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Federal Policies, American Indian Polities and the "New Federalism"

JOSEPH G. JORGENSEN

INTRODUCTION

In the following essays we focus on the ways in which contemporary governments currently operate among several American Indian tribes. All of the inquiries are born of relatively long-term contacts with the tribes—contacts that began in the 1960s or 70s and have continued to the present. Immediately prior to our first-hand contact with these tribes, they had experienced about a decade in which Federal policies sought to terminate them from trust status and Federal obligations. Some of us began our studies as Johnson Administration policies began to alleviate Indian fears about imminent termination.

Policies set in motion by the Nixon Administration offered new meaning to "self-determination" among Indian tribes. We observed, even participated in, some of the Indian responses to self-determination programs. They were short-lived, but very influential during their effective lives.

With the advent of Reagan's "New Federalism" we have observed the empirical consequences to Federal programs enabled by self-determination legislation when Federal funds are withdrawn. We assess the consequences of policy decisions on the several tribes that we have come to know through research and assistance over the past ten to twenty years.

Joseph G. Jorgensen is a professor in the Program in Comparative Culture at the University of California, Irvine.

In a recent paper Wilcomb Washburn (1984) has argued that Indian governments, organized under the Indian Reorganization Act of 1934, were freely chosen by many bands and tribes in the 1930s and that they are suited to Indian governance. In general we find Washburn's assertions simplistic and his analysis of Indian governments superficial. We do not counter all of Washburn's claims, nor is there space to provide detailed histories of each tribal government. We do, however, provide analyses of the position of Indian governments within the national political economy, their limited sovereignty, their dependence, and the consequences of Federal policies for tribal programs.

We presume that most readers will not have extensive backgrounds about American Indian governments or the Federal policies that have exercised special influence over Indians in the past. As an introduction to the case analyses the following few pages summarizing Federal Indian policies are offered.

THE POLICY PENDULUM OF INDIAN AFFAIRS

Beginning with the ratification of the Constitution of the United States, the Congress assumed awesome powers over Indian affairs, powers that are, for the most part, unqualified. These plenary powers derive from the Commerce Clause of the Constitution (Article 1, Section 8) which stipulates that Congress shall have the power to regulate commerce with Indian Tribes. During the course of the history of the United States, policies toward Indians have swung back and forth, first in wide, then in more narrow arcs. The thrust behind each of these swings of policy comes from a complex dialectic that is quintessentially American, to wit: the unresolved struggles between individualism and collectivism, between personal rights and group rights, between capitalism and communitarianism, and between white actions and Indian responses.

The issue is complicated by a contradiction in the United States between a non-Indian ideology that abhors special favors to groups under the law and champions the rights of individuals, and a non-Indian ideology that champions fair play and compassion, recognizing wrongs perpetrated on groups and seeking to rectify those wrongs.

During the earliest years of the new nation, tribes were treated

as collectivities in much the same way that foreign nations had treated them prior to confederation, by and large as sovereigns and possessors of the land. After the creation of the nation only the Federal Government could deal with them. In 1823, however, Indian rights to land were redefined through a doctrine of discovery as "impaired title" by the U.S. Supreme Court. The Federal Government, in laying claim to Indian land, assumed the exclusive right to extinguish Indian title which was an equitable title of use or occupancy. Henceforth, Indian tribes possessed usufruct rights which could be negotiated away (*Johnson v. McIntosh*).[1] Subsequent U.S. Supreme Court decisions limited Indian sovereignty as domestic dependent nations (*Cherokee Nation v. Georgia,* and *Worcester v. Georgia*).[2]

Since about 1830 the forces of political economic history, guided by the unresolved dialectic, have swung Indian policies and, consequently, Indian affairs, like a pendulum. The dialectic has forever matched a strong thesis against a weak antithesis. The strong thesis champions the rights of the individual. The underlying theme in the history of Indian affairs is the desire to transform Indian culture to white culture, to integrate Indians into the fabric of American life as that life is perceived by business, federal, and Christian interests. Indians have been tugged toward narrow, competitive individualism of the Protestant ethic sort, only then to be shoved toward corporate collectivism. The Federal policies that have pushed and pulled American Indians in contradictory directions have been unsettling and insoluble. For example, Indians as members of a tribe have been urged to join together as a corporate collectivity, yet to sever their tribal ties and become "civilized."

In 1790 Congress specifically assumed control of non-Indian intercourse with Indians and forbade agreements between Indians and non-Indians that did not have Congressional consent. Yet until 1871 Congress treated with Indian tribes, recognizing them as collectivities. In 1871 Congress, exercising its plenary powers through a rider to the Appropriation Act of that year, established as law that Indians shall no longer be "acknowledged or recognized as an independent tribe or power with whom the United States may contract by treaty." Beginning in 1871 Congress dealt with Indians by statute. Sixteen years later the pendulum swing in which Indians were treated as collectivities had finished its arc.

In 1887 Congress approved the General Allotment Act (or the Dawes Severalty Act), hailed at the time as "Freedom Legislation." The intention of the act was to allot tribal land in severalty, dissolve tribal estates, dissociate tribesmen, and push individual Indians and their nuclear families to compete in life's many facets, such as religious liberty and the ownership of a home, outright and clear, and to compete in the nation's economy. Individual Indians were being "freed" from the tribal bonds that chained them to collective, unproductive ways.

The General Allotment Act has had a hoary history which is far too robust to describe here. Suffice it to say that following enactment American Indian landholdings were reduced from 140 million acres to 32 million in 1934, and that a host of bills were enacted which granted Indians citizenship, empowered the Secretary of the Interior to declare Indians competent or incompetent, made some Indians subject to civil government (in erstwhile Indian Territory), and the like. A now famous survey of Indian conditions conducted in the late 1920s identified major Indian problems as ill health, poor educations, inadequate incomes, inadequate occupational skills, dilapidated housing, and complicated legal enigmas (including allotted land tied up in complex heirship status).[3] Indians had no capital and scant employment. Their land was either leased to non-Indians, or lay idle.[4]

The Meriam report presaged the completion of the pendulum's individualism arc and the onset of a collectivity arc. The commencement of a collectivity arc was driven by forces which sought to restore Indian collectivities, to deal with them, and to restore selected aspects of Indian culture. Roosevelt's New Deal era occasioned the implementation of contradictory Federal policies toward Indians: corporate collectivism was fostered, as was competitive individualism. These policies, I aver, reflected the American ambivalence about group rights and laws favoring special groups, and obligations to provide humane assistance to minority groups until such time as their members can strike out on their own.

The major developments began with repeal of the General Allotment Act and passage of the Indian Reorganization Act of 1934 (IRA, aka Wheeler–Howard Act). In brief, the IRA provided for (1) the creation of tribal governments with constitutions and corporate charters; (2) tribal purchase and consolidation of allot-

ments and heirship land; (3) tribal purchase and consolidation of non-Indian owned land near Indian land holdings; (4) the development of reservation infrastructure, such as irrigation systems, through a modest revolving credit fund; and (5) the establishment of schools on home reservations.

Ratification of boilerplate constitutions required a simple majority vote of all persons of eligible age who showed up to vote on the date specified by each tribe. Some constitutions were voted on by fewer than a dozen voting eligible members. Seven for and five against would suffice for ratification. In some instances, and the Northern Utes of the Uintah and Ouray Reservation are an example, the initiatives were poorly publicized, inadequately explained, and engineered by the BIA staff to round up favorable votes only. Mixed-bloods ratified the Northern Ute constitution, and 50 years of bickering ensued, punctuated by a separation of full bloods from mixed-bloods and termination of the mixed-bloods.[5]

John Collier, Commissioner of Indian Affairs at the time, believed that while maintaining their tribal integrity and nourishing the most valued features of tribal cultures, Indians could be encouraged to work together in order to create viable corporations for their reservations. He also felt that Indian governments could be taught to administer these corporations, as well as to determine tribal membership, levy taxes, assign tribal land for use by individual tribal membership, establish police forces, establish courts, appoint judges, control the movements of unenrolled persons on the reservation, submit budgets for BIA and Secretary of the Interior approval, create jobs, pay salaries, and so forth.

Self-determination was the goal of the IRA. The model through which self-determination might be achieved was not based on Indian governmental practices. It was a fusion of concepts drawn from several rational-legal forms of government (Federal, state, local), several branches of government (executive, legislative, judicial), appointed and elected positions, and some features of modern corporations. A basic constitution and a charter were written in Washington, without Indian consultation, and submitted to tribes for perusal. Tribes could modify them before ratification.

Although self-determination was the goal, the IRA was passed without Indian consent, and the ratification of constitutions and

charters increased the powers of the Secretary of the Interior over Indian lives. So as before, Indian sovereignty was limited, but after ratification of constitutions the restrictions extended beyond land title and business dealings with non-Indians to all manner of political, judicial, social and economic decisions that affected the internal workings of tribes and their relations with non-Indian corporations, governments, and persons. The new versions of the domestic dependent nations could now have any of their decisions vetoed by the Secretary of the Interior.

IRA governments were akin to little states, but administered by the BIA. The BIA, in turn, was controlled by the Secretary who could exercise his persuasion, reverse, or veto BIA and IRA decisions. In some instances even the House Committee on Interior and Insular Affairs retained the authority to disapprove of expenditures in tribal budgets. Financial controls over Indian budgets and the disposition of court awards to Indian tribes were regularly retained by the Federal office responsible for the allocation of funds.

Between the ratification of the IRA and the cessation of World War II, Federal Indian affairs followed a bumpy course. Congressional support of BIA policies began to dwindle as soon as Commissioner Collier implemented policies to acquire Federal land for Indians. Congressmen from the western states which were most affected by reacquisition of former Indian lands were instrumental in removing Collier as Commissioner in 1945 and passing the Indian Claims Commission Act one year later. These were harbingers of a reversion of Federal Indian policy to the goals of "Freedom," individualism, and assimilation of Indian persons.

By the late 1940s the pendulum completed another collectivism arc and started on an individualism swing. This time the break from corporate collectivism led toward termination of Federal relations with Indians. Congress passed the Indian Claims Commission Act of 1946 to allow Indians to sue the United States for expropriations, broken treaties, and a few other complaints without requiring a separate act of Congress each time they sought to sue. Awards rendered by the Indian Claims Commission were to be monetary. Judgment awards extinguished claims to title and expropriated land was not returned to Indian possession.

The Indian Claims Commission heard claims and made awards

between 1951 and 1978, when its term expired. Over $730 million was awarded by the ICC for 370 claims. Attorneys fees were set at ten percent, and the Federal Government exacted "off-setting" costs from the awards. "Off-setting" costs were levied for services provided to tribes by the Federal Government during the reservation period (land operations, social services, law and order, etc.). Off-setting costs frequently totalled one-half of the awards and were exacted without tribal consent.

About the time that the Indian Claims Commission was established, the House of Representatives authorized an investigation of the BIA.[6] The investigation was a prelude to termination of Indians from Federal services and obligations, including the trust relationship it had towards its wards. Upon termination the Federal statutes governing Indians would no longer apply, but state statutes would apply. Tribal rolls would be closed.

By unanimous vote Congress passed a general statement on termination policy in 1953 (House Concurrent Resolution 108, or HCR 108). Because HCR 108 was only a "sense of Congress," specific legislation was required in order to terminate tribes. Between 1954 and 1962, 114 rancherias, bands, and tribes were terminated. Two of these terminated tribes—the Menominee of Wisconsin and the Klamath of Oregon—provide oft cited examples of the negative effects upon all tribes that were stripped of trust land and federal oversight. Termination, similar to its nineteenth century counterpart, allotment in severalty, has had a hoary history. Since about 1970 every terminated tribe has petitioned for legislation to rescind termination.

The swing toward individualization through termination was accompanied by other legislation. In 1952 Congress authorized the transfer of hospital services from the BIA to private, non-governmental, or state entities. In 1954 BIA health services were transferred to the U.S. Public Health Service (PL 568). In 1953 Public Law 280 transferred criminal and civil jurisdiction over Indian lands from Federal to state governments in several states and extended to all other states the option to assume jurisdiction at their own initiative. Beginning in 1951 Federal funds from the Johnson-O'Malley Act were sent to local public schools to educate Indians.

Termination was not specifically repudiated nor rescinded, but the Kennedy Administration called a moratorium on termination. The call to slow, if not reverse termination policies, was based

on analyses of the symptoms of Indian underdevelopment. Three major studies in the 1950s and early 1960s pointed out that Indians were the least educated, least employed, least healthy, most deprived American minority.[7] The findings were similar to those of the Meriam Report of 1928.

The pendulum wiggled a bit as the clarion sounded for an infusion of public funds—earned and unearned—to help the beleaguered Indians. It did not call for consultation with Indians about their plans to develop sustained economies, massive infusions of tribally-controlled capital, the training of Indians in management and finance, or the vesting in Indians of control over the means of production of tribal resources. The Johnson Administration's "War on Poverty" gave a push to the collective swing of the pendulum as it brought legal assistance, housing assistance, community action projects, job training programs, education programs, and new sources and amounts of Federal welfare transfers to the reservations.

Tribes learned some important lessons about dealing with Federal and state agencies during this period, but they were also advised to lease their non-renewable resources for extremely long periods (99 years, or until projects terminated), and unconscionably low rates. Oil, gas, coal, tar-sands, oil shale, uranium, hot rocks and hot water were leased in great quantities. Transnational energy corporations benefitted from this advice. No self-sustaining, private sector tribal economies were generated through the War on Poverty or from the leasing advice provided by the Department of the Interior.

Several acts of Congress between 1962 and 1980 promoted some aspects of self-determination of Indian tribes. The key legislation actually did not appear until the mid-1970s, however, following some initiatives set into motion by the Nixon Administration in the early 1970s. The self-determination legislation of the 1970s was intended to change the relations of Indians to governments at all levels, to social service agencies, to school boards, to health care delivery agencies, and to the private economic sector.

The Indian Financing Act of 1974 was important because it provided funds, available through grants awarded by the Bureau of Indian Affairs to individual Indians to assist them in starting new businesses and refinancing old ones. But the centerpiece of 1970s legislation focused on tribes, not individuals. The Indian

Self-Determination and Education Assistance Act of 1975 granted tribes the authority to contract for services provided by the Bureau of Indian Affairs, the Indian Health Service, and many other public sector agencies, and to contract for goods and materials provided by other vendors and contractors and paid for by public funds.[8] Other important pieces of 1970s legislation included the Indian Education Act, Indian Child Welfare Act, and several related acts which jointly offered provisions that would allow Indian tribes to exercise control over some aspects of their economies and affairs that they had not previously exercised.

The Indian Self-Determination Act was slow to take hold and to cause dramatic changes in tribal government and tribal affairs. But it provided tribes with considerable possibilities for the management of the public funds and publicly-sponsored services that were delivered to them. In the twelve years since the Act was passed, tribal governments have struggled with a few management failures, and suffered criticism from some BIA personnel. The cause of the criticism, perhaps, is that by 1981 many tribes implemented plans that transformed local BIA offices to contracting and granting agencies, reducing their personnel and decentralizing their authority.

Administering the public economy in both its earned and unearned sectors was not the same as owning and controlling production, of course, but experience in the public sector stimulated greater tribal independence while continuing Federal services among many tribes, such as the Uintah and Ouray Northern Ute, the Mississippi Choctaw, the Kansas Kickapoo, and the Zuni. In the late 1970s many tribes, such as the aforementioned, began modest and cautious attempts to develop their private sectors. The obstacles standing in the way of success were many. Indians possessed little capital, little information, little expertise, and modest access to information and capital. Their decisions could be vetoed by the Secretary; their public funds withdrawn by legislation or even by the foot-dragging of agencies. The enormous power over information, capital, and world-wide markets controlled by corporations were other structural obstacles to Indian success. The installation of the Reagan Administration and its policies of "New Federalism" have demonstrated how ineffectual self-determination is if funds are withdrawn from the Federal pipeline.

THE REAGAN ADMINISTRATION'S "NEW FEDERALISM"

The Reagan Administration's "New Federalism" has obviated self-determination as it has plumped for independence and self-determination. The contradiction lies in Reagan's requests for private sector development on Indian reservations, while he withdraws funds which were used for public sector development on Indian reservations.

The Federal budget for Indian programs has dropped consistently since 1981. The Bureau of Indian Affairs (BIA) budget, which has always been central to Indian programs, has sustained large annual cuts. For example, the BIA budget for Fiscal Year (FY) 1986 was $62 million less than in FY 1985, and the Administration's version of the BIA budget for FY 1987 was $68 million less than FY 1986. The BIA's own version of the FY 1987 budget was $35 million less than the actual FY 1986 budget. One effect of dwindling appropriations on BIA officials has been to influence them to ask for less.

Large scale reductions affecting a wide range of Indian programs are not new, not since 1981 at least. During President Reagan's first seven years he has persuaded Congress to cut the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS of the Public Health Service) budgets annually, and to dismantle programs to provide on-the-job training, education, health care, and social services. When the Indian Health Care Improvement Act (IHCIA) required reauthorization in the fall of 1984, and a reauthorization bill was passed by Congress, President Reagan promptly vetoed it. IHS budget authority was reduced $88 million in FY 1986 and another $85 million in FY 1987.

The decline in the Reagan budgets for Indian programs are consonant with Reagan's ideology of government. Interestingly, the National Tribal Chairmen's Association (NTCA), whose funding derives from the BIA, supported the election of Reagan. It continued to support his administration until mid-1983. They hoped that with the President's help the self-regulating free market that he espoused would rectify old wrongs and push Indian tribes toward solvency as well as sovereignty. Yet as early as January, 1983 the NTCA asked for the resignation of then Secretary of the Interior James Watt. Watt championed the free market approach to Indian affairs and was especially outspoken in his criticism of the causal relation between Federal wardship and Indian poverty

and social pathologies. He maintained that wardship caused those social problems.

By September of 1983 the NTCA saw the problem as something greater than Secretary Watt. At that time they began circulating a petition protesting the loss of job training programs, the dwindling of health services, the collapse of the BIA into an "almost useless" agency, and the callousness of the Reagan Administration. By 1986 the NTCA had been excised from the BIA budget.

On January 14, 1983 President Reagan created a Presidential Commission on Indian Reservation Economies to advise him on actions which could lead to a stronger private sector on reservations, lessen tribal dependence on Federal monies and programs, and reduce the Federal presence in Indian affairs. He did not appoint members to the Commission until March of 1984. The Commission issued its report (scheduled for December 31, 1983 by the President) in November 1984 (Presidential Commission 1984). That report, recently labeled "Voodoo Development" by Michael E. Melody,[9] is consonant with the Reagan Administration's interpretation of self-determination: the individual Indian entrepreneurs, unshackled from the political chains that have bound them on the reservations, will effect the transformation of Indian societies and the redemption of Indian persons. In short, the commission called for the jettisoning of communitarian acts, sentiments and ideas on reservations while casting their lot with the Protestant ethic and the market.

The commissioners, predominantly Indian men, responded as social philosophers, not bookkeepers. They suggested that economics is the driving force behind society and that tribal governments have been impediments to the exercise of proper controls over that driving force. The commission suggested that tribal governments should be reeled in, their sphere of authority more severely circumscribed. In particular the commissioners pushed for policies that would emphasize the profit motive in Indian business endeavors. Particular actions which would assist this end were (1) privatizing tribal enterprises so that tribes would not be in competition with individuals or private business associations, and (2) controlling tribal governments so that they do not interfere with market activities. The latter referred to reducing the powers of tribal governments to levy taxes on, and to provide excessive regulation of Indian businesses or non-Indian businesses that operate on reservations.

The Bureau of Indian Affairs, too, is pinpointed as an obstacle to Indian economic development and self-determination. As has been demonstrated so often in the past, the BIA consumes two-thirds of its annual budget on itself, while Indian economies continue to flounder.

Reagan's commissioners would not allocate funds to the BIA or to the tribes. They recommended that entrepreneurial development programs be developed and that community development corporations be established to take advantage of the many business opportunities that abound. Entrepreneurs, it is averred, "see life as offering opportunities rather than problems, and they are at work implementing such possibilities to their benefit and to the benefit of their surrounding communities."[10]

Thus far, through budget and program cutting, the President has been more successful in lessening tribal dependence on federal monies and programs than increasing private enterprise on reservations.

The BIA budget for FY 1987 is $923 million ($35 million less than FY 1986). It reallocates funds in bold ways. Fully $340 million are cut from education, services, economic development, construction, and natural resource development. Under the Self-Determination Act Indian tribes could contract for those $340 million. The FY 1987 budget allocates $304 million to new categories labeled "tribe/agency/total operations." Those "operations" ostensibly will promote Indian self-determination, but given an annual inflation rate of about four percent, a thirty-eight percent reduction of funds in the specific programs to which the Self-Determination Act provided access, and transfer of funds from programs which specifically facilitated provisions of the Indian Self-Determination Act to programs that may or may not facilitate self-determination does not lend itself to a favorable economic forecast. It is likely that the $35 million cut from the FY 1987 budget were the remainder of the funds drawn from education, services, and the like, which were not allocated to "operations."

As for stimulating the private sector as Reagan claimed he would do in his 1983 Indian Policy Statement, Reagan hasn't added a penny to the $10 million revolving credit fund established by the Carter Administration to assist economic development on Indian reservations. In 1986 the BIA, under provisions of the Indian Financing Act, entertained grant requests of from

$5,000 to $100,000 from individual Indians to start new businesses or expand existing ones.

The constraints placed on the applicant pursuing a grant were considerable: grants were made for no more than twenty-five percent of the new financing needed, and financing for the remaining 75 percent required proof; no more than one grant could be approved for a single project; agency superintendents could approve or deny grants up to $40,000 pending the availability of funds on the basis of their judgment of the reasonable probability of the success of the enterprise.

Through fiscal 1986 there were few successful applicants for grants made possible through the Indian Financing Act. In response, the BIA sought proposals for the creation of a center for model Indian business development which would provide management and technical assistance to tribes and individuals to help obtain private sector financing and to expand private businesses on reservations. Advice has never been in short supply, unlike financing and viable economic enterprises on Indian reservations.

NOTES

1. *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543.
2. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 1831; and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 1832.
3. Lewis Meriam, *The Problem of Indian Administration* (Baltimore: Johns Hopkins Press, 1928).
4. Land Planning Committee of the National Resource Board, *Indian Land Tenure, Economic Status, and Population Trends* (Washington, D.C.: United States Government Printing Office, 1935).
5. For a fuller account see: Joseph Jorgensen, *The Sun Dance Religion: Power for the Powerless* (Chicago: University of Chicago Press, 1972).
6. House Report 2503.
7. See William A. Brophy and Sophie D. Aberle, *The Indian, America's Unfinished Business* (Norman: University of Oklahoma Press, 1966); U.S. Senate, *The Education of the American Indians. The Organization Question*, Volume 4, Committee on Labor and Public Welfare, Subcommittee on Indian Education. 91st Congress, 1st Session, 1969.
8. U.S.C. 4502–450n.
9. Michael E. Melody, "Voodoo Development," *Native American Policy Network Newsletter* 7 (1987): 1–7.
10. Presidential Commission on Indian Reservation Economics, Report and Recommendations to the President of the United States (Washington, D.C.: United States Government Printing Office, 1984), 118.