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The Consent of the Governed - A New Concept in Indian Affairs

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THE CONSENT OF THE GOVERNED— A NEW CONCEPT IN INDIAN AFFAIRS?

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The Indian tribe is a unique component in our federal system of government. Unlike all our other governmental institutions, the tribe is not a creature of the Constitution of the United States, nor of the federal government created by the Constitution, nor of the states which created the Constitution.

The existence of the Indian tribe is, however, explicitly recognized in the Constitution, and the tribes' governmental rights and responsibilities have been confirmed and protected by many federal laws and treaties.[1]

Under the Constitution, relations with the Indian tribes are the exclusive responsibility of the federal government. Although the territory of an Indian tribe may lie wiin the boundaries of a state, the state may not legislate with rspect to its affairs or otherwise interfere with the right of its members to govern themselves within its reservation in accordance with their own laws and customs, except with the express sanction of the Congress of the United States.[2]

While Congress has legislated with respect to a number of

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1. U.S. CONST. art. IV, § 8 provides in pertinent part: "The Congress shall have the power . . . To regulate Commerce . . . with the Indian tribes. . . ." For a summary of the development of the legal status of the Indian tribe as a governmental unit, *see* Williams v. Lee, 358 U.S. 217 (1959).

2. Kennerly v. District Court, 400 U.S. 423 (1971); Seymour v. Superintendent, 368 U.S. 351 (1962); Williams v. Lee, 358 U.S. 217 (1959); State of Ariz. *ex rel.* Merrill v. Turtle, 413 F.2d 633 (9th Cir. 19693, *cert. denied,* 396 U.S. 1003 (1970); Annis v. Dewey County Bank, 335 F.Supp. 133 (D.S.D. 1971); Omaha Tribe of Neb. v. Village of Walthill, 334 F.Supp. 823 (D.Neb. 1971); Whyte v. District of Montezuma County, 140 Colo. 334, 346 P.2d 1012 (1959); Boyer v. Shoshone-Bannock Indian Tribes, 92 Ida. 257, 441 P.2d 167 (1968); Commissioner of Taxation v. Brun, 286 Minn. 43, 174 N.W.2d 120 (1970); Sigana v. Bailey, 282 Minn. 367, 164 N.W.2d 886 (1969); Kain v. Wilson, 83 S.D. 482, 161 N.W.2d 704 (1968); Pourier v. Board of County Com'rs. of Shannon Co., 83 S.D. 235, 157 N.W.2d 532 (1968); Smith v. Temple, 82 S.D. 650, 152 N.W.2d 547 (1967); Makah Indian Tribe v. Clallam County, 73 Wash.2d 677, 440 P.2d 442 (1968).

specific matters affecting reservation Indians,[3] has granted authority for states to govern certain reservations,[4] has extended state authority over all reservation Indians in certain matters,[5] and has established a number of specific limits on tribal action,[6] it has otherwise left the government of Indian country to the tribes themselves.[7]

This is the theoretical legal framework of Indian reservation government which has developed over the years. However, it becomes apparent after a few years as a tribal attorney that federal practice in the Indian country has not always conformed to this theoretical framework. For many years the financial condition and political helplessness of Indian tribes left the government of reservation Indians largely in the hands of the federal government acting through the Bureau of Indian Affairs.

Education, maintenance of law and order, health programs, social services, road construction and most of the other functions usually performed by local government were performed in the Indian country, not by the recognized tribal governing bodies, but by the Bureau. As will be seen later in this article, a radical change in the relationship between the Bureau and the tribes is now taking place through direct federal funding (by agencies other than the Bureau of Indian Affairs) of tribes to perform governmental functions.[8] But this development has begun only in the last decade.

It is against this background of a century of federal control over local government in the Indian country that President Nixon's declaration of a new Indian policy in 1970 should be viewed. The President, of course, reaffirmed the rejection of tribal termination in language reminiscent of the Kennedy and Johnson administrations. But he also proposed a new departure in the federal-tribal relationship.

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3. *See e.g.*, 18 U.S.C. § 1153 (1970), which defines certain acts as criminal offenses when committed by Indians in Indian country, and 18 U.S.C. § 1154 (1970), which regulates the introduction of alcohol into the Indian country.

4. *See* 18 U.S.C. § 1162 (1970) and 25 U.S.C. § 1322 (1970).

5. *See* 25 U.S.C. §§ 231, 311, 349, 483a (1970).

6. *See* 25 U.S.C. § 1302 (1970).

7. United States v. Quiver, 241 U.S. 602 (1916); *Ex Parte* Crow Dog, 109 U.S. 556 (1883); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956); Spotted Eagle v. Blackfeet Tribe, 301 F.Supp. 85 (D. Mont. 1969); Glover v. United States, 219 F.Supp. 19 (D.Mont. 1963); Oglala Sioux Tribe v. Barta, 146 F.Supp. 917 (W.D.S.D. 1956); Boyer v. Shoshone-Bannock Indian Tribes, 92 Ida. 257, 441 P.2d 167 (1968). A minority view has now emerged that a state may tax a tribal Indian on income earned on a reservation, although it may not punish him for a crime committed there nor reach him there through the civil process of its courts. McClanahan v. State Tax Commission, 14 Ariz.App. 452, 484 P.2d 221 (1971), *appeal docketed*, No. 834, 40 U.S.L.W. 3322 (U.S. December 23, 1971). *See also* Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (1969), in which the parties stipulated that a state tax on a tribal Indian's income earned on his reservation did not interfere with reservation self-government.

8. For a summary of Indian policy through 1968, *see* Kelly, *Indian Adjustment and the History of Indian Affairs*, 10 ARIZ. L. REV. 559 (1968). For a review of the development of tribal links with federal agencies other than the Bureau of Indian affairs between 1961 and 1970, *see* Schifter, *Trends in Federal Indian Administration*, 15 SO. DAK. L. REV. 1 (1969).

S. 1573—THE TRIBAL TAKE-OVER BILL

"Even as we reject the goal of forced termination," the President declared in his July 8, 1970 message to the Congress on Indian affairs, "so we must reject the suffocating pattern of paternalism."[9]

The President went on to propose a legislative package designed to expedite transfer of the administration of federal programs for the benefit of Indian people to Indian tribal governments. The key feature of the President's plan, which is still being studied in the House and Senate Committees on Interior and Insular Affairs, is Section 2 (a) of S. 1573, H.R. 8796, which provides in pertinent part:

> [I]f an Indian tribe or community, after consultation with the Secretary [of the Interior or of Health, Education and Welfare, as the case may be], requests that it be given the control of operation of a program or service administered by the Secretary, the Secretary shall within one hundred and twenty days from such request, or such later date as may be agreed to by the Secretary and the organization, transfer control or operation to the Indian tribal organizations.[10]

How would this provision work? In the case of an Indian tribe on a federal reservation which elects to take over the operation of the Bureau of Indian Affairs Agency on its reservation, the tribe would simply serve notice of its intention to the Secretary. On the face of the bill the Secretary of the Interior would have no discretion to determine whether the tribe has the necessary capabilities to administer the agency program. The Secretary would, on the contrary, be required by law to transfer administration of the agency to the tribe within 120 days of the tribe's request.

Even if he were convinced of the tribe's complete incapacity to carry out the program, his only recourse would be to transfer control of the agency to the tribe in accordance with the terms of the bill and subsequently terminate tribal control for mismanagement after the tribe demonstrated incapacity. Some tribes generally sympathetic to greater Indian tribal participation in the operation of federal programs for the benefit of Indians in the Indian country may hesitate at the radical character of the Nixon plan.

Essentially, S. 1573 opens up the possibility that tribal governments can carve up the existing federal programs for the benefit

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9. 28 CONG. Q. 1821 (1970).

10. S. 1537 (H.R. 8796), 92 Cong. 1st Sess. § 2 (a) (1971) [hereinafter cited as S. 1537]. This bill was orginally introduced as S. 4164 and H.R. 18728 in the 91st Congress.

of reservation Indians. These programs are now administered by the Department of the Interior's Bureau of Indian Affairs and the Indian Health Service of the Department of Health, Education and Welfare in the absence of any determination by the officials ultimately responsible to the Congress for the administration of these programs that tribal administration is either desirable or feasible (from the standpoint of individual Indian recipients of federal services).

The Nixon Administration has fully committed itself to the implications of S. 1573. In his July, 1970 message the President laid down the new philosophy of "tribal take-over":

> There is no reason why Indian communities should be deprived of the privilege of self-determination merely because they receive monetary support from the Federal government. Nor should they lose Federal money because they reject Federal control.
>
> For years we have talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises . . . when a decision is made as to whether a Federal program will be turned over to Indian administration, it is the Federal authorities and not the Indian people who finally make that decision.
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> This situation should be reversed. In my judgment, it should be up to the Indian tribe to determine whether it is willing and able to assume administrative responsibility for a service or program which is presently administered by a Federal agency. To this end, I am proposing legislation which would empower a tribe or a group of tribes or any other Indian community to take over the control or operation of Federally-funded and administered programs in the Department of the Interior and the Department of Health, Education and Welfare whenever the tribal council or comparable governing group voted to do so.[11]

Although the Administration's proposal of granting to Indian tribes the right to require that federal programs be turned over for tribal administration has received a cold reception from the Congress and no noticeable support among reservation Indians,[12] the Administration has not backed away from its approach. In testimony supporting S. 1573 before the Senate's Subcommittee on Indian Affairs on May 8, 1972, Assistant Secretary of the Interior Harrison Loesch contrasted S. 1573 with the contract approach to tribal operation of federal programs contained in another bill, S. 3157:

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11. 28 CONG. Q. 1821 (1970).

12. None of the Indian tribes for which I have served as legal counsel since July 1970, including tribes in the states of South Dakota, Idaho, Alaska, New Mexico, Florida and New York, have expressed any interest in the enactment of S. 1573.

> S. 3157 makes Indians nothing more than parties to a contract which they negotiate between themselves and the Secretary of the Interior or the Secretary of Health, Education and Welfare. In the last analysis it would be the appropriate Secretary, not Indians, who would determine the extent of Indian involvement in the program or service . . . we believe that S. 1573 would be of greater benefit to Indians and recommend that it be enacted in lieu of S. 3157.[13]

Whether or not all Indian tribes in the United States have reached a stage in their development which justifies the transfer to them upon their request of all federal programs and services for their benefit is a question which is beyond the scope of this article. Surely so radical a change in the concept of the trust relationship between the federal government and the Indian tribes, which have frequently been described as its "wards,"[14] deserves careful study prior to any Congressional action. Indian tribes, of course, vary widely in population, territory, budget, complexity of tribal administration, and degree of experience in dealing with governmental agencies and the private non-Indian community.[15]

Even if the Bureau of Indian Affairs and the Indian Health Service have not fully performed the obligations toward Indian communities which Congress has conferred upon them, it may be suggested that improvement in the quality of federal services for Indian people may not inevitably result in every case from tribal administration of their programs.

The Administration responds, of course, that it should be up to the tribe, not the federal government, to determine whether a tribe is ready.

There may be a certain emotional appeal for Indian people in this argument, as well as for non-Indians who have followed the vagaries of federal attempts to govern the Indian country. If solid, widely-based reservation Indian support for S. 1573 has developed since July 1970, and surely it has had time to develop, the call for "tribal take-over" would have even greater appeal. But in the

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13. Statement submitted by Harrison Loesch, Assistant Secretary of the Interior at Hearings on S. 3157 before the Subcomm. on Indian Affairs of the Senate Comm. on the Interior 92d Cong., 2d Sess. (1972). [hereinafter cited as S. 3157].

14. The Supreme Court of the United States has explained the idea of an Indian tribe as a "ward" of the United States as follows: "From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." United States v. Kagama, 118 U.S. 375, 384 (1886).

15. For example, the Navajo Tribe with a population of more than 120,000 governs nearly 14,000,000 acres. Florida's Miccosukee Tribe, with an enrolled population of 230 lives in an area in the Everglades National Park five and one half miles by 500 feet to which it holds a fifty year permit. The Kootenai Tribe, with an enrollment of sixty seven, inhabits a 2,600 acre reservation. U.S. DEPARTMENT OF COMMERCE, FEDERAL AND STATE INDIAN RESERVATIONS - AN EDA HANDBOOK 33, 129, 135 (1971).

absence of any such expression of Indian opinion, the Congress would be well advised to explore other avenues by which Indian tribes may be provided with the financial and technical resources to develop their viability as tribal governments, while the ultimate federal responsibility for the services provided by the federal government for reservation Indians is maintained.

The concept of the "consent of the governed," which has been proclaimed from the earliest days of our Republic as the foundation of our political system, defines a spirit in which government operates, not a device or mechanism. In the context of the Indian country, it may well require that the Congress refrain from granting to Indian tribal governments the right to require the transfer of federal programs to tribal control in the absence of widespread and vocal Indian support for the proposal.

Central to the common sense notions which underlie the theory of government by consent is the idea that people at the grass-roots level often know better the actual effects of governmental activities in their own lives than the politicians or the technicians who may have more statistical information and "expertise." In the absence of widespread, vocal Indian support for S. 1573 among Indians themselves, the Congress should give careful thought to the possibility that the reservation Indian is expressing his view by his silence.

S. 3157 — "THE INDIAN SELF-DETERMINATION ACT OF 1972"

On February 9, 1972 Senator Henry M. Jackson (D.-Wash.) and Senator Gordon Allott (R.-Colo.) introduced in the United States Senate a bill, S. 3157, which begins with the declaration that ". . . inasmuch as all government derives its just powers from the consent of the governed, maximum Indian participation in the government of Indian people shall be a national goal."[16]

The bill goes on to provide for certain changes in the present laws applicable to contracts between the federal government and the Indian tribes.

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16. S. 3157, 92d Cong., 2d Sess. § 1 (a) (1) (1972).
Hearings were held on H.R. 2377, the House companion of S. 1573, by the Subcommittee on Indian Affairs, House Interior and Insular Affairs Committee on June 26 and 27, 1972. The National Congress of American Indians reported:

> Many of the tribes do not feel enough thought has been given to the legislation and not enough consideration has been given to the hidden and long-range ramifications of the proposal. Unfortunately, the Federal Government has a tendency to swing from extreme to extreme in its Indian policies—from paternalism to complete self-government or control without going through the experience of a gradual move from one to the other.

Statement of Leon Cook, President, National Congress of American Indians. The National Tribal Chairmen's Association witness declined to support the bill and 'warmly endorsed' S. 3157, stating that his support for the latter bill 'was based on the general support we found for the bill in the Indian community.' Statement of William Youpe, representing the National Tribal Chairmen's Association.

To non-Indians it may seem incongruous that an affirmation about the "consent of the governed" and Indian participation in the government of Indian people as a "national goal" should be followed by a series of rather technical amendments to existing law.

The bill could prove to be, however, a significant legislative supplement to the Wheeler-Howard Act[17] which has provided (since 1934) a mechanism by which tribal Indians can modernize the structure of their reservation governments. For many tribes whose traditional tribal governments had been literally stamped out, or whose traditional forms of government had proved unable to cope with reservation conditions, the Wheeler-Howard Act provided a second chance to develop governmental institutions representative of tribal aspirations.

Since most Indian tribes lacked the financial resources to provide the essential public services expected of a local government, it was contemplated that federal financial assistance would be forthcoming to tribes seeking to modernize their governmental operations.

For a variety of reasons, however, Indian tribes did not receive any substantial federal financial assistance in the period from 1934 to 1965.[18] Then, as a consequence of tribal eligibility for the various programs established by the Johnson Administration in the "War on Poverty," Indian tribes began for the first time to receive a substantial amount of federal money which could be used to employ personnel in social service programs, to engage in public works programs, and to carry on other similar activities which have long been the stock-in-trade of non-Indian local governments.[19]

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17. Act of June 18, 1934, ch. 576, § 16, 48 Stat. 987, 25 U.S.C. § 476, which provides in pertinent part:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe.

18. [Commissioner of Indian Affairs John] Collier's resources development and Indian rehabilitation plans [1934], as it turned out, could not be launched on the scale expected because of the limitation of funds which resulted from the depression and the shortage of funds and manpower during World War II . . . . [T]he post-war interest in Indians took an unexpected turn toward the termination and transfer of federal responsibilities. Kelly, *supra* note 8, at 569.

19. The basic difference between the Bureau of Indian Affairs, and the Public Health Service, on the one hand, and the Federal agencies which entered the Indian country in the Sixties on the other hand, lies in the manner in which the Federal service is rendered. BIA and PHS follow the traditional pattern of employing officials who are placed on the reservations to furnish service directly to Indians. The other Federal agencies, by contrast, rely in their dealings with states and local communities throughout the country on the grant-in-aid approach. On Indian reservations they recognize the Indian tribes as the appropriate units of local government. Thus, more than a quarter century after enactment of the Wheeler-Howard Act did the concepts of the framers of that law come to full fruition. Indian tribal governments

The federal financing of the late sixties gave Indian tribal officials new experience in dealing with governmental problems and, for the first time, they began to see the all-pervasive Bureau of Indian Affairs as only one small thread in the complex fabric of the American governmental system. For once tribes began to inaugurate and carry to successful conclusion reservation projects with little or no Bureau of Indian Affairs involvement.

The reaction of at least some of the BIA officialdom to this development was represented by the statement to tribal representatives of a Bureau of Indian Affairs Area Director upon the completion of a fifty-unit tribally sponsored lower income housing project, which had been financed through Federal Housing Administration mortgage insurance pursuant to the provisions of Section 236 of the National Housing Act:[20]

> I never thought you fellows could put it together.[21]

While federal financing increased the viability of tribal government, a series of court cases threatened their jurisdictional status, especially in the area of taxation, but with broad implications for the central question of whether the Indian tribe or the state and its subdivisions are the fundamental units of local government in the Indian country.[22]

It is against this background of growing tribal viability balanced against insecurity arising from unsettled jurisdictional questions

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were no longer puppets whose strings were pulled by agency superintendents. They were now viable entities of government, delivering public services of major importance to the reservation population. Schifter, *supra* note 8, at 12-13.

20. Act of August 1, 1968, Pub. L. No. 90-448, 12 U.S.C. § 1715 z-1.

21. Statement of BIA Area Director.

22. *See* note 7 *supra*. In its decision in the McClanahan case the Arizona Supreme Court construed Williams v. Lee, 358 U.S. 217 (1959), to mean that a state may legislate with reference to the affairs of reservation Indians so long as it does not infringe on the right of an Indian tribe to be self-governing. It then reviewed a series of cases which involve governmental immunity from taxation where the right to tax employees or contractors with governmental bodies was upheld. The court then held that the imposition by the state of a tax "upon income earned by a reservation Indian from sources within the reservation is not an infringement of the right of self-government of the tribe of which the taxpayer is a member." McClanahan v. State Tax Commission, 14 Ariz. App. 452, 484 P.2d 221, 226 (1971). It seems that the Arizona court has misunderstood the rule on the limits of state power in Indian country by relying on one sentence extracted from Justice Black's formulation of the principle that:

> *[E]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be governed by them. . . . Congress has also* acted consistently upon the assumption that the States have no power to regulate the affairs of Indian on a reservation . . . . Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. State of Georgia* denied.

Williams v. Lee, 358 U.S. 217, 220-221.

This opinion does not speak of a *tribe's right to govern itself but of the right of reservation Indians to govern themselves* in a context which makes plain that what is meant is self-government free of state interference unless Congress has sanctioned such interference.

that the Nixon "pitch" for "tribal take-over" and the more conservative Jackson-Allott contracting approach must be viewed.

What, exactly, would the Jackson-Allott bill do? The following are its basic provisions:

(1) The bill expressly authorizes the Secretary of the Interior and the Secretary of Health, Education and Welfare to negotiate (without advertising) contracts with Indian tribal organizations to plan, conduct and administer Bureau of Indian Affairs and Indian Health Service programs.[23]

(2) The bill authorizes grants to tribal organizations for planning, training, evaluation and other activities needed to make such "self-determination contracts."[24]

(3) The bill authorizes the detailing of federal employees to assist Indian tribes in developing and administering contract programs.[25]

(4) The bill contains certain express exceptions from customary federal contracting procedures: (a) payments in advance are expressly provided for so that the usual, complicated, time-consuming procedure for securing approval of advance payments need not be followed; (b) performance and payments bonds need not be obtained for construction contracts negotiated with tribal organizations; (c) express authority is granted for revising or amending such contracts or grants with the consent of the appropriate tribal organization; and (d) express authority is granted for permitting the use of federal buildings and other facilities or equipment by tribal organizations in the performance of such contracts.[26]

The key provision of the bill is, of course, the authorization to each Secretary ". . . in his discretion and upon the request of any Indian tribe to enter into a contract or contracts with any tribal organization of any such Indian tribe to carry out the programs for Indians for which they are respectively responsible."[27]

There is no provision in S. 3157, as Assistant Secretary Loesch pointed out to the Senate Indian Affairs Subcommittee, which requires the federal authorities to turn a program over to an Indian tribe upon demand. Each Secretary retains the discretion to negotiate the terms of the contract or refuse to enter into one. This is, therefore, a much more modest proposal for the participation of Indian tribes in the administration of federal programs for their benefit than the Administration proposal.

In his July 1970 message, President Nixon took note of the fact

23. S. 3157 §§ 3 and 4.
24. S. 3157 § 5.
25. S. 3157 § 6.
26. S. 3157 § 7.
27. S. 3157.

that the Bureau had already established a policy of contracting with tribes for the operation of Bureau programs. Indeed, he cited two instances in which tribes had:

> [R]ecently extended this principle of local control to virtually all of the programs which the Bureau of Indian Affairs has traditionally administered for them. Many Federal officials, including the Agency Superintendent, have been replaced by elected tribal officers or tribal employees.[28]

The President states:

> It is my hope and expectation that most such transfers of power would still take place consensually as a result of negotiations between the local community and the Federal government. But [under the new legislation proposed by the President] in those cases in which an impasse arises between the parties, the final determination should rest with the Indian community.[29]

What, then, is the need for S. 3157? If the Nixon concept of tribal take-over on demand is not adopted, why is any new legislation necessary since the federal government is already negotiating contracts with tribes under which they can operate federal programs for their benefit?

THE MICCOSUKEE "TAKE OVER"

The experience of Florida's small Miccosukee Tribe may clarify some of the reasons why legislation is needed.[30] In November 1970, the Miccosukee Tribe presented a detailed proposal to the Commissioner of Indian Affairs for a contract under which the Tribe would operate the program then being conducted by the Bureau's Miccosukee Indian Agency. On January 15, 1971 the Bureau replied in writing to the tribal proposal agreeing in principle and enclosing certain contract provisions which would have to be incorporated in the final agreement. On February 2, 1971 the Miccosukee Tribe submitted a proposed agreement to the Bureau which contained the contract provisions requested by the Bureau on January 15. After review by the Bureau additional provisions were added to the agreement, which was resubmitted on February 17, 1971.

The Bureau was then advised by the Office of the Associate Solicitor for Indian Affairs that the Johnson O'Malley Act, which was being relied upon as the statutory authority for the proposed

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28. 28 CONG. Q. 1822 (1970).
29. 28 CONG. Q. 1821 (1970).
30. The following review of the negotiation of the contract between the Bureau of Indian Affairs and the Miccosukee Tribe in 1971 is based on my experience in representing the Miccosukees in the negotiation and, except as otherwise indicated, on materials and correspondence in my files.

agreement, does not authorize the Bureau to conract with an Indian tribe. Since the Johnson O'Malley Act authorizes contracts with ". . . any appropriate state or private corporation, agency or institution for the education . . . and social welfare . . . of Indians . . ."[31] the Miccosukee Tribe had contemplated that it was eligible under that Act as an "agency" or "institution." The Bureau had, apparently, supposed that it did have the authority to contract with the Tribe since it committed itself to do so in its January 15th letter.[32]

The Departmental Solicitor, however, had previously issued an opinion that an Indian tribe can by virtue of its inherent sovereign powers create a private corporation.[33]

Legal counsel for the Association on American Indian Affairs then advised the Miccosukee Tribal Chairman, and the Tribal Chairman, in turn, advised the Business Council of the need for chartering such a private tribal corporation and the procedures for doing so. Since the creation of a separate corporation appeared to be the only course by which the contract could be moved forward, the Council promptly enacted an ordinance creating the Miccosukee Corporation as a private corporate entity distinct from the Tribe.

While the narrow construction given by Interior's lawyers to the existing laws authorizing Bureau contracts did not permanently stall the Miccosukee proposal, it did add measurably to the lawyer's time, frustration, and confusion incidental to the negotiation of the contract.

None of the work involved in the solution to this problem had any significance so far as the quality of the program to be conducted by and for the Miccosukees was concerned. Its value related solely to making the contract suitable for approval by the Associate Solicitor for Indian Affairs under existing law. The Associate Solicitor ruled on March 26, 1971 that the proposed contract was ". . . from the standpoint of compliance with the requirements of substantive law . . . acceptable."[34] S. 3157 by expressly authorizing such contracts with tribes would eliminate the need for otherwise unnecessary paper work.

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31. 25 U.S.C. § 452 (1970).

32. "The tribe's operation of the Miccosukee Agency, School and related activities will be funded on the basis of the amounts currently available for regular operations at Miccosukee. Specifically, the amounts which are made available to the tribe within this fiscal year will be the unobligated balances of the funds involved at the time the transfer is totally completed." Letter, from the Acting Commissioner of Indian Affairs to the Chairman, Miccosukee Tribe of Indians of Florida, January 15, 1971.

The Bureau had, however, been advised by the Associate Solicitor for Indian Affairs in 1969 of his opinion that the Johnson O'Malley Act does not authorize the Bureau to make contracts with Indian tribes. Memorandum from the Associate Solicitor for Indian Affairs to the Commissioner of Indian Affairs, March 14, 1969.

33. Opinion of the Solicitor, U.S. Department of the Interior, M-36781, August 25, 1969.

34. Memorandum to the Commissioner of Indian Affairs from the Associate Solicitor, Indian Affairs, March 26, 1971.

At the same time that the Miccosukee contract was sent for review to the Associate Solicitor, Indian Affairs, it was also sent to the Interior's Associate Solicitor, Procurement and Patents, who disapproved the contract on March 24, 1971 on the ground that it violated the Anti-Deficiency Act,[35] by obligating the United States to spend money in the absence of appropriations therefor.[36] The Associate Solicitor reached this view notwithstanding the fact that the renewal provision of the proposed contract expressly provided that payments in any subsequent fiscal year shall be subject to the availability of appropriations. However, on March 30, 1971, the Associate Solicitor, Procurement and Patents, withdrew his objection to the legal sufficiency of the contract.[37]

Meanwhile, the Miccosukee contract, in an unusual departure from previous Bureau procedures, was sent to the Interior Department's Assistant Secretary for Administration for an additional review. On April 1, 1971, the Assistant Secretary advised the Commissioner of Indian Affairs that ". . . we do not believe, as a matter of policy, that the Department and the Bureau are on secure ground that present authorities are adequate to execute contracts of this nature."[38]

This conclusion was reached on the ground that the President had proposed legislation to carry out his proposal for tribal self-determination, on which the Congress had so far failed to act, a conclusion which ignored the President's statement that ". . . it is my hope and expectation that most such transfers of power will still take place consensually as a result of negotiations between the local community and the Federal Government. . . ."[39]

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35. 31 U.S.C. § 665 (a) (1970) which provides in pertinent part:
No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any officer or employee involve the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.
The Interior Department's concern that the Bureau may not be authorized to agree to the annual review renewal of contracts with Indian tribes for the operation of schools and other BIA programs, subject to the availability of appropriations, arises from the interpretation of the Anti-Deficiency Act by the Comptroller General in a case involving a three year "requirements contract" made by the Air Force for its installations at Wake Island. The Air Force argued that the contract did not obligate future appropriations because funds were not actually obligated until the Air Force placed orders with the contractor. The Air Force lost. According to the Comptroller General's opinion, existing law prohibits ". . . contractual agreements [by the Government] under fiscal year appropriations which involve the Government beyond such period of availability not only in appropriation obligations, but any other obligation or liability which may arise thereunder and ultimately require the expenditure of funds." 42 COMP. GEN. 272, 277 (1962).

36. Memorandum to the Commissioner of Indian Affairs from the Acting Associate Solicitor, Procurement and Patents, March 24, 1971.

37. Memorandum to the Commissioner of Indian Affairs from the Acting Associate Solititor, Procurement and Patents, March 30, 1971.

38. Memorandum to the Commissioner of Indian Affairs from the Assistant Secretary for Administration, U.S. Department of the Interior, April 1, 1971.

39. 28 CONG. Q. 1821 (1970).

Thus, after three months of active negotiations with the Bureau, the Miccosukees were informed that their contract was off, at least until Congressional action expressly authorized it. As the Miccosukee Chairman observed to the Senate Subcommittee on Indian Affairs: "By this time, the Miccosukee people were beginning to think I had been wasting time and money in trying to negotiate a contract with the Bureau."[40]

Although the Miccosukees are a small tribe, their history reflects a tenacity of purpose which goes back to the days in 1799 when they interrupted the survey of the boundary between the United States and Spanish Florida through Miccosukee country. Not willing to take no for an answer, Chairman Tiger appealed to the Secretary of the Interior and to his Congressional delegation. Finally, after the Secretary of the Interior obtained specific approval for the contract from the Appropriations Subcommittees of the House and Senate, the contract was signed on May 14, 1971, and the Miccosukees began to administer their school with only two weeks of the school year to go.[41]

At each turn in its negotiation with the Bureau the Miccosukees were confronted with objections based on doubts which went straight to the heart of the Miccosukee contract proposal.[42] Each specific question alone could have been taken in stride but altogether they

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40. Statement submitted by Buffalo Tiger, Tribal Chairman, Miccosukee Tribe of Indians of Flordia, to the Senate Indian Affairs Subcommittee. Hearings on S. 3157, May 8, 1972.

41. A comment on the quality of the educational program which the Miccosukees have administered during the past year is in order:

> There are few Indian schools that have greater staff competence, or that work better as a team. . . . I would say that the children I observed would certainly be reading as well as or better than other children of the same age in any school in the country. Other elements of the curriculum which I observed were equally well presented and student performance was of a very high caliber. . . . Educational leadership and perception demonstrated by the school administrator were of the highest. Staff were aware of the latest trends and innovations in education. . . . In conclusion, let me say that I found the school learning atmosphere to be of the highest order. I have not been to all of the B.I.A. Indian schools, but I would say this school would certainly be one of the leading schools in the United States. It is a school I would be proud to have my own children attend.

Letter from Paul C. Fawson, Acting Director, Bureau of Indian Affairs, National Indian Training Center, to S. B. Dean, April 7, 1972.

For the experience of other tribal organizations which have negotiated with the Bureau for control of educational programs, including the Ramah Navajo School Board, the Wind River Shoshone-Arapahoe Eduction Association and the Busby School Board in Montana, *see* Gross and Smith, *Getting Straight at Ramah,* NEW MEX. REV. AND LEG. JOUR. (Nov. 1970); Greider, *Indian Runaround - How the Bureaucracy Vetoes a Nixon Vow on Schools,* Washington Post, November 7, 1971; Gaillard, *Indian Education - We'll Do It Our Own Way Awhile,* 3 RACE REL. REP. 21 (1972).

42. For example, the Assistant Secretary for administration in his April 1, 1971 letter commented as follows on the Bureau's January 15 commitment to negotiate the transfer to the tribe of the unexpected balance in the Miccosukee Agency's Fiscal Year 1971 budget:

> We cannot approve contracting on a fixed price basis by the turnover of available unexpended balances. Negotiated contracting on a fixed price basis with a non-profit organization is accomplished by the submission of estimated costs to be incurred which are subject to the review of the contracting officer. A fixed price is then negotiated on a basis of agreement as to the cost to be concurred.

added up to an attitude on the part of the federal bureaucracy that the existing laws were not designed to facilitate the purchase by the Government from an Indian tribe of programs already being performed by the Bureau.[43]

One reason for the suspicion with which Bureau and Departmental representatives greeted the Miccosukee proposal can be found in a report which was formally submitted by the Interior Department's Office of Survey and Review to the Commissioner of Indian Affairs in October 1971 on Bureau procedures in negotiated procurements.[44]

> 1. The Bureau has been operating under a de facto exemption from the Federal Procurement Regulations and this condition has existed for a long time. Most of the things we found wrong represent a continuation of long standing practices. While the new thrust of Bureau programs toward tribal involvement have added to the problems, a conclusion identifying policy changes as the principal cause is, in our opinion, incorrect.
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> 2. Expediency seems to constantly prevail. Consequently, even if the inclination to fully comply with regulatory requirements existed, there would not be enough time to do so.
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> 3. The Bureau has not effectively analyzed the technical aspects of its procurement requirements. Until recently, no attempt was made to break procurement down into its component parts, identify the unique characteristics of each classification, and develop Bureau-wide approaches and alternatives.
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> 4. It must be admitted that some of the things the Bureau is trying to do either are not covered by procurement regulations or unavoidly conflict with procurement regula-

43. Of course, the Assistant Secretary's comments (*see* note 42, *supra*) are correct as to the manner in which a fixed price procurement is normally negotiated. But where the Bureau is negotiating a contract with an Indian tribe for the operation of an existing Bureau program provided for the tribe, what other reasonable basis for negotiating than the existing budget can be conceived? Unlike the typical contractor, the Indian tribe not only has a legal right to be informed about the existing budget but, as well, about budget estimates for future years prior to their submission to the Congress. 25 U.S.C. § 476 (1970) provides in part: "The Secretary of the Interior shall advise such tribe [a tribe organized under the Wheeler-Howard Act] or its tribal council of all appropriation estimates or Federal projects for the benefit of the Tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress."

44. U.S. Department of the Interior, Office of Survey and Review, Review of Negotiated Procurement at Area Offices, Bureau of Indian Affairs, October 6, 1971. In an earlier report on negotiated procurements in the Washington office of the Bureau the Office of Survey and Review noted a wide variety of discrepancies between Bureau procurements practices and the Federal Procurement Regulations and recommended that the Director of the Office of Survey and Review "be given the authority to interject himself into the procurement process at any time he deemed it necessary [in order to counteract the fact that] the program people, in their zeal to get new programs under way, have more or less taken over the procurement process . . . [and] program decisions dominate procurement policy." U.S. Department of the Interior, Office of Survey and Review, Review of Negotiated Procurement, Headquarters Office, Bureau of Indian Affairs, August 20, 1971. The later report reflects a shift away from placing the blame on new programs toward a recognition that the Bureau has never complied with the Procurement Regulations.

> tions. We have particular reference to contracts with tribes and Indian organizations. The procurement regulations are written with the view that an arm's length relationship exists, that the contractor has been found fully qualified, and that the services involved can be reasonably well defined and specified. The Bureau is often faced with the reverse conditions — the Bureau's relationship with tribes and Indian organizations is intimate; the Bureau is trying to create competence where none exists; and performance specifications are unavoidably general.[45]

Thus, the Department has recognized the inconsistency between typical Government contracting procedures and the policy of encouraging tribal operation of existing Bureau programs by contract, as it has recognized that, for many years, the Bureau's procurement practices have not conformed to the contracting procedures normally employed in Government contracting.

In the absence of Congressional action, however, the attempt to regularize Bureau contracting procedures is already having a significant impact on the negotiation of "self-determination contracts." In the negotiation of the renewal of the Miccosukee contract in May 1972, for example, the Bureau has insisted on a wide variety of contract provisions, which were not included in the original contract, in order to conform the Miccosukee agreement to a standard form cleared with the Office of Survey and Review.

The Bureau's efforts to go forward with "self-determination" contracting within the confines of existing statutory authority are, of course, to be commended.[46] But from the standpoint of tribal self-determination, it follows that:

(1) Under the Fiscal Year 1972 Miccosukee contract, the curriculum in the Miccosukee school can be changed during the contract term only with the consent of both parties. Under the new

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45. *Id.* at 4-5. The "de facto exemption" of the Bureau from the Federal Procurement Regulations (Title 41, Code of Federal Regulations) may have arisen from the view that the Act of May 15, 1886, 24 Stat. 46, *as amended* (now codified as 25 U.S.C. § 477 (1970) and generally known as the "Buy Indian Act") does not merely exempt the Bureau from the statutory requirement to advertise for bids in making contracts with Indian organizations, 15 COMP. GEN. 1144 (1936) and 37 COMP. GEN. 368 (1957), but relieves such contracts from the requirements of the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, and the Federal Procurement Regulations issued thereunder. 40 U.S.C. § 486 (c) (1970). However, the Interior Solicitor has rejected this view and concluded that the Buy Indian Act merely permits negotiated procurement from Indian organizations in conformity with all the laws and regulations normally applicable to negotiated procurements by federal agencies. Memorandum from the Solicitor, U.S. Department of the Interior, to the Assistant Secretary Public Land Management, January 20, 1969; Memorandum from the Solicitor, U.S. Department of the Interior, to the Commissioner of Indian Affairs, April 27, 1971.

46. The Bureau deserves special congratulations for the manner in which it has conducted the negotiation of the renewal of school contracts with tribal organizations in April and May 1972. The courtesy and efficiency of Bureau representatives in the 1972 negotiations has been noted by the Ramah Navajo School Board, the Wind River Shoshone-Arapahoe Education Association and the Miccosukee Corporation.

form, the Bureau can order changes in the curriculum without Miccosukee consent.

(2) Under the existing contract the Bureau must notify the Miccosukees of its intention not to renew the contract by a specific date or the contract renews automatically, subject to the availability of appropriations. Under the new form, the Bureau merely agrees to complete negotiations for renewal thirty days prior to the end of the fiscal year.

(3) Under the existing contract the Miccosukees have received funds under the contract in four quarterly installments on specified dates. Under the new form, the Miccosukees will be required to submit itemized invoices showing what has been spent in order to receive additional funds.

Each of these modifications brings the Miccosukee contract more closely into conformity with standard Government contracting practice. Does that necessarily mean, however, that the quality of the Miccosukee program will be improved or that the contract will conform more closely to the President's policy of Indian self-determination?

BEYOND S. 3157—AN INDIAN SELF-DETERMINATION GRANT PROGRAM

S. 3157 does not provide a complete answer to the discrepancy between self-determination policy and contracting procedures. At least it addresses itself to this issue. Section 7 (a) of the bill provides:

> Contracts with tribal organizations pursuant to this Act shall be in accordance with all Federal procurement laws and regulations except, in the discretion of the appropriate Secretary, such contracts may be negotiated without advertising and need not conform with the provisions of the Act of August 24, 1935 (49 Stat. 794), as amended.[47]

47. This section merely dispenses with advertising and the requirement that a contractor obtain a performance bond. S. 3157 would conform more closely to the noble declarations in section 1 if it: allowed contracts for longer than one year so that tribes could have some sense of security about the future of the program without running the gauntlet of the Anti-Deficiency Act; allowed arbitration of disputes between the Government and the tribe by a neutral arbitrator instead of by the Interior Department (or HEW); included a provision requiring a retrocession clause in "self-determination" contracts; and authorized the appropriate Secretary to waive any contracting law or regulation when its application would be inconsistent with the goal of Indian self-government. Authorization to make grants for the operation of programs, as well as for training, planning and evaluating, also seems to follow logically from the goals stated in section 1 of the bill.

Under existing law the Bureau cannot include an arbitration clause in such contracts. Bailey v. Commissioners, 171 U.S. 161 (1898). "We know of no cases where arbitration has been sustained except where specifically authorized by statute." Memorandum from the Associate Solicitor, Procurement and Patents, U.S. Department of the Interior, to the Commissioner of Indian Affairs, March 13, 1972. A provision permitting the Government to make changes within the general scope of the contract

What this language fails to do is to free self-determination contracts from the usual requirements imposed by law, regulation and "sound Government contracting practice" in negotiated procurements.

Should it do so? It seems an answer to that question is suggested in the Department of Health, Education and Welfare's criteria for determining when to use a contract and when to use a grant in an HEW program for which both devices are available.

> The contract is the appropriate instrument when:
> 1. the objective is the acquisition of a specified service or end-product for the Government; or
> 2. in order to accomplish its mission, the awarding agency must exercise considerable direction and control over the manner of performance and the timing of work.
> On the other hand:
> The grant is the appropriate instrument for providing support to an activity of the applicant which is in furtherance of a statutory purpose of the awarding agency when:
> 1. there is no expectation of a specific service or end product to be furnished to the Government as a quid-pro-quo for Federal funds; or
> 2. the awarding agency does not need to exercise considerable direction and control over the manner of performance and the timing of work, and therefore extensive freedom of approach in carrying out the purpose of the award is to be reserved to the recipient.[48]

This is the issue which the policy-makers in the White House and in Congress ought to be facing.

The President has declared: "[a] policy which encourages Indian administration of these programs will help build greater pride and resourcefulness within the Indian community."[49]

Do you build pride and resourcefulness by exercising "considerable direction and control over the manner of performance and the timing of work," or do you build it by allowing "extensive freedom of approach in carrying out the purpose of the award . . . to be reserved to the recipient?"

The Jackson-Allott bill pronounces that ". . inasmuch as all government derives its just powers from the consent of the governed, maximum Indian participation in the government of Indian people shall be a national goal"[50] and declares that, ". . . maximum Indian participation in the government of Indian people would be

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without the consent of the contractor is not required in non-personal services contracts by statute but is encouraged "as a matter of Government-wide policy." *Id.*
S. 3157 was ordered reported favorably by the Senate Interior Committee on June 27, 1972, substantially in its original form.

48. Grossbaum, *Choosing Between Research Project Grants and Contracts in Mission Agencies*, 5 NAT. CONT. MAN. J. 41, 43 (1960).
49. 28 CONG. Q. 1822 (1970).
50. S. 3157.

enhanced by increased participation of Indians in the planning, conduct, and administration of programs and services of the Federal Government for Indian people."[51]

If the purpose of S. 3157 is "to promote maximum Indian participation in the government of Indian people," then the Government is interested not so much in the "acquisition of a specified service or end product" as a quid-pro-quo. What it wants to achieve is government by consent in the Indian country.

Whether the device is labeled a "contract" or a "grant" is not the issue. The issue is how it works. What the Congress should now provide, if it wants to follow through on the commitment which the President has made to Indian people, is a program which provides federal financing for the exercise of Indian choice.

51. *Id.*