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AN HISTORICAL ANALYSIS OF THE 1968 'INDIAN CIVIL RIGHTS' ACT

DONALD L. BURNETT, JR.*

Introduction

In the Indian Civil Rights Act,¹ enacted as a rider to the Civil Rights Act of 1968,² Congress faced a number of the problems involved in the relationship between the various Indian tribes and the federal constitutional system. In order to properly understand its provisions, however, the Act must be seen in historical perspective — in terms of the development of the place of the Indian in the American legal system and of the legislation itself. Because the debate in 1968 over the Civil Rights Act centered on the sections intended primarily to benefit other minorities, so have most of the commentaries written on it since then, and the necessary historical analyses of the Indian provisions have not been undertaken.

Judicial sensitivity is especially important in the area of Indian civil rights. The United States Commission on Civil Rights recently noted: "In enforcing the act, the courts will have the serious responsibility of drawing a balance between respect for individual rights and respect for Indian custom and tradition. Many important questions . . . will not be answered until the courts have settled them."³ In deciding cases involving these provisions, some courts have not engaged in the sort of historical discussion and analysis that should be essential.⁴ An underlying thesis of this article is that a sense of history will engender greater judicial sensitivity for the need to preserve effective tribal institutions. A better understanding of the relevant history should aid judicial analysis and guide the courts and the agencies implementing the legislation.

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1 25 U.S.C. §§ 1301-03, 1311-12, 1321-26, 1331, 1341 (1970).

2 82 Stat. 73 (codified in scattered sections of 18, 25, 42 U.S.C.).

3 UNITED STATES COMMISSION ON CIVIL RIGHTS, AMERICAN INDIAN CIVIL RIGHTS HANDBOOK 11 (1972).

4 See, e.g., *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971).

This article, first briefly outlines the history of the issue of Indian tribal sovereignty and the ways in which federal law in this area has developed. It next traces the legislative process, especially the part played by Senator Sam Ervin of North Carolina, which resulted in the Indian civil rights provisions. This analysis focuses on Senator Ervin's apparent objectives, the interests of the affected parties, the areas of conflict and accommodation, and the process of enactment. It then examines the ways in which various courts have interpreted the Act and how the tribes have been affected by it.

I. TRIBAL SOVEREIGNTY FROM 1786

A. *The Early Years: Seminal Concepts*

The federal government's Indian affairs policy originated in times when it regarded the tribes as enemy nations. In 1786, Congress delegated responsibility for Indian affairs to the War Department.⁵ The Bureau of Indian Affairs (BIA) was created in 1824, and President Jackson appointed a Commissioner of Indian Affairs within the War Department in 1832.⁶ The responsibility for administration in the field rested with the local agent, often a cavalry officer, who was given broad powers "to manage and superintend the intercourse with the Indians" and "to carry into effect such regulations as may be prescribed by the President."⁷ The President, in turn, was "authorized to prescribe such rules and regulations as he may think fit."⁸

The states took little part in the management of Indian affairs, for the Removal Act of 1830⁹ transferred many eastern tribes to the plains west of the Mississippi River where no states yet existed. Moreover, in *Worcester v. Georgia*,¹⁰ the Supreme Court held that native tribes were not subject to the jurisdiction of the states in which they were located. Chief Justice Marshall described the

5 H. DRIVER, INDIANS OF NORTH AMERICA 485 (2d ed. rev. 1969).

6 *Id.* at 482.

7 Act of June 30, 1834, ch. 162, § 7, 4 Stat. 736-37.

8 *Id.* at § 17, 4 Stat. 738.

9 Act of May 28, 1830, ch. 148, 4 Stat. 411-12.

10 31 U.S. (6 Pet.) 515 (1832).

Cherokee tribe as "a distinct community, occupying its own territory with boundaries accurately described in which the laws of Georgia can have no force."¹¹ In an earlier decision holding that the Cherokees were not a foreign nation within the meaning of the Constitution for the purpose of determining the Supreme Court's original jurisdiction, Chief Justice Marshall had described the tribe as a "domestic dependent nation" and had likened each Indian's relationship to the federal government to that of a "ward to his guardian."¹² These analogies reflected the traditional view that Indian tribes remained sovereign bodies empowered to regulate their own affairs, limited only by acts of Congress.¹³ By virtue of the federal government's conquest, Congress was viewed as enjoying plenary authority over Indian affairs.¹⁴ The treaties enacted under congressional authority often reserved to the Indians the right to retain their traditional institutions and to continue such essential activities as hunting and fishing.¹⁵ Their implications were commonly broad, "[giving] the Indians every warrant to believe that they could retain their lands, their governments, and their way of life as long as they wished."¹⁶

Thus, the place of Indians and Indian tribes in the American system was uncertain. Indians were commonly regarded as federal wards; yet tribal organizations were acknowledged as "distinct communities" of a sovereign nature.

B. *The Era of Conquest: The Rule of the BIA*

Following the Bureau's transfer from the War Department to the Department of the Interior in 1849,¹⁷ BIA policy continued to

¹¹ *Id.* at 560.

¹² *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

¹³ See Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1347 (1969).

¹⁴ See Crosse, *Criminal and Civil Jurisdiction in Indian Country*, 4 ARIZ. L. REV. 57 (1962).

¹⁵ See 2 C. KAPPLER, *LAWS AND TREATIES*, S. DOC. NO. 452, 57th Cong., 1st Sess. (1903).

¹⁶ W. BROPHY & S. ABERLE, *THE INDIAN: AMERICA'S UNFINISHED BUSINESS* 25 (1966) [hereinafter cited as BROPHY]. This volume expands *FUND FOR THE REPUBLIC, REPORT OF THE COMMISSION ON THE RIGHTS, LIBERTIES AND RESPONSIBILITIES OF THE AMERICAN INDIAN* (W. Brophy & S. Aberle eds. 1961).

¹⁷ DRIVER, *supra* note 5, at 482.

reflect these conflicting views. The field agents still exercised the broad statutory power previously noted, but they also created indigenous police forces and courts or retained them where they already existed. Of course, this policy was not simply a concession to the sovereign powers of the tribes. The Indian police, directed by the local agent, served not only to enforce law and order, but also to set examples of acculturation to the native communities and to undermine the authority of recalcitrant chieftains and councils.¹⁸ In the 1890's the Indian police were instrumental in suppressing the Ghost Dance movement among the Sioux, the last great organized resistance to the inexorable white dominance.¹⁹

The law enforced by these indigenous police detachments was a mixture of tribal custom and rudimentary codes drafted by the BIA in the early 1880's. In part, these codes were intended to supplant native customs, but they were also required because the trauma of conquest had weakened traditional social controls.²⁰ The "successful" experiment with Indian police encouraged the BIA to establish Indian courts with native judges. Courts of Indian offenses were established by the Secretary of the Interior in 1883, and that year's Annual Report of the Commissioner of Indian Affairs set forth rules, approved by the Secretary, governing the operation of the new courts.²¹ In practice, these courts operated very informally.²²

By the mid-1880's a structure for Indian affairs management had emerged. Alert to the uncertain legal status of the tribes and the unclear extent of their sovereign powers, the BIA adopted a middle course. Certain trappings of tribal sovereignty (in the form of Indian police and courts) were encouraged, but matters of pol-

18 W. HAGAN, *INDIAN POLICE AND JUDGES* 69-79 (1966).

19 *Id.* at 103. For an examination of what underlay the Ghost Dance movement, see P. FARB, *MAN'S RISE TO CIVILIZATION AS SHOWN BY THE NORTH AMERICAN INDIANS FROM PRIMEVAL TIMES TO THE COMING OF THE INDUSTRIAL STATE* 280-84 (1968).

20 HAGAN, *supra* note 18, at 9.

21 SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, *SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS ON CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN*, 99th Cong., 2d Sess., 14 (Comm. Print 1964) [hereinafter cited as *SUMMARY REPORT OF HEARINGS*].

22 The extent to which the native judges served the will of local BIA agents varied with circumstances and personalities; but a report of the Board of Indian Commissioners in 1892 charged that agent influence remained unduly strong, partly because appeals from court decisions could be taken to BIA administrators. HAGAN, *supra* note 18, at 110.

icy, such as the drafting of codes, remained exclusively in the hands of the Bureau.

C. *The Settlement Era: The Indians and the Law*

As white America pursued its "Manifest Destiny," Indian country ceased to be remote. Law and order on the reservations gravely concerned burgeoning numbers of settlers, and the increase in crimes committed by whites on reservations troubled the Indians as well. The new courts of Indian offenses exercised jurisdiction in civil and criminal cases in which both parties were Indian and also occasionally in cases involving whites on the reservations. But the creation of states as sovereign entities and a reluctance by the settlers to entrust serious criminal cases to Indian tribunals resulted in a substantial limitation of Indian court criminal jurisdiction.

State jurisdiction over crimes committed by whites on the reservations was extended in *United States v. McBratney*²³ in which the Supreme Court held that the United States Circuit Court for Colorado did not have exclusive jurisdiction over the murder of one white man by another on the Ute Reservation in Colorado. The Court said that the United States did not have exclusive jurisdiction over a reservation unless Congress had expressly exempted it from state jurisdiction when it had admitted the state to the Union. No such exemption had been made with respect to the Ute Reservation,²⁴ and, as a result, Colorado had "acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of its territory . . . including the Ute Reservation. . . ."²⁵

As the Supreme Court extended state criminal jurisdiction over whites on the reservations, Congress limited Indian court authority over Indians committing crimes against other Indians on the reser-

²³ 104 U.S. 621 (1881).

²⁴ The Court sought support from *United States v. Ward*, 28 Fed. Cas. 397 (No. 16,639) (C.C.D. Kan. 1863) and *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866). But these cases held merely that where express provisions *did* exist, Indian lands were exempt from state jurisdiction. They did not hold that express provision was an absolute prerequisite. Nevertheless, pressure to extend state jurisdiction, founded partly in fear of reservations becoming "no man's lands," was so great that *McBratney* became a landmark precedent.

²⁵ *United States v. McBratney* 104 U.S. 621, 624 (1881).

vations. In the celebrated *Crow Dog* case,²⁶ the Oglala court had convicted the defendant of murder and ordered him to make restitution in the form of services and property to the victim's family. This form of penalty was fully consistent with traditional tribal practices, but outraged whites demanded a more severe punishment. The defendant was tried again and convicted in a Dakota Territory district court sitting as a United States circuit court. The Supreme Court held that the district court did not have jurisdiction over a crime committed in Indian country by one member of a tribe upon another of the same tribe.²⁷ In response, Congress eliminated tribal jurisdiction over cases involving serious crimes.

The Seven Major Crimes Act²⁸ gave territorial courts jurisdiction over enumerated major offenses committed by Indians within a territory, whether or not on a reservation and gave federal courts jurisdiction over such offenses when committed by Indians on a reservation within a state. The validity of the Act was established in *United States v. Kagama*,²⁹ in which the Supreme Court upheld the exercise of federal jurisdiction over the murder of an Indian by two other Indians on the Hoopa Valley Reservation in California. The Court recalled Congress' plenary power and reiterated Marshall's wardship concept: "These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights."³⁰

At the same time, state courts and lower federal courts began to extend the logic of the Seven Major Crimes Act to give the states

26 *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

27 *Id.* at 562.

28 Indian Appropriations Act of 1885, 23 Stat. 385 (1885) [informally and hereinafter referred to as Seven Major Crimes Act], as amended 18 U.S.C. § 1153 (1970). In the original Act of 1885, federal courts and law enforcement agencies were granted jurisdiction over cases of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny committed by one Indian upon another on the reservation. Incest, assault with a dangerous weapon, and embezzlement were added later. Pub. L. No. 89-707, § 1, 80 Stat. 1100, and Pub. L. No. 90-284, § 501, 82 Stat. 80, amending 23 Stat. 385 (1885). The Act did not abrogate existing treaties. 18 U.S.C. § 1153 (1970) (as amended). The Cherokee, expressly granted jurisdiction over all crimes committed on their reservation by 1785 treaty (7 Stat. 18), were unaffected.

29 118 U.S. 375 (1886).

30 *Id.* at 383-84.

criminal jurisdiction over Indians off the reservation.³¹ The resulting diminution of the jurisdiction of tribal courts to include only less serious offenses committed by Indians while on the reservation led an Oregon district court to declare that the Indian courts were merely "educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian."³²

In 1896, however, the Supreme Court clearly reaffirmed its adherence to the principle of tribal sovereignty. *Talton v. Mayes*³³ presented the question whether a Cherokee practice of using a five-man jury to institute criminal proceedings violated the grand jury requirement of the fifth amendment. In a landmark opinion, the Court held that the requirement was applicable only to the federal government,³⁴ saying that because the sovereign powers of Cherokee governing bodies had existed prior to the white man's arrival, the Indian courts were not federal agencies subject to the fifth amendment.³⁵ This reaffirmation of tribal sovereignty carried into the present century as tribal governments were acknowledged to enjoy immunity to suit without prior consent. In *Turner v. United States*,³⁶ the Supreme Court indicated this view as dictum, and in 1940, it held flatly that "Indian Nations are exempt from suit without Congressional authorization."³⁷

31 *In re Wolf*, 27 F. 606 (W.D. Ark. 1886) (conspiracy of Indians to obtain money from tribe under false pretenses); *Pablo v. People*, 23 Colo. 134, 46 P. 636 (1896) (murder of Indian by Indian); *Hunt v. State*, 4 Kan. 60 (1866) (murder of Indian by Indian); *State v. Williams*, 13 Wash. 335, 43 P. 15 (1895) (murder of Indian by Indian).

32 *United States v. Clapox*, 35 F. 575, 577 (D. Ore. 1888).

33 163 U.S. 376 (1896).

34 In this respect, *Talton* paralleled *Hurtado v. California*, 110 U.S. 516 (1884), in which the Supreme Court had held that states were not required by the due process clause of the fourteenth amendment to prosecute only after indictment by a grand jury.

35 Recently, one distinguished commentator has suggested that *Talton* means only that a tribal government will not be required to grant a remedial right under the Constitution, the question of fundamental rights being left open. Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 No. DAK. L. REV. 337, 341 (1969).

36 248 U.S. 354 (1919).

37 *United States v. United States Fidelity Co.*, 309 U.S. 506, 512 (1940). The Court also held the tribes immune to counterclaim except as authorized by statute.

D. 1920 to 1940: Nations in a Nation

After World War I, Congress passed the Indian Citizenship Act, which provided that "all noncitizen Indians born within the territorial limits of the United States [are] declared to be citizens of the United States."³⁸ Most states extended the franchise with this new citizenship although several states did not.³⁹

Following this grant of citizenship, the Secretary of the Interior hired the Brookings Institute to survey Indian tribes and to recommend further steps to bring the Indians more completely into the American mainstream. In 1928, the Institute issued the Meriam Report,⁴⁰ which revealed grim economic, educational, and health conditions on the reservations and stressed the impossibility of integrating the Indians directly into white society.⁴¹ The Report was highly critical⁴² of the Indian General Allotment Act of 1887,⁴³ which was an earlier attempt to achieve rapid assimilation. That Act had distributed Indian land to individual natives in 40, 80, or 100 acre allotments. Through white exploitation of native ignorance of the formalities of land titles, Indian land holdings decreased from 138 million acres in 1887 to 48 million acres in 1934.⁴⁴

Drawing heavily on the Meriam Report and work begun during the Hoover administration,⁴⁵ New Deal appointees to the Department of the Interior were instrumental in drafting and guiding through Congress the Indian Reorganization Act of 1934,⁴⁶ a major reform measure. It cancelled the general allotment policy and radically changed BIA procedures regarding economic development and community self-government. The most important self-government provision was section 16, which authorized the tribes to adopt

38 8 U.S.C. § 3(c) amended 8 U.S.C. § 1401(a)(2) (1970). A number of Indians, such as those who had previously enlisted in the armed forces or who had accepted land allotments were already citizens by previous legislation. Rice, *The Position of the American Indian in the Law of the United States*, 16 J. COMP. LEG. & INT'L L. 78, 86 (3d Ser. 1934).

39 E.g., *Porter v. Hall*, 34 Ariz. 308, 271 P. 411 (1928) (holding Indians ineligible to vote under a state statute denying the franchise to "persons under guardianship").

40 L. MERIAM, *THE PROBLEM OF INDIAN ADMINISTRATION* (1928).

41 *Id.* at 86-90.

42 E.g., *id.* at 7.

43 Act of Feb. 8, 1887, ch. 119, 24 stat. 388.

44 BROPHY, *supra* note 16, at 20.

45 *Id.* at 181.

46 25 U.S.C. §§ 461-79 (1970).

their own constitutions and by-laws, to be ratified by a majority of the members and by the Secretary of the Interior. An elected tribal council was authorized to pass ordinances consistent with the tribal constitution.⁴⁷ The Act authorized the establishment of tribal courts, to be manned by judges elected by the tribes or appointed by the councils and to be guided by rules drafted by the tribes themselves, subject to the Secretary's approval. Whenever a tribal court was established, it superseded the court of Indian offenses if one existed.⁴⁸ Finally, the Secretary was authorized to draft a model code as a guide to the tribes and as an operative code for those tribes who did not draft their own.⁴⁹ Although the original version of the Act provided for a court of Indian affairs with appellate jurisdiction, this provision was removed before passage, leaving unchanged the old system of appeals to BIA administrators and ultimately to the Secretary.⁵⁰

The motivation behind the Indian Reorganization Act was to encourage the establishment of Indian governing bodies to exercise the sovereign powers which the Supreme Court in *Talton* had said belonged to the tribes. This view was expressed by Felix Cohen, one of the drafters of the Act: "These powers are subject to qualification by treaties and by express legislation by Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and their duly constituted organs of government."⁵¹ This notion of "internal sovereignty"⁵² was to become the watchword of the courts in ensuing decades.

Because many tribes, however, were ill-prepared for self-government, the BIA often simply imposed its own code and created the tribe's constitution, by-laws, council, and court.⁵³ "While the trappings of autonomy had been created the substance was lacking.

47 The Act provided no express authority for the Secretary to review council-passed ordinances, but it became customary for him to do so through his local superintendent. See 25 C.F.R. § 11.1(e); see also SUMMARY REPORT OF HEARINGS, *supra* note 21, at 3.

48 25 C.F.R. § 11.1(b) (1969).

49 25 C.F.R. § 11 (1969).

50 H.R. REP. NO. 1804, 73d Cong., 2d Sess. 6 (1934).

51 U.S. SOLICITOR FOR DEPT. OF INTERIOR, FEDERAL INDIAN LAW 143 (1940).

52 "Internal sovereignty" was contrasted with "external sovereignty" — the tribes' powers vis-a-vis non-Indians. The tribes enjoyed full sovereign independence from outside forces except for the federal government.

53 Oliver, *The Legal Status of American Indian Tribes*, 38 ORE. L. REV. 193 (1959).

No major transfers of governmental functions from the Bureau of Indian Affairs to the tribes took place."⁵⁴

In fact, the 1934 Act strengthened the role of the BIA in tribal affairs, and the Secretary's review powers ensured that the BIA would still have considerable influence even among those tribes capable of creating their own governing bodies. While the Bureau role at first seems inconsistent with the principle of tribal sovereignty which the Act was apparently designed to implement, BIA involvement conformed with the Meriam Report which had acknowledged that true Indian self-government was a long-term objective at best, and that Indians should prepare for the eventual control of their own affairs through the gradual extension of tribal power.⁵⁵

E. *World War II to 1955: Termination and Assimilation*

Nearly 25,000 Indians served in the American armed forces during World War II, and almost twice that number worked in industry.⁵⁶ As had been the case following World War I, new efforts were made after World War II to bring the Indians into the mainstream of American society. It appeared, however, that while white America was making room for the native American, it also threatened to destroy his Indian identity.

The cultural conquest of the recalcitrant red man, by cajoling and by assimilation was at hand. He was measured for the melting pot. It was with this hope in mind that the Hoover Commission on postwar governmental reorganization, which had been appointed by President Truman, recommended "complete integration" Evidently it was thought that if the Indian could fight and work like everyone else then he must be like everyone else.⁵⁷

Advance warnings of an attempt to remove the confining but protective fabric woven into the 1934 Act appeared as early as 1943, when the Senate Indian Affairs Subcommittee called for liquidation of the BIA and termination of its services.⁵⁸ In 1947,

⁵⁴ Schifter, *Trends in Federal Indian Administration*, 15 S.D. L. REV. 1, 4 (1970).

⁵⁵ MERIAM, *supra* note 40, at 86-90.

⁵⁶ DRIVER, *supra* note 5, at 495.

⁵⁷ S. STEINER, *THE NEW INDIANS* 23 (1968).

⁵⁸ S. REP. NO. 310, 78th Cong., 1st Sess. 17 (1943).

the Commissioner of Indian Affairs presented a plan to the subcommittee for termination of federal services to some more "advanced" tribes.⁵⁹ The Hoover Commission, in 1948, coupled its plea for integration with a proposal to terminate federal services to tribes and to transfer these functions to the states.⁶⁰ The next year, measures were introduced in Congress to abolish the BIA⁶¹ and to amend the Constitution to eliminate the power of Congress over Indian affairs.⁶²

In 1948, Congress authorized New York to assume criminal jurisdiction over all Indians residing within its borders,⁶³ and a year later it extended coverage to include all civil disputes.⁶⁴ Because the Indians in New York were relatively assimilated and voiced no objection to the legislation, these actions created little controversy. The movement for further extension of state jurisdiction over Indian reservations throughout the country was slowed temporarily in 1948 when a bill to that effect failed in the Senate after passing the House.⁶⁵

However, the move to transfer tribes from BIA guardianship to state jurisdiction gained momentum as the Bureau brought discredit on the system created in 1934. In 1950, Dillon Myer, former director of the World War II Japanese-American Relocation Program, was named Commissioner of Indian Affairs. In order to implement the BIA's plan to relocate Indians into the cities, Myer used the Bureau to control or to dispose of reservation lands and individual property.⁶⁶ The BIA also allegedly meddled in tribal politics, froze tribal funds to quiet dissent on the reservations, interfered with the tribes' efforts to obtain legal counsel, and re-

59 STEINER, *supra* note 57, at 23.

60 Report of the Committee on Indian Affairs to the Commission on Organization of the Executive Branch of the Government (Oct. 1948), cited in BROPHY, *supra* note 16, at 36. The idea of turning Indian problems over to the states was an old one. In 1882 the Commissioner had recommended that when the Dakota and New Mexico territories became states they be given jurisdiction over reservations, but four years later the Supreme Court warned: "They [the Indians] owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 383 (1886).

61 S. 2726, 81st Cong., 1st Sess. (1949).

62 95 CONG. REC. 9745 (1949).

63 25 U.S.C. § 232 (1970).

64 25 U.S.C. § 233 (1970).

65 H.R. 4725, 89th Cong., 2d Sess. (1948).

66 See generally STEINER, *supra* note 57, at 179.

fused to build permanent community facilities on reservations (such as a hospital in Papago country) because it would encourage the natives to remain on their land rather than to relocate.⁶⁷

The BIA's abuse of its power to prepare Indians for self-sufficiency moved Congress to attempt "to get out of the Indian business."⁶⁸ After bills to set tribes "free" under state jurisdiction nearly passed the Eighty-second Congress, the Eighty-third Congress adopted House Concurrent Resolution 108, stating in part:

[I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship⁶⁹

Bills to transfer jurisdiction over Indians to California, Minnesota, Nebraska, Nevada, Oregon, and Wisconsin were introduced.⁷⁰ Of these, H.R. 1063 was enacted and became known as Public Law 280.⁷¹ Although originally drafted to affect only Indians in California, in its final form it covered Indians in Minnesota, Nebraska, Oregon, and Wisconsin. Sections 6 and 7 permitted states whose constitutions contained disclaimers of jurisdiction over Indian affairs to amend their constitutions to exercise such jurisdiction. In making this open-ended transfer of authority Congress did not even require that the Indians be consulted before a state assumed jurisdiction over them. President Eisenhower signed the bill reluctantly, terming the legislation an "unchristianlike approach" to Indian problems, and noting further:

⁶⁷ Cohen, *The Erosion of Indian Rights, 1950-1953*, 62 *YALE L.J.* 348, 352-59 (1953).

⁶⁸ *Hearings on H.R. Con. Res. 108 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess., ser. 7, at 28 (1953) (remarks of Representative Saylor of Pennsylvania), *quoted in* Oliver, *The Legal Status of American Indian Tribes*, 38 *ORE. L. REV.* 193, 238 n. 247 (1959).

⁶⁹ H.R. Con. Res. 108, 83d Cong., 1st Sess., 99 *CONG. REC.* 9968 (1953).

⁷⁰ These states had no disclaimers of jurisdiction over Indians written into their constitutions, and their tribes had been previously "consulted" about the transfer, although no claim was made that their consent had been obtained. H.R. REP. No. 848, 83d Cong., 1st Sess. 7-8 (1953).

⁷¹ Act of August 15, 1953, 67 Stat. 588, *as amended* 18 U.S.C. § 1162 (1970) and 28 U.S.C. § 1360 (1970).

The failure to include in these provisions a requirement of full consultation in order to ascertain the wishes and desires of the Indians and of final Federal approval, was unfortunate. I recommended, therefore, that at the earliest possible time in the next session of the Congress, the act be amended to require such consultation with the tribes⁷²

The administration, however, did not submit a bill to implement the President's recommendation. While several members of Congress responded in the Second Session of the Eightythird Congress and continued to introduce modifying legislation during the remainder of the decade,⁷³ none was successful.

In 1954, Congress proceeded with legislation to terminate federal services to selected tribes, as contemplated by House Concurrent Resolution 108.⁷⁴ Several bills proposed to terminate tribes throughout the west and midwest. The most significant legislation to emerge was the termination of the Menominee,⁷⁵ Klamath,⁷⁶

⁷² *Hearings on S. 961-968 and S.J. Res. 40 Before Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 243 (1965) (testimony of Eagle Seelatsee, Chairman, Yakima Tribal Council) [hereinafter cited as 1965 Hearings].*

⁷³ S. 2625 and S. 2838 were introduced by Senators Murray and Goldwater, and H.R. 7193 by Representative Metcalf, in the next session; all of these bills died in committee. Similar bills were introduced in later years by these members of Congress, joined by Representatives Rhodes, Senner, and Olsen, and Senators Burdick and Mansfield. One bill was successfully shepherded through the Senate by Senator O'Mahoney of Wyoming, despite resistance of Senator Watkins of Utah, Chairman of the Indian Affairs Subcommittee, and despite an adverse report from the Interior Department. 102 CONG. REC. 399 (1956). However, the bill failed to clear the House Interior and Insular Affairs Committee. *Id.* at 661.

⁷⁴ House Concurrent Resolution 108 states in part: ". . . [A]t the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: The Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Potawatamie Tribe of Kansas and Nebraska, and those members of the Chippewa Tribe who are on the Turtle Mountain Reservation, North Dakota. It is further declared to be the sense of the Congress that upon the release of such tribes and individual members thereof from such disabilities and limitations, all offices of the Bureau of Indian Affairs in the States of California, Florida, New York, and Texas and all other offices of the Bureau of Indian Affairs whose primary purpose was to serve any Indian tribe or individual Indian freed from Federal supervision should be abolished." H.R. Con. Res. 108, 83d Cong., 1st Sess., 99 CONG. REC. 9968 (1953).

⁷⁵ 25 U.S.C. § 891 *et seq.* (1970).

⁷⁶ 25 U.S.C. § 564 *et seq.* (1970).

and various western Oregon⁷⁷ tribes. The Klamaths promptly lost most of their timberlands and farmlands, which a Portland bank acting as trustee sold to the government and to private users following what appeared to be little consultation with the tribe. The tribe then began to disintegrate as a political and social organization.⁷⁸ The termination of the Menominee also caused the disintegration of the tribal structure, in addition to the near insolvency of several large tribal enterprises and the depletion of its treasury reserves before an adjustment to the new situation could be made.⁷⁹

The termination policy sent a shock through Indian country which continues to this day.⁸⁰ The termination controversy also split the Department of the Interior and the BIA.⁸¹ To calm the storm around him, Secretary Seaton announced in a radio broadcast that henceforth no tribe would be terminated unless it fully understood the program and clearly consented to it.⁸² An old lesson had been re-learned: "The Indian tolerates his present impotent and unjust status in his relations with the Federal Government because he sees the Bureau of Indian Affairs as the lesser of two evils. . . . [T]he Bureau and only the Bureau stands between the Indian and extinction as a racial cultural entity."⁸³ The federal burden was again accepted as part of white society's debt to the Indian:

As to special Indian rights, since being an Indian is hereditary, the rights at first glance seem anomalous in a democracy; when we study them, however, the anomaly fades. They are part of a quid pro quo promised solemnly by us in treaties, agreements and laws, and upheld over and again by our courts, in exchange for the whole area of the United States and for the ending of rightful independence.⁸⁴

77 25 U.S.C. § 691 *et seq.* (1970).

78 BROPHY, *supra* note 16, at 199.

79 *Id.* at 201-03.

80 "Fear of termination pervades Indian thinking. It colors the Indian's appraisal of every proposal, suggestion and criticism." E. CAHN, *OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA* 16 (1969).

81 BROPHY, *supra* note 16, at 182.

82 105 CONG. REC. 3105 (1959).

83 CAHN, *supra* note 80, at 14.

84 LaFarge, *Termination of Federal Supervision: Disintegration and the American Indians*, 311 ANNALS 41-42 (1957).

F. *The Recent Years: The Indians and the Courts*

In *Tee-Hit-Ton Indians v. United States*,⁸⁵ the Supreme Court held that certain tribal property rights established by occupancy "since time immemorial" could be cancelled by Congress at its discretion and without compensation. This much-criticized decision⁸⁶ has been seen to undercut the principle of the Indian's sovereign control of tribal lands and to run counter to the spirit of a decision in 1941 upholding the notion of sovereign control and requiring compensation for cancellation of that control.⁸⁷ In *Tee-Hit-Ton* the Court declared: "Our conclusion . . . leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of government-owned land rather than making compensation for its value a rigid constitutional principle."⁸⁸ As termination fever cooled, the significance of *Tee-Hit-Ton* diminished. A number of subsequent decisions by the Court of Claims recognized the tribes' sovereign control of their lands and resources and ordered compensation on statutory, not constitutional, grounds.⁸⁹

Lacking clear direction, lower federal courts rendered divergent, uncertain opinions on issues of tribal sovereignty. The Eighth Circuit, for example, took the traditional position in *Iron Crow v. Oglala Sioux Tribe*,⁹⁰ upholding the enforcement of a tribal court's sentence for adultery. The Tenth Circuit was guided by similar principles in *Martinez v. Southern Ute Tribe*⁹¹ as it declined to review a decision by a tribal council which allegedly denied an Indian the benefits of tribal membership. In *Oglala Sioux Tribe v. Barta*,⁹² however, a district court agreed to hear a tax collection action brought by the tribe against a non-member who was leasing tribal land. Normally such a matter would be

85 348 U.S. 272 (1954).

86 E.g., *The Supreme Court: 1954 Term*, 69 HARV. L. REV. 119, 150 (1955).

87 *United States v. Santa Fe & Pacific R.R.*, 314 U.S. 339 (1941).

88 348 U.S. at 290-91 (1954).

89 See, e.g., *United States v. Seminole Indians*, 180 Ct. Cl. 315 (1967); *Whitefoot v. United States*, 155 Ct. Cl. 127 (1961); and *Tlingit and Haida Indians v. United States*, 147 Ct. Cl. 315 (1959).

90 231 F.2d 89 (8th Cir. 1956).

91 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958).

92 146 F. Supp. 917 (D.S.D. 1956).

under tribal court jurisdiction. The court suggested that the 1934 Act had changed the tribe from a sovereign entity to a federal agency: "Thus the rights derived from original sovereignty have been directly channeled into a Federal statutory scheme and all tribal powers are exercised under Federal law."⁹³ When the lessee appealed, the Eighth Circuit upheld the tribe's right to exact a discriminatory tax on non-Indians on the reservation, despite the due process protections of the fifth amendment or the equal protection clause of the fourteenth.⁹⁴ It also held that the lower court had not acted improperly in hearing the cases.⁹⁵ Thus, the appeals court implied that federal jurisdiction rested on the tribe's operation under federal law but that provisions of the federal Constitution remained inapplicable.

A less puzzling retreat from the tribal sovereignty principle appeared when the plaintiff in *Martinez*,⁹⁶ who had failed in federal court, sought a remedy in Colorado courts. The Colorado Supreme Court,⁹⁷ noting that the plaintiff's remedy had been denied in tribal and federal courts, reasoned that to deprive her of any remedy whatever would deny her equal protection of the laws and agreed to hear the case. The court maintained that incorporation under the 1934 Act constituted an expression of consent by the tribe to be sued in state court, because as a corporation, the tribe had recourse to state courts for protection of its rights, and it should, therefore, be required to answer the claims of others in state courts as well.

Notwithstanding the Colorado Supreme Court's decision, the movement away from tribal sovereignty during the years following 1954 slowed as two widely publicized decisions in Navaho country again reaffirmed the principle of tribal sovereignty by denying constitutional guarantees of individual rights to Indians in disputes with their tribal governments. In 1959, members of the Native American Church brought a first amendment attack in federal court on a Navaho ordinance which prohibited them from using or possessing peyote, a mild hallucinogen, as a substitute for the usual

93 *Id.* at 918.

94 259 F.2d 553, 556-57 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1958).

95 *Id.* at 555-57.

96 *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958).

97 *Martinez v. Southern Ute Tribe*, 150 Colo. 504, 374 P. 2d 691 (1962).

Christian sacraments. In an earlier first amendment action, charging infringement of religious freedom of Protestants in a Catholic pueblo, a federal district court had dismissed for lack of jurisdiction;⁹⁸ but in *Native American Church v. Navaho Tribal Council*,⁹⁹ the Tenth Circuit did not refuse jurisdiction, even though the Navaho tribe had not organized under the 1934 Act. Rather, the court held that, with respect to freedom of religion, the Constitution did not apply to the Navaho tribe. The first and fourteenth amendments were interpreted as restrictions on the state and federal but not on tribal governments. The argument that the tribe was actually a federal agency was dismissed.

In the same year, the Supreme Court clarified limitations of state jurisdiction over civil disputes on the reservation in cases where the state had not assumed full jurisdiction under Public Law 280. In *Williams v. Lee*¹⁰⁰ the Court held that a state court could not compel payment by Indians for goods purchased on credit at a non-Indian's store on the reservation. The Court noted that the Navaho court system could exercise broad criminal and civil jurisdiction over suits by outsiders against tribesmen. It issued a sweeping endorsement of tribal sovereignty, suggesting the following guideline for allocating disputes between state and tribal courts: "Essentially, 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 ruled by them."¹⁰¹

Students of Indian problems, deeply affected by the failure of instant assimilation, entered the 1960's with a renewed awareness of the need to retain sovereign power in tribal institutions. This theme was struck in an independent report,¹⁰² in the report of a Department of the Interior Task Force created by the newly ap-

98 *Toledo v. Pueblo de Jemez*, 119 F. Supp. 429 (D.N.M. 1954).

99 272 F.2d 131 (10th Cir. 1959).

100 358 U.S. 217 (1959).

101 *Id.* at 220. *But cf.* *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962) (dictum). The restriction of non-Indians to tribal courts or courts of Indian offenses for certain civil remedies, by *Williams* and subsequent decisions such as *United States ex rel. Rollingson v. Blackfeet Tribal Court*, 244 F. Supp. 474 (D. Mont. 1966), is said to have caused concern among white businessmen on the reservations. Often viewed by the Indians as exploiters, they feared they could not expect impartial treatment from a native tribunal.

102 FUND FOR THE REPUBLIC, REPORT OF THE COMMISSION ON THE RIGHTS, LIBERTIES AND RESPONSIBILITIES OF THE AMERICAN INDIAN (W. Brophy & S. Aberle eds. 1961).

pointed Secretary of the Interior, Stewart Udall,¹⁰³ and in the Declaration of Indian Purpose issued from a native American convocation at the University of Chicago in 1961.¹⁰⁴ Unresolved was the fundamental problem of how tribal institutions should relate to the constitutional system of the surrounding society.

II. THE ERVIN INDIAN INQUIRY AND PROPOSED LEGISLATION

A. *Senator Ervin and the Indians*

When Congress passed the Removal Act of 1830,¹⁰⁵ Andrew Jackson deployed troops throughout the southeastern United States to force the Indians westward. One hundred thousand Indians were resettled, and thousands more died along the "Trail of Tears" to Oklahoma. However, some tribes, including the Choctaw, the Seminole, and a band of the Cherokee, resisted. After \$50 million and 1500 men had been lost pursuing the Seminole in the Everglades for two decades, further efforts to enforce the Removal Act against southern tribes were abandoned.¹⁰⁶

Unlike the Seminole who remained isolated in the Everglades and the Choctaw who regrouped in sparsely settled areas of Mississippi, the surviving Cherokee continued to live in close contact with southern white society. Acquisition of a small reservation in North Carolina over which federal jurisdiction was concluded in 1868¹⁰⁷ established the Cherokee people as permanent residents of that state.

The co-existence between the white man and the Indian in the South, nurtured perhaps by a sense of common defeat at the hands of armies sent from Washington, has resulted in what one observer has termed the "romantic" southern affection for the Indian and his heritage.¹⁰⁸ Among the southerners who have publicly proclaimed this feeling for the Indian is Senator Sam Ervin of North

103 TASK FORCE ON INDIAN AFFAIRS, A PROGRAM FOR INDIAN CITIZENS (1961).

104 American Indian Chicago Conference, Declaration of Indian Purpose (June 13-20, 1961).

105 Act of May 28, 1830, ch. 148, 4 Stat. 411-12.

106 DRIVER, *supra* note 5, at 486.

107 *Id.* at 499.

108 Letter from Arthur Lazarus, Jr., counsel to the Association on American Indian Affairs, to the author, March 3, 1970, on file at office of Harvard Legislative Research Bureau.

Carolina.¹⁰⁹ His professed interest in Indian affairs may also be reinforced by a large native-American constituency in his home state.¹¹⁰ It has surely been augmented by his repeatedly demonstrated concern for the protection of constitutional rights.

When the *Williams*¹¹¹ and *Native American Church*¹¹² decisions reaffirmed that systems of tribal government were largely unregulated by the Constitution, Helen Scheirbeck, a Lumbee serving with Senator Ervin's Subcommittee on Constitutional Rights, initiated a preliminary inquiry to determine whether such immunity from constitutional restraint had resulted in actual deprivations of constitutional rights by the Indian tribes. As the investigation progressed, it broadened into one of Indian rights in general, as the Subcommittee staff received numerous complaints about violations of constitutional guarantees not only by tribal authorities but also by federal, state, and local officials. However, Senator Ervin appeared to find the conflict between the Constitution and tribal sovereignty more intellectually stimulating than the broader issue of white relations with the Indians.¹¹³ Furthermore, Senator Ervin, who had opposed previous civil rights measures, was careful at this time to separate the fledgling Indian project from the volatile issues of race relations concerning other minority groups.

In order to maintain his stand on Negro civil rights while investigating those of the Indian, Senator Ervin and his staff deftly distinguished red from black. Indians came to be known as "the minority group most in need of having their rights protected by the national government."¹¹⁴ Senator Ervin was later to claim, "[e]ven though the Indians are the first Americans, the national policy relating to them has been shamefully different from that relating to other minorities."¹¹⁵ The Indian project in fact later

109 110 CONG. REC. 22081 (1964).

110 With 40,000 Indians in 1960, North Carolina trailed only Arizona, New Mexico, Oklahoma, and California in Indian population. STEINER, *supra* note 57, at 324. 1970 figures reveal approximately 45,739 Indians in the state. UNITED STATES BUREAU OF THE CENSUS GENERAL CHARACTERISTICS OF THE POPULATION.

111 See text at note 100, *supra*.

112 See text at note 99, *supra*.

113 See, e.g., 107 CONG. REC. 17121-22 (1961).

114 Letter from Lawrence M. Baskir, Chief Counsel and Staff Director, Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary, to the author, March 5, 1970, on file at office of the Harvard Legislative Research Bureau.

115 114 CONG. REC. 393 (1968).

provided Senator Ervin with occasional opportunities to embarrass his northern liberal colleagues, who were allegedly less interested in the first Americans than in the politically powerful black community.

Senator Ervin could politically afford to support Indian rights largely because of the extensive assimilation of North Carolina Indians into southern life. The Cherokee and Lumbee settlements had been fully integrated into the state's governmental structure as counties and municipalities.¹¹⁶ It has been said that they represent a small, unaggressive, poorly differentiated minority in the state.¹¹⁷ This integration has been facilitated, especially in the case of the Cherokee, by the early evolution of legal institutions modeled after those of their white neighbors. Their codes, courts, sheriffs, and police forces, for example, have long been in existence.¹¹⁸

While this fact freed Senator Ervin to investigate Indian rights without political difficulty at home, it limited his perspective. During the hearings, he revealed his inclination to try to duplicate the North Carolina assimilation experience on a national level. He demonstrated this predilection by focusing on how the systems of tribal justice outside North Carolina failed to conform to the country's constitutional scheme. As Senator Ervin launched the investigation, he cited the preliminary inquiries of his own staff, the Fund for the Republic Report, and the Department of the Interior Task Force Report, as factors in his decision to proceed.¹¹⁹ Each had advanced the conventional thesis that deviations from constitutional government in the United States were improper in themselves and required eventual correction.¹²⁰

116 *Hearings on Constitutional Rights of American Indians Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess., pt. 1, at 4 (1961)* [hereinafter cited as *1961 Hearings—Part I*].

117 In a 1970 school desegregation dispute, the BIA declared that the Lumbees lacked a tribal culture and did not constitute a tribe. Franklin, *Indians Resist Integration Plan in Triracial County in Carolina*, N.Y. Times, Sept. 13, 1970, § 1, at 78, col. 4.

118 HAGAN, *supra* note 18, at 19-21.

119 107 CONG. REC. 17121 (1961).

120 This language from the Fund for the Republic Report, is expanded in BROPHY, *supra* note 16, at 44: "No government should possess the authority to infringe fundamental civil liberties For any tribe to be able to override any of them violates the very assumptions on which our democratic society was established."

B. *The Subcommittee Field Hearings*

For the Subcommittee's first official hearing on Indian rights, Senator Ervin turned to non-Indian authorities.¹²¹ An assistant secretary of the Department of the Interior, various BIA administrators, and interested members of Congress were heard first. Then the hearings moved west to Colorado, New Mexico, Arizona, North and South Dakota, and California before returning to Washington where further sessions were held in 1963 and 1965. Native testimony mixed self-interest and tribal loyalty, bitterness about white mistreatment and cautious acceptance of Anglo-American precepts. From this mixture emerged a broad picture of constitutional neglect which Senator Ervin was determined to remedy. The focus fell first on the tribal system.

1. Constitutional Guarantees and the Tribal System

Tribal politics is politics in a closed circle; it is intense and deeply personal.¹²² Traditionally, tribal government has been fully participatory, controlled mainly by the prospect of shame before the group. One commentator described nineteenth century tribal systems:

Law in the sense of formal written codes, of course, they did not have, but there were clearly defined customary codes of behavior enforced by public opinion and religious sanctions For most Indians the prospect of scornful glances and derisive laughter from the circle around the campfire was the chief instrument of social control.¹²³

In this century, group pressure remains central, but individuality is not stifled; rather, the security of tribal identity has encouraged differentiation without fear of being ostracized and isolated. Thus, the "[c]ommunity of tribalism does not diminish the Indian's individuality. On the contrary it protects him socially and thus frees him individually. . . . The more secure his tribe is, the more secure the Indian feels — and the more independent and

¹²¹ 1961 Hearings — Part 1, *supra* note 116.

¹²² Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1830 (1968).

¹²³ HAGAN, *supra* note 18, at 11.

self-confident he is."¹²⁴ Because the individual's sense of well-being is based in part on the security of the tribe, an Indian will frequently react more strongly to an attack on tribal institutions than to an attack on his own individual rights or powers.¹²⁵ This tribal orientation has been reinforced by the fact that all of the rights which the United States reserved to Indians by treaty pertained to the tribes as group entities rather than to individuals and in light of the conflict with white society over control of group-owned reservation resources.¹²⁶

The traditional lack in most tribes of established social classes further cements tribal ties since there are fewer sources of localized power and sub-group disaffection. Tribes of the plains, prairies, and the East (such as the Cheyenne, the Creek, and the Iroquois) had well-defined systems of rank, but these were primarily based on achievement and only secondarily on heredity.¹²⁷ Certain tribes of the Northwest which maintained slave systems and the Pueblo communities of the Southwest were exceptions to this general rule. The Pueblo communities have been termed theocratic, because seats on the governing council were filled by the leaders of the many religious societies.¹²⁸ The social adhesive in the tribal systems appears to have been the collective manner in which decisions were made — community consent was required before the council would act. The emphasis was on group harmony: "In council meetings, it was considered bad form to become self-assertive and vociferous, and those who did almost never gained the assent of the council to their proposals."¹²⁹ There is some evidence that the aura of harmony was protected in the past by a policy of expurgation, as deviants were occasionally expelled or put to death.¹³⁰ Thus, no decisions were made without group consent, but the group was constantly adjusted to render consent possible.

The scope of tribal governments is generally similar to that of

124 STEINER, *supra* note 57, at 140.

125 1961 Hearings—Part 1, *supra* note 116, at 223 (statement of Arthur Lazarus, Jr.).

126 *Id.* at 187.

127 DRIVER, *supra* note 5, at 298, 341.

128 *Id.* at 297.

129 *Id.* at 338-39.

130 *Id.* at 297.

state or municipal governments in non-Indian communities.¹³¹ These bodies make, enforce, and interpret laws affecting the general welfare, including the control on the reservation of criminal behavior not within federal jurisdiction by the Seven Major Crimes Act. Testimony in Washington revealed that of 247 organized tribes, 117 (most of them organized under the 1934 Act) operated under constitutions protecting individual civil rights, while 130 did not.¹³² What rights provisions there were in these constitutions, however, were often incomplete.¹³³ In addition, 188 other tribes or bands were not organized under any tribal constitution.¹³⁴ In tribal courts, the absence of guaranteed rights was illustrated in four critical areas of due process — right to counsel, right to remain silent, right to trial by jury, and right to appeal.

The testimony at the hearings made it clear that few, if any, tribal courts allowed professional attorneys to appear before them. Courts of Indian offenses had been prevented by federal regulation from hearing professional counsel until the Secretary of the Interior revoked the regulation on May 16, 1961.¹³⁵ Generally, representation by another member of the tribe was permitted, but an assistant secretary of the Interior informed the Subcommittee that he knew of only one Indian lawyer practicing with his tribe.¹³⁶ Consequently, a de facto prohibition of professionals prevailed, in keeping with the informal nature of low-budget courts, managed by a single judge, without aid of a prosecutor.¹³⁷

Many courts failed to advise defendants of their right to remain silent. In Phoenix, a BIA area director indicated that he knew of no tribe with protection against self-incrimination written into its constitution. In practice, however, courts for tribes which were capable of devoting substantial resources to evidence-gathering

131 BROPHY, *supra* note 16, at 24.

132 1961 Hearings — Part 1, *supra* note 116, at 121.

133 Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess., pt. 4, at 823 (1963) [hereinafter cited as 1963 Hearings].

134 1961 Hearings — Part 1, *supra* note 116, at 166.

135 26 Fed. Reg. 4360 (1961).

136 1961 Hearings — Part 1, *supra* note 116, at 23.

137 The Criminal Justice Act of 1964, 18 U.S.C. § 3006A later provided legal assistance for Indians charged with violations of the Seven Major Crimes Act, and tried in U.S. district courts, but the 1964 Act did not extend to violators of tribal regulations brought before tribal courts.

usually protected the right to silence.¹³⁸ Smaller tribes, with less adequate enforcement facilities and personnel, did not offer this protection. Asked if he believed silence would prejudice a defendant's case, a Pima-Maricopa judge replied, "It certainly would."¹³⁹

Most tribes provided for jury trial in some form, following the pattern established by regulations governing the old courts of Indian offenses. Even in those cases, however, the right to jury trial was often partially abridged. Typically, the jury consisted of six persons. They received compensation of only 50 cents per day, making it very difficult to assemble a jury. Accordingly, defense challenges were limited to three members of the jury panel. To prevent hung juries and new trials, verdicts could be decided by majority vote.¹⁴⁰ In some areas, moreover, the right to jury trial was lacking entirely. The Southern Utes of Colorado, for example, had no provision in their code for jury trials.¹⁴¹ At Fort Totten-Devil's Lake, a BIA-appointed judge, pressured by the tribal council and police to maintain a high conviction rate,¹⁴² simply refused all pleas of not guilty.¹⁴³ Similarly, a Standing Rock Sioux judge occasionally circumvented jury trials by incarcerating defendants even if they had not pleaded or been found guilty.¹⁴⁴

Appellate procedures were similarly attenuated. Among many tribes, such as the Navaho, the court of appeals was comprised of all the trial judges sitting together as a panel.¹⁴⁵ Tribes with only a single judge devised more ingenious procedures; for example, the Shoshone-Bannock system provided trial by jury on appeal,¹⁴⁶ while the Pima-Maricopa tribal council appointed two laymen

138 *1963 Hearings*, *supra* note 133, at 862.

139 *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 2, at 366 (1961) [hereinafter cited as *1961 Hearings—Part 2*].

140 25 C.F.R. § 11.7(d) (1971).

141 *1961 Hearings—Part 2*, *supra* note 139, at 436.

142 A BIA practice of receiving efficiency reports on judges from law enforcement personnel made such pressure inevitable. *1961 Hearings—Part 1*, *supra* note 116, at 88 (statement of Senator Quentin Burdick).

143 *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess., pt. 3, at 769 (1962) [hereinafter cited as *1962 Hearings*].

144 *Id.* at 734.

145 *1963 Hearings*, *supra* note 133, at 862.

146 *Id.* at 826.

when the need arose to serve with the tribal judge on a three-member appeals panel.¹⁴⁷

The principal reason for the denial or abridgement of these rights was apparently the paucity of resources which most tribes could allocate to law enforcement. Prohibition of trained lawyers made possible the continued functioning of the tribal court system with untrained judges and without prosecutors. Compulsory testimony of defendants eased the costly burden of police investigation. Eliminating the jury or shifting it to the appeals level relieved pressure on court budgets. Redundancy of judges at the trial and appeals levels and ad hoc appointment of laymen for appealed cases produced similar savings. Despite strivings toward professionalism and the acceptance in principle by many tribal courts of due process requirements,¹⁴⁸ budgetary restrictions made infringement of these rights unavoidable. Average family incomes of \$1,500,¹⁴⁹ land held in trust by the BIA, and meager royalties received for white development of reservation resources¹⁵⁰ provided inadequate bases for tribal revenue. The approximately 6000-member Pima-Maricopa tribe allotted only \$4,500 annually to cover all court and police operations.¹⁵¹ Even larger more affluent tribes, such as the Warm Springs Confederation, which spent \$50,000 annually on judicial and law enforcement activities, regarded the financial burden of putting trained personnel in tribal courts as "impossible." The Confederation's general counsel observed that without financial assistance, "imposition upon the tribal courts of all the requirements of due process as we non-Indians know them, would mean the end of our tribal courts."¹⁵²

Infringement of constitutional rights by tribal councils, in contrast to that by the tribal courts, appeared to manifest more than

147 1961 Hearings—Part 2, *supra* note 139, at 366.

148 Representative E. Y. Berry later informed Congress that the tribal judges had formed their own professional society, whose purpose was "to upgrade the Tribal court system through professional advancement and continuing education." 115 CONG. REC. 938 (1969).

149 Current estimates of Indian family income are generally in the area of \$1500. CAHN, *supra* note 80, at viii; Collier, *The Red Man's Burden*, RAMPARTS, Feb., 1970, at 30.

150 CAHN, *supra* note 80, at 82-92.

151 1961 Hearings—Part 2, *supra* note 139, at 367-68.

152 1963 Hearings, *supra* note 133, at 872.

simply budgetary distress. One issue which drew Subcommittee attention to the abuse of council power was freedom of religion. The refusal of the Tenth Circuit to void the Navaho ordinance prohibiting the use of peyote in *Native American Church*¹⁵³ clearly illustrated the power of tribal councils. Outlawing the use of peyote was tantamount to outlawing the Native American Church. In the hearings, members of the Church complained to the Subcommittee that they were also victims of police harassment and of employment discrimination, even at the hands of the BIA, as a result of religious affiliation.¹⁵⁴

Other witnesses also charged that some tribal councils violated individuals' constitutional rights. An attorney for the Rosebud Sioux claimed that many South Dakota tribal councils had with BIA approval enacted unconstitutional ordinances prohibiting private drunkenness.¹⁵⁵

2. Constitutional Guarantees and the BIA

As the discussion of the authority of tribal councils has indicated, the BIA frequently shared culpability with tribal councils for failure to observe the requirements of due process. Because the Bureau was decentralized, with little upward accountability, there was considerable potential for the abuse of authority at the local agency level.¹⁵⁶ One Shoshone-Bannock attorney charged the BIA with neglect of reservation law enforcement. He claimed that although the tribe was authorized to have two chief judges and three associate judges, the BIA had without cause refused to provide more than one; and that one was considered arbitrary and prejudiced. The BIA refused to remove her from office, even when petitioned by the tribal council to do so.¹⁵⁷ When pressed by Subcommittee counsel in the initial hearings, Interior's Assistant Solicitor for the Division of Indian Affairs testified that he knew of no systematic study undertaken by the Department to ascertain if the code contained unconstitutional provisions.¹⁵⁸

The director of the BIA's law enforcement branch further ad-

153 See text at note 99, *supra*.

154 1961 Hearings—Part 2, *supra* note 139, at 467-78.

155 1962 Hearings, *supra* note 143, at 608.

156 CAHN, *supra* note 80, at 147-55. Reforms in 1970, especially elimination of area offices, may help to alleviate this problem.

157 1963 Hearings, *supra* note 133, at 817.

158 1961 Hearings—Part 1, *supra* note 116, at 112.

mitted that the Bureau had never attempted to supply Indian courts with adequate law libraries and had failed even to request funds for this purpose.¹⁵⁹ The executive director of the National Congress of American Indians subsequently charged that the Bureau's neglect also extended to inadequate facilities, personnel, and training; the BIA simply had refused to request greater appropriations for these purposes.¹⁶⁰

The Subcommittee received testimony alleging that in numerous instances attorney contracts requiring BIA approval had been delayed for such extended periods as to deprive the Indians of legal counsel. The Shoshone-Bannock reported a delay of eight months,¹⁶¹ and the Quechan (Yuma) testified that a delay of 13 months had caused its prospective attorney to withdraw without ever serving.¹⁶² The Navaho reported in later hearings that the entire staff of the tribe's chief counsel had resigned because of Bureau delay of contract approval.¹⁶³

The Bureau's refusal to act on requests for code review, pleas for adequate resources for law enforcement, and submissions of attorney contracts contrasted sharply with its conscientious screening of tribal council legislation for adherence to BIA policy. Yet the Subcommittee failed to find statutory authority for this sort of activity.¹⁶⁴ Subcommittee counsel noted that there was no provision for further review by the courts of such BIA decisions; appeals were confined to the Interior bureaucracy.¹⁶⁵

The thrust of the testimony was that the BIA was less interested in the adequacy of law enforcement on the reservations and in the constitutional rights of the people for whom it was responsible than in maintaining control over tribal courts and councils and over the affairs of individuals. The attitude was neatly expressed, said the Shoshone-Bannock attorney, in a remark attributed to a BIA employee at Fort Hall: "We didn't have any trouble with the Indians until they found out they had constitutional rights."¹⁶⁶

159 *Id.* at 152.

160 *Id.* at 190, 202.

161 1963 *Hearings*, *supra* note 133, at 824.

162 1961 *Hearings—Part 2*, *supra* note 139, at 410.

163 1965 *Hearings*, *supra* note 72, at 300.

164 SUMMARY REPORT OF HEARINGS, *supra* note 21, at 3.

165 1961 *Hearings—Part 2*, *supra* note 139, at 317.

166 1963 *Hearings*, *supra* note 133, at 819.

3. Constitutional Guarantees and State and Local Authorities

Subcommittee counsel indicated that a principal reason for investigating Indian rights was the large number of complaints about civil liberties violations by federal, state, and local agencies.¹⁶⁷ The hearings, however, produced only scattered complaints about federal officials outside the BIA.¹⁶⁸ Rather, if the volume of complaints is any guide to the seriousness of a problem, the greatest threat to the civil liberties of Indians was presented by the enforcement of state criminal laws by local authorities in communities relatively near Indian reservations.¹⁶⁹ For example, the Shoshone-Bannock and Rosebud Sioux asserted that police from surrounding communities entered the reservations, where they lacked jurisdiction, to make arrests.¹⁷⁰ Moreover, the Cheyenne River Sioux claimed that Indians were frequently arrested for crimes for which whites would not have been prosecuted.¹⁷¹

Testimony also revealed occasional mistreatment of Indians while in custody. The South Dakota Indian Commission charged that Indian prisoners in some city jails were compelled to perform manual labor not demanded of non-Indian prisoners.¹⁷² The Shoshone-Bannock testified that a tribesman intoxicated on cleaning fluid was jailed by Pocatello authorities who allegedly were aware that he required hospitalization. The Indian died within

¹⁶⁷ 1962 *Hearings*, *supra* note 143, at 769.

¹⁶⁸ A tribal judge for the Hualapai claimed that the United States attorney repeatedly refused to prosecute major criminal cases that were placed under federal jurisdiction by the Seven Major Crimes Act. 1961 *Hearings—Part 2*, *supra* note 139, at 383-4. The Crow tribe of Montana charged federal game wardens with failing to enforce hunting and fishing regulations against non-Indians on Indian reservations. Moreover, the tribe claimed, one federal official had used his airplane to drive elk herds off the Crow Reservation into Wyoming, where white hunters waited. 1963 *Hearings*, *supra* note 125, at 887.

¹⁶⁹ 1961 *Hearings—Part 1*, *supra* note 116, at 224 (testimony of Arthur Lazarus, Jr.)

¹⁷⁰ 1963 *Hearings*, *supra* note 133, at 827; 1962 *Hearings*, *supra* note 143, at 639.

¹⁷¹ 1965 *Hearings*, *supra* note 72, at 331.

¹⁷² 1962 *Hearings*, *supra* note 143, at 588. The deliberate nature of this discriminatory treatment was illustrated in the testimony of the Chairman of the Crow Creek Sioux who quoted a police commissioner in a small South Dakota town: "Well, I think the boys are going to have to get some more Indians in jail, because we need a lot of snow moved over there on the north side of town." 1963 *Hearings*, *supra* note 133, at 898.

hours.¹⁷³ The Navaho charged police in Gallup, New Mexico, with "frequent" murder of Indians, citing as a typical case the black-jack bludgeoning of a tribesman jailed for drunkenness. He died in his cell the next day without having received medical treatment.¹⁷⁴ Spokesmen for the Crow tribe alleged that police in Billings and Hardin, Montana, customarily released intoxicated Indians at the city limits, dropping them there even in sub-zero weather.¹⁷⁵

During these hearings, non-Indian courts were linked with non-Indian police as villains.¹⁷⁶ The Shoshone-Bannock charged that Indian defendants confronted a presumption of guilt in courts off the reservation.¹⁷⁷ The Hualapai claimed that these courts cooperated with police who had made unauthorized arrests on reservations by attempting to sentence the defendants even though the courts knew they lacked jurisdiction.¹⁷⁸ Representatives of several tribes, as well as an assistant attorney general of South Dakota, testified that these courts sentenced Indians to penitentiary terms for "escape" when the local police negligently or intentionally allowed the prisoners to "walk away" before completing jail terms served for misdemeanors.¹⁷⁹ One such court was accused of ordering the release of Indian prisoners from jail and causing them to be transported to another state, where they were turned over to a farmer and forced to harvest crops.¹⁸⁰

Attorneys also related to the Subcommittee deprivations of due

¹⁷³ *Id.* at 820-21.

¹⁷⁴ *Id.* at 860-61.

¹⁷⁵ *Id.* at 882-83.

¹⁷⁶ Witnesses also claimed that their rights off the reservations were being violated by local and state officials other than those involved in law enforcement. Numerous instances were reported of Indians who lived off the reservation and were legal residents of the states involved being denied care at state hospitals. *E.g.*, 1961 Hearings—Part 2, *supra* note 139, at 650. Senator Burdick of North Dakota testified that reservation Indians were denied use of state correctional schools and that they could not be accepted in state mental institutions because they were not considered residents of the states. 1961 Hearings—Part 1, *supra* note 108, at 88. Indians residing off the reservations in South Dakota were said to be issued periodic certificates of non-residency, rendering them ineligible for state welfare benefits. 1961 Hearings—Part 2, *supra* note 139, at 603.

¹⁷⁷ 1963 Hearings, *supra* note 133, at 828.

¹⁷⁸ 1961 Hearings—Part 2, *supra* note 139, at 373-75.

¹⁷⁹ *E.g.*, 1962 Hearings, *supra* note 143, at 631, 699.

¹⁸⁰ 1963 Hearings, *supra* note 133, at 860.

process in arraignment. Right to counsel allegedly was denied or was not explained to defendants.¹⁸¹ Instances of local judges disallowing pleas of not guilty were recounted.¹⁸² One attorney claimed that in a number of cases when he surprised the prosecutor by appearing for Indian defendants, the charges were dropped. In many other cases, he asserted, the presence of a lawyer resulted in lesser sentences; in general, unrepresented Indian defendants received heavier penalties than their white counterparts.¹⁸³

Testimony received in California revealed another form of discriminatory treatment. California was charged with failing to devote adequate resources to law enforcement on its reservations after jurisdiction over them had been extended following passage of Public Law 280. The Quechan (Yuma) testified that after California had obtained jurisdiction over its reservation, the tribe was "left stranded." Its own law enforcement system was dissolved, but the California county officials claimed that because the reservation remained federal land, the county had no jurisdiction. The tribe was, therefore, required to re-hire and to pay its own law enforcement personnel.¹⁸⁴ Joined by the Rincon, Pala, and Puma representatives, the Soboba Band of Mission Indians reported problems of inadequate police protection of their lands and claimed that the local sheriff occasionally failed to respond to calls for assistance.¹⁸⁵

Frequently, the failure of state officials to provide law enforcement services on reservations where they were empowered to do so resulted in legal "no man's lands."¹⁸⁶ Such a situation had been created on the Soboba reservation. The Navaho reported a similar

181 1962 *Hearings*, *supra* note 143, at 598.

182 1961 *Hearings—Part 2*, *supra* note 139, at 375.

183 1962 *Hearings*, *supra* note 143, at 634-35.

184 1961 *Hearings—Part 2*, *supra* note 139, at 406-12.

185 *Id.* at 330.

186 A similar problem was found occasionally in civil disputes. A merchant, for example, could not compel an Indian on the reservation to pay a debt or to relinquish property through a non-Indian court. In practice, however, this problem has been minimized by the willingness of many tribal authorities to intervene on the merchant's behalf to avoid refusal of credit to all Indians. Moreover, some tribes have provided for concurrent state and tribal court jurisdiction in such cases, but the validity of these arrangements is in doubt unless they are preceded by tribal referendum and by state authorization under Public Law 280. See text at notes 316-17, *infra*.

difficulty, claiming that when tribal police apprehended whites for crimes such as rape, murder, and assault committed on the reservation and delivered them to New Mexico authorities for trial, the state disclaimed jurisdiction and released the prisoners.¹⁸⁷

Extradition posed a related problem. Many tribes were found not to enjoy reciprocal agreements with the states, or even with other tribes. The Mescalero Apache testified that an Indian might commit an offense off the reservation, then find sanctuary on the reservation if tribal officials were not inclined to arrest and deliver him.¹⁸⁸ The Papago claimed that such difficulties had arisen with defendants finding refuge on other California reservations.¹⁸⁹

Many of the problems of extradition, "no man's lands," and the failure of law enforcement in states extending jurisdiction over the reservations under Public Law 280 had their roots in the unwillingness of the states to accept the entire burden of law enforcement on the reservations. In addition, the assumption of jurisdiction by the state created a great deal of confusion, as, virtually overnight, tribal councils were rendered powerless to legislate and members of the tribe were required to conform to a "foreign" legal system. Arrangements for a "piecemeal" transfer of jurisdiction, by negotiation between state and tribe, with careful groundwork laid prior to each transfer of a specific function, offered a better solution. One state tried this alternative. In 1963, Idaho assumed jurisdiction over some formerly Indian responsibilities including school attendance, youth rehabilitation, public assistance, and domestic relations; but it refrained from further extension until each tribe affected gave its consent.¹⁹⁰

When the field hearings ended in 1963, nearly 1100 pages of testimony had been recorded and nearly 2500 questionnaires distributed in the field had been returned. Expressions of Indian

187 1963 *Hearings*, *supra* note 133, at 856-57. Authority of New Mexico courts to try persons of crimes committed on the Navaho reservation had been established in *State v. Warner*, 71 N.M. 418, 379 P.2d 66 (1963). However, a recent decision in the Ninth Circuit, *State ex rel. Merrill v. Turtle*, 413 F.2d 683 (1969), held that Arizona authorities could not enter the Navaho reservation to arrest an Indian. This decision is criticized in Comment, *The "Right to Tribal Self-Government" and Jurisdiction of Indian Affairs*, 1970 UTAH L. REV. 291.

188 1961 *Hearings*—Part 2, *supra* note 139, at 491.

189 *Id.* at 393.

190 IDAHO CODE §§ 67-5101 to 5103 (Supp. 1969).

discontent focused on the violation of constitutional rights by tribal courts and councils, the inadequate support of tribal legal systems by the BIA, and the violation of constitutional rights by non-Indian authorities off the reservation or the failure of these authorities to provide law enforcement services on the reservation when empowered to do so. As these issues emerged, the interested parties began to take sides. Indian tribes, the Department of the Interior, other federal agencies, members of Congress, various associations of non-Indians, and state governments advocated positions on issues affecting their interests. At the hub of the controversy was Senator Ervin. His self-assigned task was to sift the information and to examine the positions of the parties in order to formulate a complete and sensible response.

C. *Proposed Legislation and the Washington Hearings*

In 1965, Senator Ervin introduced bills S. 961-968 and S.J. Res. 40, to provide a frame of reference for the hearings convened in Washington in June of that year.¹⁹¹ The open-ended inquiry of 1961 through 1963 had produced a broad overview of and sufficient data on the Indian rights problem; it was, therefore, time to focus the attention of the interested parties on the specific provisions of tentative legislation.

The legislation Senator Ervin initially proposed reflected his personal interests. The first four bills affirmed his conviction that tribal systems of justice should not be allowed to operate outside the Constitution. Each measure displayed Senator Ervin's intention to bring the tribes more fully into the nation's legal mainstream, establishing the uniformity he had known in North Carolina. The bills were addressed primarily to bringing the Constitution to the reservations, integrating tribal systems into the overall legal system of the country, and protecting the principle of consent of the governed. But the legislation avoided harder, less abstract questions: how to control the sometimes arbitrary and unresponsive BIA, how to more adequately fund tribal systems

¹⁹¹ 111 CONG. REC. 1784 (1965). Senator Ervin had introduced the same bills as S. 3041-48 and S.J. Res. 188 in 1964. At that time he cautioned that the bills were "not to be interpreted as final solutions" and acknowledged that "the language . . . may be revised and concepts clarified as the Senate deliberates these matters." 110 CONG. REC. 17326 (1964).

of justice, how to halt violations of Indian rights by state and local officials. The hearings had revealed that the Indians were more concerned about these questions than they were about any others. These questions did not, however, present the theoretical constitutional dimensions to capture Senator Ervin's interest; the only mundane matters to which he responded were lawyers' contracts and the availability of legal research materials.

1. S. 961

S. 961 provided that any tribe exercising its powers of self-government would be subject to the same limitations and restraints as imposed upon the federal government by the Constitution. Senator Ervin's only concession to the special nature of Indian tribes was a recognition of their ethnic character; S. 961 would not have subjected them to the "equal protection" requirement of the fourteenth amendment, which applied only to states.

Indian reaction to S. 961 varied considerably. The Hopi claimed to be unaffected, since their constitution was already "in accordance with the U.S. Constitution."¹⁹² Most tribes, however, echoed the sentiments of the Mescalero Apaches who were sympathetic to the purposes of the bill but deemed it "premature" because the tribes were not psychologically or financially prepared for it.¹⁹³ At the other extreme were the Pueblos, who were determined to maintain their closed, traditional societies. Their position was clear and unyielding:

We have long held to our tradition of tribal courts and we have our own codes. Naturally, we are most familiar with the special conditions existing in our various communities, and the status of sovereignty which we have always enjoyed has made us dedicated to the task of preserving it.¹⁹⁴

For the Crow tribe the question remained open: "We, at the Crow Indian Reservation, cherish the opportunity of selecting our own form of government. . . . [W]e mean the action of the Crow Tribal Council shall continue to remain as it is today. . . . [W]e are confident that the people are satisfied with the present

¹⁹² 1965 Hearings, *supra* note 72, at 325.

¹⁹³ *Id.* at 340-41.

¹⁹⁴ *Id.* at 352.

system."¹⁹⁵ While such statements occasionally betrayed the hint of self-interest which was to be expected of tribal leaders with a stake in the existing order, a valid point was expressed nonetheless. American Indian tribes were many and various, and each had its unique problems; they were not equally prepared or willing to accommodate themselves to the structures of the Constitution.

A number of attorneys acknowledged this point and recommended that certain enumerated rights be protected by legislation rather than by imposing constitutional government in full.¹⁹⁶ The Department of the Interior and BIA also agreed that the blunt insertion of all constitutional guarantees into tribal systems would produce disorder and confusion. But the Department adamantly maintained that "Indian citizenship and tribal freedom from constitutional restraint have been incompatible."¹⁹⁷ Accordingly, the Department of Interior offered a substitute for S. 961 which was limited to the following guarantees: the privilege of writ of habeas corpus by order of a federal court; the right to jury trial with six-member panels in certain criminal cases; first amendment rights, excluding the prohibition of establishment of religion; fourth amendment protection against illegal search and seizure; fifth amendment rights, excluding the right to grand jury indictment; sixth amendment rights to fair trial, excluding the right to jury trial except as otherwise provided but including the right to counsel at the defendant's own expense; protection against excessive bail or fines; prohibition of ex post facto laws or bills of attainder; and the right of each member of a tribe to equal protection of its laws.¹⁹⁸

Among the constitutional rights not included in the Department of the Interior's substitute which would have been guaranteed by blanket provision in S. 961 were the right to a grand jury indictment and to a jury panel in all criminal prosecutions and in all civil disputes involving more than twenty dollars, and the right to the assistance of counsel.¹⁹⁹ In each instance the cost which

¹⁹⁵ *Id.* at 234.

¹⁹⁶ *Id.* at 222.

¹⁹⁷ *Id.* at 317.

¹⁹⁸ *Id.* at 318-19.

¹⁹⁹ Other exclusions created no controversy. The rights to bear arms and to refuse housing to soldiers were omitted on the theory that Indian tribes were not

the guarantee would impose on the already impoverished tribes was a major reason for its exclusion. In addition, the rights to a grand jury indictment and to a jury panel in civil cases were considered to be of questionable contemporary merit.

The Department of the Interior's response to the issue of the right to defense counsel revealed, however, its insensitive attitude that the Indians had testified about in the earlier hearings. The Solicitor recommended that defendants have the right to counsel but only at their own expense. He claimed that the alternative was to obtain appropriations from Congress to pay lawyers appointed by the tribal courts and, in order to maintain a balance, also to provide prosecutors for the courts. If the problem was one of maintaining a balance, there was no reason to accord the wealthy defendant a special advantage. Rather, it appeared that the BIA was reluctant to assume the initiative to obtain extra appropriations from Congress,²⁰⁰ as it had similarly failed to request adequate funds to maintain tribal libraries and other facilities. In view of the Bureau's past performance, it was not surprising that it presented the choice essentially as one between the right to counsel at the defendant's expense or no right to counsel at all, instead of being prepared to seek funds for a balanced, professional tribal court system.

Wisely, the Department's substitute for S. 961 deleted fifteenth amendment protection because the tribes, as ethnic units, were required to restrict voting to an ethnically determined, rather than to a geographically defined, community. For the same reason, equal protection of the laws was guaranteed only to members of the tribe, in order that non-Indians on reservations could not claim benefits of tribal membership. Finally, laws respecting the estab-

authorized to maintain troops. No reason was given for exclusion of thirteenth amendment protection against involuntary servitude, but it may have had something to do with the fact that, in accord with established custom, courts of Indian offenses were authorized in civil cases to require performance of assigned duties for individuals or for the tribe in lieu of monetary restitution. 25 C.F.R. § 11, 24 (1971).

²⁰⁰ Another example of the Bureau's delinquency in acquiring funds for Indians had become manifest when health functions were transferred in 1955 from the BIA to the Public Health Service. Appropriations instantly increased and stood in 1969 at four times their 1955 level. A sweeping change in attitude was noted by one Bureau of the Budget official: "The difference between the aggressive presentation of the PHS and the defensive supplications of the BIA is really something to see." CAHN, *supra* note 80, at 59.

ishment of religion were not prohibited, because such prohibition would have dissolved the social and political fabric of the theocratic Pueblos. The Department of the Interior and the BIA did not express long-term support for theocratic forms of government, but they did acknowledge the immediate need to maintain the social cohesion of the Pueblos during a period of transition.

The Interior-BIA position on S. 961 was thus a combination of a sound historical sense and a reluctance to do more to support the reservation court systems than had been done in the past. When sensitivity to Indian problems could be expressed without a commitment, the Department and the Bureau were sensitive; but when a commitment was required, even to the relatively innocuous matter of submitting a new appropriations request, they demurred.

2. S. 962

S. 962 authorized appeals of criminal convictions from tribal courts to federal district courts, with trials *de novo* on appeal. Senator Ervin thus recommended a solution to the appeals problem beyond that established by the Ninth Circuit in 1965. In *Colliflower v. Garland*,²⁰¹ the court had held that courts of Indian offenses functioned in part as federal agencies since they were

201 342 F.2d 369 (9th Cir. 1965). Lauded by Senator Ervin as "forward looking," *Colliflower* was something of a surprise, following refusal of a federal district court in Montana to issue a writ of habeas corpus on grounds that the Constitution afforded protection of due process and right to counsel only as against the federal or state governments. *Glover v. United States*, 219 F. Supp. 19 (D. Mont. 1963). The point of distinction appeared to be that the Montana case involved a tribal court, created by the tribe and governed by a tribal code, which could not be termed a federal agency. *Colliflower* appeared to authorize the issue of writs of habeas corpus only in criminal cases tried by courts of Indian offenses, although there was little qualitative difference between the functions of such courts and those of tribal courts.

In *Settler v. Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970), the court held that the power of federal district courts established in *Colliflower* to issue writs of habeas corpus applied to tribal courts as well as to courts of Indian offenses. The court found no functional basis for distinguishing between the two types of courts. The Ninth Circuit also held that writs of habeas corpus may issue even if the petitioner has been punished by fine rather than by detention. In a companion case, *Settler v. Lameer*, 419 F.2d 1311 (9th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970), the court ruled that the writ may issue when the punishment is detention even when the petitioner is free on bail. In the latter case, an appeal was still pending within the Yakima system. The Ninth Circuit apparently rejected a contention that the tribes, like states, have a legitimate interest in freedom from premature federal court intervention and took a major step toward relegating tribal courts to the screening function Senator Ervin originally had envisioned.

creations of the BIA and were governed by the BIA's model code.²⁰² As federal agencies, their decisions, therefore, were subject to limited review under the federal habeas corpus statute.²⁰³ The Ervin bill made tribal court decisions similarly reviewable and expanded the scope of the review of all Indian court decisions by providing for trial de novo. S. 962 integrated criminal justice on the reservations directly into the existing federal system and reduced the Indian courts to a screening role. Senator Ervin noted that the North Carolina magistrate system operated in this way and that it had "worked very well for one hundred years."²⁰⁴

Many tribes, while not opposed to S. 962's authorization of appeals of criminal convictions from tribal courts to federal district courts, objected to the bill's provision for trial de novo in the district court because it would severely restrict the functions of the tribal courts. The Pima-Maricopa claimed that law enforcement on the reservation would suffer as a result.²⁰⁵ The United Sioux Tribes expressed opposition because Indians could not afford to pay for the legal representation needed in federal court,²⁰⁶ and the American Civil Liberties Union called for absolute right to appointed counsel not provided by the 1964 Criminal Justice Act.²⁰⁷ The Mescalero Apache suggested that cases be remanded to the tribal courts upon a finding of error.²⁰⁸ The Fort Belknap attorney concurred, urging that this procedure would serve as a training device and improve the quality of the tribal courts. The attorney warned, however, that S. 962, like S. 961, would impose an impossible financial burden; for review by federal courts almost certainly would require the tribes to keep fuller court records, use proper procedures, and hire prosecutors.²⁰⁹

The Department and the BIA were opposed to S. 962. The Department had appellate jurisdiction over courts of Indian offenses and was unwilling to surrender it. It suggested that the district courts should be empowered to review reservation court

202 25 C.F.R. § 11 (1969).

203 28 U.S.C. § 2241 (1970).

204 1965 *Hearings*, *supra* note 72, at 91.

205 *Id.* at 328.

206 *Id.* at 148.

207 *Id.* at 224. The Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1970).

208 *Id.* at 341.

209 *Id.* at 337.

decisions only upon the full exhaustion of the administrative remedy.²¹⁰ But the Department's insistence on retaining a role in the tribal justice system contradicted its earlier testimony to the effect that the Solicitor's office had received no appeals from courts of Indian offenses.²¹¹ It became clear to Subcommittee counsel that the Department was fighting for a nominal power only, and had never regarded its appellate role with commitment.

3. S. 963

S. 963 authorized the Attorney General to investigate Indian claims of violations of their civil rights. This bill served as Senator Ervin's response to the flood of testimony about the arbitrary treatment by the BIA and the occasional brutality and discrimination by state and local officials. The bill appeared to be a broad commitment to the protection of Indian rights in general, but its breadth was circumscribed by Senator Ervin's opposition to any further growth in the investigatory function of the federal government. In any event, S. 963 was diluted in significance by its partial redundancy with authority granted to the Attorney General by previous legislation,²¹² by its failure to authorize funds, and by its inappropriate reliance on the Attorney General's office to challenge arbitrary practices in another federal agency, the BIA.

Although S. 963 was considered a token gesture, it nevertheless won the support of many tribes, who welcomed any additional pressure on the federal government to investigate civil rights complaints. But the leaders of some tribes, including the Pueblos, opposed the bill, explaining, "[w]e understand, better than non-Indians, the background and traditions which shape Indian conduct and thinking, and we do not want so important a matter to be tried by those who are not familiar with them."²¹³ Thus, while some Indian leaders welcomed the investigation of non-Indian

210 This position varied from that expressed by the Assistant Secretary in 1961, when he opposed any kind of institutionalized review of reservation court decisions on the ground that such a review structure might tend to make these courts permanent, while he believed that they should eventually disappear, as all other vestiges of Indian "separateness" from the rest of society should disappear. *1961 Hearings—Part 1, supra* note 116, at 12, 26.

211 *Id.* at 115.

212 18 U.S.C. § 241 (1970).

213 *1965 Hearings, supra* note 72, at 352-53.

courts, police, and officials, they protested being subjected to that scrutiny themselves.

S. 963 also met with the opposition of the Department of the Interior. The Solicitor asserted that many of the complaints of such violations were made to the Department and were already forwarded. The Department wanted to retain its power to screen complaints before they were forwarded to the Justice Department. Indeed, it suggested substitute legislation which would have channeled all complaints pertaining to the tribal councils through the Secretary.²¹⁴ The Department's concern over the disposition of Indian complaints of interference or mistreatment appeared to be largely self-interested. Testimony which revealed that of 79 complaints screened and forwarded to the Justice Department since 1962 no convictions had been obtained cast doubt on the Department's sense of follow-up responsibility to the Indian complainants.²¹⁵ Of course, it also caused skepticism that giving new investigative and prosecutorial authority to Justice would produce impressive results.

4. S. 964

S. 964 directed the Secretary of the Interior to recommend to Congress a new model code for the courts of Indian offenses, which would serve as a guide for the tribal courts. It also provided for the establishment of special training classes for all tribal judges. The purpose of this measure was unclear. In light of S. 961 and 962, a new model code appeared to be superfluous. And although the further education of tribal judges would be helpful, there seemed little likelihood that it would bring immediate results, since most of the infringements of right in tribal courts seemed to be the result of financial restraints. None of Senator Ervin's bills authorized appropriations to remedy this basic problem.²¹⁶

S. 964's provision for the training of tribal judges won Indian

²¹⁴ *Id.* at 318-19.

²¹⁵ *Id.* at 27.

²¹⁶ The subsequent creation of the Law Enforcement Assistance Administration has partially alleviated the funding problem, since some assistance grants have been channeled to tribes. *See, e.g.,* COURT REV., Oct., 1971, at 1 (a publication of the North American Judges Association).

support, but the tribes did not agree about its provisions for a model code. Some tribes, such as Pyramid Lake Paiute and Turtle Mountain Chippewa, expressed unqualified support.²¹⁷ Many others, however, shared the Department of the Interior's criticism that the bill might effectively impose the model code on the tribes. As long as the code remained a model, cautioned the Hopi and Apache, it would be useful.²¹⁸ The Pueblos predictably were opposed, and the Chairman of the All-Pueblo Council requested that the drafting of codes be left to the tribes.²¹⁹

The Department of the Interior objected weakly to the work that proposing the new model code would require. It claimed that the necessary allowance for variations in tribal culture and conditions would render the code meaningless, or the failure to make such an allowance would destroy many tribes as surely as would S. 961 in the form Senator Ervin had proposed. Had the Department been fully convinced of its own argument, it would have resisted S. 964 as vigorously as it resisted S. 961. Instead, the Solicitor remarked, "Let me say I do not feel very strongly about this. In fact, the Department does not take a position that this is any disaster."²²⁰ Moreover, while it was claimed that the tribes would be deprived of valuable drafting experience if they were just handed a model code, the Solicitor expressed his belief that the tribes would use the model much as states use proposed model codes, *i.e.*, as the basis for hearings and debates. In fact, he admitted, the Department had long recommended the old model code to the tribes, and the concept of a model was not unfamiliar to them.²²¹

5. S. 965, S. 966, and S. 967

While the first four bills were intended to protect individual rights, Senator Ervin's next three proposals were addressed to the problems of inadequate law enforcement, especially in those states that assumed jurisdiction over Indians in accordance with Public

²¹⁷ 1965 *Hearings*, *supra* note 72, at 348-49.

²¹⁸ *Id.* at 326, 343.

²¹⁹ *Id.* at 191.

²²⁰ *Id.* at 28.

²²¹ *Id.* at 28-29.

Law 280.²²² In order to eliminate "no man's lands," S. 965 provided for the extension of federal jurisdiction over crimes committed by non-Indians on the reservation, if a state failed to exercise its jurisdiction.²²³ Senator Ervin's provision for federal rather than tribal jurisdiction again illustrated his determination to bring the reservations within the federal system. This measure might also have mitigated the extradition problem, since such agreements exist between state and federal authorities. It would not, however, have solved extradition problems among tribes or between tribes and the states.

With S. 966, Senator Ervin went to the heart of the jurisdiction issue. While Public Law 280 had provided for the transfer of complete jurisdiction, testimony had revealed that some states were unwilling to immediately assume the total burden; hence, these states left the tribes in confusion. The result, said Senator Ervin, was "a breakdown in the administration of justice to such a degree that Indians are being denied due process and equal protection of the law."²²⁴ He also expressed the conviction that Public Law 280 violated the principle of government by consent of the governed. Accordingly, S. 966 provided for the repeal of those sections of Public Law 280 which authorized the extension of state jurisdiction without the consent of the tribes involved. It made consent a prerequisite for the extension of jurisdiction, and it authorized the United States to accept the retrocessions of jurisdiction from states who wished to be free of the burdens that they had previously assumed. These revisions of Public Law 280 left the states free to experiment with "piecemeal" extensions of jurisdiction; but they did not authorize the tribes to initiate such agreements or arrangements.²²⁵

S. 967 filled a gap in the Seven Major Crimes Act by extending

²²² See text between notes 71 and 72, *supra*.

²²³ The Assimilative Crimes Act of 1948, 18 U.S.C. § 13 (1970), incorporates state law into federal law in areas under exclusive federal jurisdiction. Thus, S. 965 was redundant in all but Public Law 280 states or others in which reservations were not exclusively under federal control.

²²⁴ 1965 Hearings, *supra* note 72, at 4.

²²⁵ Similar legislation had been introduced in both houses by the Montana delegation in the previous session, but had died in the Interior Committees. 109 CONG. REC. 192, 568 (1963).

federal jurisdiction to cover "aggravated assault." Senator Ervin's attention apparently had been attracted by the testimony of a Hualapai judge who had told of a case in which one Indian had caused permanent injury to another Indian by pouring five gallons of boiling water on him. Because the crime was not interpreted as "assault with a deadly weapon," the federal government disclaimed jurisdiction. As a result, the offender was convicted in tribal court, which was limited by code to sentences of six months or less.²²⁶

The bills to alleviate the jurisdictional problems of law enforcement on the reservations received the overwhelming support of the Indians. Not even the Pueblos objected to S. 965 or S. 967. The tribal attorney from Fort Belknap claimed, however, that S. 965 was "not worth the weight of its paper."²²⁷

S. 966 was also favorably received. Vine Deloria, Jr., then serving as Executive Director of the National Congress of American Indians, voiced the mood of the Indians in support of gradualism and consent: "Not only will we have consent of the governed if we get S. 966 passed, but we can have the opportunity then to be released from this psychological fear on the reservation of having the whole culture run over."²²⁸ The bill's provision for "piece-meal" agreements did, however, receive some criticism. The Mescalero Apache and the Yakima, among others, argued that if difficulties arose tribes should be able to withdraw their consent to such arrangements on reasonable notice to the states. They also asked that the tribes be able to initiate retrocessions of jurisdiction from the states—in effect, to make the consent provision retroactive.²²⁹

The bills Senator Ervin proposed to deal with the problems of

²²⁶ 1961 Hearings—Part 2, *supra* note 130, at 384.

²²⁷ 1965 Hearings at 337.

²²⁸ *Id.* at 198. Other testimony demonstrated that there were adequate grounds for this fear. The United Sioux claimed that South Dakota refused to require Indian consent in its 1963 act extending jurisdiction—an act later defeated by referendum after a vigorous Sioux campaign. Said one leader: "We begged the State committee to put in a consent clause. We pointed out that if State law was good, the Indians would take it. The answer was: 'State law is so good for you we are afraid to let you vote on it because you might turn it down.'" *Id.* at 149. Spokesmen for the Seminole of Florida and Nez Perce of Idaho spoke of the better approach of their respective states which extended jurisdiction only after full consultation and tribal consent. *Id.* at 347, 350.

²²⁹ *Id.* at 342, 344.

state jurisdiction on reservations posed no troublesome issues to the Department of Interior as its interests were not involved. Accordingly, it agreed with the positions taken by the Department of Justice. The Justice Department predictably opposed the passage of S. 965, since that bill would have thrust upon federal law enforcement authorities the responsibility for monitoring the performance of the states and assuming jurisdiction on reservations whenever the states failed to perform their duties. The Interior Department favored the consent requirement of S. 966 even though it had supported Public Law 280 when it had been adopted; but it aligned itself with the Justice Department, warning that "piecemeal" arrangements might create "unnecessary confusion in the enforcement of criminal statutes and in the administration of Indian affairs."²³⁰ The Department of Interior offered no opinion on S. 967, pending analysis by the Justice Department of a similar bill. The Interior Department's deference to the Justice Department on these measures reinforced the impression that it responded in an accommodating fashion when no commitment of its own was required.

6. S. 968 and S.J. Res. 40

Senator Ervin's last bill and his proposed resolution were intended to halt two troublesome administrative practices of the Department of the Interior. S. 968 provided that any attorney contract submitted by a tribe for BIA approval would automatically be approved at the end of 90 days, unless contrary action were taken prior to that time. Senator Ervin considered that the long delays in the approval of attorney contracts were particularly intolerable because "no group in the United States has more problems requiring expert legal assistance than the American Indians."²³¹

For the same reason, Senator Ervin urged the adoption of S.J. Res. 40 which would direct the Secretary of the Interior to revise, update, and consolidate legal materials pertaining to the Indians. The disorganized manner in which treaties, laws, executive orders, regulations, Solicitor's opinions, and other relevant documents had been compiled and distributed had impeded research on In-

²³⁰ *Id.* at 321.

²³¹ *Id.* at 4.

dian rights. Moreover, testimony in earlier hearings had shown that in many instances, tribal libraries had been inadequately supplied with such materials.²³²

As expected, S. 968 and S.J. Res. 40 met little resistance from the tribes. Most favored compelling the Department of the Interior to pass on attorney contracts more rapidly,²³³ and all of them favored any measure which would help them to maintain more complete law libraries for use by their courts and councils.

The Department of the Interior's reaction to S. 968 and S.J. Res. 40 illustrated its attitude whenever pressed for a concrete commitment of its own resources. The Department opposed S. 968, arguing that the problem of delays in contract review had been solved by delegating approval authority to area directors and that it would feel compelled by any automatic deadline to issue premature notices of disapproval whenever evaluation became protracted. The Department's actual objection probably was to the limiting of its discretionary authority. Questioned by Subcommittee counsel why more than 90 days should be required to review attorney contracts, the Solicitor suggested that if Congress was dissatisfied with Interior's performance it should find another agency to review tribe-attorney contracts.²³⁴ Of course, no other agency would, in fact, have been appropriate. The Department seemed in effect to be saying that it would rather allow contracts to go unreviewed than to commit itself to a deadline requirement.

Finally, the Department had no objection to S.J. Res. 40 insofar as it required its personnel to compile treaties, laws, and executive orders.²³⁵ It objected, however, to having to compile regulations and all the Solicitor's opinions. The Department acknowledged that many opinions were not distributed, yet were cited as authoritative and frequently guided policy throughout the country. Assuring the Subcommittee that a central file of opinions was maintained in Washington, the Department declared, "We believe

²³² See text at note 159, *supra*.

²³³ A spokesman for the Crow of Montana disagreed, citing an instance in which the tribe was charged a \$279,000 fee under its attorney contract, which it felt was too high. He asserted that more complete contract review might have avoided such a situation. *1965 Hearings, supra* note 72, at 236.

²³⁴ *Id.* at 45.

²³⁵ Treaties had long been compiled, so no additional effort was required in this area. See note 15, *supra*.

that the system makes the opinions readily available to persons who have a need for them."²³⁶ In this instance, the Department appeared willing to risk sheer unbelievability in order to prevent a commitment of personnel time and, perhaps, also to avoid wide circulation of what it had come to regard as "in-house" documents.

7. Summary

In summary, then, Indian reaction to Senator Ervin's bills was of four basic types. The first was no reaction at all. While the records of the hearings indicated that the Subcommittee received some expression of opinion from 70 to 80 tribes, most of the 247 organized tribes did not participate in the hearings, probably through no fault of the Subcommittee. A second type of reaction was that of blanket endorsement of the Subcommittee's work, often accompanied by an expression of surprised delight that so much attention was being paid to Indians.

Most of the tribes testifying exhibited a third pattern of reaction: they were sympathetic to the purposes of the legislation and amenable to the eventual merger of the Indian and non-Indian systems of justice. They were cautious, however, about taking large steps beyond their psychological preparedness or financial capability. Consultation with these tribes usually produced areas of agreement. A fourth reaction was shown principally by the Pueblos, who had always considered themselves different from and in some ways superior to the other tribes.²³⁷ The old, stable, and very traditional Pueblo communities were in no way convinced that the values which their system embodied were inferior to those of white America. They resisted measures which threatened their culture or the structure of their authority. When not threatened, the Pueblos were cooperative; when faced with the possibility of change imposed from the outside, they were obstinate.

Throughout the debate sparked by Senator Ervin's proposals, the attitude of the Department of the Interior and of the BIA remained consistent. When vital organizational interests, such as reputation and control, were not involved, and when a commitment of resources was not required, they proved to be cooperative.

²³⁶ 1965 Hearings, *supra* note 72, at 323.

²³⁷ *Id.* at 352.

But when confronted with the limitation of their responsibilities or influence or when pressed for a commitment to additional tasks, they resisted, even if the interests of the Indian people were compromised.

III. MAKING INDIAN LAW

A. *The Drafting of S. 1843 and its Companions*

Senator Ervin was not under immediate pressure from an assertive constituency to proceed with Indian rights legislation. It had become a labor of love to which he could allocate his energies as he chose. Some time elapsed before the revised legislation made its appearance. On May 23, 1967, the Senator introduced bills S. 1843 through 1847 and S.J. Res. 87.²³⁸ Although S. 961 through 968 and S.J. Res. 40 had been only tentative legislation, they had largely withstood the scrutiny of the interested parties, and the new bills were generally quite similar to the ones introduced in 1965. S. 1843 revised S. 961 and 962 to provide only enumerated constitutional rights²³⁹ and appeals to the federal courts by writ of habeas corpus instead of by trial de novo.²⁴⁰ S. 1844 contained the order to draft a model code and the judge training provisions. In S. 1845 Senator Ervin maintained his resolve to repeal section 7 of Public Law 280 and added the requirement that tribal consent had to be demonstrated by referendum. Because it had been felt that "aggravated assault" did not adequately describe the type of conduct Senator Ervin was trying to include, S. 1846 proposed addition of "assault resulting in serious bodily injury" to the Seven Major

²³⁸ 113 CONG. REC. 13473-78 (1967).

²³⁹ In the main, Senator Ervin had re-drafted S. 961 according to the recommendations of the Interior Department, but on one critical point he deviated from them. Interior originally worded its "equal protection" provision in such a way as to limit its application to *members of the tribe* located within its jurisdiction. Senator Ervin's revision, however, guaranteed equal protection to *any person* within the tribe's jurisdiction. The significance of the altered wording was that it might be construed to extend equal benefits of tribal affiliation to non-Indians residing, leasing, or owning property on reservations, and subject to regulations established by the tribal councils.

²⁴⁰ Senator Ervin apparently was convinced by the arguments of many tribal attorneys and United States attorneys that trial de novo under S. 962 would put an intolerable strain on the district courts, already suffering from a chronic overload of cases. As incorporated into S. 1843, S. 962 did little more than to confirm *Colliflower*. See discussion in note 201 and in text at note 201, *supra*.

Crimes Act. Apparently unmoved by the explanations of the Interior Department, Senator Ervin's S. 1847 retained the 90-day attorney contract review deadline and his S.J. Res. 87 instructed Interior to compile and update legal materials.

Senator Ervin did, however, retreat on S. 963 which had proposed authorizing the Attorney General to investigate and prosecute cases in which Indian civil rights were involved, and on S. 965, which had suggested providing concurrent federal jurisdiction over certain crimes when the states failed to perform their law enforcement duties. Since S. 963 had met with opposition both from the Department of the Interior and tribal leadership,²⁴¹ Senator Ervin let it die quietly. S. 965, which had not provoked a particularly substantial amount of debate,²⁴² was apparently felt to be largely superfluous. In states not covered by Public Law 280 federal jurisdiction already existed by virtue of the Assimilative Crimes Act.²⁴³ Since S. 1845 provided authority for Public Law 280 states to retrocede jurisdiction to the federal government when convinced that the original extension of jurisdiction had been unwise, S. 965 appeared to be relevant only when a state simply refused either to exercise jurisdiction or to retrocede it. Apparently, Senator Ervin felt that it was more prudent to await such a situation than to anticipate it, and he quietly buried the bill.

Because the Indian rights project raised a broad range of complex constitutional issues and had produced a ponderous volume of information, the only member of the Senate who fully understood it was Sam Ervin. Furthermore, since senators are specialists by committee assignment and must rely upon the understanding and good will of their colleagues, Senator Ervin had virtually full control over the destiny of the bills in the Senate. Indeed as a senatorial courtesy and as a matter of legislative diplomacy, no senator, even if he had entertained an objection, would have sought to prevent Senator Ervin from enjoying the fruit of six years' labor. Objections, if any, would have to be raised in House debate. But Senator Ervin enjoyed the luxury of allowing the bills to rest in subcommittee, able to order them reported to the floor

²⁴¹ See part II C 3 of this article, *supra*.

²⁴² See part II C 5 of this article, *supra*.

²⁴³ See note 223, *supra*.

when the occasion suited him. Meanwhile, to gauge the proper timing, Senator Ervin was closely studying the possibility of mixing red with black in another civil rights storm engulfing Congress.

B. *Tactics of Enactment*

Although it is beyond the scope of this study to examine in detail the machinations in Congress which produced the Civil Rights Act of 1968, some relevant parts of that intriguing story may be sketched. In 1967, as part of a broader civil rights package designed primarily to protect persons exercising rights guaranteed them by previous legislation, President Johnson submitted an open housing measure²⁴⁴ similar to the one that had failed in 1966.²⁴⁵ The House Judiciary Committee held hearings on the civil rights bill, H.R. 2516, but ignored the open housing measure. Conservatives and others seeking passage of anti-riot legislation introduced a separate measure, H.R. 421, which also was assigned to the Judiciary Committee. Chairman Emanuel Celler bottled up H.R. 421 until Representative Colmer, a bulwark of the Mississippi Old Guard and Chairman of the House Rules Committee, threatened to hold separate hearings on the anti-riot bill.²⁴⁶

Since Chairman Celler hoped to garner borderline votes for the civil rights bill by reporting it out of committee in tandem with the anti-riot legislation, he gave in to Congressman Colmer and lent his qualified support to H.R. 421. Representative Celler then added a series of provisions protecting Negroes and others from force or violence while engaged in lawful civil rights activities,²⁴⁷ and persuaded Representative Colmer to cooperate in sending the rights bill to the floor.²⁴⁸ On July 11, Representative Colmer's Rules Committee cleared the anti-riot bill,²⁴⁹ which the House

244 S. 1358, 90th Cong., 1st Sess. (1967).

245 In 1966, the House had approved an Administration open housing bill, H.R. 14765, sending it to the Senate by a vote of 259 to 157. 112 CONG. REC. 18740 (1966). Although the House measure had exempted small boarding houses and had allowed home-owners to instruct realtors to discriminate in finding buyers for their dwellings, it could not generate enough support in the Senate to survive an intense filibuster. After two unsuccessful attempts at cloture, the bill died. 23 CONG. Q. ALMANAC 773 (1967).

246 23 CONG. Q. ALMANAC 782 (1967).

247 N.Y. Times, June 23, 1967, at 1, col. 2.

248 *Id.*, June 28, 1967, at 23, col. 2.

249 *Id.*, July 12, 1967, at 23, col. 2.

passed eight days later by a resounding vote of 347 to 70.²⁵⁰ Keeping faith with Representative Celler, Representative Colmer dutifully forwarded the civil rights bill to the floor where it was overwhelmingly endorsed, 326 to 93.²⁵¹

When the anti-riot bill reached the Senate, Senator Ervin charged that it would compromise rights belonging to the states.²⁵² Senator James Eastland, Chairman of the Senate Judiciary Committee, apparently was so alarmed at the remarks of his maverick southern colleague that he retained jurisdiction of the bill at the full committee level, fearing that Senator Ervin's subcommittee would hold hearings to delay its passage.²⁵³ However, Senator Eastland allowed the civil rights bill to go to Senator Ervin's subcommittee, but added an open housing provision that he predicted would kill it.²⁵⁴

Senator Ervin also was troubled by the House version of the civil rights bill. Although generally in favor of protecting constitutional rights, he had his southern constituency to consider. Moreover, as a southerner, he shared the distaste of many in his region at northern hegemony and northern hypocrisy on questions of civil rights. He complained that H.R. 2516, established a new basis of federal jurisdiction — "diversity of color" — by making interference with the exercise of civil rights by members of minority groups a federal offense. He resented the implication that non-whites could not receive justice outside the North. In subcommittee he offered a substitute to H.R. 2516, grounded on the commerce clause rather than on the fourteenth amendment, eliminating "diversity of color" and making it a federal offense for any person to interfere with the exercise of civil rights.²⁵⁵ The Ervin measure also extended protection for working men exercising rights under section 7 of the National Labor Relations Act²⁵⁶ and provided Indians those rights which had been included in S. 1843 through 1847 and in S.J. Res. 87. In short, Senator Ervin's goal

250 *Id.*, July 20, 1967, at 1, col. 6.

251 *Id.*, Aug. 17, 1967, at 1, col. 8.

252 *Id.*, July 21, 1967, at 35, col. 3.

253 *Id.*, July 27, 1967, at 1, col. 7.

254 *Id.*, Aug. 26, 1967, at 23, col. 2.

255 *See, e.g.*, 114 CONG. REC. 329-34 (1968).

256 29 U.S.C. § 158 (1970).

was either to amend the Civil rights bill into defeat or to have it pass with his Indian rights provisions attached.

Senator Ervin's tactic was based on the axiom that in some circumstances clusters of bills may be more difficult to enact than the same bills considered separately. If bill "A" could pass the Senate by a 60 to 40 vote and bills "B" and "C" each by margins of 90 to 10, and if half those opposing "B" and "C" came from the ranks of those supporting "A", then "A" with "B" and "C" appended might fail to win a majority. It was not likely that many senators would oppose Senator Ervin's Indian bill openly, but influential western congressmen in the House could be expected to resist H.R. 2516 if it returned with the Indian rights rider. These congressmen were essential to Senator Ervin's strategy.

The Indian Affairs Subcommittee of the House Interior and Insular Affairs Committee had given birth to Public Law 280 in 1953; and it was this body which had declared its intention "to get out of the Indian business."²⁵⁷ The Subcommittee's membership then included Representative Aspinall, a Democrat from Colorado, and it had been chaired by Representative Berry, a Republican from South Dakota. In 1967, these two legislators remained senior authorities in their respective parties on Indian affairs legislation. Moreover, by virtue of successive Democratic administrations, Representative Aspinall had ascended to chairmanship of the full committee. Both of these congressmen had deep personal and philosophical stakes in Public Law 280.

Representative Aspinall's policy had been to remain professedly neutral on Indian legislation but far from neutral on land and water resources policy.²⁵⁸ He had been a strong proponent of private and state ownership of resources currently under federal jurisdiction,²⁵⁹ and Indian reservations were among the vast acreages of federally controlled land in western states. Public Law 280 had provided a simple means by which to replace federal jurisdiction with state jurisdiction in those areas. Although such a transfer did

²⁵⁷ Statement by Representative Saylor, *supra* note 68.

²⁵⁸ See CAHN, *supra* note 80, at 167.

²⁵⁹ Representative Aspinall had used the weight of his chairmanship to oppose the Wilderness Act of 1963 "because he believed the act would 'tie up' portions of federal lands from economic development." Henning, *The Public Land Law Review Commission*, 7 IDAHO L. REV. 77, 78 (1970).

not immediately effect a change in land ownership, it did encourage non-Indians to invest in reservation businesses and to develop reservation resources under lease agreements. In Public Law 280 states, non-Indians were not subject to the regulations of tribal councils or to the decisions of tribal courts; in any disputes, they could protect their interests in the more friendly state legislatures and tribunals.

As subcommittee chairman, Representative Berry had been instrumental in passing Public Law 280. He, too, felt it would open the reservations to economic development. His approach had always been that of the assimilationist — to bring the Indian into the American cultural and economic mainstream. Representative Berry had also played an active part in the termination legislation of 1954. He even claimed to have obtained the Indians' consent to such legislation, although at least some Indians insisted that they had not been consulted.²⁶⁰ As recently as 1961, when the termination movement was all but dead, Representative Berry continued to call for evaluation and categorization of tribes to ascertain which could be terminated most expeditiously.²⁶¹

Senator Ervin had every reason to be confident a conflict would emerge on the House floor if H.R. 2516 were amended with his Indian rights measures. The Ervin legislation would repeal the section authorizing further extensions of jurisdiction by states without tribal consent and would authorize retrocession of jurisdiction already extended. Representatives Aspinall and Berry, however, regarded Public Law 280 as so essential to the development of reservation resources and to the assimilation of the tribes that they wanted it implemented as soon as the *states* were ready. In Senator Ervin's view, the law was not so needed that it should deprive Indians of due process and fail to receive their consent; rather, he believed it should be implemented when the *tribes* were ready. The split was deep. Thus, even if the civil rights bill were to clear the Senate, resistance in the House to its changed form might force the bill back to committee or into conference.

However, Senator Ervin was not simply exploiting the Indian project to deter black civil rights legislation. Even if the House

²⁶⁰ See, e.g., N.Y. Times, June 19, 1955, at 76, col. 1.

²⁶¹ 107 CONG. REC. 2622 (1961).

failed to approve H.R. 2516 with the Indian rights amendment, the Indian bills would be in no more disadvantageous a position than if they had been passed separately by the Senate and forwarded to the House in routine manner. The bills would go to Representative Aspinall's committee and receive the same opposition they would receive on the floor as part of H.R. 2516. On the other hand, the bleak future of the bills in committee made the amendment tactic especially attractive as a positive way to secure enactment of the Indian rights legislation. If the House were determined to accept the Senate bill in toto, the Indian provisions would bypass committee, becoming law despite the objections of powerful men.

It is quite plausible that Senator Ervin had planned such a move far in advance. Undoubtedly, he was aware of the House Interior Committee's hostility to sections of his legislation amending Public Law 280. Yet he had drafted those provisions at least three years before and had remained loyal to them. They formed essential parts of his legislative package and clearly were expressions of personal conviction. While it is difficult to imagine why Senator Ervin had allowed six years' work to languish, he may have been waiting for the right opportunity to push his Indian bills.

Senator Ervin's substitute for H.R. 2516 moved through his subcommittee with little difficulty.²⁶² But it failed in the full committee by a single vote.²⁶³ Senator Eastland quietly allowed H.R. 2516 to reach the floor, but only when he became confident that the bill would not be put on the calendar for 1967. Defeat in the full committee forced Senator Ervin to call his substitute to the floor in competition with H.R. 2516. Success along this route seemed unlikely; thus he faced the prospect of having to introduce provisions of the substitute as amendments. Voting on the civil rights bill would almost certainly occur under restriction of cloture rule XXII.²⁶⁴ If the Parliamentarian ruled that the Indian rights amendments were not germane, the amendments would not be voted — unless supporters could convince the Senate to set aside the ruling.

One argument for the Senate's approving the Indian rights

²⁶² N.Y. Times, Oct. 10, 1967, at 22, col. 1.

²⁶³ See 114 CONG. REC. 230 (1968) (remarks of Senator Ervin).

²⁶⁴ SENATE MANUAL 24-25 (1971).

amendments was that Indian rights legislation would otherwise die in committee in the House. The past record of the Aspinall committee, which had buried every other bill that inserted a consent clause into Public Law 280, lent weight to this contention.²⁶⁵ Senator Ervin acted to underscore the Aspinall committee's opposition and allay suspicions of his own motives; he consolidated S. 1843 through 1847 and S.J. Res. 87 into one bill, S. 1843 as amended, and had the Judiciary Committee report the bill. It passed the Senate without opposition and was directed to the Aspinall committee. Each day the committee allowed to pass without action on the bill emphasized the need to pass the Indian rights measure as an amendment to H.R. 2516.

Just prior to the close of the First Session of the Ninetieth Congress, on a sparsely populated senate floor, Majority Leader Mike Mansfield requested and obtained unanimous consent to put H.R. 2516 on the calendar for the next session starting in 1968. Senator Ervin subsequently called up his substitute bill, but Congress encountered new pressure from the President to pass the committee bill. Senate liberals attacked Senator Ervin's measure. The liberals tested their strength when the Senate tabled the Ervin substitute on February 6, 1968, by a vote of 54 to 29.²⁶⁶

Gambling that this vote was a bellwether of senate opinion on civil rights generally, Senators Brooke and Mondale introduced an open housing amendment to H.R. 2516. To mollify borderline senators, President Johnson proposed an anti-riot act, directed at those who crossed state lines to incite riots. Events of the summer of 1967 and the action taken in the House had made it clear that Congress would pass such an act, with or without Administration support. The President's statement appeared to authorize Senators Hart, Tydings, and others managing the Administration's civil rights package to use the assurance of tough anti-riot legislation to "firm up" wavering commitments to open housing. However, when Senator Mansfield delivered the first cloture petition on the civil rights bill, some senators remained wary and provided the key votes to defeat cloture by a vote of 55 to 37 on February 20.²⁶⁷ The cloture vote left the Senate's stand on open housing unclear;

²⁶⁵ See note 73, *supra*.

²⁶⁶ N.Y. Times, Feb. 7, 1968, at 23, col. 1.

²⁶⁷ *Id.*, Feb. 21, 1968, at 1, col. 2.

no one knew how that issue had affected the balloting. But when Senator Mansfield moved to table the Brooke-Mondale amendment, ostensibly because it could endanger the rest of the legislation,²⁶⁸ the result was a 58 to 34 straw-vote victory for civil rights and open-housing supporters.²⁶⁹

Although a second cloture vote failed soon thereafter, the straw vote appeared to move Senator Dirksen²⁷⁰ to support the Brooke-Mondale amendment with "certain exceptions." A Dirksen compromise bill reached the floor on February 28. The Senate voted that same day to table the Brooke-Mondale amendment.²⁷¹ The Dirksen bill, in the form of a substitute, paralleled Brooke-Mondale in its exemption of "Mrs. Murphy;" the Dirksen bill further exempted owners of single-family dwellings selling without a broker's assistance.

After some confusion in a third unsuccessful cloture vote, the Senate finally agreed to limit debate on the civil rights package.²⁷² Some 80 amendments to the Dirksen substitute had been filed prior to cloture, and each now had to be read, debated, and voted on. Among the amendments rejected were several offered by Senator Ervin.²⁷³ However, Senator Ervin's Indian rights amendment, number 430, a duplicate of the consolidated version of S. 1843 which still languished in Representative Aspinall's committee, fared better.

Amendment 430 caused considerable consternation at the White House and among senate civil rights proponents. As a friend of disadvantaged minorities, President Johnson felt compelled to support Indian rights legislation. The President included an endorse-

268 24 CONG. Q. ALMANAC 158 (1968).

269 N.Y. Times, Feb. 22, 1968, at 1, col. 2.

270 Undoubtedly a prime factor in Senator Dirksen's decision to support some form of open housing legislation, even though he had opposed the 1966 bill on constitutional grounds, was the erosion of Republican resistance to cloture. In 1966, two cloture votes had produced 10 and 12 Republican votes in favor, with 21 and 20 opposed. In 1968, however, the vote was split at 18 each on the first two votes. Fully half of Senator Dirksen's party had voted against him, and even more "yea" votes might have been cast had he not openly opposed cloture. 24 CONG. Q. ALMANAC 157 (1968). Senator Dirksen had taken great pride in being the voice of the party on Capitol Hill and in the party conventions. A change of position was required if he was not to lose his footing as the party shifted under him.

271 N.Y. Times, Feb. 29, 1968, at 20, col. 3.

272 114 CONG. REC. 4960 (1968).

273 *Id.* at 5813, 5822, 5825, 5834.

ment of the amendment in his message to Congress on March 6.²⁷⁴ The Johnson message may have diminished resistance to the Ervin amendment, since those torn between favoring constitutional rights for Indians and protecting the President's civil rights package could support Senator Ervin without directly opposing the White House.

Issues of Indian law became embroiled in parliamentary maneuvers. Senator Mansfield suggested a quorum was lacking,²⁷⁵ perhaps in order to provide time for consultation. When the resulting order for a quorum was rescinded, Senator Mansfield assured Senator Ervin that Senator Burdick had been in contact with the House Indian Affairs Subcommittee and had learned that there was no substantial opposition to S. 1843. But pressed by Senator Ervin, Senator Burdick impeached his own sources and suggested that the Subcommittee had taken no action thus far simply because it suffered an overload of proposed legislation. Senator Ervin suggested that if the Subcommittee did not have time to report legislation it favored, the Senate should perform a service by passing the amendment so that the Indian rights bill would circumvent the Subcommittee.²⁷⁶ Senator Mansfield then "reluctantly" made the point of order on germaneness. Senator Spong, serving as President Pro Tem, acquiesced in the opinion of the Parliamentarian and ruled the amendment out of order. Senator Ervin succeeded, 54 to 28, in overturning the ruling of the chair.²⁷⁷ Following the vote, Senator Hart rose to support the amendment, which subsequently was approved, 81 to 0. Almost anti-climactically, the Senate then approved the Dirksen substitute, as amended, 61 to 19.²⁷⁸ Three days later, on March 11, the Senate voted 71 to 20 to send H.R. 2516, as amended back to the House.²⁷⁹

On March 13, House Speaker McCormack emerged from a White House conference to announce his intention to ask the House to accept the Senate's version of H.R. 2516 in toto.²⁸⁰ How-

274 *Id.* at 5520 (1968).

275 *Id.* at 5834.

276 *Id.* at 5837-38.

277 *Id.* at 5838.

278 *Id.* at 5839.

279 *Id.* at 5992.

280 *N.Y. Times*, Mar. 14, 1968, at 1, col. 7.

ever, when Representative Colmer's Rules Committee convened, it voted to postpone action on the bill until April 9 and to conduct hearings in the interim. That decision provided time for Representative Aspinall to mount a last-minute campaign against the Indian rights provisions.²⁸¹ On March 19, in the absence of his subcommittee chairman, Representative Aspinall himself convened a hearing on S. 1843.²⁸² Eight witnesses testified in opposition to the legislation, and three in favor.

While the one-day hearing raised no new issues and few new facts, it did generate concern that H.R. 2516 should not be passed precipitously. The hearing had provided concrete testimony both on the need to retain Public Law 280 as a tool the states could use to promote urban growth in the Southwest and on the opposition of some Indians to the enumerated rights and model code sections of the legislation. With this evidence Representative Aspinall appealed to the Rules Committee to send the Indian amendment to H.R. 2516 to committee for further study. Representative Reifel of South Dakota, the only American Indian serving in Congress and one of the Indians who supported the Ervin amendment, objected and opposed further delay of the civil rights and open housing provisions of H.R. 2516. Questioned about the Pueblos' opposition, Representative Reifel said, in effect, that he considered their objections to be ill-founded and accorded them little weight.²⁸³

As the Rules Committee hearings continued, Minority Leader Ford and other senior House Republicans agreed to a conference, pledging to accept the Senate version of H.R. 2516 if the conferees failed to reach agreement within ten days.²⁸⁴ President Johnson exerted his influence in characteristic fashion, urging Congress to quit "fiddling and piddling" with his civil rights bill.²⁸⁵

Then, on the fourth day of April, Martin Luther King was killed.

281 Representative Colmer's move was also interpreted as an attempt to afford the national real estate lobby time to bring effective pressure against the open housing provisions. See 24 CONG. Q. ALMANAC 165 (1968).

282 *Hearings on Rights of Members of Indian Tribes Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 1 (1968).

283 114 CONG. REC. 9110-12 (1968).

284 N.Y. Times, Mar. 21, 1968, at 28, col. 1.

285 24 CONG. Q. ALMANAC 165 (1968).

The President somberly reviewed the legislation with House leaders. Representative Ford hinted that he might be changing his position.²⁸⁶ As April 9 approached, civil rights forces lobbied intensely for passage of H.R. 2516 as a tribute to their assassinated leader. On the critical day, the Rules Committee defeated by one vote a motion directing H.R. 2516 to conference.²⁸⁷ A resolution concurring in the Senate amendments was reported to the floor as Chairman Colmer, taking note of the disorders in Washington following the King murder, accused his fellow committeemen of legislating "under the gun."²⁸⁸

The debate on the floor on April 10 generally appeared to center on whether H.R. 2516 had been so radically altered by the Senate that its passage without further delay would impugn the integrity of the House as a deliberative body. Discussion of the Indian provisions was more specific, touching on the merits and faults of particular sections of the Ervin legislation. Several congressmen participated, but Representatives Aspinall and Reifel remained the principal figures. Representative Aspinall argued that his hearing had revealed the spectre of treaty rights in jeopardy and that by passing H.R. 2516 Congress might be destroying the rights of one minority (Indians) to aid another (blacks). He charged that certain procedural requirements in title I, such as trial by jury, could destroy the tribal courts. Predictably, he attacked the amendment's alterations of Public Law 280, focusing on the possible confusion caused by states extending or withdrawing jurisdiction over reservations.²⁸⁹ In rebuttal, Representative Reifel routinely explained the amendment's provisions and assured the House that the Ervin legislation would relieve the oppressiveness of tribal governments and errors of Public Law 280.²⁹⁰ Representative Reifel's efforts may well have been crucial. The House voted 229 to 195 to consider the resolution to accept H.R. 2516; and by a vote of 250 to 171, the bill was approved. The President signed

286 N.Y. Times, Apr. 7, 1968, at 57, col. 7.

287 The key "nay" vote was cast by Representative Anderson of Illinois who may have been encouraged by the timely adoption of an open housing ordinance by a city in his home district. 24 CONG. Q. ALMANAC 168 (1968).

288 N.Y. Times, Apr. 10, 1968, at 31, col. 4.

289 114 CONG. REC. 9614-15 (1968).

290 *Id.* at 9552-53 (1968).

it the following day.²⁹¹ In the angry clash of black and white, North and South, Indian law was made.

IV. THE IMPACT OF THE 1968 ACT ON INDIAN LAW

Even after the 1968 Civil Rights Act was passed, the Pueblos sought exemption from its Indian rights provisions. In response to their political agitation, members of the New Mexico congressional delegation introduced bills to that effect,²⁹² and Senator Ervin returned to New Mexico to hold a special hearing of his subcommittee. In it the Pueblos reiterated a familiar theme:

Our whole value structure is based on the concept of harmony between the individual, his fellows, and his social institutions. For this reason, we simply do not share your society's regard for the competitive individualist. In your society, an aggressive campaigner is congratulated for his drive and political ability. In Pueblo society, such behavior would be looked down upon and distrusted by his neighbors. Even the offices themselves, now so respected, would be demeaned by subjecting them to political contest. The mutual trust between governors and governed, so much a part of our social life, would be destroyed.²⁹³

More specifically, the witnesses voiced concern about extending equal protection to non-Indians in their communities and about the bill of attainder problems created in tribal systems where the same body often served as the tribal council and court.

Senator Ervin's response was limited. When he returned to Washington, he introduced S. 2172 and S. 2173.²⁹⁴ The first of these bills restricted the meaning of "any person" in title II to "American Indians" and provided that non-Indians on the reservations were not entitled to the equal protection of tribal laws. But

²⁹¹ On November 21, 1968, President Johnson issued Exec. Order No. 11435, authorizing the Secretary of the Interior to accept states' retrocessions of jurisdiction over Indian country, pursuant to the Act. That order appears with title IV of the Act, at 25 U.S.C.A. § 1321-26. See Appendix for the language of the Ervin legislation as it finally appeared, as Titles II-VII of the Civil Rights Act of 1968.

²⁹² S. 3470 and H.R. 17040, 91st Cong., 1st Sess. (1969).

²⁹³ *Hearings on S. 211 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969) (reproduced in part in 2 *AM. INDIAN L. NEWSLETTER* 94, 95 [1969]).

²⁹⁴ 115 *CONG. REC.* 12532 (1969).

Senator Ervin qualified his support for the bill by remarking that he introduced it in order "to afford Congress an opportunity to consider the advisability of such an amendment."²⁹⁵ After being placed under advisement in the Senate, S. 2172 quietly disappeared. The second bill, S. 2173 provided that the model code which the Department of the Interior was instructed to draft under title III would serve as no more than a model and would not be imposed by Congress. Because fear of the title III had diminished as the BIA moved slowly to draft a new code, the bill was really addressed to a less than urgent issue. It did, however, pass the Senate on July 11, 1969;²⁹⁶ but after being sent to the House of Representatives, it died in the Indian Affairs Subcommittee. The new bills Senator Ervin introduced did not respond effectively to any of the Pueblo problems because no proposal was made on the equal protection controversy or on the problem of the separation of powers. Instead, Pueblo leaders learned that their communities were expected to conform to the 1968 legislation.

That lesson has not been lost on other major tribes, who have begun to make the necessary adjustments, but "to date there has been no dramatic overall change."²⁹⁷ The factors prolonging the period of transition include the need for funding (which is being met in part by the Law Enforcement Assistance Administration), the high turnover and inadequate training of tribal judges, the blurred separation of executive and judicial powers in a number of tribal governments, and the continued resistance by some tribes to congressional intrusion into their internal affairs.²⁹⁸ It has been further noted that "as long as the Bureau of Indian Affairs has not changed the Code of Indian Offenses as directed by Congress, the chances are slim that the tribes having their own codes will assume any new burdens."²⁹⁹

A questionnaire to which 16 of the largest tribes responded³⁰⁰

²⁹⁵ *Id.* at 12555.

²⁹⁶ *Id.* at 19239.

²⁹⁷ Letter from William F. Meredith, Project Director, National American Indian Court Judges Association, to the author, April 29, 1971, on file at the office of the Harvard Legislative Research Bureau.

²⁹⁸ *Id.*

²⁹⁹ Letter from Arthur Lazarus, Jr., general counsel to the Association on American Indian Affairs, to the author, April 5, 1971, on file at the office of the Harvard Legislative Research Bureau.

revealed that while only seven had permitted professional, non-Indian attorneys to represent criminal defendants in tribal courts prior to 1968, 11 tribes now do, while four have expressed no policy. The only tribe which stated that it continued to bar non-Indian attorneys was later compelled to admit them by a federal district court.³⁰¹ The tribes reported a difficulty, however, in funding prosecutor's offices. Ten of the 12 tribes which lacked prosecutors prior to 1968 continue to operate without them. This financial inability to formalize tribal court proceedings has led one observer to warn that a disproportionate number of habeas corpus proceedings arising from detention by tribal authorities may require new evidentiary hearings in federal district courts, thus in part creating the system of trial de novo which Senator Ervin originally had intended to establish.³⁰²

In other areas where reform requires money, little change has occurred. Five of the six tribes which did not protect the defendant's right to silence (apparently in order to compensate for inadequate investigative facilities) still do not do so, or at least have no standing policy of protection. Before 1968 two tribes made no provision for trial by jury, and the same number today continue to refuse as a matter of policy to express the right, although neither tribe actually denies trial by jury to all defendants. Fifteen tribes had institutionalized appellate structures³⁰³ prior to 1968; the number does not appear to have changed.³⁰⁴

300 The tribes responding were the Shoshone-Bannock, Blackfeet, Cheyenne River Sioux, Colorado River tribes, Fort Belknap, Flathead, Hopi, Jicarilla Apache, Navaho, Northern Cheyenne, Pierre (Crow Creek and Lower Brule), Rosebud Sioux, Standing Rock Sioux, Warm Springs Confederation, Wind River, and Yakima. The author mailed the questionnaires in the spring of 1971 and received replies throughout that summer. The questionnaires which support the factual propositions in the text between notes 304 and 308 are on file at the office of the Harvard Legislative Research Bureau. More detailed information on particular tribes has been compiled by the National American Indian Court Judges Association, 1345 Connecticut Avenue, N.W., Washington, D.C. 20036.

301 *Towersap v. Fort Hall Indian Tribal Court*, Civ. No. 4-70-37 (D. Idaho, Dec. 28, 1971). See text at note 315, *infra*.

302 See Note, *Criminal Procedure: Habeas Corpus as an Enforcement Procedure under the Indian Civil Rights Act of 1968*, 46 WASH. L. REV. 541, 547-50 (1971).

303 The existence of a structure does not always signify an operating appeals system. Meredith, *supra* note 297.

304 This conclusion necessarily reflects the author's interpretation of the significance of failure in some instances to respond directly to a particular question. This evaluation is based on comments appended to the questionnaires and on earlier testimony in the Ervin hearings.

The federal judiciary may have the most important role in administering change in the tribal justice systems. These courts, especially at the district level, will determine how broadly the 1968 legislation will affect traditional practices. In construing the statute, the federal courts should look closely at the legislative history.

The legislative history of title II appears to reflect Senator Ervin's change from an approach of imposing on the tribes the constitutional limitations applicable to the federal government to an approach (suggested by the Department of the Interior and many of the tribes) of extending certain specified protections to members of the tribes as individuals. This change was the product of a philosophical compromise between Senator Ervin's apparent view that the scope of public authority should be strictly defined by the individual's need for protection and essential services, and the view, expressed in extreme form by the Pueblos, that the scope of individual liberty should be strictly limited by the community's traditional need for harmony. While S. 961 had been rooted in a theory of government with enumerated powers, title II provided members of tribes with enumerated rights.

For the federal courts, the practical meaning of this accommodation is that title II requires a limited construction which takes an informed account of its development. It does not authorize the court to apply broadly such elusive and expanding concepts as due process, equal protection, or unreasonable search and seizure without a sensitive regard for their impact on tribal structures and values. Because this point is fully revealed only by tracing seven years of legislative history, there is a danger that it may be missed and that an unlimited construction of title II will exacerbate the tribes' difficulties adjusting to its requirements.

Three federal district court decisions illustrate this danger. In 1968, an outspoken and reportedly abrasive non-Indian attorney directing the Navaho legal aid agency was ordered expelled from the reservation by the tribal council. In an action to enjoin enforcement of the order, the attorney challenged the power of the council to enter such an order after the enactment of title II. In *Dodge v. Nakai*,³⁰⁵ the federal district court held that it had pendent jurisdiction to hear the case despite the failure to exhaust a

305 298 F. Supp. 17 (D. Ariz. 1968).

remedy available in the tribal system because not all of the issues or parties involved were cognizable in the tribal courts. It also based jurisdiction to hear the non-Indian's complaint against the tribal council on the language of title II, guaranteeing equal protection of tribal laws to "any person." The court subsequently enjoined enforcement of the order, finding that it not only denied due process but also constituted a bill of attainder.³⁰⁶

In 1969, a district court in Montana held that title II did not directly authorize civil actions for damages against individuals who in their official capacities violated enumerated rights. The court did rule, however, that it had pendent jurisdiction to adjudicate such a claim if it was coupled with an action against the tribe for equitable or habeas corpus relief with which it shared a "common nucleus of operative fact."³⁰⁷

A federal court in New Mexico expanded the reasoning of these cases in a civil action for personal injuries allegedly inflicted by a Zuni Pueblo police officer upon the plaintiff in his custody.³⁰⁸ The Court noted that the applicable provisions of title II bore a "striking" resemblance to the fourth and fifth amendments and said:

The similarity of language and the legislative history of the Act establish that Congress intended these provisions to limit tribal governments as the Fourth and Fifth Amendments limit the federal government. . . . The analogy of the Indian Civil Rights Act to the Amendments is appropriate and the law governing actions against individuals for damages under the Fourth and Fifth Amendments should be applied to the Act.³⁰⁹

Thus, in a series of decisions, district courts have built upon notions of pendent jurisdiction and analogies to constitutionally protected right to extend the power of the federal judiciary. The 1968 legislation has been interpreted to empower federal courts to decide cases not previously heard by the tribal courts or brought

³⁰⁶ *Dodge v. Nakai*, 298 F. Supp. 26 (D. Ariz. 1969).

³⁰⁷ *Spotted Eagle v. Blackfoot Tribe*, 301 F. Supp. 85 (D. Mont. 1969). The court relied heavily on an analogous Supreme Court case, *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), holding that federal courts exercised pendent jurisdiction in damage claims arising under state law coupled with federal claims sharing a "common nucleus of operative fact."

³⁰⁸ *Loncassion v. Leekity*, 334 F. Supp. 370 (D.N.M. 1971).

³⁰⁹ *Id.* at 374.

to federal courts by habeas corpus, to apply developing fourth and fifth amendment concepts, and to allow damage actions not authorized by the statute. The "legislative history" to which the *Loncasion* court referred and on which the decision was said to have rested, has really received no consideration.

In a recent decision, the Tenth Circuit declined to follow the examples set by these three district courts and affirmed the action of the District Court for Wyoming. The lower court had held that title II did not extend federal jurisdiction to hear complaints of discriminatory practices in admission to tribal membership.³¹⁰ On appeal, the court assumed that the application of standards for tribal membership might raise equal protection or due process problems, but held that the pleadings disclosed no such issues.³¹¹ Moreover, it recalled its holding in a previous case³¹² that title II did not impose broad due process requirements which conflicted with a statutory system of appointing rather than electing a tribal chief. The Tenth Circuit stressed that "the Indian Bill of Rights was concerned primarily with tribal administration of justice and the imposition of tribal penalties and forfeitures and not with the specifics of tribal structure or office-holding."³¹³ Had the court fully examined the legislative history of title II, its analysis (more persuasive than that of the three interventionist lower courts) would have found additional support.

This tension between restraint and intervention should not arise, however, when the courts apply the various specific commands and prohibitions of the Act. The express provision for representation by defense attorneys, for example, has been strictly applied by district courts in Montana³¹⁴ and Idaho,³¹⁵ which have ordered tribal courts to permit non-Indian lawyers to represent

310 *Pinnow v. Shoshone Tribal Council*, 314 F. Supp. 1157 (D. Wyo. 1970).

311 *Slattery v. Arapahoe Tribal Council*, 453 F.2d 278 (10th Cir. 1971).

312 *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971).

313 *Slattery*, 453 F.2d at 282. *Accord Lefthand v. Crow Tribal Council*, 329 F. Supp. 728 (D. Mont. 1971); *but cf. Solomon v. LaRose*, 335 F. Supp. 715 (D. Neb. 1971).

314 *Spotted Eagle v. Blackfeet Tribe*, Civ. No. 2780; *Rafalsky v. Blackfeet Tribe*, Civ. No. 2849; *Regan v. Blackfeet Tribal Court*, Civ. No. 2850 (D. Mont., July 7, 1969).

315 *Towersap v. Fort Hall Indian Tribal Court*, Civ. No. 4-70-37 (D. Id., December 28, 1971).

Indian defendants. In the Idaho case, the court rejected the contention of the Shoshone-Bannock that the phrase "assistance of counsel" in title II should be construed to mean only the aid of a friend within the tribe, a practice traditionally permitted by the tribal court. While the policy of allowing professional counsel in tribal courts at the defendant's expense may be subject to criticism, there is little doubt that in adhering to the plain language of the statute the court implemented the intent of the drafter of the provision.

The meaning of title IV language is generally clear and may usually be applied strictly. In *Kennerly v. District Court of the Ninth Judicial District of Montana*,³¹⁶ the United States Supreme Court invalidated a Blackfeet tribal ordinance granting Montana courts concurrent jurisdiction over civil actions against members of the tribe on the ground of its failure to conform to express title IV requirements. In so doing, the Court pointed out that Montana had not taken legislative action to extend jurisdiction under Public Law 280 and that the tribe had failed to evidence the consent of its members through referendum.³¹⁷ While this decision apparently was in accord with Senator Ervin's strong feelings about the need for consent of the governed through a vote of the members of the tribe, the Court's opinion did not fully examine the legislative history of title IV but relied mainly on surface statutory construction.

Construing merely the words of the statute is proper when they are unambiguous. The necessity for using legislative history, however, was demonstrated by the Nebraska District Court's effort to decide whether title IV required the federal government to accept all jurisdiction retroceded by Nebraska or whether the state could retain part of the jurisdiction assumed under Public Law 280.³¹⁸ The extent of the court's historical analysis was to conclude from statutory language itself that title IV was enacted to benefit the

³¹⁶ 400 U.S. 423 (1971).

³¹⁷ Compare *Annis v. Dewey County Bank*, 335 F. Supp. 133 (D.S.D. 1971); *Martin v. Denver Juvenile Court*, 493 P.2d 1093 (Colo. 1972); *Crow Tribe of Indians v. Deernose*, 487 P.2d 1133 (Mont. 1971) with *Makah Indian Tribe v. State*, 76 Wash. 2d 485, 457 P.2d 590 (1969), *appeal dismissed sub nom. Makah Indian Tribe v. Washington*, 397 U.S. 316 (1970) (the cause of action had arisen prior to 1968).

³¹⁸ *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971).

Indians.³¹⁹ Since the tribe in question had expressed a preference to remain under state jurisdiction after title IV had been enacted, the court held that the federal government could accept a partial retrocession. The legislative history treated in this article reveals that the hearings highlighted the need for piecemeal transfers of jurisdiction by negotiation between state and tribe in order to avoid problems of extradition, "no man's lands," and inadequate law enforcement caused by "lump sum" transfers of jurisdiction.³²⁰ In response, Senator Ervin had introduced S. 966 and maintained its provisions intact until enactment as title IV. S. 966 had authorized piecemeal transfers, but had provided that such transfers could be initiated only by the states. Although the latter provision was criticized by several tribal spokesmen, Senator Ervin retained it, apparently to assure the states that they would be affected by this repeal of section 7 of Public Law 280 only at their own option. Consequently, the language authorizing piecemeal transfers of jurisdiction was not intended solely to benefit the Indians. The partial retrocession approved in *Brown* could have been grounded more firmly in a power reserved to the states, had the legislative history been fully examined.

V. CONCLUSION

Each of the decisions discussed reveals a need for a closer analysis of legislative history of the Indian rights provisions. In the future the federal courts will again be asked to construe the 1968 Act in manners inconsistent with its plain language or its history. Advocates of further federal intervention into tribal criminal justice systems may seek to broaden the meaning of the due process, equal protection, or search and seizure provisions in title II, converting the enumerated rights section into what Senator Ervin had originally suggested but later rejected in S. 961. Opponents of the philosophical foundations of the legislation may argue for the special construction of particular protections or prohibitions in order to bring them into closer correspondence with tribal practices before 1968. The federal judge should refrain from exer-

³¹⁹ *Id.* at 541-42.

³²⁰ See part II C 1 of this article, *supra*.

cising a broad power to establish policy when plenary power over Indian affairs rests with Congress. The judge may believe that he perceives what is best for the tribes within the court's jurisdiction; but the Indians have suffered from a surfeit of patrons in all branches of government. Given adequate resources, the tribes may best adjust to the new legislation in a judicial milieu of sensitive, restrained construction. In this difficult period of transition, the judge who seizes opportunities to demand more of the tribes than required by the letter and history of the Act might become a contemporary analogue to the BIA agent of an earlier period, who imposed tenets of personal conviction through the power of the white conqueror.

APPENDIX

CIVIL RIGHTS ACT

Public Law 90-284
90th Congress, H.R. 2516
April 11, 1968
AN ACT

To prescribe penalties for certain acts of violence or intimidation, and for other purposes.

* * * * *

TITLE II — *Rights of Indians*

Definitions

Sec. 201. For purposes of this title, the term —

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, tribes, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

Indian Rights

Sec. 202. No Indian tribe in exercising powers of self-government shall —

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers,

and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

- (3) subject any person for the same offense to be twice put in jeopardy;
- (4) compel any person in any criminal case to be a witness against himself;
- (5) take any private property for a public use without just compensation;
- (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
- (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both;
- (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
- (9) pass any bill of attainder or ex post facto law; or
- (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Habeas Corpus

Sec. 203. The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

TITLE III—*Model Code Governing Courts of Indian Offenses*

Sec. 301. The Secretary of the Interior is authorized and directed to recommend to the Congress, on or before July 1, 1968, a model code to govern the administration of justice by courts of Indian offenses on Indian reservations. Such code shall include provisions which will

- (1) assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in a Federal court for any similar offense,
- (2) assure that any individual being tried for an offense by a court of Indian offenses will be advised and made aware of his rights under the United States Constitution, and under any tribal constitution applicable to such individual,
- (3) establish proper qualifications for the office of judge of the court of Indian offenses, and
- (4) provide for the establishing of educational classes for the training of judges of courts of Indian offenses. In carrying out the provisions of this title, the Secretary of the Interior shall consult with the Indians, Indian tribes, and interested agencies of the United States.

Sec. 302. There is hereby authorized to be appropriated such sum as may be necessary to carry out the provisions of this title.

TITLE IV—*Jurisdiction Over Criminal and Civil Actions*

Assumption by State

Sec. 401. (a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all

of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Assumption by State of Civil Jurisdiction

Sec. 402. (a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or person [sic] property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceeding or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State be given full force and effect in the determination of civil causes of action pursuant to this section.

Retrocession of Jurisdiction by State

Sec. 403. (a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction or both, acquired by such State pursuant to the provisions of section 1162 of title 18 of the United States Code, section 1360 of title 28 of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Consent to Amend State Laws

Sec. 404. Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State

to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this title. The provisions of this title shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Actions Not to Abate

Sec. 405. (a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this title shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) No cession made by the United States under this title shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purposes of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

Special Election

Sec. 406. State jurisdiction acquired pursuant to this title with respect to criminal offenses or civil causes of action or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

TITLE V — *Offenses Within Indian Country*

Amendment

Sec. 501. Section 1153 of title 18 of the United States Code is amended by inserting immediately after "weapon," the following: "assault resulting in serious bodily injury,".

TITLE VI — *Employment of Legal Counsel*

Approval

Sec. 601. Notwithstanding any other provision of law, if any application made by an Indian, Indian Tribe, Indian council, or any band or group of Indians under any law requiring the approval of the Secretary of the Interior or the Commissioner of Indian Affairs of contracts or agreements relating to the employment of legal counsel (including the choice of counsel and the fixing of fees) by any such Indians, tribe, council, band, or group is neither granted nor denied within ninety days following the making of such application, such approval shall be deemed to have been granted.

TITLE VII — *Materials Relating to Constitutional Rights of Indians*

Secretary of Interior to Prepare

Sec. 701. (a) In order that the constitutional rights of Indians might be fully protected, the Secretary of the Interior is authorized and directed to —

(1) have the document entitled "Indian Affairs, Laws, and Treaties" (Senate Document Numbered 319, volumes 1 and 2, Fifty-eighth Congress), revised and extended

to include all treaties, laws, Executive orders, and regulations relating to Indian affairs in force on September 1, 1967, and to have such revised document printed at the Government Printing Office;

(2) have revised and republished the treatise entitled "Federal Indian Law"; and

(3) have prepared, to the extent determined by the Secretary of the Interior to be feasible, an accurate compilation of the official opinions, published and unpublished, of the Solicitor of the Department of the Interior relating to Indian affairs rendered by the Solicitor prior to September 1, 1967, and to have such compilation printed as a Government publication at the Government Printing Office.

(b) With respect to the document entitled "Indian Affairs, Laws and Treaties" as revised and extended in accordance with paragraph (1) of subsection (a), and the compilation prepared in accordance with paragraph (3) of such subsection, the Secretary of the Interior shall take such action as may be necessary to keep such document and compilation current on an annual basis.

(c) There is authorized to be appropriated for carrying out the provisions of this title, with respect to the preparation but not including printing, such sum as may be necessary.