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Let a Thousand Policy-Flowers Bloom

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Let a Thousand Policy-Flowers Bloom: Making Indian Policy in the Twenty-First Century*

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Two conflicting visions of the federal-tribal relationship have competed for dominance in Indian law and policy. The metaphor of "discovery" aptly describes the first, casting Indian people as passive victims of European hegemony. According to this story, when the European nations laid claim to the Americas, they engaged in the "extravagant pretension" that they had discovered the continents.[1] This fiction of discovery relied on the claim that the native peoples who had been there for centuries had nothing of value to give the world other than the wealth to be taken from their lands. The Europeans discerned no legal institutions, religious traditions, ideas, or cultures worthy of respect. These "great nations of Europe" devised the first Indian policy to regulate their relations with each other to avoid conflicts over claims to the New World.[2] In time, those making Indian policy shifted their focus from European aspirations and relationships to gaze at In-

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1. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 591 (1823) ("However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned").

2. "[A]s they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish

dian tribes and people so inconveniently inhabiting the New World. The needs of Indian people were either ignored or presumed to be the same as the needs of the European nations. Religious and cultural superiority provided convenient justifications for subordinating native peoples[3] for their own good.

After the War of Independence, Indian people remained the objects of policies set by those in power, despite lip-service to the contrary from the United States Government. Treaties signed with instant "chiefs" without authority from their tribes were ratified by the Senate over protests from the rest of the tribe and upheld by the Judiciary out of respect for the political branches. After the executive obtained California from the California Indian through 18 treaties, they were moved off the land and the treaties locked away, never to be ratified by Congress. Treaties negotiated honestly and fairly in which tribes made considerable concessions in return for solemn promises of protection of land and sovereign powers were abrogated by Congress with little restraint from the Judiciary. Congress modified compacts negotiated with other tribes and enacted the resulting modification into law without further tribal consultation. By 1955, the Supreme Court dismissed treaties with tribes by stating:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.[4]

Although more recently Congress has claimed to act in the interests of the Indian tribes in setting Indian policy, policymakers inevitably conclude that the interest of tribes is the same as the interest of the United States. The interest of the United States has been, for the most part, to assimilate Indian people, so that they can be dealt with as minorities adding their voices to those of other state citizens within the general

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a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves." *Id.* at 573.

3. "The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence." *Id.* at 573.

4. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955).

polity, instead of as persons acting through tribes with claims to retain their sovereign status pre-dating the Constitution.[5]

The vision of consent on the other hand, places Indian tribes as actors, nations waging war or making alliances when necessary to hold their territory against or wrest concessions from the invaders. They maintained political relationships first with the European nations and then with the United States. While European colonists denied other indigenous peoples any rights to govern themselves or act as political rather than cultural entities, American Indian tribes and nations succeeded in establishing a "government-to-government" relationship with the national government. As with any political relationship there have been conflicts and breaches of faith; nevertheless tribes continually insisted that the United States honor the ideal of consent embodied in this relationship,[6] and the United States has done so, for the most part.[7]

The fact that tribes have succeeded in maintaining this relationship in the face of military power and a hostile legal system is a tribute to their ability to make use of whatever leverage they have had. Initially tribes had superior numbers and the ability to make political alliances with other tribes or nations; their land holdings were so vast that they could agree to land concessions in return for promises of protection of the remainder. Even when their land base and numbers were re-

5. During the late nineteenth and early twentieth centuries, Congress forced individualized land holdings on Indian people to break the hold of tribalism over them; during the 1950s, Congress severed relations with many tribes, substituting individual cash payments for tribal property rights. The 1970s produced the Alaska Native Claims Settlement Act, which, despite its name, was imposed on Alaskan natives, substituting shares of corporate stock for tribal property rights. *See generally,* S. LYMAN TYLER, A HISTORY OF INDIAN POLICY (1973) (summarizing development of policy initiatives through the early 1970s).

6. During the events of the eighteenth and nineteenth century the practice of making treaties with the Indian tribes enshrined consent as the formal policy of the United States. Even after the House of Representatives put an end to the treaty era in 1871 by refusing to appropriate any money to fulfill new treaty promises, the government continued to seek tribal consent by means of compacts negotiated with the executive branch or commissioners sent by Congress which were then enacted into positive law by both houses of Congress. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 127-28 (Rennard Strickland, et al, eds.) (1982 ed.) [hereinafter HANDBOOK OF FEDERAL INDIAN LAW].

7. Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 39-43 (1947).

duced, they could promise peace at times, such as after the Civil War, when the Nation could ill afford another Indian war. In the late twentieth century tribes have had to use other tools to work the system more efficiently. The small percentage of Native American people in the country, less than 1%, contribute to the group's lack of ability to influence the political process purely by the force of numbers.[8] In addition, Indian tribal peoples' interests are markedly different from that of many other historically disadvantaged groups. In particular, Indian tribes seek to maintain their separate status, whereas other historically disadvantaged groups have sought fuller integration into the mainstream. Consequently, tribes find fewer natural allies with whom they can combine to increase their ability to influence national policies.[9] Tribes have overcome these barriers, with varying degrees of success, by hiring advocates to bring land and resource claims, to lobby on their behalf before congressional committees, or to take their cases to the public.

These efforts have culminated in the late twentieth century recognition of tribal self-determination as a cornerstone of United States Indian policy. The revitalization of tribal governments permitted by the Indian Reorganization Act of 1934 began this process.[10] After a substantial setback during the 1950s, the Kennedy administration set in force policies[11] that culminated with such landmark legislation as the Indian

8. STEPHEN CORNELL, THE RETURN OF THE NATIVE 166-69 (1988) (noting that Indian voting patterns in state and federal elections reflect the knowledge that the vote is rarely a realistic resource for achieving Indian goals).

9. CORNELL, *supra* note 8, at 171-73 (discussing the different agendas of Indian tribes and environmental groups and other minority groups.)

10. 25 U.S.C. §§ 461-79 (1988). *See generally,* CORNELL, *supra* note 8 (tracing the resurgence of modern Indian political activities from the Indian Reorganization Act to the present.)

11. *See* Duane Champagne, *Organizational Change and Conflict: A Case Study of the Bureau of Indian Affairs, in* NATIVE AMERICANS AND PUBLIC POLICY 33, 4447 (Fremont Lyden and Lyman Legters, eds.) (1992) (explaining how efforts to bypass Republican controlled state and local governments enabled Indian communities to bypass the BIA). President Kennedy appointed a task force which held extensive hearings around the country to find out what to do in Indian policy to create a new order. The Task Force Report recommended ending tribal termination, although it was assimilationist in advocating withdrawal of federal services from assimilated Indians. *See* TYLER, *supra* note 5, at 189-204 (discussing 1961 task force report).

Self-Determination and Education Assistance Act of 1975,[12] designed to protect Indian tribal separateness and strengthen tribal sovereignty by providing for tribes to take over programs administered in the past by the Bureau of Indian Affairs, the Indian Child Welfare Act,[13] recognizing tribal court authority over adoptions of Indian children, and legislation according tribes equal treatment with states in such important areas as environmental protection.[14] In addition, individual tribes have succeeded in enlisting the sympathies of the public and the aid of the executive and congressional branches, often combining a well-crafted legal claim with sophisticated settlement negotiations including the tribe, the state, and the federal government, followed by the introduction of legislation to confirm and ratify the settlement.[15] In short, the United States has reaffirmed and continues to honor the existence of a political relationship between the federal government and over 300 Indian tribes.

Both visions coexist uneasily in the language of Indian policy. The political vision has captured the rhetoric of modern Indian policy, under the rubric "government-to-government relationship," reiterated in countless statutes[16] and executive[17] policy statements.[18] Nevertheless, the phrase

12. 25 U.S.C. §§ 450-450n, 455-458(e) (1988).

13. *Id.* at §§ 1901-1963.

14. *See generally* Judith Royster, *Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation*, KAN J. L. & PUB. POL. 94 (1991) (reviewing history of EPA policy to treat tribes as states and congressional reauthorization of most environmental laws to treat tribes as states for purposes of the specific statute).

15. A well-publicized tribal grievance may garner support from public interest groups or the public who actively support a particular tribes' cause. For example, President Richard Nixon returned the Blue Lake to the Pueblo of Taos, although the tribe could not make a legal claim for its return and despite the opposition of the state and conservationists. Public support in these efforts is usually very important, if not dispositive. The rationalizing factor in all these cases is, not surprisingly, convincing the public that the interests of many non-Indians converge with those of the tribe.

16. *See, e.g.*, 25 U.S.C. § 1771(7) (Supp. 1992); Energy Policy Act of 1992, Pub. L. No. 102-486, § 2602, 106 Stat. 2776; Advisory Council on California Indian Policy Act of 1992, Pub. L. No. 102-416, § 2(1), 106 Stat. 2131.

17. President Reagan was the first to use the term in his official statement, Ronald Reagan, *Statement Reaffirming the Government-to-Government Relationship Between the Federal Governments and Indian Tribal Governments*, 1991 PUB. PAPERS 662. President Bush continued the practice. George W. Bush, *Statement on Indian Policy*, 1983 PUB. PAPERS 96.

states more an ideal than it describes the reality of the government's relation to Indian tribes. Congress claims the ultimate power to impose federal policy on tribes without their consent.[19] Ironically, even federal policies designed to promote tribal self-determination can be imposed upon tribes.[20] When these same policies seriously undercut tribal separateness, the two visions compete for control. This dichotomizing of Indian policy makes it difficult to argue against legislation designed to further self-government without being accused of being unfaithful to the vision. In other words, when informed that "all the tribes" support such legislation, the critic hesitates to voice dissent.

Efficiency, not evil, is the engine that has driven recent congressional efforts to simplify the process of soliciting tribal input into policysetting. With 300 to 500 tribes, depending on who's counting and why, dealing with all tribes separately is simply not feasible. Assuming that many tribes share similar problems, Congress has often legislated for all Indian tribes in general terms. What every legislator and bureaucrat wants, of course, is one Indian to telephone to get the definitive answer to the much asked question: what do Indians want? Although there have been contenders for this position, this magical Indian informant does not exist. Moreover, tribes do not react toward policy monolithically: some may favor while others oppose pending legislation.[21] Recently, especially in the last ten years, Congress has taken active steps to encourage tribal input by various mechanisms. Individual com-

18. The popularity of the term seems odd. If the relationship is truly political, the term "political relationship" should suffice. On the other hand, a political relationship need not be equal; perhaps the term "government-to-government" connotes equality.

19. Of course, the nation has the authority to *decide* the nation's policy toward Indian tribes just as it does with regard to foreign nations. But it also claims the authority to impose that policy on tribal peoples, an authority it does not claim in the international arena.

20. *See* Russell Barsh, *When Will Tribes Have a Choice?*, *in* RETHINKING INDIAN LAW 43 (National Lawyers Guild, Committee on Native American Struggles, ed. 1982) (arguing the Indian Reorganization Act was imposed on tribes).

21. For example, two Native Alaskan tribes, the Inupiat and the Gwich'in have taken opposite sides on the issue of oil development in the Arctic National Wildlife Refuge. *Compare* 137 CONG. REC. S14232-01 (daily ed. Oct. 2, 1991) (noting Gwich'in opposition to oil development) *with* 133 CONG. REC. E1779-03 (daily ed. May 6, 1987) (reporting Inupiat support for oil development with appropriate environmental controls).

mittee members have met with tribal representatives from their own districts as well as from other areas of the country. The committees invite tribal representatives to testify at hearings either in person or by written testimony. In addition, the Indian committees have begun to circulate draft bills to a mailing list of Indian tribes seeking their input. Criticisms and suggestions have then been incorporated into the bills introduced.

Lobbyists hired by individual tribes and national tribal organizations have also played an active role in suggesting legislation and commenting on proposals.[22] Some of the tribal organizations may have been formed by the tribes themselves, like the National Congress of American Indians (NCAI) or by tribes with similar needs, such as the Congress of Energy Resources Tribes (CERT) or the Northwest Indian Fishing Commission. Other organizations may be formed to represent common interests of certain classes of Indian people, such as the Association of American Indian Physicians or the National Indian Education Association. These organizations have some claim to speak for their tribal and individual members. Others may be advocacy organizations formed to work with Indian tribes, often with boards of directors comprised of Indian people, such as the Native American Rights Fund, the Indian Law Resource Center, or the National Indian Health Board. These organizations may represent their clients' viewpoints to policymakers or they may voice the organizations' own opinions of proposed Indian policy. Because of their activities on behalf of Indian interests, their reputations, and the merits of their points of view, the legislative branch may give great weight to their positions on various matters.

Nevertheless, none of these organizations, with the possi-

22. After the Supreme Court stated existing law restricted tribal criminal jurisdiction to members of the tribe, Congress enacted legislation reaffirming its understanding that this jurisdiction is part of the retained powers of tribes. Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646. For a description of the problems posed by statutory resolutions of the *Duro* holding, see Philip S. Deloria & Nell J. Newton, *The Criminal Jurisdiction of Tribal Courts Over Non-Member Indians*, 38 FED. B. NEWS & J. 70 (1991). *See also* Nell J. Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992) (commenting on process leading up to the enactment of the permanent bill).

ble exception of the NCAI,[23] can claim to speak for all Indian tribes. Lobbyists, of course, can only represent their own client's points of view. National organizations are usually governed by boards of directors who meet infrequently for short periods of time during which they must decide many questions about the organization, including which legislation to support. As in the corporate world or with universities, officers of the organization who are full-time employees of the organization can and do manipulate their boards. However well-intentioned these opinion makers may be regarding Indian affairs, they inevitably must advance their own agenda as well. Special interest organizations that claim to speak for all Indian educators or all Indian physicians may represent the opinions of the organization's own staff more than its members. Officers of national organizations and lobbyists, for example, are not going to advocate legislative positions that will make their own efforts unnecessary. Conversely, the temptation to advocate or even introduce legislation that will ensure their own futures may be irresistible. Nevertheless, these lobbyists and national organizations have a great deal of influence in Washington because of their presence on the scene, familiarity with the congressional staffs, and ability to work the system. As is the case in many areas of policy, the opinion shapers in Washington often have more immediate influence than the people who may be directly affected by legislation. But in Indian policy, the number of Indian tribes and the difficulty in exchanging in meaningful dialog with each of them has increased the influence of these national organizations.

Recent proposals by the Senate Select Committee that appear to be designed to open up the consultative process to more tribes are much more likely to increase the appearance of consensus in Indian country and the ease with which Congress may obtain tribal input on legislation. In the 102nd Congress in particular, the Senate Select Committee began to advocate the creation of intertribal organizations both to set

23. The NCAI represents 105 tribes, which in turn represent a majority of the Indian population, according to Wayne Ducheneaux, its president. *See Establish a Permanent National Native American Advisory Commission, Hearing on S. 1057, Before the Senate Select Committee on Indian Affairs*, 102d Cong., 1st Sess. 37 (1991) [hereinafter *Advisory Commission Hearings*].

policy and to act as conduits for federal money. The Senate Select Committee has also introduced legislation to create a federally funded national Indian policy center. Each of these designs invokes the vision of tribal sovereignty as a basis for consensual relations between the tribes and the United States. Each holds out the promise of increased policysetting by Native Americans.

This article will analyze these recent legislative efforts. The first section of the article examines the two proposed national tribal organizations, a National Native American Advisory Council and a Tribal Judicial Conference, and demonstrates that they will not in fact represent all Indian tribes. The second section of the article criticizes the plan to create a national policy center in Washington, D.C., the National Indian Policy Institute. While agreeing that some of the data gathering and dissemination functions proposed for the center are needed, the article notes these functions can be more economically obtained than by creation of a new center. The article then raises more serious questions regarding the policy-setting aspects of the proposed center. Being sold to tribes as their think tank in Washington, the Center will instead serve Congress's needs. The proposed center will not strengthen the political relationship between individual tribes and the federal government, but will instead create yet another national power base outside the tribes. Instead, the article calls for strengthening organizations which exist throughout the country, especially as those organizations work with individual tribes and regional tribal governmental organizations created by the consent of the tribes themselves.

All three of the bills discussed contribute to the nationalization of Indian law: a process of reconceptualizing the over 300 Indian tribes in the nation from a diverse group of political entities with unique characteristics and needs, to a uniform entity known as "Indian Country," a monolithic voice representing all tribes as one. The thesis of this article is that while nationalizing Indian law may greatly simplify Congress's desire to obtain the thoughts of Indian tribes on legislative initiatives, this same nationalization obscures differences among the many tribes and subverts the very process of consultation that these legislative initiatives are supposedly

designed to facilitate. These methods have as much potential to erode tribal sovereignty as the hostile forced assimilation programs of the past. In place of consultation with the appropriate political unit, the tribe, each program creates organizations that will stand between the tribes and the government and marginalize the voice of those tribes without the power to influence the new organizations. In short, if Indian tribes are political entities, then policymakers must undertake the difficult task of consulting the tribes instead of creating entities outside the tribes. Indian tribes must be actors and not the objects of federal policy.

I. NATIONAL TRIBAL ORGANIZATIONS CREATED BY CONGRESS

A. National Advisory Commission

The proposed National Native American Advisory Commission presents the clearest illustration of this recent trend. Senator Inouye's statement at the hearing on the bill frankly admitted: "I know that, ideally, each tribal government wants to have direct access to policy makers and the policy formulation process. But the reality is, the federal agencies will not bring 200 native American governments into Washington for every meeting, or even less often."[24] The bill provides for a permanent panel of twenty-four members to advise the Congress and federal departments and agencies on "matters of concern to Native American people."[25] Members must be elected representatives of tribes, chosen by the tribes themselves. The bill provides for no formal mechanism for selecting the members, but merely directs all the tribes served by the twelve regional area offices of the Bureau of Indian Affairs to appoint two commission members from each region.[26] Once called into session by the Secretary of the Interior,[27] the Commission would meet quarterly when summoned by a chair to be appointed during the first session.

Commission members will not be salaried, although their

24. *Id.* (Statement of the Hon. Daniel K. Inouye).
25. *Id.* § 103(1).
26. *Id.* § 105(b).
27. *Id.* § 105(d).

expenses would be reimbursed.[28] The bill authorizes the Commission to employ a full-time director (at a GS 18 rate) and needed professional staff.[29] In addition, the bill authorizes the Commission to procure the services of consultants and secure additional personnel from other administrative agencies on detail. Except for the Director's position, which is mandatory, the Commission's ability to secure other professional expertise is dependent both on its needs and the amounts appropriated to it annually. Nevertheless, depending on the Commission's ability to fight the annual budget battle effectively, it may have a fair amount of money to spread around to accomplish its goals.

Although the Commission's functions are advisory only, it could have some impact on policy setting at the federal level. The Commission may advise federal agencies and department heads on matters of concern to Native Americans, including the trust responsibility, the "government-to-government" relationship and tribal sovereignty.[30] In addition, the Commission will submit an annual report to Congress and the Secretaries of the Interior and Health and Human Services, with proposals for new policies and recommendations for funding levels.[31] Finally, the Commission may recommend to the Executive Department names for appointment to offices with responsibility for Native American programs and policies.[32] Given these statutory directives, the proposed Commission could become a powerful voice on the policy scene. A Washington increasingly accustomed to referring to all tribes together as "Indian Country" would give greater weight to the opinions of this official commission than to the voices of individual tribes.

In short, one can expect the Commission's recommendations to be treated as representing the voice of the Native peo-

28. *Id.* § 105(g).

29. *Id.* § 107. It appears that the additional staff will be professional personnel, because of the proposed rate of pay (up to GS 17) and the direction that the Secretary of the Interior is to provide space, other facilities, and reimbursable administrative support services.

30. *Id.* § 108(1). The fact the bill's language uses both terms "government-to-government" and "tribal sovereignty" is puzzling, if these terms have the same meaning.

31. *Id.* § 108(2) & (3).

32. *Id.* § 108(3).

ple: This assumption will not be true, however. Twenty-four commissioners cannot adequately represent the voices of over 300 independent tribes. Moreover, the Commission itself, like most such organizations, is subject to influence by its professional staff. Commissioners invited to Washington four times a year cannot be expected to spend the rest of their time studying the implications of the policies on which they will be asked to comment. As elected representatives of tribes, they will have more pressing day-to-day tribal business. Instead, they will function more like boards of directors and rely on their permanent staff located in Washington to present them with proposals requiring action. One of the witnesses testifying at the Senate Select Committee's hearing on the Advisory Commission frankly noted that "as with any organization, the success or failure of this commission as an entity depends entirely upon the talent, skill, and resourcefulness of the person chosen as the executive director. The activities of influence exerted by this position will determine more than any other factor, the success or failure of the commission itself."[33]

While most testimony at congressional hearings tends to sound like preaching to the choir, because the staff selecting witnesses either rounds up the usual suspects or deliberately selects witnesses who will support the bill, the testimony in favor of the Advisory Commission was lukewarm at best. Although only one witness predicted the commission could endanger tribal sovereignty,[34] several witnesses rather pointedly stated that the proposed commission should not be regarded as the voice of all Indian tribes.[35] Others raised concerns about fair representation of small tribes or states

33. *Advisory Commission Hearings, supra* note 23, at 28 (statement of Leroy Ellis, Lieutenant Governor, Absentee Shawnee Tribe).

34. *Advisory Commission Hearings, supra* note 23, at 16-17 (testimony of Dr. Eddie Brown, the Assistant Secretary for Indian Affairs, Department of the Interior, stating "the importance of the government to government relationship . . . may be endangered by a national commission").

35. *See Advisory Commission Hearings, supra* note 23, at 28 (statement of Leroy Ellis, Lieutenant Governor, Absentee Shawnee Tribe, that the Advisory Commission should not be considered *the* committee, supplanting other organizations); *id.* at 30 (statement of Harold Monteau that Indian tribes want assurance that the Commission would not "purport to be the voice of Indian country"); *id.* at 37 (statement of Wayne Ducheneaux, President NCAI, reminding committee that not even NCAI speaks for all tribes: "the official voice of the Indian tribes is the tribal chairman").

with large Indian populations.[36] One witness reminded Congress of its sorry history of consulting by "chief-naming" in stressing that any new organization would have to have the confidence of tribal leaders.[37] In fact, each of the seven witnesses expressed some concerns about the proposed commission.[38] Senator Inouye seemed somewhat surprised at the negative comments, stating his belief that all the tribes supported the bill: "this proposal and the draft of this bill was sent to every tribe . . . . Since that time, we have received many responses. To date, all of them have been favorable. We have yet to receive one unfavorable response."[39] The Chairman reassured those testifying that the Committee had no intention of passing the bill if it would hurt Indian tribes.[40] Nevertheless, he also stated that if Indian tribes did not want the commission, they could simply refuse to appoint members to it.[41] One hopes that the Chairman did not mean this last statement literally. Tribes would hesitate long to refuse to take part in the appointments to the Commission, for if some abstain they would have no voice, while those who participate would have greater power. Thus, if the legislation passes, the tribes would surely feel constrained to participate to protect their own interests. Ironically this participation would then be cited as giving the Commission legitimacy.

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36. *See Advisory Commission Hearings*, *supra* note 23, at 28 (statement of Leroy Ellis, Lieutenant Governor, Absentee Shawnee Tribe noting Oklahoma tribes comprise 25% of the Indian population and thus need more representation); *id.* at 37 (statement of Wayne Ducheneaux, President NCAI, explaining NCAI voting method designed to give greater weight to the small tribes).

37. *See Advisory Commission Hearings*, *supra* note 23, at 25, 27 (statement of William Ron Allen, Chairman, Jamestown Band of Klallam Indians). "Chief-naming" is a reference to the practice of treaty commissioners arbitrarily naming Indian signatories as chiefs capable of granting concessions on behalf of the entire tribe. *See also id.* at 18 (statement of Eddie F. Brown, Assistant Secretary for Indian Affairs, Department of the Interior, noting concerns that the process of consultation would be turned into a new bureaucratic layer).

38. In addition to the witnesses cited elsewhere, see *Advisory Commission Hearings*, *supra* note 23, at 18 (statement of Douglas Black, Associate Director, Office of Tribal Activities, Indian Health Service, arguing the commission is not needed because existing liaisons with other national organizations are sufficient); *id.* at 23 (statement of James Sappier, Governor, Penobscot Indian Nation, noting "there are many concerns we have with this legislation").

39. *Advisory Commission Hearings*, *supra* note 23, at 36.

40. *Advisory Commission Hearings*, *supra* note 23, at 37.

41. *Advisory Commission Hearings*, *supra* note 23, at 38.

It is to be hoped that this proposal will be withdrawn or permitted to die a quiet death. More likely, the basic proposal for some kind of congressionally created national commission will arise again because of its convenience. In place of real consultation with tribes, a National Advisory Commission substitutes the appearance of consultation. Instead of one wise informant, the bill substitutes a panel of twenty-four. The result is the same: with an easy mechanism for determining "what Indian people want," there would be less reason or need to listen to dissenting voices. The only winners are the professional staff of the Commission who would secure jobs in the "Indian business" in Washington, where Indian policy has always been set.

B. Tribal Judicial Conference

Tribal courts are under tremendous pressures. They strive to administer justice fairly with the limited resources available to them, while at the same time satisfying the norms imposed upon them by the dominant legal society and the pressures imposed upon them by their own tribal councils.[42] The most recent study of tribal courts was undertaken by the Reagan Administration Civil Rights Commission. After holding five hearings throughout the United States that seemed designed to turn over every rock to find bad news, the Commission's Final Report recommended no changes in federal law to bring the tribal judiciary under the control of the federal courts. Instead the Commission concluded that in-

42. Recent scholarly work on tribal courts has been both extensive and sensitive to the unique problems they face. *See, e.g.*, Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990); Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589 (1990); Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411; Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49 (1988); Chief Justice Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989). *See also* CLINTON, ET AL., AMERICAN INDIAN LAW 402-27; 477-491 (1991); VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1st ed. 1983) (tracing development of tribal court systems).

creased funding was essential to enable tribal governments to improve their court systems.[43] In 1991, the Senate Select Committee on Indian Affairs and the House Interior and Insular Affairs Committee began formulating legislation to improve tribal courts' funding so that tribes could continue to develop their court systems.

Both bills would increase annual funding considerably, from approximately $12 million allocated in 1992[44] to over $50 million. At present, tribal court funding is administered by the Bureau of Indian Affairs. The Bureau's Judicial Services Branch makes grants to tribes and organizations for special projects, such as training programs, tribal appellate courts, and special technical assistance. The Bureau disburses funds directly to tribal councils using the Indian Priority System (IPS), which is the most recent of bureaucratic procedures designed to give the tribes the opportunity to express their opinion of how funds should be allocated at the reservation level. The IPS permits tribes to set priorities within certain designated budgets for the use of funds. Under the IPS, for example, a tribe may tell the Bureau what proportion of its federal money it wants to spend on tribal courts. In short, the IPS vests in tribes the difficult decision regarding allocation.[45] Sometimes tribal court improvements lose out in this process in favor of more pressing immediate needs such as housing. But in this regard, tribes are no different from financially strapped municipal governments.

Although the need for increased funding for tribal courts is the major impetus for legislation, dissatisfaction with the

43. U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT 74 (1991) (stating the Commission's belief "that respect for tribal sovereignty requires that prior to considering such an imposition [of federal court review], Congress should afford tribal forums the opportunity to operate with adequate resources, training, funding, and guidance, something that they have lacked since the inception of the ICRA").

44. S. REP. NO. 102-314, 102d Cong., 2d Sess. 15 (1992).

45. The BIA's handling of the IPS system has been criticized, especially because the Bureau's funding levels for certain activities, including tribal justice systems, is based on historical funding levels and thus creates inequities among tribes. The BIA is in the process of adopting a new system designed to cure some of these defects. The IPS is described somewhat critically in the Report. *See* NATIONAL INDIAN POLICY CENTER, REPORT TO CONGRESS: RECOMMENDATIONS FOR THE ESTABLISHMENT OF A NATIONAL INDIAN POLICY CENTER, 55-56 (1992) [hereinafter POLICY CENTER REPORT].

Judicial Services Branch seems to have been a substantial motivation for the intertribal organization proposed in the Senate bill,[46] the Tribal Judicial Conference.[47] A Tribal Judicial Conference formed by the tribes and recognized by Congress will supplant both functions of the Bureau. It will be given authority to make annual base grants to tribal courts from an annual fund of $50 million[48] under a formula to be devised not by the tribal councils, but by the conference itself, albeit after "complete consultation with tribal governments."[49] Once the formula is set by the Conference, the only function of the Judicial Services Branch will be to distribute the money.[50] In addition, the grant-making function of the Judicial Services Branch will be taken over by the Conference. The Conference will be allotted $2.5 million annually to make grants to "tribal governments, tribal consortia, and national Indian organizations."[51] The Conference may choose any of several methods of awarding grants: it may distribute funding on the basis of formulas devised by the Conference, "or in such amounts as the Conference determines appropriate."[52] The Conference may also choose to distribute the money through grants, which may or may not be competitive.[53] The only curb on its discretion in awarding grants is that it must consult with the participating tribal governments.

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46. At a meeting I attended to discuss tribal court improvement sponsored by the Senate Select Committee, committee staffers expressed concern that the Bureau had instituted a system requiring competitive grants for training projects in place of a sole-source system it had been using for some time. The staff seemed concerned that the BIA had improperly led an institute set up to train judges to expend considerable effort in developing expertise in tribal judges' training in reliance on receiving continued funding and then cut the funding off with little or no notice, much to the detriment of the institute. In place the BIA had announced a plan to urge tribes and local colleges and universities to cooperate in creating training programs and bid on the grant money.

47. S. 1752, 102d Cong., 2d Sess., § 101(a) (1992) (providing for the development, enhancement, and recognition of Indian tribal courts).

48. *Id.* § 109(a).

49. *Id.* § 106(a). An aggrieved tribe may appeal the Conference's formula to the Board of Hearings and Appeals in the United States Department of the Interior. *Id.* § 106(c).

50. *Id.* § 106(b). The bill permits the Judicial Services Branch to retain only $250,000 of the annual appropriations for the tribal courts act, the amount of money needed to function in this limited role. *Id.*

51. *Id.* § 107(a).

52. *Id.* § 108(b).

53. *Id.*

In addition to providing for a Tribal Judicial Conference, the Senate bill also mandates a survey of tribal court needs to be conducted by a survey team comprised of nine members, with three appointed by the Conference, three appointed by the Director of the National Center for State Courts, and three appointed by the Director of the Administrative Office of the United States Courts. The final title of the bill provides for expedited procedures in both houses of Congress for disapproval of the Tribal Judicial Conference.[54]

The House version of a tribal courts improvement bill is similar in several respects to the Senate bill. The House version[55] provides for $50 million in funding for tribal court improvement, including base funding to be disbursed after consultation with tribes to determine funding formulas.[56] In addition to increased funding,[57] the formulas in both bills are to be based on objective criteria and actual needs instead of historic formulas that resulted in inequities in the distribution of what were already very limited funds.[58] Like the Senate, the House bill also mandates a tribal court survey.[59] In short, the drafters of both versions clearly recognized the need for increased funding as the major need of tribal justice systems.

Conspicuously missing from the House bill, however, is the Tribal Judicial Conference. The Secretary of the Interior remains in charge of contracting with tribes, tribal organiza-

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54. *Id.* § 301. These provisions seem designed to limit individual legislators' ability to stall or foreclose the creation of the Tribal Judicial Conference. The bill requires a Joint Resolution to disapprove the Conference, specifies the committees to which the petition can be referred, and limits debate on the floor to 10 hours. *Id.*

55. H.R. 4004, 102d Cong., 2d Sess. (1992).

56. S. 1752 §§ 103(c), 104(b). The bill provides for $7 million for the Judicial Services Office, which will also undertake the tribal court survey. *Id.* § 104(a). The bill also provides increased funding ($10 million) for the Administration for Native Americans to make grants to Indian tribes and organizations under the Native American Programs Act. *Id.* § 201.

57. According to the House Committee, BIA presently funds only 20% of the costs of running tribal justice systems. H. Rep. No. 675, 102d Cong., 2d Sess. 11 (1992).

58. *See* H.R. 4004, § 103(c); H. Rep. No. 675, 102d Cong., 2d Sess. 14 (1992) *Cf.* S. 1752, § 106(a) (listing objective factors to be considered, such as projected caseloads); *see* S. Rep. No. 314, 102d Cong., 2d Sess. 1819 (1992) (noting procedure for appeal was designed to "insure that decisions on the formula are made in a fair and non-arbitrary manner").

59. *Compare* S. 1752, § 201 (providing for survey of tribal court needs by tribal survey team) *with* H.R. 4004, § 102 (directing Office of Tribal Justice Support to conduct annual survey of tribal justice systems).

tions, and intertribal consortia to deliver tribal justice services. Instead of eviscerating the Judicial Services Branch, however, the House bill elevates the branch to a renamed office, the Office of Tribal Justice Support, increases its funding, and broadens considerably the categories of technical assistance the Judicial Services Office can provide to tribes.[60] The House also adds $10 million to the budget of the Administration for Native Americans to provide grants to tribes for improvement of tribal justice systems, including "the establishment of innovative local and national programs for the advancement of tribal justice systems."[61] The Committee Report makes clear that this language was inserted for the specific purpose of permitting funding for tribes wishing to organize regional or national intertribal judicial conferences on their own.[62]

Both the Senate and the House seem equally convinced of the merits of their versions and equally opposed to the other house's version.[63] Neither version passed both houses during the 102d Congress,[64] but both are likely to be reintroduced in the 103d Congress in 1993. Although both bills purport to strengthen the political relationship between the federal government and Indian tribes, the Senate version creates yet another intertribal organization to accrue power in Washington and stand between the federal government and the tribe's governing bodies. Many criticisms can be made against Senate Bill 1752. Certainly its unnecessary cost and blurring of pow-

60. For example, the House bill directs the Office to establish an information clearinghouse, including an electronic database, on tribal justice systems. H.R. 4004, § 101(f). Such a clearinghouse could be quite valuable, as tribes do not presently have a mechanism for obtaining each others' judicial decisions. The *Indian Law Reporter* publishes selected tribal judicial opinions, but no other readily available source of tribal opinions exists.

61. H.R. 4004, § 201(H).

62. H. Rep. No. 675, 102d Cong., 2d Sess. 16 (1992).

63. The House enacted House Bill 4004 and sent it to the Senate where the Senate Select Committee struck out everything after the enacting clause and substituted its own version. *See* S. 1752 (June 16, 1992 version). The Senate then returned House Bill 4004 to the House requesting concurrence. No further action was taken before adjournment.

64. Senator Gorton added an amendment to the Senate Bill providing for a tribal/federal court review study to be conducted by a panel comprised of four representatives from tribal governments appointed by the House and Senate and four representatives of the United States courts of appeals appointed by the Administrative Office of the United States Courts. 138 CONG. REC. S11,804-05 (daily ed. Aug. 6, 1992) (detailing amendment No. 2912 as introduced by Senator Gorton).

ers between the federal administrative and congressional branches[65] could risk a veto, no matter who is elected president. But more important for the theme of this paper is its potential to undercut tribal authority.

Considering the way hearings are organized and the tremendous need for more money for tribal justice systems, it is not surprising that the Select Committee reported enthusiastic response to its initial bill.[66] Most of those testifying reported their greatest enthusiasm for the increased funding, however.[67] There were some voices critical of this new layer of bureaucracy created by the Senate bill, and some who questioned the impact the powers of the Judicial Conference would have on tribal sovereignty.[68] The Select Committee's response was a simple one. Instead of rethinking the creation of a Conference, the Committee simply inserted language of denial: a disclaimer stating that the law would not or should not be read as undercutting tribal sovereignty, stating, for example:

> Nothing in this Act shall be construed to—
> (1) encroach upon or diminish in any way the inherent sovereign authority of each tribal government to determine the role of the tribal court within the tribal government or to enact and enforce tribal laws;
> . . . .
> (3) impair the rights of each tribal government to determine the nature of its own legal system or the apportionment of authority within the tribal gov-

65. It could be argued that the Senate bill would violate the Appointments clause by vesting a private agent, the Director of the Judicial Conference, with significant executive authority. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (invalidating provision permitting Congress to appoint Federal Elections Commission members, while upholding delegation of investigative and information gathering functions, but not enforcement powers to the congressional appointed officers); Bowsher v. Synar, 478 U.S. 714, 736 (1986) (invalidating the vesting of a congressional officer with executive powers).

66. S. Rep. No. 314, 102d Cong., 2d Sess. 15 (1992) (noting the "initial reaction from Indian Country to S. 1952 as introduced was overwhelmingly positive.")

67. *See Tribal Courts Act of 1991: Hearing Before the Senate Select Committee on Indian Affairs*, 102d Cong., 1st Sess., Sept. 10, 1992 (statement of Senator Daniel K. Inouye reporting testimony "straightforward and unanimous regarding need for resources").

68. *See* Letter from John Washakie, Chairman, Shoshone Business Council, to Dr. Eddie F. Brown, Assistant Secretary for Indian Affairs, 2 (Apr. 29, 1992) (criticizing "elaborate legislation that creates new and undoubtedly expensive bureaucracies").

ernment; . . . .[69]

In reassuring voice of a parent patiently explaining away a child's groundless fears, the Select Committee Report explains the section as follows:

> The section makes clear that neither the Act or its implementation may in any way infringe, encroach, diminish, impair or alter any aspect of the governmental structures of Indian tribes or of the manner in which those governments choose to structure tribal court functions or to allocate tribal court jurisdiction.[70]

Saying it ain't so only underscores the potential destructive impact of Senate Bill 1752. Tribes will have no choice but to participate in the Tribal Judicial Conference or lose tribal court funding.[71] If that is not coercion, just tell a state government it can avoid congressional conditions on spending by refusing the money. A Tribal Judicial Conference will create a new power source outside the structure of tribal governments and more accountable to its funding sources than to the tribes themselves. That Indian tribal governments have survived in the face of the federal government's repeated attempts to destroy them is a testament to the will of Indian people to retain their political identities. Whatever form of government tribal people have chosen—whether to retain traditional governments or adopt modern governments—they have increasingly chosen to hold their governments accountable. Change in tribal court systems must come from the people of the tribe, acting principally through their government structures. For most tribes, that government structure is the tribal council. If respect for tribal sovereignty means anything, it means that outsiders, including the Federal government, must deal through the tribal councils. If the federal government chooses to strengthen tribal courts by bypassing the tribal councils and dealing directly with the courts,

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69. S. 1752, § 5(1), (3).

70. S. Rep. No. 314, 102d Cong., 2d Sess. 17 (1992).

71. Although section 111 of the bill states that tribes can still receive money through the IPS, they would lose any chance to influence the setting of the base funding by the Conference and also foreclosed from other money available to those who join the Conference. *See* S. 1752, § 111 ("Nothing in this Act shall affect the eligibility of a tribal government to receive funding through the Indian priority system of the Bureau of Indian Affairs for support of the tribe's court system.").

political power on the reservations would be increasingly fragmented.

In sum, a Tribal Judicial Conference would create a new center of power, benefitting mainly those who would serve on it and the lucky recipients of noncompetitive grants. Moreover, there would be no formal accountability. When speaking to Congress, the Judicial Conference would conveniently represent "all the tribes." When speaking to the tribes the Conference will be presumed to speak for Congress. In fact, like a real estate broker, the Conference may end up representing only itself. If a tribal council wants to plan an innovative program by, for example, teaming up with a local tribally controlled community college to provide training to tribal judicial personnel, it will have to go hat in hand to the Tribal Judicial Conference. Attempts to contact a bureaucrat or a legislator will be met with the handy excuse: "Go take it up with your regional representative, and he will raise it at the next Judicial Conference meeting."

With an National Native American Advisory Commission and a Tribal Judicial Conference there will be very little need to waste Congress's time by dealing with Indian leaders who are not represented on one of these important federally created entities.

C. The National Indian Policy Research Institute

In 1990, a rider to the Defense Committee Appropriations Act appropriated $1 million to the Secretary of Health and Human Services to fund a feasibility study on the wisdom of establishing a national Indian policy center in Washington, D.C.[72] Apparently, the grant by HHS was predesignated for the George Washington University in Washington, D.C.[73]

72. Act of May 24, 1990, Pub. L. No. 101-301, § 11, 104 Stat. 206, 211 (to be codified in scattered sections of 25 U.S.C.). The proposed organization has undergone several name changes. Initially, Congress named it the National Center for Native American Studies and Policy Development. *Id.* The Report issued by the Center used the term National Indian Policy Center, while the Senate bill renamed the organization the National Indian Policy Research Institute. For purposes of this article I will use the term "Policy Center" when discussing the arguments made by the planners and the term "Institute" when discussing the federal legislation.

73. *National Indian Policy Research Institute: Hearings Before the Senate Select Committee on Indian Affairs*, 102d Cong., 2d Sess. (1992) [hereinafter *Policy Hearings*]

Two years later, on June 1, 1992, the National Indian Policy Center, submitted its report to Congress concluding, not surprisingly, that a permanent national policy center is not only desirable but necessary.[74] Shortly thereafter, Senator Inouye introduced a bill, Senate Bill 3155, to create a federally chartered National Indian Policy Research Institute[75] to be located at The George Washington University, in Washington, D.C.[76] Although the bill passed the Senate, it did not pass the House.[77] Nevertheless, Congress appropriated continued funds for fiscal years 1992 and 1993 to continue what may be the longest and most expensive feasibility study conducted in some time.[78]

The planned Institute will be governed by a Board of Directors of sixteen voting members.[79] The Policy Center will be

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(unpublished hearings to be published in 1993) (testimony of Stephen Joel Trachtenberg, President of The George Washington University) (indicating the University's involvement with the plan from its inception).

74. POLICY CENTER REPORT, *supra* note 45, at 10.

75. 138 CONG. REC. S11,951-54 (daily ed. Aug. 7, 1992) (statement of Senator Inouye and the first version of the bill).

76. Neither of the two schools with whom I have been associated, Catholic University or The American University, has sought to begin an Indian policy center or any program that would compete for federal funds allocated for the National Indian Research Institute at George Washington University. In addition, I have worked with the American Indian Law Center, in Albuquerque, New Mexico, primarily as an instructor in the Pre-Law Summer Institute for Native American Students. My regard for the Center's work is one reason that I believe that regional organizations are better equipped to carry out the functions of the proposed Institute. Nevertheless, the ideas expressed in this article are completely my own and expressed after much hesitancy arising both from my regard for colleagues at George Washington University and concern that my criticisms would be held against organizations with which I have been associated.

77. As amended, the bill passed the Senate on October 2, 1992. *See* 138 CONG. REC. S16,316-21 (daily ed. Oct. 2, 1992) (reporting second version of the bill, final amendments and final version of the bill as passed by the Senate). The bill was then referred to the House, but no action was taken before the end of the 102nd Congress. *See* 138 CONG. REC. H10,959 (daily ed. Oct. 2, 1992) (reporting request by Senate for concurrence of the House).

78. Older Americans Act, Pub. L. No. 102-375, 106 Stat. 1195, Sept. 30, 1992, § 813 (20) (appropriating money for fiscal years 1992 and 1993 to continue "development of a detailed plan . . . for the establishment of a National Center for Native American Studies and Indian Policy Development").

79. The House and Senate each would select seven members from lists prepared by the Senate Select Committee and the House Interior and Indian Affairs Committees; the president of the University would select two members, and the president of the University and the staff director of the Institute would serve ex officio as voting members. S. 3155, § 7(a); 38 CONG. REC. S16,319-20 (daily ed. Oct. 2, 1992).

run by a professional staff under the supervision of a Director to be appointed by the Board. No mechanism in the bill provides for formal tribal input into the selection of the Board, apart from a requirement that the appointing authorities consult with tribes and solicit nominations from tribes as well as other organizations. The bill provides for an Indian preference for the staff[80] and states that the appointing authorities must "ensure that a majority of appointments are Indians who are broadly representative of Indian country."[81]

The idea of "an Indian 'think tank' organization which could bring together the best minds in Indian country"[82] is an appealing one. Nevertheless, the Institute's concentration in Washington, D.C., its funding by Congress, and its hoped for status as the only national policy institute in the country could combine to stifle creativity and further marginalize points of view outside of the mainstream of Indian law and policy. Moreover, an institute created by Congress yet controlled by an academic institution will operate in a setting of opposing tensions—academia's commitment to scholarship and at least the appearance of objectivity versus the inevitable political pull exerted by Congressional demands. Factor in the expectations of tribes that the Policy Center will also serve their needs—an expectation fostered by the planners of the proposed Institute during the feasibility study but ignored by the bill-and even the most adroit administrator may find it difficult to keep the balls in the air.

II. APPRAISING THE JUSTIFICATIONS FOR THE PROPOSED POLICY CENTER

The Report advances several justifications for a national policy center, falling into two major categories, which I will call "investigative and clearinghouse functions" and the "policy functions." The drafters of the Report argue that policies are too often undertaken without first obtaining reliable data; and that a national center can establish databases, coordinate with government agencies, and otherwise serve as a clearing-

80. S. 3155, § 9(d).

81. S. 3155, § 7(a)(2)(C).

82. POLICY CENTER REPORT, *supra* note 45, at iv (quoting Senator Daniel K. Inouye).

house for information to the many and diverse tribes.[83] With regard to its policy functions, the Report stresses the need to provide for active participation by the Indian tribes in the interpretation of data and creation of policies. The Report also stresses the need to provide for the development of a coherent, consistent policy in Indian affairs, not driven by the kind of crisis management that is the impetus for creating most policy initiatives. While both the investigative and clearinghouse functions are important, they can be achieved by other methods less costly to the taxpayer. Of the policy development functions, the first, participation by tribes in setting policy, is more likely to be harmed than helped by the proposal. The second, achieving a unified field of Indian policy, is not only unrealistic, but antithetical to developing the innovative policies so desperately needed in Indian country. Whether any of these functions needs to be performed at a national center located in Washington, D.C. is also open to question.

A. Location

Tribes expressed doubts about the desirability of creating a national center in Washington, D.C., rather than providing for the Center's functions to be performed by regional organizations either by creating new ones or by contracting to existing policy research organizations located more closely to Indian reservations.[84] Although the congressional staff and executive offices as well as tribal lobbyists, attorneys, and consultants will find this location quite convenient, the location is far less convenient for many tribes, especially the small tribes that cannot afford either to travel frequently to Washington or to otherwise monitor the work product of the Institute to ensure that the Institute is not misrepresenting the position of all Indian tribes on particular issues. The current Director acknowledged these concerns in his testimony in favor of the proposed Center: "two of the most commonly asked questions" have been: "Why the Institute [s]hould be [l]ocated in Washington, DC and [w]hy at The George Washington Uni-

83. POLICY CENTER REPORT, *supra* note 45, at 3-4.

84. For a description of other policy centers and proposed programs, see *infra* text accompanying notes 87-91.

versity."[85] His answer to the question of location was simply that a national center had to be located somewhere and Washington provided the readiest access to federal policymakers. In addition, the Director argued it would be too expensive to create regional centers in the 20 states with substantial Indian populations.[86] The third choice, of contracting out policy center functions to existing policy centers and tribal organizations was not considered.

The Report mentions, without any specifics, that other policy centers exist, but it does not give any details about these centers other than to state the need for a central policy center to incorporate policy studies produced by these other centers into a database.[87] Many of the existing organizations exist on money raised from outside sources, such as contracts with tribal, federal, and state governments. The Report includes a table indicating that 25 out of the 46 universities responding to a survey by questionnaire indicated a current involvement in policy research regarding American Indians.[88] Of those that responded, 28 indicated involvement in policy research initiatives affecting Native Americans. Apparently none of these organizations was contacted for further information regarding the scope and extent of their activities. There are no details about these programs, although an appendix to the Report notes that "program efforts of such institutions as the University of Colorado, the University of Oklahoma, Montana State University, the University of New Mexico, the University of Alaska, Stanford University and Harvard University, have been of great benefit to the Indian population in general and should be looked to as examples for the NIPC."[89] In addition, there are 28 tribally controlled colleges whose major missions are both to educate Indian students and to aid

85. *See Policy Hearings, supra* note 73, at 7 (statement of Alan R. Parker, Director, National Indian Policy Center) (on file with author).

86. See *Policy Hearings, supra* note 73, at 7.

87. POLICY CENTER REPORT, *supra* note 45, at 62 ("Indian research and policy studies are scattered throughout various universities, colleges, and other private and public entities"); *id.* at 65 ("incorporating computer communication training into existing communications networks").

88. POLICY CENTER REPORT, *supra* note 45, app. G, at 1 (listing of colleges and universities surveyed). Of 114 institutions contacted, 46 responded. *Id.*

89. POLICY CENTER REPORT, *supra* note 45, app. G, at 1.

in strengthening tribal governments.[90] From my own perspective as a law professor, I am familiar with policy centers operating at several law schools in the United States. Since a simple answer to a survey question does not give the flavor of these programs, it may be useful to describe some of them.

The American Indian Law Center is located at the University of New Mexico Law School, but is an independent, Indian-controlled organization. It has been in existence for over twenty years, providing policy analysis and technical assistance to tribal governments. The Law Center has worked with tribes on a great number of projects, including developing tribal codes and improving judicial services. For example, it has administered the Southwest Intertribal Court of Appeals. The Law Center started the State-Tribal Relations Commission, the first such effort to bring together state and tribal officials occupying similar positions in their governments. It also contracts with the federal government to provide services to Indian tribes. In addition, the Law Center administers the Pre-Law Training Institute for Native American Students, which has helped produce over 1,000 Native American attorneys in the last twenty years.

Only four years old, the Center for the Study of American Indian Law and Policy at the University of Oklahoma focuses its efforts on the many tribes of Oklahoma. For example, the Center has helped the Osage tribe draft legislation to separate political rights from mineral ownership rights and also drafted a Model Tribal Cultural Heritage Ordinance to enable tribes fully to exercise their powers to protect tribal artifacts and other objects of their cultural patrimony. The Center also established a comprehensive Indian Law Library. Other law schools have also just recently announced the formation of regional centers: The Hamline University School of Law has proposed an American Indian Research and Policy Institute and plans to focus its work on issues of importance to the Minnesota tribes.

Whether through formal centers, clinics, or more informal mechanisms, other law schools have established working

90. POLICY CENTER REPORT, *supra* note 45, app. G, at 1 (noting existence of tribally controlled community colleges).

relationships with local Indian tribes. The University of Montana Law School has worked with the Montana tribes and in particular with tribal courts. The University of Washington Law School has been active in working with local tribes attempting to secure their fishing rights. The University of Arizona has worked with Arizona tribes and in particular with tribal courts. Arizona State University has extensive training programs workshops, and seminars on Indian law and policy. The Great Lakes Indian Law Center at the University of Wisconsin has done research and provided legal assistance to various tribes. In addition, the Report notes that some tribes have developed formal agreements with local Universities, in particular, the Navajo tribe with Universities in the Southwest, and the Yupik Inuit with the University of Alaska at Fairbanks.[91]

Many of these organizations presently convene forums to discuss issues of importance to Indian tribes,[92] a function planned for the Policy Center.[93] All of these organizations would benefit from increased funding. In light of the multiplicity of financially struggling institutions and organizations, it seems rather wasteful to create a new one anywhere in the country, much less promote it to the status of "the" Center. The question of why this particular university is easier to answer. Senator Inouye is a graduate of the George Washington University's law school, has served on the University's board of trustees, and has been an enthusiastic supporter of the Institution,[94] most recently, in attempting to set aside $50 million from the City of Washington's budget to finance improvements in the University's well-respected medical center.[95] In

91. POLICY CENTER REPORT, *supra* note 45, at 4.

92. For example, in 1991, I attended two such forums in the Southwest attended by numbers of tribal judges concerned about the Supreme Court's decision in *Duro v. Reina* that tribes did not have criminal jurisdiction over nonmembers. The Southwest Intertribal Court of Appeals had such a meeting at the University of New Mexico Law School, and the National Indian Court Judges Association held a meeting under the auspices of the Arizona State University School of Law.

93. POLICY CENTER REPORT, *supra* note 45, at 40.

94. *See* 138 CONG. REC. S4995, 102d Cong., 2d Sess. (daily ed. Apr. 8, 1992) (remarks by Senator Pryor in recognition of Senator Inouye, noting the Senator's efforts on behalf of the George Washington University).

95. *See* Betsy Dance, "House Rules: How Congress Plays with the District," *Washington Post*, C1, Oct. 4, 1992 (criticizing Congressional interference with D.C.

light of these facts, the Director's statement that no other major university in Washington "approach[ed] the Congress and offer[ed] to compete with The George Washington University in its willingness to commit resources."[96] Although this setting aside of $3 million in federal money for a policy center seems minor in comparison to other Congressional efforts to dispense "academic pork" to preferred institutions, the practice has been justly criticized for avoiding competitive processes for attracting money to research institutions.[97] Compared to the budgets of other research institutions, the money may seem trifling; to financially strapped Indian tribes,

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Home Rule); Kent Jenkins, Jr., "Congress Approves DC. Payment; GWU and Inouye Drop Effort to Obtain $50 Million for Hospital," *Washington Post*, A13, Sept. 27, 1991 (detailing history of the controversy); Molly Sinclair, "GWU's 'Pragmatic' President Thrives in the Spotlight," *Washington Post*, B3, Sept. 21, 1991 (describing attempts to raise funds).

96. *See Policy Hearings, supra* note 73, at 7 (statement of Alan R. Parker, Director, National Indian Policy Center).

97. "Academic pork" is the congressional practice of earmarking research funds for specific universities. Colleen Cordes, *W. Virginia Leads the Way in Obtaining Congressional Earmarks for Research*, CHRON. OF HIGHER EDUC., June 24, 1992, at A21. The traditional means of allocating federal research money is through a competitive peer-review process. Todd Ackerman, *Academic Pork Slipping from Texas*, HOUSTON CHRON., Sept. 26, 1992, at A25. Earmarking, however, is a way of using spending bills to channel money directly to a particular university. *Id.* Earmarked funds are generally slipped into spending bills by lawmakers at the last moment, with little or no committee debate. *Id. See also* Colleen Cordes, *Washington Lobbyists Continue to Sign Up University Clients, Capitalizing on Academe's Demand for Political Expertise*, CHRON. OF HIGHER EDUC., Oct. 9, 1991, at A31. The majority of these earmarked funds have been allocated by the Appropriations subcommittees on agriculture, defense, energy, and water development. Eric Pianin, *'Academic Pork' Fills Favored School Larders*, CHRON. OF HIGHER EDUC., Sept. 23, 1992, at A17.

The presence of academic pork in federal spending bills has increased dramatically in the last 12 years. Todd Ackerman, *Academic Pork Slipping From Texas*, HOUSTON CHRON., Sept. 26, 1992, at A25. In 1980, Congress earmarked $11 million for specific universities. *Id.* By 1992, the figure spiraled to $708 million. *Id.* Between 1980 and 1992, Congress has earmarked a total of $2.5 billion for particular university research projects, almost one-third of which went to five states—Massachusetts, Oregon, Pennsylvania, Louisiana, and New York. *Id.* The University of Hawaii, located in Senator Inouye's state, paid academic-pork lobbyists $636,000 in fees over four years, but garnered nearly $33 million in appropriations from Congress. Colleen Cordes, *Washington Lobbyists Continue to Sign Up University Clients*, CHRON. OF HIGHER EDUC., Oct. 9, 1991, at A31, A34.

Academic pork is not without its supporters, however, who argue that earmarking is a way to counter the maldistribution of federal funds to certain prestigious universities by spreading the wealth to "have-not" universities, so that these universities can eventually compete in a meritbased system. *See* Daniel S. Greenberg, *In Defense of Pork Barrel Science*, WASH. POST, Mar. 31, 1992, at A17.

some of which can only budget $32,000 for annual operation of a tribal court, the amount is princely.[98] According to the Tribal Chairman of the Grand Ronde Community of Oregon, "I can assure you that for the top five or six unfunded ANA grant applicants in any given year, [$1 million per year] is not an insignificant amount."[99]

B. Investigative and Clearinghouse Functions

As students of history and policy are well aware, the federal government tried in vain to destroy tribes as political entities. With the enactment of the Indian Reorganization Act in 1934,[100] the federal government signaled its intention to deal with tribes as political units. Tribes whose traditional governments had been destabilized began to develop governments patterned after the political units of the dominant society. Tribal governments are not static, they continue to change in response both to external and internal pressures.[101] Tribal people demand accountability from their governments and seek many of the same services that members of communities demand. And tribal governments are increasingly attempting to meet these demands, even those that are among the poorest communities in the United States.[102] Tribes need information and ideas on what methods are practical, necessary, and desirable for land and resources management, and relations with the federal and state governments, and delivery of tribal services, including the maintenance of criminal justice systems. Because of the number of tribes, the small size of so many of them, their location in rural areas, and their concomitant lack of financial resources, news from policymakers in Washington

98. *See Initiatives for the 1990s: Hearings Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 2d Sess. 9-11 (1990s) (statement of Joseph Myers, Executive Director, National Indian Justice Center) (noting financial needs of tribal courts).

99. Letter from Mark Mercier, Tribal Chairman, Grand Ronde Community, to Senator Daniel Inouye, Chairman, Select Committee on Indian Affairs 4 (Sept. 4, 1992) (on file with author).

100. *See generally*, STEPHEN CORNELL, THE RETURN OF THE NATIVE (1988) (examining the resurgence of American Indian political activity after the enactment of the Indian Reorganization Act).

101. *See id.*

102. *See* Peter T. Kilborn, *Sad Distinction for the Sioux: Homeland is No. 1 in Poverty*, N.Y. TIMES, Sept. 20, 1992 (describing conditions on the Pine Ridge Indian Reservation).

and new developments in other tribes reaches them slowly, if at all. Creating a clearinghouse may be the best justification advanced in the Report for the Center's existence. Senate Bill 3155 embraces these clearinghouse functions as central to the role of a national center. Despite the need for better information, the Center's plans for filling this need seem somewhat grandiose and overly expensive in light of the real problems facing Indian reservations.

A clearinghouse able to provide a wide variety of information on legal developments—state, federal, and tribal court cases; pending tribal, state, and federal legislation, including new tribal constitutions and state-tribal agreements; Interior Department opinions and other administrative agency developments, such as proposed rules, and requests for proposals (RFPs) from various agencies—would serve a great need in Indian country. The proposed Policy Center would fulfill this function in several ways: by distributing legislative actions;[103] by serving as a conduit for information among tribes and between tribes and Congress by devices such as computer databases, bulletin boards and other advanced telecommunication devices;[104] and by collecting statistical data on tribes for tribal and congressional use.[105]

The bill gives an imprimatur to these data gathering functions, authorizing the proposed Center to establish data and information clearinghouses, to sponsor public forums, and to disseminate information to the public.[106] In fact, the Senate bill weights the clearinghouse function much more strongly than the drafters of the Policy Center Report. While the Report focuses mainly on the proposed Center's role in setting policy, discussed below,[107] the bill stresses the importance of the investigative and clearinghouse functions. While the need for clearinghouse functions is probably the best justification advanced by the drafters of the Report, creating a new center to provide this service is inefficient and duplicative. Moreover, much of the Center's proposals to rely on new

103. POLICY CENTER REPORT, *supra* note 45, at 40.
104. POLICY CENTER REPORT, *supra* note 45, at 41.
105. POLICY CENTER REPORT, *supra* note 45, at 42.
106. S. 3155, § 5(b)-(d).
107. *See infra* text accompanying notes 116 to 131.

technology seems less than pragmatic. The Report drafters have not investigated the extent to which other organizations may already provide these clearinghouse functions or may otherwise be better equipped to carry out these functions either on their own or for the price of a subsidy that would require substantially less money than the creation of a national policy center. In addition, the drafters of the Report have focused on the most expensive and difficult technology for collecting and disseminating information, assuming that the cost both of providing equipment and training for those who might use these services will somehow be available.

At present a considerable amount of information relating to Indian law and policy is available in existing databases. LEXIS and WESTLAW, the two major legal database systems, offer Supreme Court cases the day the decision is announced as well as the briefs filed in those cases. These voluminous on-line research services also contain the full text of many state and all federal cases, as well as cases reported in foreign countries, such as Canada and Australia, whose law relating to indigenous peoples has been much influenced by United States law. In addition both databases contain valuable administrative information, such as the Federal Register, the Code of Federal Regulations, and opinions of the Attorney General. Legislative material includes the Congressional Record and the full text of pending legislation. In addition, through LEXIS's NEXIS service, the user can access major newspapers, magazines, and even the text of National Public Radio news broadcasts. Moreover, both companies provide extensive training services for users.

Other commercial indexes, such as the Knowledge Index,[108] maintain large numbers of databases, including books in print, and abstracts of research in history, anthropology, sociology, and other fields of vital interest to those working in Indian affairs. Those affiliated with a university have ready and inexpensive access to Bitnet and Internet. These two networks are computerized bulletin boards available through most research institutions and government agencies. Users can choose from thousands of categories and read the

108. A service of the Dialog company.

messages posted there daily. They can retrieve information that they want to keep and also post messages and queries there. Internet also provides access to many library catalogs and master catalogs compiled by major research university consortiums.

Through Internet a user can also access Nativenet, a listserve. A listserve is a large mailing list, and Nativenet is such a mailing list for persons interested in issues concerning indigenous peoples. These mailing lists permit a kind of ongoing electronic conference. A user may easily send out a query to everyone on the list and receive hundreds of responses. Although Indian tribes might not have access to the two major networks, Nativenet is publicly accessible through Peacenet, one of several networks operated by nonprofit organizations. Often the user only has to pay only for a local telephone call in addition to a modest surcharge.

The University of Iowa Law School operates the Indian Law Defense Network (ILDN) available for the cost of a long-distance telephone call for most users. As with other bulletin boards, the ILDN permits electronic messaging. In addition, the service urges users to upload (send by modem from the user's computer to the bulletin board) drafts of tribal laws, queries about difficult issues in pending cases, and anything else they think might be useful to users of the bulletin board. Professor Robert N. Clinton, who operates the network, routinely uploads legislation and important cases.[109]

The Indian law scholar has access to a wealth of other information to assist her in researching policy and legal issues affecting Indians. Despite this wealth of available information, there are gaps. In particular, tribal laws and court decisions are rarely available. Selective tribal court opinions are published in the *Indian Law Reporter*, a commercial publication issued monthly. Although users of the ILDN are urged to upload tribal court rules and decisions to the Network, many tribal attorneys are not users of this service.[110] Never-

109. Telephone interview with Robert N. Clinton, Professor, University of Iowa Law School (Aug. 28, 1992).

110. The ILDN has not been widely publicized. In addition, many attorneys have not graduated beyond learning wordprocessing to make use of the more sophisticated communications programs.

theless, having access to the information that already exists in a form retrievable by researchers of Indian law and policy would be a great benefit to Indian tribes. One cannot help wondering why, if this information does exist, it is necessary to create yet another database instead of helping tribes access the existing services. The Report focuses more on the proposed Policy Center's role in creating new databases than in strengthening the ones that exist and providing tribes with access to them, however.

The major reasons tribes do not access the existing services are directly related to the expense of doing so. The expense includes both the cost of hardware and software, which can be considerable, as well as surcharges by the minute for the use of private databases and research services. WESTLAW and LEXIS, the on-line research services discussed above, are extremely expensive. Even large firms and government agencies have had to limit the time their associates may spend using the services. Although these services are relatively easy to use in part because of the excellent training provided by the companies, they are not presently available to most Indian law practitioners as a practical matter. The other services mentioned are far less expensive, but require expensive telecommunications equipment and a great deal of computer literacy by those wishing to access them.

Money will be needed to train tribal personnel who would want to access the shiny, new computer databases. Many tribes lack personal computers or, if they have PCs, the PCs are slow and out-of-date.[111] Some tribes, like other rural communities, still operate party lines and have inadequate telephone systems. Touch tone phones and modems are necessary to use modern communication technology; yet many tribes do not have these systems. Even when the telephone system is sufficient, many computer users are unable to transfer data, because they lack familiarity with communications software.

It is not necessary to relegate tribes to the dark ages of

111. The same could be said for underfunded city court systems as well, of course. Attorneys in the Office of Corporation Council for the District of Columbia have to share PC's and their time on the commercial databases is so limited as to be almost nonexistent.

the print media. Tribes could benefit enormously from the kinds of computer and telecommunications technology the authors of the Report tout. A central database might well be useful, but different tribes have different needs, of which upgrading their computer and communications systems may not rank the highest.[112] The authors of the Report admit the magnitude of the problem of creating systems that can and will be used by Indian tribes, stating: '[a]ppropriate systems are usually expensive, require specialized technology, and often require specialized education not available through institutions currently serving most Indian populations.[113] The Report speaks in glowing and extremely general terms about upgrading reservation systems, as if the creation of the Policy Center will ensure the upgrades necessary:

> Subsidies will be necessary to upgrade reservation telecommunications infrastructures whether through purchase from local telephone and public utilities or through independent purchase. In planning for the upgrades, reservations will need to positions [sic] themselves to take advantage of the rapid telecommunications developments that are expected in the next ten years. These will include the use of fiber optics to create high speed communication, a large enough capacity in the telecommunications channels to handle graphical images, and the software and hardware to store and transmit digitized text and picture images. NIPC can play a significant role by educating Indian Country about the options available through local utilities or building alternatives to telephone networks, leveraging Indian resources to install the needed infrastructure in a cost effective way, and to blend state-of-the-art technologies, such as satellite or cellular transmission or the use of low frequency bands, into the mix of choices.[114]

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112. It would be useful for someone to study the number of grants awarded to contractors to develop computer systems for Indian tribes. I suspect a fair number were developed, using many different systems during the 1970s and 1980s. Were any successful? Are any still used? Of course, a major part of the problem is that the technology has developed so quickly that programs and hardware become obsolete almost overnight. In this climate, training a person to work one particular program can be of very limited utility.

113. POLICY CENTER REPORT, *supra* note 45, at 64 (noting the inadequate telephone systems on most reservations)

114. *Id.* at 64-65.

This description of what needs to be done to bring all the wonders of modern technology to reservations is probably accurate. But it is hard to believe the federal government is going to provide the "subsidies [that] will be necessary." Perhaps illustrating the extent to which the drafters of the Report are out of touch with the real needs of reservation people, the Report simply assumes that once its well-paid consultants explain to Indian tribes the benefits of these modern communications systems, the tribes will put their highest priority on raising the necessary money. Surely most tribal economic development officers would be far more concerned about sewer systems, alcohol and drug programs, family violence programs, and adequate housing long before attempting to justify the cost of upgrading the tribal communications systems so that tribal officers could access the databases and other services in Washington.[115]

C. Policy-Setting Functions

1. Participation by Indian Tribes in Policysetting

Tribes have long insisted that Congress has an obligation to seek ways to include them in the policymaking process. The drafters of the Report assert that a major goal of the Institute would be to "assist Indian tribes in dealing more effectively, on a government-to-government basis, with the many different federal agencies carrying out Indian programs."[116] Since the Report itself and testimony before the Senate Select Committee claimed that "[t]ribal support for a Policy Center was uniform,"[117] it seems appropriate both to assess the Institute's methodology in garnering this support, the Institute's

115. Given the poverty on Indian reservations, updating telecommunications systems has to have a fairly low priority on most reservations. According to testimony before the Senate Select Committee on Indian Affairs: '[Tribal] needs are simply overwhelming. . . . In housing the estimated need is $7.3 billion. On school construction, the backlog is $400 million. On water and waste disposal, the backlog is around $700 million. *Impact of Supreme Court's Ruling in* Duro v. Reina: *Hearings on S.962 & S.963 Before the Senate Select Comm. on Indian Affairs,* 102d Cong., 1st Sess. 26-30 (1991) (statement of Sam Deloria, Director, American Indian Law Center).

116. POLICY CENTER REPORT, *supra* note 45, at 1.

117. POLICY CENTER REPORT, *supra* note 45, at 38 (stating that "[c]learly there is wide ranging support for a National Indian Policy Center"). *See also Policy Hearings, supra* note 73, at 5 (statement of Alan R. Parker, Director, National Indian Policy Center that "the need and value of such an institution was repeatedly recognized").

articulation of its own vision of the role of elected tribal leaders in policy formation, and the Senate's response in the bill drafted to create the Center. These sources reveal defects in methods of consultation and a generalization of the considerable tribal support for assistance in research and tribally responsive policy setting into a general enthusiasm for the Center despite serious concerns raised by tribes that a national center would supplant tribes' governmental functions or become a new power source beyond tribal control.

The Report notes that its conclusions were based on over forty meetings with tribal leaders throughout the country.[118] Although this consultation process is commendable, it would be helpful to know what mechanisms were used to ensure participation by elected tribal leaders, in particular, whether some of the $2 million appropriated by Congress was used to ensure that every tribe could send someone to at least one of the meetings. If, for example, meetings were simply announced with the assumption that tribes would send someone at tribal expense, the legitimacy of labeling the resulting input either uniform or representative would be open to question. For all that the Report reveals, the same basic group of tribal leaders could have attended all of the meetings.[119]

The questionnaire methodology used by the planners raises even more serious concerns. The Planning Office sent a questionnaire to forty tribes, of which only eighteen responded. No indication is given why the particular tribes' opinions were sought. The Center staff also reported informal telephone contact with twenty-two national and regional organizations.[120] Given the large number of tribes in the United States, the questionnaire can hardly be cited as the authoritative voice of the tribes. Moreover, the questionnaire only contained four questions and those seemed loaded in favor of the Center. Instead of asking whether Congress should create any

118. POLICY CENTER REPORT, *supra* note 45, at 61-62, 77 (stating that the American Indian Resources Institute, the Native American Rights Fund, the National Congress of American Indians, and the Council of Energy Resource Tribes organized the series of meetings).

119. *See* POLICY CENTER REPORT, *supra* note 45, at 48, 61, 77 (describing meetings).

120. *See* POLICY CENTER REPORT, *supra* note 45, at app. F (listing organizations contacted).

kind of center, whether regional or national the questions assumed the existence of a Center, by asking, for example: "How should the National Indian Policy Center be organized in order to assist your tribe in its policy research analysis and responsibilities?" and "Is there a need by your tribe to develop resources and/or an internal capacity that would enable you to be more effective in exercising a policy of government-to-government relationship?"[121] It is not surprising, then that the planners reported generally supportive responses by tribes, especially regarding the data-gathering and communication functions.

The Report also claims a unique role for the Center in helping to articulate and establish what it describes as an evolving federal policy requiring tribal participation in and even consent to federal actions affecting tribes.[122] Tribal participation in policy setting is notably absent from Senate Bill 3155, however. The Institute is to give priority to research instituted by the executive or legislative branches, for example. In short, the bill leaves no doubt that the Center will be accountable to the federal government and not the tribes. In fact, the Institute may find itself in the opposite role of providing tribal consensus to the government, instead of gaining governmental acquiescence to tribe's demand for inclusion in policymaking. The Report raises the need to debate the question whether this participation should include acceptance of the notion that tribes have a fundamental right to withhold consent to policies.[123] Asserting that recent congressional initiatives may have created a "new higher standard for tribal involvement," the Report stresses that the Policy Center can facilitate methods of obtaining this tribal consent.[124]

The Report indicates that tribes responding expressed a strong interest in being included in analyzing data and setting

121. *See* POLICY CENTER REPORT, *supra* note 45, at 37-38 (providing summary of questionnaire).

122. POLICY CENTER REPORT, *supra* note 45, at 33-35.

123. POLICY CENTER REPORT, *supra* note 45, at 33. The Report's assertions regarding participation are difficult to parse, in part because the authors use more buzz words than a first-year law student: "tribes have a fundamental right to withhold consent, but only 'on the same basis as other constituencies.' " *Id.* Since no constituency without a majority can withhold consent, this statement appears rather empty.

124. POLICY CENTER REPORT, *supra* note 45, at 34-35.

general policy rather than being the passive recipients of policy set by the Center. Formal and informal testimony reflected strong concern that the proposed Center not supplant the tribes or be regarded as the voice of the tribes. The President of NCAI reported on behalf of its constituent members that "the strongest concern was that policy analysis papers not replace tribal input and that a process be in place which guarantees tribal reviewal of policy papers prior to publication."[125] Several tribes submitted letters to the Committee opposing the creation of the center for this reason. The Chairman of one tribe questioned "the legitimacy of an independent Institute that is charged with proposing Federal policy for the very Tribal governments it excludes from any meaningful role in the Institute itself."[126] The Director of the Institute answered these concerns in effect by admitting them. He agreed that as a congressionally created organization the Institute will be accountable to Congress and not the tribes. Moreover, he insisted that the legitimacy of the Institute depends on it being independent of control by "one tribe or several tribes." Accountability will be ensured, he testified because "if the Institute's activities are seen as adverse to the best interests of Indian tribes, the tribal leadership will make their views known directly to the Board of Directors and, if needed, ultimately to the Congress."[127]

This vision of accountability puts the entire burden on the tribes to monitor the Center's activities. It is difficult enough for tribes to evaluate the policy suggestions that emanate from Washington or from other tribes. Yet, the Policy Center would create another source of proposed policies that

125. *See Policy Hearings, supra* note 73, at 3 (statement of Gaiashkibos, President of NCAI).

126. Letter from Mark Mercier, Tribal Chairman, Grand Ronde Community of Oregon to the Honorable Daniel Inouye, Chairman, Select Committee (Sept. 3, 1992) (on file with author); *see also* Letter from Marge Anderson, Chief Executive, Mille Lacs Band of Ojibwa Indians, to The Honorable George Miller, House Interior & Insular Affairs Committee (July 20, 1992) (on file with author) (opposing the legislation for the same reasons). Other tribes expressing similar concerns included the Colville, Nez Perce, the Spokane, and Umatilla tribes of Washington and Oregon. Telephone Interview with Deborah Allery, staff of the Honorable Collin Pederson, House of Representatives (Oct. 21, 1992).

127. *See Policy Hearings, supra* note 73, at 6 (statement of Alan R. Parker, Director, National Indian Policy Center).

must be evaluated. More important, these policies will have the imprimatur of Congress's own Policy Center, located nearby, with a well-funded staff. A tribe that opposes or even needs time to consider more carefully a program supported by the Policy Center will have trouble being heard. As I have stated before, small tribes will be particularly harmed by this proposed center. A tribe that does not have the resources to review and counter a policy suggestion forcefully will be counted as supportive by its failure to object. The Congress can too easily claim that since only two out of 500 tribes objected to a certain policy, it has the support of all.

In short, there is a real threat that the Center will become a power base outside tribes. The proposed Policy Center will be controlled by the House and Senate committees, the President of George Washington University, and its staff director, not by the tribes. Ensuring that most board members and staff are Native Americans does not constitute tribal participation. Even those Native Americans who are active members of federally recognized tribes do not and cannot represent the voice of their tribes. The Institute will in fact be controlled by Congress which will fund the Institute and appoint the majority of board members, as the implementing legislation makes clear. In addition to the provisions regarding appointment and removal, Senate Bill 3155 states: "Priority consideration shall be given to policy initiatives proposed for consideration by the executive or legislative branches of the Federal Government."[128] Moreover, the bill creates an Advisory Council composed of members of all the major government agencies that deal with problems affecting Native Americans as well as the chairs of the two congressional committees. The Advisory Commission is empowered to make recommendations to the Commission regarding research procedures and monitor the Institute's work.[129]

128. S. 3155, 102d Cong., 2d Sess. § 5(a) (1992).

129. *See id.* at § 8 (naming the Secretaries of Health and Human Services, Interior, Education, Commerce, and Labor and the chief administrative officers of the Smithsonian Institution, the Library of Congress, the National Academy of Sciences and the National INstitutes of Health).

2. Development of a Coherent, Consistent Policy

The Report argues that present mechanisms for setting Indian policy on the national level fail to produce a coherent, consistent policy, because so many different decisionmakers confront questions of Indian policy. The Report is particularly critical of policysetting in the Executive Branch. The drafters of the Report argue that a National Center is necessary to help coordinate the functions of the eleven cabinet departments and twelve independent federal agencies administering programs relating to Native peoples. For example, the Department of the Interior has only one staff person available to do policy research.[130] As a result, the Associate Secretary for Indian Affairs has to rely on the staff members administering particular programs to monitor the effectiveness of these same programs, a practice rightfully criticized by the drafters, who state: "[i]t is widely understood by policy specialists that government program administrators have difficulty providing objective information or performance evaluations on their own programs."[131]

Noting that the Indian constituency of many executive departments may be small compared to their other constituencies, the Report also argues that a Policy Center could aid the Executive in assessing the impact of its policies on Indian people. For example, the Report outlines HUD's attempt to privatize public housing, which depends for its efficacy on the ability to attract private capital and mortgage money. Because Indian trust land cannot be mortgaged and because other barriers to the attraction of capital are also unique to Indian Country, these new policies were particularly ineffective in Indian Country.[132] Attempts to substitute the new pol-

130. POLICY CENTER REPORT, *supra* note 45, at 25 (praising the quality of work produced by the limited staff of the Office of Program and Policy, but noting the Office has produced three Indian policy studies since its inception in 1973).

131. POLICY CENTER REPORT, *supra* note 45, at 26. Relying on persons administering programs to evaluate their own programs is bad policy because no one is going to criticize the program he administers. Perhaps the same could be said for the Policy Center's evaluating the feasibility of continuing its own existence.

132. These policies were also ineffective to aid the persons at whom, presumably they were addressed: low income persons in need of public housing. While it benefitted some modest wage earners, the programs withdrew desperately needed housing from the public housing stock. Nevertheless, it would be fair to say that the program was

icies for other mechanisms of delivering public housing money to reservations nearly resulted in a serious losses to Indians needing housing.[133]

Naturally, the Report is less critical of Congress, the source of its funding. Nevertheless, the Report decries the fact that Congress has not always followed its own favorable policies: "Congress has not always followed prior legislation that is consistent with the established Indian policy principles of trusteeship and tribal rights of self-governance."[134] The Report notes the structural barriers preventing Congress from obtaining the best possible information on which to base its policy decisions: the lack of formal representation by Indian tribes in Congress; the competing policy agendas of committee chairs; the issue-driven nature of legislation; and the large work loads of committee staffers.[135] In addition, the Report notes that important issues affecting Native Americans can and do arise in committees other than the two committees charged with developing expertise in Indian affairs, the House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs. The energy committees have jurisdiction over issues affecting Alaskan natives, for example. These other committee chairs and staffs have their own policy agendas that often conflict with the needs of Indian people.[136] For example, the Report states the legislative policy of providing for access to sacred sites on public land has been undercut by the more recent and often conflicting policy of fostering commercial and recreational use of these

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particularly illsuited to Indian Country. For example, one of HUD's ideas was to attract investors to rehabilitate vacant public housing for sale to low-income persons, yet Indian reservations contain virtually no vacant housing. POLICY CENTER REPORT, *supra* note 45, at 23.

133. The Report states that HUD proposed abolishing the Indian Housing Program in three consecutive years at a loss to Indian people of approximately $230 million each year. Only action by Congress directing HUD not to defund the program has kept it alive. POLICY CENTER REPORT, *supra* note 45, at 23. The Report also criticizes the SBA for ignoring Indian interests in the pursuit of more general policies. *Id.* at 22-23. (explaining that SBA general regulations were too restrictive for the special needs of Indian tribes).

134. POLICY CENTER REPORT, *supra* note 45, at 29.

135. POLICY CENTER REPORT, *supra* note 45, at 26-28.

136. POLICY CENTER REPORT, *supra* note 45, at 28 (noting "interest of constituencies in competition with the Indian interest may dominate a committee's policy decisions").

same sites.[137]

The provision of better information to Congress and the Executive is the weakest argument in favor of a policy center. Legislators necessarily balance competing interests, and the Report states the concern that too often the Indian interests are ignored or given too little weight. Certainly no one could disagree with the planners' conclusions on this point. Yet, it is hard to see why the creation of a National Center will magically transform the Congress into a body willing to put Indian tribal interests ahead of the interests of more powerful constituents. Moreover, the drafters wrongly elevate consistency and coherence as the highest goals of Indian policy. On the contrary, Indian policy is not static or consistent throughout the branches of government at any given time. Even the assumption that consistency itself is a worthy goal of those attempting to influence policy is subject to challenge.

Ignored by the drafters of the Report is the fact that tribes' interests diverge. Tribes vary considerably in culture, size, reservation demographics, and geographic location. For example, the Navajo reservation, the largest reservation in the United States, has very few non-Indians residing on the reservation, while the Suquamish Indian reservation consists of only fifty tribal members and over 2,000 non-Indians. The range of possible or advisable solutions for issues such as economic development or tribal judicial systems confronting these two tribes will vary considerably.[138] To elevate coherence and consistency to primary goals of rational policy makes little sense in this setting. In fact, a good argument could be made for increased sensitivity to contextualism in Indian legislation. To put the Policy Center in charge of forming a consistent vision by shaping consensus on issues further disadvantages tribes whose ideas may differ. The creation of norms will only marginalize the tribes that fail to measure up to them.

A more serious flaw of the planners is their belief that a

137. POLICY CENTER REPORT, *supra* note 45, at 29.

138. *See* Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLINE L. REV. 543 (1985) (analyzing the effect of the Supreme Court's vision of the "typical" Indian reservation on the development of Indian law norms).

Policy Center can construct grand theory in Indian law, in particular, one embedded with a pro-Indian tilt. In this respect, they have adopted the view of many traditional Indian law scholars that it is possible to create a unified field theory of Indian law.[139] For example, the drafters of the Report state four fundamental policies for which they claim bedrock status—the trust responsibility, self-government, economic self-sufficiency and social well-being and preservation of unique cultural heritages.[140] But by naming four policies, the drafters necessarily subordinate all others. The policies stated are sufficiently abstract that many tribes would probably agree with them. Nevertheless, some have argued that the very premises of Indian policy are Eurocentric at best and racist at worst and must be reexamined.[141] In fact, the drafters reveal a complete lack of awareness of a great deal of scholarship in law generally, in particular the scholarship of critical race theorists and critical legal studies scholars which challenges the fallacy of attempts to construct grand theories.[142] The drafters also flatly state that the little scholarship that has been done in Indian law "demonstrates a narrowness of vision and scope inherent to the process of one-time studies or single purpose research."[143] To the contrary, there has been a significant increase in theoretical studies of Indian law and policy representing many different voices and political theories.[144]

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139. *See, e.g.*, CHARLES WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1987); Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989) (articulating a theory based on John Locke's notion of consent of the governed).

140. POLICY CENTER REPORT, *supra* note 45, at 17.

141. See ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990) (arguing for rejection of the legal discourse based on racist justifications for subjugating Indians and its replacement with principles developing in international law recognizing indigenous peoples community rights).

142. *See, e.g.*, MARK V. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988) (criticizing grand theory in constitutional law analysis); Glenn Harlan Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110, 111 (1991) (applying chaos theory developed by mathematicians and scientists to legal analysis); William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945 (1986).

143. POLICY CENTER REPORT, *supra* note 45, at 19. *See also id.* at 25 (claiming there is "an absence of a body of published research on relevant topics").

144. *See, e.g.*, S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 HARV. INDIAN L. SYMPOSIUM

Moreover, even if the Center were able to produce a series of excellent suggestions to change Indian policy that would find favor with most tribes, the drafters of the Report assume that the legislative and policy process is rational in that better information will inevitably produce better policy. The Report reflects a naive view of the potential of "good" legal doctrines to influence the development of the law, by assuming that all Congress is waiting for is an independent, objective statement of what Indian law requires in order to enact favorable legislation. Yet much of American political theory, going back to Madison's *Federalist* No. 10, is based on a model of interest group bargaining. Assuming that federal policy is information driven, centralization of policy influence in one institution is efficient. Under this model, providing "correct" information will magically transform Congress into a body willing to put Indian tribal interests ahead of the interests of more powerful constituents. On the other hand, if one assumes that federal policy is interest group driven, centralization in one unit is dangerous: it diminishes the number of interest groups that can play roles in the policy setting process, thereby diminishing instead of increasing the voices of Indian tribes.

The drafters' belief that articulation of better rules will dictate better policy is best illustrated by their optimistic statements regarding existing Indian policy which were signifi-

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191 (1990); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1; Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739 (1990); P.S. Deloria & Robert T. Laurence, *What's an Indian?: A Conversation About Law School Admissions, Indian Tribal Sovereignty and Affirmative Action*, 44 ARK. L. REV. 1107 (1991); Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203 (1989); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990); Frank Pommersheim, *Liberation, Dreams and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411; Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991); Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85 (1991); Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713 (1986); Robert A. Williams, Jr., *The Algebra of Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

cantly changed by the Senate Select Committee in the bill. For example, the Report states the trust responsibility is fundamental, but also attempts to set standards, stating that the United States "shall implement according to the highest fiduciary standards its duty to protect [Indian resources.]"[145] This statement attempts to impose standards on the government that may not be imposed by existing laws. Unless the drafters were cynically pandering to the tribes who might read the Report, the drafters seem to have a somewhat rosy-colored glasses view of the realities of Indian law. In fact, the introduced bill included the four policies, thus giving a congressional imprimatur to a potential canon for Indian law.[146] Significantly, however, the bill substantially changed the four policies. For example, the bill acknowledges the trust responsibility, but omits the reference to the standard to be applied in judging whether the federal government has violated its fiduciary responsibility. This omission is very important, because the trust is meaningless if the government has only a duty to act reasonably, for example.[147] Consequently, the bill's statement is so vague as to have very little meaning.[148] Similarly, the bill's version of the other fundamental principles has weakened them considerably, omitting any statements that could be taken to be normative rather than descriptive.[149] Language stating that tribal sovereignty must

145. POLICY CENTER REPORT, *supra* note 45, at 17.

146. S. 3155, § 2(a)(1)(A)-(D). *Compare* POLICY CENTER REPORT, *supra* note 45, at 17 *with* S. 3155, § 2(a)(1)(A). The highlighted text was omitted from the bill's version, while the bracketed text was added:

> The United States has assumed a trust responsibility *and shall implement according to the highest fiduciary standards its duty* to protect, maintain[,] and manage Indian lands and related natural resources, including water, fisheries, game and game habitat, as *necessary* [and] to preserve permanent homelands for Native people within this nation.

Id.

The bill also added a fifth principle, reaffirming congressional endorsement of the principles of tribal self-determination in general and in particular that tribes be encouraged to take over programs administered by the federal government. *Id.* at § 2(a)(1)(E).

147. *See* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 789-817 (1992) (analyzing the importance of a statutory standard to breach of trust claims in the Claims Court).

148. S. 3155, § 2(a)(1)(A).

149. *Compare* POLICY CENTER REPORT, *supra* note 45, at 17 *with* S. 3155,

be "strengthened and enhanced" has been omitted;[150] language stating that tribal economic self-sufficiency and Indian cultures and religions "shall be supported," has also been omitted. In short, the proposed bill states nothing but the present state of federal law: that these principles have been recognized. The bill states no obligation to continue to recognize these principles, however.

My purpose in pointing out these important differences is not to accuse Congress of misstating the law. In fact, the statement of federal policy in the proposed bill is more accurate, in my opinion, than the aspirations-stated-as fact of the Policy Center's Report. Moreover, the drafters of the Report appear to believe they can have it both ways on objectivity. They maintain throughout that the major purpose of a Policy Center is to provide independent and objective scholarship to Congress unlike the biased information Congress now receives from advocacy organizations. Advocacy organizations necessarily focus their efforts on single issues instead of setting broad national policy. The Report intimates that while advocacy groups might provide information that tribes would find helpful, their very status as advocacy groups serves to undermine the objectivity reliability of the information they provide to Congress and the Executive branch.[151] Yet the Report's

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§ 2(a)(1)(C), (D). The highlighted text was omitted from the bill's version while the bracketed text was added:

> The [goals of] economic self-sufficiency and [improvement of the] social well-being of tribal and *native* communities *shall be supported*[,] with the objective of achieving parity with the general *U.S.* [United States] population as evidenced by national averages for *health and* health care, per capita income and rates of employment and educational achievement [, are recognized as the basis for numerous Federal statutes and administrative policies].
>
> The unique cultural heritage of [tribal people in the United States,] *tribes* including maintenance of native language proficiency, the practice of traditional ceremonies, and religious and artistic expression *shall be considered* [, is recognized in numerous Acts of Congress as] an irreplaceable national treasure to be supported and protected.

150. *Compare* POLICY CENTER REPORT, *supra* note 45, at 17 *with* S. 3155, § 2(a)(1)(B). The highlighted text was omitted from the bill's version, while the bracketed text was added:

> Tribal rights of self-government are (a) recognized under the *U.S. constitution* [United States Constitution] and numerous treaties, inter-governmental agreements, statutes and executive orders, *(b)* [and] have been consistently upheld by the highest courts of the United States, *and (c) shall be strengthened and enhanced.*

151. POLICY CENTER REPORT, *supra* note 45, at 40-41.

statement of the four fundamental principles of Indian law shades them as much as possible to favor Indian interests, as one would expect an advocacy group to do. The Report also criticizes existing advocacy groups as too biased to have any real impact. On the other hand, the Policy Center's description of the objective reports it commissioned during the feasibility study period indicates that the writers with whom the Center contracted were advocates involved in these very same organizations.[152] My point is not to criticize the work of these authors, but only to point out the false ring of the Policy Center's claim that it will be independent and objective. The Report itself is an advocacy document; one suspects the products of the Center will be similar. The Policy Center will not be objective because it has too many different constituencies to please.

Many would argue that the search for objectivity is useless, although I believe that the value of objectivity is an important one that can constrain an observer's tendency to inject herself into the data studied. The problem of selling an institution on this basis, however, is that someone may hold the seller to her promise. More important is that if Congress ultimately controls the proposed Institute, as it will, Congress can easily ensure that the Institute's Director toes the line on policy, or appoint someone new. For example, during the bill's passage through the Senate, the bill was amended to direct the Institute to "ensure that such research shall consider all factors affecting Indian policy including the impact of such policy upon other Americans."[153] This kind of influence over policymakers in any administration is a given; most of those involved in policy work recognize, for example, the even Insti-

152. *See* POLICY CENTER REPORT, *supra* note 45, at 54 (noting the Center contracted for two studies with attorneys at the Native American Rights Fund, while indicating that "[a]lthough NARF is known to be an advocate of Indian legal rights, the writer succeeded in approaching the subject with an objective and balanced perspective"). Other projects included papers by a Washington attorney with a law firm representing Indian tribes; a firm specializing in Indian economic studies, the Red Willow Institute; and a paper prepared for the Navajo Nation by an economist who formerly worked for the Senate Budget Committee. *Id.* at 49, 51.

153. *See* S. 3155, § 5(a) (describing the Institute's research and analysis functions). In addition, the Findings were amended to include a similar statement: "Federal Indian policy impacts the lives and property of all American citizens, Indian and non-Indian, living on or near reservations throughout Indian country." *Id.* § 2(a)(4).

tutes set up by Congress and given a fair amount of objectivity are not truly independent. For example, the Center models itself after the National Institutes of Health, which it lauds as the paradigm independent agency. The extent to which NIH is responsive to politics has been well-documented, however.[154]

When tribes expressed concerns that the Center would become an advocacy organization promoting itself as the voice of Indian tribes, the Senate Select Committee responded by including a statement in the bill to allay tribal fears: "[t]he institute shall not engage in the advocacy of public policy alternatives, represent itself as the voice of tribal governments, or take other actions that might be construed as interfering with or diminishing the government-to-government relationship between tribal governments and the United States."[155] As with the legislative denial inserted in the Senate's Tribal Courts bill, this language will be meaningless if the structure of the organization permits it to do the opposite, however. In short, under the guise of helping the tribes to influence the federal government into adopting more enlightened policies, the Institute could become an agent of the Federal Government attempting to influence tribes to accept the policies adopted in their best interests. When one considers the poli-

154. *See, e.g.*, Dan Weikel, *Dannemeyer Raps Bush on AIDS Stance*, LOS ANGELES TIMES, A23, col. 1, Feb. 15, 1992 (noting HHS Secretary "canceled a planned $18-million National Institutes of Health study of teen-age sexual practices after [Rep.] Dannemeyer and [Sen.] Helms announced their intention to fight the survey in Congress."); Frank Spencer-Molloy, *Politics, Apathy Hamper Medical Research, Scientists Say*, HARTFORD COURANT, D1, Feb. 26, 1992 (discussing pressures taking NIH away from pure research); Eric Pianin, *Sen. Byrd's 'Pork Barrel' Revenge?; Hill Bill Chops More Than 30 Executive-Branch Research Projects*, WASH. POST, May 22, 1922, A23 (relating congressional attempts to cut "more than 32 executive-branch research projects financed by the National Science Foundation and the National Institutes of Health); Betsy Pisik, *RX for Women at NIH*, WASH. TIMES, June 19, 1992, E1 (relating Dr. Bernadine Healy's criticism of lack of funding for women's health concerns by past administrations of NIH); Sandra G. Boodman, *Healy's Switch on the Issue*, WASH. POST, June 30, 1992, Z13 (intimating NIH director selected after passing administration litmus test on abortion and fetal tissue research); Editorial, *Fake Facts Cited in Fetal-Tissue Debate*, ATLANTA CONST., July 31, 1992, A10 (criticizing administration's right-wing ideology distorts research agenda in AIDS policy, fetal tissue research, and abortion); Jon Van, *Science's New Order: Focus on Results Favored over Basic Research*, CHICAGO TRIBUNE, Oct. 4, 1992, C1 (relating that National Science Foundation and NIH have focused more on result-oriented than pure research).

155. S. 3155, § 10(a).

cies the Federal Government has attempted to sell to tribes as representing their own best interests, such as assimilation and termination, this prospect is alarming. Even if this fear does not become reality, however, the Institute will surely become yet another power center in Washington that is not responsive to Indian tribes.

III. LET A THOUSAND POLICY-FLOWERS BLOOM

As legal theory increasingly rejects formalism, so should those striving to set Indian policy. Instead of propounding innovations from Washington, the Congress should facilitate tribes' innovative capabilities. Instead, the Policy Center operates on the same assumptions that fuel the various intertribal commissions: Indian tribes cannot be trusted to do the right thing on their own; they need to be told what must be done and then the government must provide them with the necessary mechanisms. Moreover, by providing the illusion of tribal participation, through its function of calling tribal leaders together in forums to create consensus, the Center may find itself responding to Congress's demand to deliver an Indian consensus when none actually exists. Instead, the government should begin listening to tribes and giving them the funds necessary to enable them to develop their own policies either on their own or by contracting with the private sector. More innovation would result from dividing up the $3 million allotted to date for the Policy Center among the tribes to fund grants designed to fund real intertribal organizations (those formed by tribes directly), state-tribal commissions, cooperative programs with local universities and colleges, and government improvement projects. Tribal councils will be strengthened by giving them more responsibility, not by taking areas of responsibility away from them by assuming that, left to their own devices, they will not adequately fund their court systems. If the federal courts have to go to the federal legislature for money, the tribal courts should have to justify their funding to the tribal councils. If the BIA Judicial Services Branch is not allocating the money fairly on a competitive grant basis, then the Congress should exercise its oversight role.

Indian law and policy would benefit from increased fund-

ing for organizations struggling to help Indian tribes develop policy. A code developed for one tribe may become a model code for similar tribes; innovative judicial training programs developed in one center may be tested, rejected, modified, and improved by others. If the Congress made more money available for policy studies, then organizations like these could be expected to compete for it and new organizations may be formed to build on existing strengths of institutions located in Indian country. More important, power must be returned to the tribal level, where it belongs. Tribes must be able to engage in extensive discussions at the tribal level about problems encountered in contemporary tribal governments. With regard to tribal courts, for example, tribes must address internal as well as external pressures on their justice systems and the special issues of defining and protecting basic civil rights of all people subject to or affected by tribal governments. Regional organizations could facilitate state-wide meetings which would involve elected tribal officials and tribal judges and would address issues of governance developed after intensive discussions with tribal officials. Initiatives discussed at regional meetings could be framed to fit individual reservations, again with input from that particular reservation.

Even the investigative and database functions of the proposed Center are problematic. Those who gather and synthesize information have the power to declare what information is truly relevant and to marginalize that information not thought sufficiently significant to be collected. If a Bureau of Indian Statistics would help Congress and the tribes set better policy, Congress should create one, and preferably house it at an institution in Indian country, like the Southwest Indian Polytechnic Institute or Haskell Indian Junior College, the Crownpoint Institute of Technology, or any of the tribally controlled community colleges that could use the money to train bright young Indian technocrats. The statistics institute could make an annual report to Congress and disseminate its findings to all Indian tribes. Congress could encourage research institutions to create databases that are cheaper than the existing legal research databases, by using CD ROM technology, in which the user accesses information on a disk. A year's worth of tribal court opinions and legislative records

could be placed on one easily usable disk, for example. Or Congress could contract with LEXIS or WESTLAW to create a database for tribes that would be accessible at much lower rates.

If all Congress wants is better research capability for the federal government's own internal use, it should add salary lines to the Congressional Research Service for this purpose or create more policy analyst positions in the Interior Department.

The Policy Center proponents set forth an initially seductive agenda—a cohesive, pro-Indian policy that will give voice in the halls of Congress to a scattered, largely disenfranchised minority. They fail, however, to acknowledge that congressional funding of this agenda obviously will influence this National Policy Center's ability to function independently. While the planners view the Policy Center as ammunition for those congressional leaders who wish to hold the government accountable for its trust responsibility toward Indian property, support Indian tribal self-government and promote Indian economic development, they ignore the potential for this Center to become a policy factory to limit tribal sovereignty in the guise of a helping hand from the powerful majority. As messy and difficult as it is, Congress must deal with individual tribes, for it is with the tribes, and not a mythical large tribe called "Indian country" with which Congress has a political relationship. To deal with so many tribes might be difficult, messy, or even chaotic; but if "scientists themselves have managed to come to terms with uncertainty, and even . . . put it to work,"[156] perhaps it is time to embrace ideas that do not fit into the preconceptions that have hindered the development of Indian policy.

156. Glenn Harlan Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110, 111 (1991) (citing J. GLEICK, CHAOS: MAKING A NEW SCIENCE 250-51 (1987).