is the poorest county in Wisconsin. It has the highest birthrate in the state and ranks at or near the bottom of Wisconsin counties in income, housing, property value, education, employment, sanitation and health. The most recent figures available (1967) show that the annual income of nearly 80 percent of our families falls below the federal poverty level of $3,000. The per capita annual income of our wage earners in 1965 was estimated at $881, the lowest in the state.
>
> Our county does not have diversified industry. Over 70 percent of those employed work in our MEI lumber industry. In 1968, 24.4 percent of our people were unemployed, the highest unemployment rate in the state.
>
> This lack of employment opportunities, combined with our high birthrate, forced nearly 50 percent of our county

171. RAY, MENOMINEE TRIBE, *supra* note 126, at 71.

172. For example, in 1963, the unemployment rate in Menominee county was 13.6%; the corresponding statewide rate was 4.0%. In 1964, the rates were 18.1% and 3.7%. In 1972, they were 25.7% and 5.2%. *See* 1966 Report, *supra* note 130, at 29; BIA REPORT, *supra* note 154, at 29. In addition, the incomes of the large Menominee families were lower than those of the smaller, non-Indian families in the state. In 1970, the per capita income for Menominee was $1,028; the average state per capita income was $3,158. In a ten-year period, the median income had risen but $377. *See* RAY, MENOMINEE TRIBE, *supra* note 126, at 91; BIA REPORT, *supra* note 154, at 29.

> residents to go on welfare in 1968. Welfare costs in the county for 1968 were over $766,000 and our per capita welfare payment was the highest in the state. The majority of Menominee who have left our county to seek work in the cities have become trapped in poverty there also.[173]

The unemployed Menominee were forced to turn to the welfare system for their support. A once self-sufficient people, they were made to depend on a government that, in terminating them, had rhetorically promised to free them.[174]

As the post-termination years passed, both the individual Menominee and the county became dependent on the assistance provided by the federal and state governments. In 1954, its first year, Menominee County was declared a depressed area and, thereby, made eligible for federal assistance.[175] The Menominee had not needed this help before. In 1953, they had paid the federal government for all but $59,000 of their reservation expenses.[176] But with termination, this changed. From June 17, 1954, to June 27, 1973, the Menominee and the county received more than *$20,000,000* in federal and state aid.[177] A great deal of this went to individual families in the form of welfare payments.[178] As had been promised, termination had freed the Menominee from the ward status that accompanied the trust supervision of the Bureau of Indian Affairs. However, in the Bureau's place a new group of *quasi*-trustees—the caseworkers—emerged. Often less knowledgeable about and less sensitive to Indian culture than the Bureau people they replaced,[179] the caseworkers intervened to play a significant role in Menominee life. As was the case with other poor

173. *Hearings on S.C.R. 26 Before the Comm. on Interior & Insular Affairs*, 92d Cong., 1st Sess 119 (1971) [hereinafter cited as Hearings on S.C.R. 26].

174. When in public, the proponents of the withdrawal programs dropped their coercive tactics and used the freedom rhetoric extensively. *See* Herzberg, *supra* note 1, at 319.

175. 1966 Report, *supra* note 130, at 23.

176. 119 CONG. REC. 34302 (1973).

177. Report of the Department of the Interior on H.R. 7421, sent by letter dated June 27, 1973, at p. 2.

178. In 1954, 14% of the Menominee received some form of aid as compared to 2.6% of all Wisconsin residents, RAY, FREEDOM, *supra* note 126, at 90. As previously mentioned, the Menominee paid for the aid to their people. By 1968, 46% of the Menominee were receiving aid, *id.* at 37. A great portion of this was paid by the county which, in order to raise the revenue, was forced to use the highest mill rate of any county in the state, *id.* at 90. From 1961 the number of Menominee receiving aid increased 95% while the number of other Wisconsin residents decreased 10.4%. During that same period, the amount spent on Menominee welfare increased 19 while that spent on other state residents increased but 10.5%. 1966 Report, *supra* note 130, at 34.

179. RAY, FREEDOM, *supra* note 126, at 39.

Americans, the Menominee lost the promise of their freedom in the policies and procedures that fostered their dependence on the welfare bureaucracy.

Many of the Menominee who were receiving state aid learned a tough economic lesson when they found that to qualify for aid, they were forced to give up the only asset they had obtained from the dissolution of the tribe's communal holdings—their Menominee Enterprises income bonds. To be eligible for aid, a Wisconsin resident had to show that he was in need and that he held no more than $750 worth of liquid or negotiable assets.[180] Because the discounted bonds were found to be worth $1,200, the Menominee families that held them did not qualify for assistance. For two years, many Menominee tried to sell the bonds on the open market; the market was not predictable and the bonds were often sold for but a fraction of their value. In 1963, the state legislature addressed the problem. However, instead of making the bonds exempt from the property limitation, the legislature took a tack that ultimately led to the state's ownership of many of the bonds. By the new law, a Menominee bondholder who applied for aid had two choices. He could either assign the bond to the state, or he could post it with the state as collateral for a loan. In either case, once he received $3,000 in aid, the state became the owner of the bond.[181] By 1969, the state owned $1,030,931 worth of bonds and held another $218,290 worth of assigned bonds.[182] A group of outraged Menominee organized and formed the Menominee County Welfare Rights Organization, which lobbied to repeal the law. They were successful. In 1971, the Department of Health and Social Services ordered an end to the state's taking of Menominee bonds.[183] Statutes were later passed which ended the practice and returned the bonds to their original owners.[184] During the period in which the state held the bonds, the Menominee were not only deprived of the interest paid on them, but they also suffered the loss of a symbolic tie to their traditional pattern of communal ownership.

180. The $750 limit was applied to those Menominee seeking Old-Age Assistance [Wis. Regs.—Eligibility for Old -Age Assistance, § 49.20 (11-1-68)]. For those seeking Aid to Families with Dependent Children, the limit was $500. [Wis. Regs.—Eligibility for Aid to Families with Dependent Children, § 49.19 (10-22-68)].

181. WIS. STATS § 49.70(2) (1963).

182. 1969 Report, *supra* note 130, at 28.

183. The Department's order was issued at the request of Governor Patrick J. Lucey, who had previously promised the Menominee that he would end the bond assignments.

Before termination, the Menominee shared one strong tie to their culture and tradition—the practice of holding tribal land in common. This tie, the product of the tribe's strong, successful resistance to the white man's many attempts to take the Menominee land, was broken by termination. The impact was felt deeply by the Menominee, both individually and as a tribe.[185]

Termination forced the Menominee to implement a system of individual land ownership and title that had been foreign to their culture and tradition. For centuries, individual Menominee had built their homes and lived on land communally owned by the tribe. Blamed for the "slow development" of Indian commerce and enterprise, and later attacked as "communistic," this practice was never popular with the government.[186] Over the years, many tribes succumbed to the government's pressure and rhetoric and switched from the system of communal ownership to one of individual title. The Menominee did not. But after termination they could resist no longer. The Menominee land was parceled and sold, both to the Indians who had lived on it and to outsiders.

The system of individual ownership was not easily implemented. Actually, neither the termination act nor the tribe's termination plan dealt with the problem of land ownership. Although individual ownership was an implied goal of termination, the law did not require it.[187] The plan placed the land, along with the tribe's other communally held assets, under the control of Menominee Enterprises, Inc. It was the corporate board of directors that made the decision to parcel and sell it. The board ruled that all land that was being used for housing be appraised and offered for sale to its occupants. To preserve their family homes, the Menominee had to buy the land they had been living on from

184. The assignments were formally ended by ch. 302, 1971 Wis. Laws 1169. Another section, ch. 303, 1971 Wis. Laws 1169, directed the Department to return the bonds it held to their original owners. But, many of the bonds that were held by private interests were never returned. For a discussion of how these bonds fell into private hands, *see* Report to the Menominee Indian Study Committee on the Menominee Enterprises Inc. 4% Income Bonds (1971).

185. The Menominee were but one of a very few tribes to retain a sizeable portion of their aboriginal lands. Although they gave up a great deal of land in a series of treaties, they later refused to relocate and would not participate in the allotment program that ultimately led to white ownership of a sizeable portion of Indian lands. Herzberg, *supra* note 1, at 279-83.

186. *Id.* at 279-302.

187. The terminated Klamath were given an option; they could either take an individual share of the tribe's assets, or have their share communally managed by the government. The majority of those who took individual shares soon lost them, while those who held them communally remained in the traditional wardship that termination was supposed to end. *Id.* at 310, 311.

Menominee Enterprises. The land was appraised at its fair market value. A good deal of it was so beautiful that it could command a high price on the recreational use market; the prices at which it was offered were often so high as to be beyond the realistic reach of its occupants. To preserve their housing, families pledged their one asset, the income bond, but without jobs, many soon defaulted on their loans. To make matters worse, the land was no longer exempt from taxation. With the county assessing at the maximum rate allowed by state law, hundreds of families failed to pay their tax bills and faced the loss of their houses.[188] Housing became a critical problem for the terminated Menominee.[189]

When it became clear that the mill could support neither the Menominee people nor the county, the directors of Menominee Enterprises, in an attempt to generate income and expand the tax base, turned to the exploitation of the tribe's most cherished assets—the reservation land and water.[190] Limited by a provision in the termination plan that allowed it to lease but not sell the land, the board, in 1962, began a program of recreational land leases. However, when the program failed to generate the funds necessary for the expansion and diversification of tribal industry, the board asked the firm of Ernst and Ernst to prepare an economic development plan. The plan proposed the sale of recreational land sites. Because it called for the sale of land, the plan had to be approved by the Menominee. At one meeting, of the 253 Menominee stockholders who attended, 156 voted to follow the plan while 97 opposed it. It is not clear that the voters understood that they were approving land sales. Many thought they were approving, in principle, economic development. Few understood that they were voting to allow the sale of tribal land to outsiders.[191]

188. ORFIELD, *supra* note 12, at ch. 6, pp. 11, 12, 15; Deer, Testimony, Hearings on S.C.R. 26, *supra* note 173, at 14, 23.

189. The housing the Menominee were fighting to preserve was critically substandard. The average value per house was $4,000. Less than one-third were sound; most were deteriorating and dilapidated. To magnify the problem, the Menominee had large families; there were half again as many people living in their houses than lived in the average Wisconsin household. RAY, MENOMINEE TRIBE, *supra* note 126, at 89.

190. For a thorough discussion of the Legend Lake project and the machinations of the voting trust, *see* RAY, FREEDOM, *supra* note 126, which contains the following statement of the importance of land to the tribe: "To the Menominee, land is the center of their existence. The nature of the land determines how they live. In short, their land provides their very identity." *Id.* at 34.

191. *Id.* at 29. "The Menominee had no idea the economic development zone would degenerate into a mass sell-out of their land! They heard talk of 'warranty deeds' by their Directors, but this term was not adequately explained. After the damage was done, they were all to realize that issuing a 'warranty deed' allowed the corporation to sell the Menominees' land."

Actually, in order to protect the tribe from the pressures that might lead to a hasty sale, the Menominee Enterprises articles of incorporation specified that the corporation had to obtain the votes of the "holders of not less than two-thirds of the outstanding shares of stock entitled to vote" before it could sell land. This possible obstacle to the sales was eliminated by the voting trustees who, once they interpreted it to require a vote of the trustees, not the shareholders, voted to proceed with the plan.

With this questionable authorization in hand, the board entered an agreement with a developer who had become well known for his exploitation of scenic lands and water. The agreement called for the creation of a large, artificial lake, and the sale of 2,600 recreational building sites. Small lakes were flooded and enlarged. Wetlands and hills disappeared.[192] As the lots were sold to outsiders, the Menominee lost the use of their land.[193]

Had the plan succeeded, some may have argued that it was worth the costs. But it failed, and its failure was predictable. Although the land sales generated some revenue and expanded the tax base, they also created a county liability to provide services. The Menominee were caught by Catch 22. To provide services, they had to sell land; the sale of land created a new obligation to provide services. After years of failure, the partnership was dissolved and the sales terminated. But, to this day, thousands of acres of Menominee land are owned by outsiders.

192. For a description of the ecological damage done by the project, *see id.* at 33, which contains the following; "[T]he project destroyed a wild and beautiful area of Menominee County, dotted with lakes and marshes and swarming with wildlife, and replaced it with a large artificial lake system replete with noise, motorboat pollution, and other environmental abuses caused by concentrations of several thousands of people."

193 *Id.* at 6. "Some White people chased me away from my hunting lands. One guy asked me what I was doing there, and I said, 'You got some nerve. This is my land.' The man said, 'You talk pretty good.' And I replied, 'Oh sure, I went to school at least a couple years. Any more questions you want to ask me?'" Before termination, many Menominee exercised their hunting and fishing rights to feed their families. After termination, these rights were protected from state regulation only after extensive, costly litigation. *See* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968). The developers failed to respect the land and the Menominee values it symbolized. For example, "There was once a fireplace on what is now called Legend Lake, that Menominees have known for at least 800 years. An archeologist came here to study it a few years back and collected sacs [*sic*] full of pottery to carbon test how old the site was. He told me how valuable the site was, and I told him we Menominee knew it. That fireplace was burning all day and all night, 365 days of the year for people traveling by the reservation. Sort of what you folks call a 'motel' these days. The archeologist also pointed to an Indian burial mound nearby and told us we should mark it off, so people would know it's a sacred and important historical place. I thought it was a good idea too, but before I could do anything about it, the man came in and bulldozed the whole thing. Can you believe it? He didn't ask anyone about the land he was destroying. He just went ahead and bulldozed it." *Id.*

Some of the termination losses which had the greatest impact on the Menominee cannot be quantified; although intangible, they are no less deeply felt. They are the product of the government's success in achieving one of its major termination goals—the forced assimilation of the Indian into the predominant white culture. In the struggle to survive termination, the Menominee lost some sense of identity, culture, and cohesion, some of the control over their lives that is usually exercised by a free people, and thereby suffered some of the frustrations of a people forced by an external power to change to a foreign lifestyle.

The termination policy was an open attack on "Indianness"; in many ways, it succeeded. Its first victims were those Menominee children born after June 17, 1954, the day the tribal rolls were officially closed; they lost their paper status as Indians.[194] Other termination pressures diminished the remnants of the traditional lifestyle and values. Communal ownership of tribal assets was ended. The tribe ceased to be the focus of reservation life; it was no longer the source of jobs, services, and sustenance. In its place appeared laws, a bureaucracy, and a way of life few Menominee wanted. Some Menominee, often the young, unable to find work and unwilling to face a life of dependence on state and federal assistance, left the reservation.[195] With them left some of the hope for the continuation of a life guided by tribal tradition and molded by Menominee values.

Rather than emancipate the Menominee, termination deprived them of the opportunity to control their own lives. It made them the wards of many masters—a county government with which they could not identify, a welfare bureaucracy, and a corporate structure that isolated them from the decision-making power. Few Menominee participated in the formal county government that replaced the General Council. Government welfare workers often

194. Herzberg, *supra* note 1, at 323.

195. The impact of the termination act on the Menominee young was described by Menominee Alfred Pyatskowit, in his testimony in support of the Restoration Act. "[I]dentification as members of the Menominee Indian Tribe has diminished to the point of nonexistence among many of the young people. Many realize that they are American Indian, but the termination act has left them with a loss of identification as recognized members of the Menominee Indian Tribe because they happened to be born after the closing of the official roll. Subsequently, a form of cultural shock has taken place and has left these young people in a void that may never be filled for them." *Hearings on H.R. 7421 Before the Subcomm. on Indian Affairs of the House Comm. on Interior & Insular Affairs*, 93d Cong., 1st Sess., ser. 93-20, at 115 (1973). Even though the Menominee birthrate was high, from 1960 until 1970, the reservation area population increased by but one person. BIA REPORT, *supra* note 154, at 18.

had more power over the lives of the individual Menominee than had the Bureau employees that they replaced. But, it was in the management of Menominee Enterprises, Inc., which controlled the tribe's assets, that the exclusion from power was most blatant and meaningful. The Menominee found the voting trust that controlled the corporation inaccessible and beyond their control. Few believe that the tribe would have supported the trustees' decision to sell Menominee land.[196] The Menominee did not willingly accept the dominance of the trustees. When an election was held to dissolve the trust, a well-organized majority of the Menominee voted to do so. However, their efforts were frustrated when a trustee, voting the shares of the First Wisconsin Assistance Trust as a block, did so in favor of continuing the trust.[197] It was not a total defeat. In this grassroots campaign were sown the seeds of a movement to return the tribe to its pretermination status, seeds which, when nurtured by the energy of many Menominee, bore the fruit of victory—restoration.

(Part II of this article by Professor Herzberg will be published in the next issue of the *American Indian Law Review*, Volume VI, Number 2.— *Ed. Note*)

196. The Menominee were strongly opposed to the land sales; the only support came from the small elite-acculturated faction which dominated the tribe's political processes. ABERLE & BROPHY, *supra* note 74, at 197.

197. The loss of control over tribal life had a negative impact on Menominee morale. In a "confidential" memorandum, Assistant Attorney General John Bowers stated: "Without exception, every single individual spoken to in Menominee County stated that the morale on the Reservation is the lowest that it has ever been in the memory of the individuals spoken to. Some of these people have lived on the Reservation for 35 or 40 years and they all say that the morale is very, very low—lower than it has ever been. Generally speaking, the people are fearful of the Corporation; they are fearful of the Corporation management; they do not have any confidence in the Board of Directors or the voting trustees, and identify each of these groups with management, without exception and voluntarily without prompting by questioning the individuals stated that they felt appeals to the Board of Directors or the voting trustees were useless because they were merely appealing to management. Two Indian members of the Board of Directors are not managing the Corporation and they are merely a rubber stamp for the managers...." RAY, MENOMINEE TRIBE *supra* note 126, at 85.

The creation of the First Wisconsin Assistance Trust was an insult to the Menominee that proved false the freedom rhetoric of the termination proponents. Although under Wisconsin law parents or relatives usually held the shares of incompetents or minors in trust, these shares were placed under the control of a corporate trust department. No hearings were held to declare adult Menominee incompetent, or to show that the shares would not be properly managed by a family trustee; they were automatically assigned to the bank. At the beginning of the termination period, the bank held, and voted as a block, nearly 41 per cent of the Menominee shares. Needless to say, the bank held a disproportionate share of the power over Menominee affairs. For discussions of the tribe's battle to regain control over its assets, *see* Otradovec v. First Wisconsin Trust Co., 454 F.2d 1258 (7th Cir. 1972); RAY, FREEDOM, *supra* note 126, at 67 *et seq.*