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The Climate of Congress: Indians Face Period of Uncertainty

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SPECIAL RECENT DEVELOPMENT:

THE CLIMATE IN CONGRESS: INDIANS FACE PERIOD OF UNCERTAINTY†

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During this commemoration of Native American Awareness Week, it certainly isn't necessary to remind each of you today that Congress has plenary power over the affairs of Indian tribes. That power has its origin in the United States Constitution and in interpretations by the Supreme Court. In practice, Congress has executed this authority, for good or evil, since at least 1789. Rather than bore you with a historical litany of congressional-Indian relations over the last 200 years, I believe it is important for us to examine where we are today—what is the present status of Indian relations in Congress? Additionally, it is especially important for us to consider what the future may hold for those relations as we contemplate a new Congress.

This is a transition year in American politics, and I suggest to you that it is also a transition year insofar as Indian relations with Congress are concerned.

But I do not intend to imply that a possible change in administrations or a new Congress are the key factors in that transition for Indians. Rather, the popularity of Indian causes in Congress seems to depend more upon events outside the realm of national political elections, or the victory of one party over another. Indian legislation is handled in a uniquely bipartisan manner in Congress, and I have had the advantage of seeing it from the perspective of the House and the Senate. It is my feeling—and to some degree my fear—that the climate for the favorable consideration of progressive Indian legislation in Congress is approaching a stormy era. It is not pure coincidence that we are approaching this discordant juncture, however. We now stand at the end of a six-year era of significant legislative achievements for Indian tribes and individuals and at the threshold of tackling a number of vital and pressing issues, involving not only Indians and the federal government, but also the states and their non-Indian citizens. How the Congress addresses those vital issues

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will go a long way in determining the progress of Indians toward the goal of self-determination.

But, you may first question my implication that Indians have *ever* enjoyed a favorable climate in Congress. You may say—to paraphrase the old joke—"If these have been good times, who needs the bad?"

Seriously, Indian tribes have enjoyed periods when their relations with Congress were harmonious and progressive legislation resulted. After the publication of the Meriam Report,[1] the 1930's witnessed the enactment of the Indian Reorganization Act[2] and the Oklahoma Indian Welfare Act.[3] Although antiquated and needing reforms now, those acts attempted to—and did—strengthen withering tribal governments. In those acts, Congress recognized the desirability of the government consulting with tribes before taking actions affecting their trust property. Additionally, tribal approval was made necessary for contracts with attorneys and other contracting agents. For the first time since the advent of Europeans on the North American continent, the reduction of tribal land was stopped. This brief period of goodwill came to an end in the late 1940's. Although certainly not a "golden age"—much work was left undone —that period was immeasurably better than the years which had preceded it and was paradise as compared to the quarter century which followed.

What followed was the termination years, the bad effects of which lasted roughly from 1950-1970. Several Oklahoma tribes had their trust relationship with the federal government terminated during those years, in a misguided and disastrous policy. During that time, Congress also enacted Public Law 83-280,[4] conferring civil and criminal jurisdiction over Indian tribes to five states. Other than these two major, regressive acts, that period of time can be characterized by congressional inertia in Indian affairs.

For the last few years, since about 1971, there has been a good legislative "climate" for Indian affairs. I've used the word "climate" without describing from where it comes. I suppose that this favorable climate in Congress has come from the American public and media, from an overwhelming desire on their parts to do something about Indian affairs and their willingness to make their feelings known to the Congress and the administration. This heightened public sensitivity to the plight of the Indian—although necessary to the cause—was not enough by itself to get the progressive legislation of the last few years on the books. Sincere concern for the Indian, after all, had resulted in the passage of the 1887 Allotment Act.[5] The Indian tribes, organizations like NCAI[6] and NTCA,[7] and en-

lightened Indian leaders also did much to focus on the legislation that was actually needed. Fortunately, also, there is a growing number of young, well-educated Indian professionals who contributed significantly. Many people simply took the time to care and understand the complexities of Indian affairs.

Certain members of the Senate and House had the interest to become substantively involved and demonstrated a willingness to listen and to act. This was a remarkably bipartisan effort in Congress and in the administration. Those involved in this effort included not only my boss, Senator Henry Jackson, but also my former boss, Congressman Meeds, Senator Abourezk, and Republican Senators Fannin and Bartlett. A major factor in the enactment of the progressive legislation over the last few years has been the presence, on the House and Senate subcommittees on Indian affairs, of two eminent Indian counsels who are now retiring—Franklin Duchaneaux and Forest Gerard. Their presence marked the first time since the creation by the Congress in 1820 of committees to deal with Indians, that Indians actually drafted and staffed the Indian legislation which was engineered through Congress. The combination of these many factors made for a favorable climate in Washington, thus enabling the action on Capitol Hill. Since I didn't become a part of that Washington-Capitol Hill team until 1975—yes, I used to be a Washington "outsider" too—I cannot be accused of boasting when I recite just some of the progressive legislation that Congress has enacted since 1970.

The 1973 Menominee Restoration Act signalled Congress' repudiation of the termination era. The 1974 Indian Financing Act provided for an expanded revolving loan fund, loan guarantees, and business grants to Indian tribes and individuals. The 1975 Indian Self-Determination Act marked Congress' support of the President's policy of tribal self-determination; it provided for tribal assumption of certain BIA and HEW functions—Indian preference in contracts and grants—and it reformed the misused JOM[8] education law.

The Congress enacted the Submarginal Lands Act,[9] which conveyed to Indian tribes over 370,000 acres of submarginal lands acquired for their use in the 1930's. A general statute was passed that simplified the adoption of judgment fund distribution plans. The American Indian Policy Review Commission was established by Congress to make a comprehensive study of Indian affairs and submit recommendations for policy changes to Congress. That report will be due in February, 1977. Just one month ago, House and Senate conferees agreed to extend the life of the Indian Claims Commission[10] to 1978, an extension badly needed in order to facilitate the

adjudication of 140 pending cases, 70 of which are claims of Oklahoma tribes.

Finally, in the closing days of this session, the Congress enacted the Indian Health Care Improvement Act introduced by Senator Jackson. This $480 million bill is the largest authorization in history for the improvement of the health care needs of Indian people, and to provide scholarship funds and hospital construction money. Oklahoma's share of this authorization is substantial, totalling $27.9 million for hospital construction over the next three years and $6.5 million for sanitation facility construction for fiscal year 1978. Thus, it could be said that the early 1970's have been an "era of good feeling" insofar as congressional-Indian relations is concerned, and I can report that the status of Indian affairs in Congress has been good.

Unfortunately, we know that many good things come to an end. In order for a good climate to continue into the 95th Congress, the often fragile cooperation of the non-Indian public and media must continue. There are indications that that cooperation is ending.

The 92nd through 94th Congresses settled a number of issues involving the relationship between Indians and the federal government. Most of the legislation enacted was social welfare/human resources in nature. Thus, Congress did not address itself to problems involving the relationships between Indians and states and Indians and non-Indians, such as civil and criminal jurisdiction, tribal sovereignty, treaty fishing rights, the protection of Indian natural resources, or the settlement of water rights disputes. Congress, having cleared the air of many chronic federal-Indian problems, is left to consider these vital and pressing issues. Indeed, these issues are the very touchstone of the continued viability and existence of Indian tribes. Tribal sovereignty, jurisdiction, treaty rights, water rights, protection of natural resources—these are code-words for Indian people—signifying the final battleground of their striving for self-determination and the full development of their potential in the American society.

Several events point to the presence of unfavorable winds insofar as the resolution of these issues is concerned. First, the gains made by Indians over the last few years, both in Congress and in court decisions, have begun to invoke the wrath of non-Indians who feel threatened by those gains. In the closing days of this session, a bill was introduced in the House that provides for the establishment of a commission to study the effects of the *Boldt*[11] and *Belloni*[12] decisions in Washington and Oregon. For those of you who don't know, those court decisions, now named after the courageous federal judges who issued them, affirmed the off-reservation treaty fishing rights of

Northwest Indians, free of state regulation. Since those decisions were handed down, the commercial and sports fishing industries have been in a turmoil—non-Indian fishermen are demanding the impeachment of Judge Boldt and the introduction of legislation in Congress to abrogate the treaty rights. The pressure to abrogate those rights is growing every day. Indians everywhere should be aware that this simple "fish" commission bill, which is charged with the responsibility of making recommendations to Congress, if enacted, would eventually lead to recommendations that would eliminate the fishing rights of Northwest Indians.

I need not remind you of how serious such an act would be—even for Oklahoma Indians. If Congress can end treaty rights in Oregon, it may not be long before it does something equally serious in Oklahoma. Another indication of the gathering storm has been the proliferation of non-Indian organizations, whose purpose it is to petition the Congress to end the tax-exempt status of Indian lands, take away tribal jurisdiction over civil and criminal matters, and eradicate the potential for tribes to exercise the powers of a sovereign. Many of those groups have come to Washington and have commanded the attention of congressmen and senators who are concerned that there is a growing backlash against gains made by Indians. Those groups oppose the passage of S. 2010, the bill which would allow tribes and the federal government to reacquire the jurisdiction lost with the passage of Public Law 83-280.

Finally, the very fact that the issues which the Congress will have to grapple with in the future are so controversial means that Indians will have to compete against the interests of states and non-Indians affected by those issues, and the interests of major energy-producing corporations.

One of those issues, the protection and development of Indian-owned natural resources—particularly those which have energy potential—has already confronted tribes with what one distinguished Indian attorney has called "a pervasive crisis threatening the present and future uses" of Indian natural resources. The fact that Indian tribes are principal owners of upwards of 13 per cent of the nation's most valuable and easily strippable coal and possibly 10 per cent of the nation's uranium makes this issue an international concern.

So you can see that now the stakes are high. Because those stakes are high, many more special interest groups are competing, striving to obtain a resolution of those issues which will be unfavorable to Indians. Soon, all the human resources that Indian tribes can generate may be called upon to assist in obtaining the favorable congressional determination of those vital issues. Hopefully, a spirit of

cooperation with non-Indian special interests will prevail—and I hope that Indians everywhere will work for that goal—so that a favorable climate will remain in Congress. But all Indians must remain eternally vigilant if they are to retain those rights for which they have fought so long and hard.

NOTES

1. MERIAM, PROBLEM OF INDIAN ADMINISTRATION (1928).
2. 25 U.S.C. § 461 (1970).
3. 25 U.S.C. §§ 501-10 (1970).
4. 18 U.S.C. § 1162 (1970); 28 U.S.C. § 136 (1970).
5. 25 U.S.C. § 331 (1970).
6. National Congress of American Indians.
7. National Tribal Chairmans' Association.
8. Johnson-O'Malley Act, 25 U.S.C. §§ 455-57 (Supp. IV, 1974).
9. 7 U.S.C. §§ 1010-1012 (1970).
10. 25 U.S.C. § 70 (1970).
11. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, No. 75-588, 44 U.S.L.W. 3426 (Jan. 27, 1976).
12. Confederated Tribes of the Umatilla Indian Reservation v. Callaway, No. 74-991 (D. Ore. Feb. 13, 1976).