THE FOURTH WORLD OF THE ABORIGINAL: ISSUES IN FEDERAL INDIAN LEGAL PHILOSOPHY

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ABSTRACT

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By

Harry Edward Mika II

The present milieu of the American Indian, based on whatever index of subjugation, cannot be attributed to some latent, inadvertent residue of the confrontation between the Indian and the European visitor. Such a simplistic analysis shrouds the very conscious attempt by the dominant polity to legislate against the praxis of the aboriginal, or what shall be referred to as the Fourth World. One historical expression of the Indian/white relationship is federal Indian law. The progression of this law to modern times has been prodded by periodic philosophies which are said to be indicative of enlightened perspectives on the nature of the Indian "problem." By scrutinizing two relatively recent variations in federal philosophy of Indian affairs, reorganization and termination, it is possible to elucidate the tenor of federal concern for the aboriginal.

The analysis in the thesis is based on the examination of two handbooks of federal Indian law which were issued in conjunction with, or as a result of, the Indian Reorganization Act of 1934 and the Termination Acts of the 1950's. Felix S. Cohen, in his Handbook of Federal Indian Law (1941), attempted to define federal Indian law in the

context of Indian tribal reorganization, limited self-government, and an Indian land base. As federal philosophy and policy moved into the termination era, Cohen's rendition of Indian law became an embarrassment, and Frank G. Horne, Federal Indian Law (1958), was charged with revising the Cohen text pursuant to the termination of the wardship/guardian status of Indians to the federal government. Through the major substantive areas of federal Indian law, as expressed in these two volumes, it is possible to discern the composite picture of the contrasting philosophies of reorganization and termination.

The respective texts of Cohen and Horne represent two rather diametrically opposed philosophies of Indian Affairs. Horne, from the termination perspective, attempts to negate those major tenets of Cohen's Handbook which revolve around the affirmation of tribal sovereignty. The philosophical constructs of Indian law, which reflect changing federal attitudes toward Indians, have implications for the comparative study of indigenous people. While reorganization and termination are in the absolute congruous expressions of manifest destiny, it is possible to contrast their comparative elements and thus elicit a clearer picture of federal Indian law, its past, its present, and even its future. As law generally reflects a large array of "reality," examination of the legal structure of a particular entity can illuminate many clues as to the nature of political,economic, and social relations. It is postulated that the study of comparative legal philosophies is a mechanism with which to dissolve the rhetoric of "enlightened" federal policy toward Indians. It is only through such analysis that the true nature and scope of the Indian "problem" becomes apparent.

THE FOURTH WORLD OF THE ABORIGINAL:
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By

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When anthropologists, government officials, and churchmen have argued that our ways have been lost to us, they are fulfilling one of their own tribal rituals—wish fulfillment.

The Fourth World

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Chapter 1

Overview: the Fourth World and Federal Indian Law

Savage and civilized society have been regarded as presenting a necessary state of conflict. There is a perpetual opposition of thoughts, manner, and opinion—a perpetual struggle of races. It is not just to suppose that the civilization of Europe, at the settlement of this country, required more of the aborigines that it ought to have done. The very reverse is true. Civilization required him to quit hunting—religion required him to quit idolatry, and virtue required him to quit idleness. The Indian was gazed at with wonder, as a man without history, but he was not hated. Civilization combated only his errors and his moral delinquencies. Letters, labor, art, morals, Christianity, demanded no more of him, than they had previously demanded, fifteen centuries before, of the Britons, Celts, Franks, Danes, and Goths, and the predatory Angles and Saxons, from the banks of the Iser and the Weser. Man was created, not a savage, a hunter, or warrior, but a horticulturist and a raiser of grain, and a keeper of cattle—a smith, a musician—a worshipper, not of the sun, moon, and stars, but of God. The savage condition is a declension from this high type; Greece and Rome were in error on this point. The civil and social state was the original type of society for man, and it was just, therefore, to require a return to it. Those who pronounce the Indian a "noble race," only mean some gleams of a noble spirit, shining through the thick moral oxydation of barbarism. The exaltation of thought that sometimes bursts out from him is ennobling, because it represents in him a branch of original humanity—of man in ruins. A noble subject of philosophical and moral inquiry the Indian truly is, and this constitutes the animus of these investigations.

Henry Rowe Schoolcraft, 1857[1]

Introduction

Understandably, Schoolcraft's perception of the "savage condition" is a rather ominous introduction to the subject of Indian

affairs in the twentieth century. Administrators in Indian affairs of recent vintage flaunt the present disposition of the federal government toward Indians as an "enlightened" understanding of the Indian "problem." However, it is essential to dispense with such rhetoric: in the absolute, the real problem for the federal government is that Indians continue to exist as Indians. Extermination, assimilation, acculturation, and termination have all been watchwords of federal concern for the Indian, and each of these grand strategies was an "enlightened" policy in its day. These methods, to be defined later in the examination of federal Indian philosophy, formed the basis on which the civilized United States was built.

Maintaining that the present Indian policy is likewise enlightened may do much to soothe guilty consciences; however, this era, much like those which have preceded it, defies quantification of the improved status of the aboriginal on this continent. To examine Indian affairs is not so much an attempt to define primitive or barbaric as it is an abrupt confrontation with "civilization" and sophisticated oppressive law. The subject of inquiry here is not the Indian, but instead the Indian "problem." The problem with Indians has been those persons who have taken it upon themselves to become civilized to the "necessary state of conflict" between societies, cultures, and races. The objective of this thesis is to examine some of the major tenets of federal Indian law and to point out those philosophical constructs of Indian law which necessarily reflect changing federal attitudes toward Indians. This legal philosophy, as it emerges from

the substantive areas of federal Indian law, is an apt indicator of the scope of the federal mission to indoctrinate the Indian into a white way of life.

The observation by Schoolcraft that the Indian, though "a branch of original humanity," is a "man in ruins" is an astute observation for 1857, and perhaps we are to credit Schoolcraft with a certain clairvoyance for the partial applicability of his observations to the present Indian milieu. What Schoolcraft did not observe, however, was the very determined contribution that the European cultures made to the ruination of Indians on the continent. From its earliest moments, the government which expressed the values of these cultures sought to impose civilization, religion, etc. upon the "barbaric" Indian through direct legislation of Indian life. Unfortunately for the Indian, federal Indian legislation continues to pride itself upon such a moralistic crusade to infuse humanity to Indian life. We need not look very far to find dramatic examples of this mission. Within the last forty-five years, the federal government has enacted two broad and diverse programs, reorganization and termination, which were fashioned to deal, in varying degrees, with the failure to "melt" the American Indian into the Indian American. Reorganization was an attempt to rectify the historical flavor of federal Indian policy and law by granting particular rights to Indians which had been usurped by the federal government. Limited tribal self-government and affirmation of the importance of an Indian land base were part of the legislated concessions of reorganization. Termination addressed the Indian dilemma

even more directly. By positing that the Indian problem involved the wardship/guardian status of Indians to the federal government, Washington D.C. felt that the most logical resolution was the termination of such relations. It was hoped that the Indian, functioning as a citizen and not a ward, would be more inclined to recognize and assume his "place" in American society. Reorganization and termination are generic issues to this discussion, as they are indicative of two specific and relevant phases of Indian policy. Aside from having been federal programs, they were also representative of federal philosophies which in fact preceded and legitimized their eventual manifestation in law.

The bulk of the analysis in this thesis will center around the federal philosophies of reorganization and termination as expressed through two government-sanctioned handbooks of federal Indian law; Handbook of Federal Indian Law by Felix S. Cohen, and Federal Indian Law done primarily by Frank G. Horne. These handbooks, written to accompany the reorganization and termination programs, are replete with succinct philosophical commentary on the perceived nature of federal Indian law relative to these phases in policy. However, an analysis of federal philosophies is attempted, it is vital to recognize that the relative contribution of either policy to the resolution of the aforementioned Indian "problem" is minimal. American history may reflect an infatuation with the disparity between reorganization and termination, while Indian history might well record both strategies as major contributions to the wretched interruption of the world of the Indian. In addition, then, to

the explication of distinct philosophies as they emerge from federal Indian law, the particular Indian praxis which indicts the existence of any attempt to legislate against the Indian world, or the Fourth World of the aboriginal, must be addressed.

The Fourth World

The "Fourth World" is first and foremost a moral issue. It retains a mystical quality which has long been divorced, in my opinion, from the purview of American social sciences. The moral demand which the Fourth World represents should not, however, lessen the legitimacy afforded to the analysis of this world order by social scientists. Its mystical dimension is perhaps nothing more than the constraints we feel when confronted with another world view which claims to be more logical or rational than the world which defines our reality. George Manuel and Michael Posluns' The Fourth World (New York: The Free Press, 1974) is the most eloquent expression of the world of the aboriginal. Their conceptualization of the Fourth World is clearly differentiated from other similar formulations of solidarity e.g., the Third World. The aboriginal world is a particularly difficult concept to grasp because we are restrained by values which in fact legitimize the need for political and economic structures as they exist for us today. The Fourth World, however, is much larger than "today" and entails a very different value system. Manuel's explication defies the shortsighted appraisal of "reality"—his definition outlines

the larger view:

The National Indian Brotherhood will celebrate the victory of the Indian peoples by bringing together aboriginal peoples from every corner of the globe.

Our celebration will embrace the aboriginal peoples of the world: the Indians of the Americas, the Lapps of Northern Scandinavia, the Polynesian and Pacific Basin peoples, the Basques of Spain, the Welsh and Celts of Great Britain, the Maori and Australian aborigines. These are the people whom we know, but there are more. Within the Soviet Union, China, Japan, and Ceylon are numerous peoples unknown in the Western world who share the status and perhaps the fate of Western aborigines. If no other way is open to them, we will be with them in spirit.

Our victory celebration will honour the fact of our survival, that we have not forgotten the words and deeds of our grandfathers, and that today Indian people throughout North America are undergoing a rebirth, as self-conscious societies aware of our own unique role in the history of this continent.

Our cultures have survived because they possess a strength and vitality with which the visitors to our continent have not yet been prepared to credit us. The ancients, both in Europe and in America, would have said, "Your gods are not as strong as our gods."

Does it matter how many battles others say you have lost if on the day of reckoning you have survived? In a Christian framework, victory means to make it to the day of reckoning. In an Indian framework, every day is the day of reckoning.

Our celebration honours our grandfathers who kept it alive.

The present concern with ecological disasters visited upon Western man by his failure to recognize land, water, and air as social, not individual, commodities, testifies to aboriginal man's sophistication in his conception of universal values.

As we view the North American Indian world today, we must keep in mind two things: Indians have not yet left the aboriginal universe in which they have always dwelt emotionally and intellectually, and the Western world is gradually working its way out of its former value system and into the value system of the Aboriginal World.

Our celebration honours the emergence of the Fourth World: the utilization of technology and its life-enhancing potential within

the framework of the value of the peoples of the Aboriginal World—not a single messianic moment after which there will never be another raging storm, but the free use of power by natural human groupings, immediate communities, people who are in direct contact with one another, to harness the strength of the torrent for the growth of their own community. Neither apartheid nor assimilation can be allowed to discolour the community of man in the Fourth World. An integration of free communities and the free exchange of people between those communities according to their talents and temperaments is the only kind of confederation that is not an imperial domination.

The Fourth World is a vision of the future history of North America and of the Indian peoples. The two histories are inseparable. It has been the insistence on the separation of the people from the land that has characterized much of recent history. It is this same insistence that has prevented European North Americans from developing their own identity in terms of the land so that they can be happy and secure in the knowledge of that identity.[2]

Manuel's account of the world of the aboriginal is problematic in the sense that it speaks to a view of life and living which we perhaps have never encountered before. He alludes to issues which pose an alternative to our way of life. At the crux of Manuel's conceptualization of the Fourth World is land, and those social, political, and economic relationships which arise from a <u>fundamentally different philosophy of life</u>. These relationships are in fact so foreign to their counterparts in our day and age that to entertain the validity of this Fourth World is to court "mysticism." The history of federal Indian policy is the account of a very conscious attempt to dispose of life as Indians understood life, or in more eloquent terms, to create order from absolute disorder. Federal Indian law is a precise tool which can be used to illuminate the ferocity of the attack on the world of the aboriginal in the United States.

Land and those social, political, and economic relationships

which revolve around a particular type of ownership will be constant themes throughout this thesis, as they necessarily illustrate a particular reality, or in this case, a negation of the aboriginal world. The pivotal element in the analysis will be sovereignty, or simply, the ability to control tribal affairs. Given the history of the Indian/white relationship, it becomes obvious that the Indian no longer "controls" even the very little he is left with. If, then, I am proposing, in agreement with Manuel, the legitimacy of the Fourth World, I am also explicitly addressing the right of sovereignty for Indian tribes in the United States. Unfortunately, to posit sovereignty as a feasible right of Indians is also to assail political and historical tradition in our society which has substituted a "melting pot" for such an exotic formulation. However, to persist in our relative tradition is to do violence to Indian life which goes much deeper than our own experience. Manuel speaks of the Indian tradition:

> Its strength lies in the accuracy of the description it offers of the proper and natural relationship of people to their environment and to the larger universe. It offers a description of the spiritual world that is parallel to, and in fact a part of, the material universe that is the basis of all our experience. 3/

In its most simplistic expression, the world view we share and the world view of the aboriginal are distinct. The reality of the present order is a very conscious affront to the world of the aboriginal. Social science inquiry is no less affected by the "facts," or the construction of reality in our society based on science and technology.

It can be argued that knowledge, a social structural process, is relative to the way in which the world is viewed. American sociology might then be expected to make assertions about "facts," reflecting its development within a scientific framework. Divergent interpretations of the "factual" world, which sociology has in the past rejected, have often been relegated to the realm of ideology i.e., alternative interpretations are dismissed as logical or rational expressions of social structural processes. If the reality of the Fourth World can only be viewed as an errant ideology opposed to <u>our</u> culturally relative conceptualization of truth, we are in fact attempting to deny meaningful existence to all persons who do not accept Western science as a universal truth. Such an understanding, in addition to the implicit naivete of divorcing notions of truth from ideology, belittles the potential scope and contribution of sociology. Only from a perspective of the sociology of knowledge is it possible to assert the validity of examining the Fourth World. It is a sociology, which looks at <u>all</u> knowledge (not just scientific knowing), that is able to entertain the world view of the aboriginal as a viable, meaningful, construction of reality.

The concept of the Fourth World is an attempt to express the salient features of a unique praxis, features of which were subject to a traumatic and devastating transformation brought about by <u>our</u> national sovereignty. The scope of this thesis does not include specific indices of conflicting realities (e.g., the material condition of Indians in the United States). Such indices are perhaps more indicative of effect than they are of cause. To understand the more basic confrontation

between disparate world views, it is necessary to examine the normative specification of "oughtness" as expressed through the law of a dominant people. The major philosophical constructs of federal Indian law portray the script of changing federal attitudes toward Indians which displays the aspects of white freedom, expressed in law, which inherently resulted in the subjugation of the Indian.

As noted above, two very salient features of the Fourth World, and indeed of any "world," are land and sovereignty. While the interconnectedness of these basic tenets might appear obvious, federal Indian policy has thrived on divorcing land and sovereignty from each other. Issues such as legal ownership, competency, mandate (God) etc. are replete in the history of the federal relationship with Indians. It would be insideous to suggest that land and sovereignty <u>together</u> do not affect our lives today: the implication that Indian life was less dependent on the power to govern its own affairs and the need for land to insure basic survival is ludicrous. Manuel addresses these "mundane" notions and their relevance today:

> Recognition of our aboriginal rights can and must be the mainspring of our future economic and social independence. It is as much in the long-term interest of the non-Indian peoples of North America as in our own interest that we be allowed our birthright, rather than that governments and churches perpetuate the Christian conspiracy that renders us the objects of charity while others enjoy the wealth of our land. 5/

Other prominent Indian authors have addressed this issue. Kirke Kickingbird and Karen Ducheneaux in <u>One Hundred Million Acres</u>

(New York: Macmillan Publishing Co., 1973) outline in detail a strategy for restoring a viable land base to Indians in the United States. Vine Deloria Jr. in Behind the Trail of Broken Treaties (New York: Dell Publishing Co., 1974) examines the land question in terms of sovereignty which is highly suggestive of Manuel's approach. Deloria's commentary, admittedly lengthy, provides insight to both the obstacles and tasks of the Fourth World:

> The proposal to restore the Indian tribes to a status of quasi-international independence with the United States acting as their protector strikes most Americans as either radical or ridiculous. In fact, it is neither. The standard objections raised by non-Indians to a fully sovereign status for tribes are generally based upon a misunderstanding of the concept of sovereignty in modern international law and practice, and on a misconception of Indian eligibility for this status because of their previous relationship with the United States government.
>
> Some say that the land areas presently possessed by Indians are too small to qualify as areas over which sovereignty can be exercised. Still others, accepting the small land area, argue that the United States totally surrounds the respective reservations, in effect locking the tribes into its political and economic system whether they wish it or not. The fact that the tribes have a small population in comparison with other independent states is often pointed out as a reason why the tribes should not have international status.
>
> The tribes' lack of an independent economic base presently helps to justify the massive federal expenditures which the government yearly makes available to Indian tribes. It is apparent that for the immediate future the United States will have to continue to appropriate large sums of money to keep the reservation people employed and to provide services for them. Can the tribes, people wonder, maintain any form of economic enterprise without the expenditures of the federal government? Would not independence in a political sense doom those programs now operating on the reservations which show some promise of succeeding? And, finally, the fact remains that many tribes lack sufficient education to succeed in the modern industrial society of the United States.
>
> With all of these factors combining to create a tremendous pocket of poverty on each reservation, many non-Indians feel that the present

movement to create an international status for the tribes is foolhardy, that the political and social basis for Indian tribal existence would vanish if the tribes were left to go it alone, and that the whole idea is un-American in some fundamental but ill-defined way.

Indians are not seeking a type of independence which would create a totally isolated community with no ties to the United States whatsoever. On the contrary, the movement of today seeks to establish clear and uncontroverted lines of political authority and responsibility for both the tribal governments and the United States so as to prevent the types of errors and maladministration which presently mark the Indian scene.

The assumption of many non-Indians is that independence of a nation implies that it stands in the same position as does the United States toward the rest of the nations of the world. People visualize a standing army, a massive import-export business, tariffs, gigantic administrative bureaucracies, international intrigue, and the ability to wage wars on distant nations with relative impunity. Such indeed are the characteristics of a superpower, but not of the average nation which has recognition as a self-governing community with inherent rights to its own existence. 6/

Deloria's analysis could be said to be overstated: tribal sovereignty is not automatically dismissed as a realistic issue because of those assets needed to be a superpower. The case for the Fourth World, a case which is based upon the right to sovereignty and land, is confronted with the calculated strategy which legislates against the aboriginal world, Indian law. It is perhaps this law itself which formulates the obstacle or "objection" to sovereignty: the analysis done here will recurrently offer this proposition.

The American Indian is subjected to an accumulation of years of federal Indian policy as it is expressed in law. The interrelatedness of policy and law is a vital component to a proper understanding of the Indian in the twentieth century. In the following discussion, this interrelatedness will be postulated by briefly outlining reorganization

and termination programs, and those handbooks of federal Indian law which afford us the opportunity to examine the philosophy of federal policy.

Indian Reorganization

In the space of less than twenty years, federal Indian policy underwent two dramatic shifts unparalleled in this century. Two specific pieces of legislation, the Indian Reorganization Act of 1934 (48 Stat. 984) and the Termination Resolution of 1953 (HCR 108), represent the contradictory climate of Indian affairs during these years.

The Indian Reorganization Act of 1934, as will be pointed our, was a monumental shift in the federal relationship with Indian tribes. It was not, however, as momentous as its primary author, then Commissioner of Indian Affairs John Collier, had proposed. In its final form, the bill hardly addressed the flagrant abuses of power, the outright violation of treaties etc. which Indians had been subject to for over a century. The ability of the Indian Reorganization Act to ever rectify these problems was questionable from the beginning.

The policy of reorganization attempted to restore to tribal governments what federal legislation had (has) sought to dissolve, namely, Indian self-governance. The Act allowed Indian tribes to incorporate, and vested certain legal powers in an elected tribal council. The allotment of Indian land, begun in 1887 with the passage of the Dawes Act (24 Stat. 388), was halted for those tribes who agreed

to the Indian Reorganization Act. The reverse of this prior allotment legislation was provided for in the provision which allowed tribal lands to be restored. A revolving loan fund was established to aid Indians in various aspects of economic development. Educational and vocational funds were also provisioned for. In general, the Wheeler-Howard Act (the Indian Reorgainzation Act of the IRA) was to provide a "new deal" for Indian tribes, much in the same spirit as other Roosevelt activities of the 1930's.

It serves no purpose here to belabor the content of the Indian Reorganization Act (IRA). [The Act itself and the Termination Resolution and Acts are provided in Appendix I.] While the IRA did indeed signal a new, although brief, era for Indians, it was not by any means of such notable construction that it was significantly more elevated than the general tenor of historical Indian legislation. Deloria (1974) observes of the IRA that there "was no rhyme or reason to the sequence of the law as written, and it reflected scattered points of view that were nearly irreconcilable philosophically, if not legally." [7]

It should be noted that all Indians were, by 1924, citizens of the United States (43 Stat. 253). Many provisions of the IRA were then redundant. Other provisions had serious shortcomings, while yet other areas of Indian affairs were ignored. Treaty rights were felt to be "commuted" if tribes reorganized under the Act, and traditionalists had seen too few of these rights upheld in the first place. Tribes in Oklahoma and Alaska were excluded from major portions of the IRA, and it was only with the Oklahoma Indian Welfare Act of 1936 (49 Stat. 1967)

that this situation was partially resolved.[8] It took until 1946, with passage of the Indian Claims Commission Act (60 Stat. 1049), before restitution for past "expropriations" of land was even addressed. This provision had been one of the most significant features of Collier's original proposal, but along with other attempts to resolve the basic dilemma of the Indian, they were relegated to marginal or no importance by Congress.[9]

Reasons for these many deficiencies are numerous, although two rather obvious explanations emerge. The first deals with "politicking" i.e., to prevent the out and out rejection of the reorganization plan as Collier initially proposed it, an ever increasing number of compromises, in the form of amendments, were attached. These "clarifications" in effect made the spirit of the legislation insipid. The second factor, often isolated as the primary contribution to the demise of Indian reorganization, was the personal philosophy of John Collier. Just what exactly John Collier's philosophy was, however, is not a closed subject. S. Lyman Tyler, in A History of Indian Policy (Washington D.C.: U.S. Department of the Interior, 1973) suggests that Collier's ultimate objective was assimilation of Indian communities into American life:

> There was a belief that the re-establishment of Indian community life and support of local Indian leadership would help prepare these communities to eventually be included in the family of local communities in the various States throughout the United States. 10/

Murray L. Wax and Robert W. Buchanan, in Solving "the Indian Problem": The White Mans' Burdensome Business (New York: New York Times, 1975)

are more direct on the issue and observe that "Like the goal of many other reformers, Colliers' was assimilation of Indians into the 'mainstream' of American life."[11] These authors proceed to differentiate Collier from other assimilationists by virtue of the fact that he went to the Indian people for both the development and approval of his legislation. Nonetheless, this notion of "assimilation" as applied to Collier is troublesome. Speaking in The Indians of the Americas (New York: W.W. Norton and Company, 1947) Collier states:

> . . . Indian societies must and can be discovered in their continuing existence, or regenerated, or set into being de novo—and made use of. This procedure serves equally the purposes of those who believe the ancient Indian ways to be best and those who believe in rapid acculturation to the higher rather than the lower levels of white life. [12]

Collier is emphasizing two purposes, namely, that of the assimilationist and that of the traditionalist. In light of his lack of enthusiasm with the value of competition inherent in capitalism in favor of Indian society (Pueblo[13]) this issue of Collier as assimilationist is very questionable.

Termination of Federal Responsibility

The reception the IRA received is perhaps best illustrated by one of its co-sponsors, Senator Wheeler of Montana, who demanded that the Act be repealed in 1937 due to its emphasis on communal and tribalistic (communistic) living and its interruption of the continued

quest for the melting pot dynamic. As one author observes:

> Trying to read behind the rhetoric, we may guess that the impact of the IRA had been deeper and greater than anticipated. Initially legislators had simply wanted to relieve Indian poverty and bring monies to their depression-ridden communities. But the IRA was doing more: it was denying to local whites the opportunities to use or gain control over Indian resources, and it was giving to Indian communities more political clout. Local white groups were becoming upset by this shift in power. Also, Indians being themselves diverse and having varied, even opposed, interests, some were bound to dislike the Indian New Deal. 14/

Although Wheeler was not successful in his efforts to repeal the IRA, his criticisms contributed to a growing resentment felt by many Congressmen over both the effects of reorganization and the functioning of the Bureau of Indian Affairs. During the Congressional attempt to revamp the unwieldy federal organization, the Bureau (BIA) was accused of being too much of a financial drain on the government. More importantly, the BIA was said to be contributing to Indian cultures rather than forsaking such cultures in favor of the white world for the Indian citizen. In short, the BIA was perpetuating the wardship status of Indians which in turn perpetuated the BIA.[15] Accordingly, appropriations for Indians were drastically reduced, and the IRA in turn, through lack of financial support, functioned even more poorly than it would have had to in the first place.

Under increasing pressure to do so, then Assistant Commissioner of Indian Affairs Zimmerman (1947) outlined criteria by which Indian tribes could be judged fit to be terminated i.e., tribes which would thereafter be ineligible for federal services etc. He proposed three

classes of tribes, each "qualified" relative to tribal approval, state approval, degree of acculturation, and a sound economic base. Zimmerman's safeguards were ignored, however, and his proposed groupings were accepted at face value. In 1953, a concurrent resolution was passed—the Termination Resolution—which stated clearly that the foremost intent of Congress was to terminate federal responsibilities to Indian tribes at the earliest possible opportunity. Federal responsibility included treaty, statutory, and judicial safeguards which Indians had been guaranteed. A widely held notion in Washington was that in the interest of "first class citizenship," assumed to be an inherent outcome of assimilation, special status such as wardship needed to be terminated. The Indian was once and for all time to be weaned and treated no better than other citizens. Aside from the fiction implicit in any claim that Indians were (are) privileged, the "wardship" mentality reflects a lack of historical perspective with regards to the genesis of the special Indian relationship with the federal government—something which will be taken up later. In the 1950's there were only Americans: "different" was analogous to "un-American," a poison intolerable in this era of McCarthyism.

During 1954, a Joint Subcommittee on Indian Affairs began writing termination legislation and held a total of thirteen hearings on acts specific to Indian tribes. Actual termination began in 1954 and continued into the 1960's (Appendix I). The joint subcommittee exhibited a high degree of efficiency which was consistent with their tactics:

> The sole criterion became whether or not the joint subcommittee could threaten harass or dupe the unsuspecting Indians into agreeing to give up their treaty committments and let the United States out of its century-old contractual agreement. . . . When tribes refused to agree to the legislation Watkins [committee chairman] told them that he would pass it anyway and in the process deny them their funds in the federal treasury. By agreeing to the legislation the tribes understood they could at least get their own money which was being held in the federal treasury for them. It was apparently the case of the lesser of two monstrous evils. . . . Bills simply flew through the two Houses of Congress and were ready for the President to sign before the tribes knew what was happening. It was almost as if Senator Watkins had been given a blank check by other members of Congress to do whatever he wanted to the Indians. 16/

Kickingbird and Ducheneaux (1973) graphically illustrate the plight of one such tribe which fell victim to the Watkins' committee, the Menominee, who were terminated in 1954. While attempting to turn the Menominee reservation into a self-supporting county in Wisconsin, millions of dollars of tribal assets disappeared. The end result was financial ruin for the Menominees and a welfare problem which the state of Wisconsin could not alleviate without federal assistance. [17] Such was the general tenor of the solution to the tutelage imposed by Indians on the federal government.

While termination was an effective clout for Congressmen anxious to force legislation upon Indian tribes, the overt termination philosophy never became as firmly entrenched in federal Indian policy as acculturation or assimilation had. By 1958, the termination objective had been relegated to a long term goal by high officials in the Interior Department. Several factors bear directly on the "change of heart," among them increased opposition to termination expressed by Indian and non-Indian alike, the disastrous experience of tribes which had been terminated (e.g., Menominee), and the reluctance of Indian tribes to

involve themselves in self-sufficiency programs of the federal government due to hostility etc. engendered by the termination policy. The philosophy of strict termination was set aside in favor of "development" of the social, political, and economic status of Indians. This is not to say that such development was designed to encourage future termination. As late as 1966, termination was still a predominant concern of Indian groups who yet felt threatened by its "waning" presence in Congress. In 1966, then Commissioner of Indian Affairs Philleo Nash was fired for purportedly opposing the termination of one of the last tribes to be so threatened, the Colvelles of Washington State. Robert La Fallette Bennett succeeded Nash to the Commissioner's post, but only after Congressional hearings made it clear that termination was still on the minds of many legislators who expected Bennett to carry forth the mandate of 1953. Bennett did not cooperate with such wishes, and emphasized instead the federal responsibility toward Indians.[18] With his message on "The Forgotten American" (6 March 1968), then President Lyndon B. Johnson proposed a new phase in federal Indian policy:

> A goal that ends the old debate about "termination" of Indian programs and stresses self-determination; a goal, that erases old attitudes of paternalism and promotes a partnership self-help. [19]

It is not within the scope of this paper to analyze the effective decline of the termination mentality, if such a decline has ever occurred. Any claim that the termination era, or what Deloria (1971) calls the "Great Indian War of the Twentieth Century,"[20] has fully

evaporated from the purview of federal Indian policy and law must be viewed with skepticism. In a larger sense, the question is whether or not fluctuations in federal Indian policy and law have signaled any significant changes for the Indian in the direction of a Fourth World order as Manuel describes it. A very basic assumption made throughout this essay will be that "changes" have easily contributed to the demise of the aboriginal order, and such "changes" are initiated when the aboriginal is no longer needed to fuel the life, liberty, or happiness of a dominant people. With the shift of federal Indian policy which resulted in reorganization and termination programs, it is possible to discern the transformation of basic legal philosophy as it was applied to federal relations with Indians. The data from which we are able to analyze fluctuating philosophies are two handbooks of federal Indian law, each expressing the sentiment of either reorganization or termination.

In 1941, Felix S. Cohen, then the Assistant Solicitor of the Department of the Interior, published through the department his Handbook of Federal Indian Law. This handbook was actually a condensed version of an earlier study headed by Cohen which filled forty-six volumes.[21] Cohen, who had assisted in the drafting of the original reorganization legislation, was keenly aware of legal questions, both domestic and international, which seriously challenged the federal policy toward Indians as it had evolved to the 1930's. The Indian Reorganization Act was a step in the right direction for Cohen, as tribal sovereignty, treaty obligations etc. were effectively shown to be more than romantic history. Cohen's volume was a monumental attempt

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to organize the monstrous collection of federal Indian law. Aside from the strict documentation of the law, however, Cohen did not hesitate to express his own philosophy of Indian affairs, a philosophy which was consistent with the intent of the original reorganization legislation. As the termination era became more and more prominent, it was obvious the Cohen Handbook was not in keeping with a more "enlightened" philosophy of the federal relationship with Indians. Under the principle authorship of Frank G. Horne, Cohen's work was revised.*

The 1958 revision of Felix S. Cohen's Handbook of Federal Indian Law was, according to its authors, to provide and reflect the dynamic changes in Indian law which had occurred during the late 1940's and early 1950's:

> As national development and progress continue and as new patterns of policy evolve, legal answers to questions of Federal Indian law will be found predominantly in the latest statutory law and judicial determinations of justiciable issues. Those are stressed in this revision for the purpose not only of seeking balance, to the extent

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* In order to simplify the continual reference to the two volumes in question, I have taken the liberty of abbreviating such references in the following manner:

The Handbook of Federal Indian Law by Felix S. Cohen (Washington D.C.: U.S. Department of the Interior, 1941) will hereafter be referred to as "Cohen." Specific quotations will be followed by a [C:page] to indicate the page of the reference in Cohen.

Federal Indian Law (Washington D.C.: U.S. Department of the Interior, 1958) will hereafter be referred to as "Horne," its principle author. As above, quotations will be followed with a [H:page] to indicate page and volume.

practicable, but also for the purpose of foreclosing, if possible, further uncritical use of the earlier edition by judges, lawyers, and laymen. [emphasis mine—H:1]

The Horne volume sets out to reinterpret those tenets of Indian law and history which fueled a widening discrepancy between "new patterns of policy"—namely, the termination policies advocated by the Department of the Interior et al.—and Cohen's original work. As Robert L. Bennet and Frederick M. Hart candidly observe in the 1971 reprint of Cohen, the 1958 version "deteriorated into a volume with a new and constant theme: the Federal Government's power over Indian Affairs is plenary." [C:vi] As might be expected, the transition from law which tolerates Indian rights of self-determination and self-governance (Cohen) to law which ignores the same in favor of plenary federal control (Horne) is not without its contradictions. The propensity of issues involved makes an analysis of these contradictions the substance of a much more lengthy study than proposed here. This exposition—limited as it might be—will be able to sufficiently outline the philsoophy of termination as well as critically evaluate the Horne revision for its so-called "high standards of objective scholarship." [H:v]

Because the primary interest herein is the philosophy of termination as it emerges from Horne and not the entire field of federal Indian law, only those issues which pose contradictions as discussed above will be examined. There are several important limitations and qualifications which need to be clarified before proceeding. [I am not a legal expert on federal Indian law, and it is certainly not my intention

to argue differently. I will only be concerned, for instance, with obvious discrepancies in the philosophies of Cohen and Horne.] One of the most serious shortcomings of this analysis will involve the legislation and judicial decisions which were very much a part of federal Indian law in the interim 1940-1956. This material has not been incorporated to either bolster or challenge any conclusions drawn, although admittedly it appears that the bulk of statutes and court decisions which Horne adds to his volume challenge many of Cohen's contentions. Whether this is a function of a changing federal policy (in the direction of termination) or selective attempts to discredit Cohen will not be judged. This analysis proceeds on the implicit and explicit philosophical differences which emerge in the two volumes.

With regards to the Horne volume, it is immediately apparent that the bulk of his text is a verbatim duplication of Cohen. Deviations in his revision, then, become suspect because by and large, such deviations represent either the addition of statutes and court rulings which have occurred in the sixteen year interval between these works, or they are attempts to justify a termination policy by reinterpreting the history and laws specific to the federal/Indian relationship. This latter type represents the bulk of the analysis.

Because the Horne text can be viewed as the "challenger" so to speak, his outline of Federal Indian Law has been retained. (The different formats—Cohen's and Horne's—are noted in Appendix II.) Some areas of federal Indian law do not contain tangible discrepancies in the two versions, relative again to this fledgling attempt at legal

interpretation, and such sections have either not been included or are addressed only briefly.[22]

Finally, it is vital not to underestimate the importance of the Cohen and Horne texts in the field of federal Indian law. The Office of the Solicitor in the Department of the Interior is responsible for all legal matters that pertain to the administration of Indian affairs. Cohen compiled his Handbook of Federal Indian Law when he was the Assistant Solicitor and heading the largest legal contingent in the federal government. Frank G. Horne wrote the revision of Cohen under the direct supervision of then Deputy Solicitor Edmund T. Fritz. These volumes are then the paramount expression of federal Indian law. By contrasting the so-called revision with Cohen's Handbook, it will be possible to elucidate the distinct legal philosophies which formulated the justification for tribal reorganization and tribal termination.

Chapter 2

The Philosophy of Federal Indian Law: Termination versus Reorganization

The Field of Federal Indian Law

Before we can begin to analyze any portion of federal Indian law, it is vital that we come to grips with the concept itself. Logically, it would seem that the definition of such a generic idea as "federal Indian law" would pose no difficulty, but as will become evident throughout this entire discussion, there are no neat, concise common denominators with which to work. Cohen defines federal Indian law as those issues relating specifically to Indian affairs. The mere involvement of Indian litigants would be an insufficient criterion:

> Our subject, therefore, cannot be defined in terms of the parties litigant appearing in any case. It must be defined rather in terms of the legal questions which are involved in a case. Where such questions turn upon rights, privileges, powers, or immunities of an Indian or an Indian tribe or an administrative agency set up to deal with Indian affairs, or where governing rules of law are affected by the fact that a place is under Indian ownership or devoted to Indian use, the case that presents such questions belongs within the confines of this study. [C:1]

Horne's approach to "federal Indian law" differs appreciably. While generally conceding to the above definition, Horne is preoccupied with

several issues which, if not addressed at an early stage, would be injurious to his later argument for termination of federal involvement in Indian affairs. The first of these issues involves Indian citizenship in the United States and the states of residence. In the past, according to Horne, Indians have been reduced to wards of the federal government principly because of the historical development of their relationship with the white man. A valid inference in this context would be that due to the improved relations with the government, acknowledged, presumably, through the extension of citizenship, Indians should reciprocate by recognizing the imposition their tutelage makes on the federal government. This idea manifests itself through the second issue that Horne discusses, namely, historical relativism. The historical progression of federal Indian law—in a quantitative, not qualitative sense—becomes for Horne an irrelevant facet of current legal questions which must find their resolution in the "latest statutory law and judicial determinations of justiciable issues." [H:1] Horne's intent here is fairly obvious:

> Much of the earlier Federal law and many Indian treaties now have only historical significance. [H:1]
>
> The early pronouncements, such as those of Chief Justice Marshall,[1] quoted in this treatise must be considered in the light of the historical situations then existing. [H:2]

While Cohen draws from the history of Indian/federal relationships from which he outlines those special "rights, privileges, powers, or immunities" of Indians, Horne de-emphasizes the role of the federal

government as trustee of special Indian rights, and substitutes instead the good of the entire country. The federal government is entrusted with the protection of those rights its citizens share in common. This contention by Horne is amply demonstrated:

> . . . nothing could be more destructive of good will or more inimical to the advancement of which Indians are known to be capable of than an immoderate accentuation of the idea that the United States Government is under a special obligation to all citizens who have Indian blood as a distinct class because of real or fancied injustices to their ancestors. [H:2]

By relegating the role of history to the burdensome epoch of the dark ages as he does, Horne elevates "citizenship" to the central justification of his termination philosophy. The special status of the American Indian—which Cohen attempts to account for and indeed defends—becomes for Horne the epitome of collusion with guilt feelings and obligations. If the Indian people are to advance in every facet of American life, he says, they must be treated no differently from the general populace. It is this philosophy, whose logic is the cornerstone of termination, which permeates all of Horne's rendition of federal Indian law. Through the major substantive areas which paint the composite picture of Indian law, it will be possible to trace the purview of changing federal policy toward Indians relative to reorganization and termination. A fundamental concern in the discussion of Indian sovereignty must be in fact the negation of that sovereignty in the United States. It is vital, then, to probe the power assumed by the federal government over the affairs of Indians.

Federal Power Over Indian Affairs

Some of the most glaring contradictions between the Cohen and Horne versions of federal Indian law occur in the area of federal control of Indian affairs. While both authors recognize the Constitutional foundations of this control, Horne's introductory remarks on the scope of federal power are noteworthy. The Constitution, he says, is of and by the people and "was not an act of sovereign and independent States." [H:21] This argument is not problematic except for Horne's persistent emphasis of "plenary constitutional powers;" treaties are subject to the common good which is the supreme law of the land. If, pursuant to the mandate "for the people," Congress should elect to nullify, repeal, or modify treaties, "a person acquires no vested right to the continued operation of a treaty and everyone is bound to obey the latest expression of the law." [H:25] It appears that Horne's intent in this brief overview of treatymaking is to impress on us that the supremacy of congressional law over treaties is grounded in the Constitution to which Indians, "as dependent alien nationalities" [H:25] are subject. This contention is based on the premise that the federal government operates in the best interests of its people and not in the best interest of "sovereign and independent states:" we should question, then, the propriety of treatymaking[2] and treaty obligations with sovereign Indian nations. This logic has its complement with the mention of Indian citizenship[3] and Horne's disposition of treaty provisions to "restrictive covenants, segregated matters, or similar problems." [H:26]

Legislative power, while grounded in constitutional mandate, is by itself unable to implement its own statutes. Dependent, then, on this legislative branch is the administrative arm of Congress which has this implementation function. Administrative power over Indian affairs is vested in the President, the Secretary of the Interior, and the Commissioner of Indian Affairs. Administrative functions are necessarily delegated further, supposedly subject to treaties and statutes which confer the administrative power initially.[4] While in theory administrative power should operate only within the confines of legislative license pursuant to federal statute, it is fact that there exist, in both theory and practice, substantial discrepancies between administrative power and legislative power.[5] Legal interpretation-in addition to philosophical ramifications—is no less affected by these same discrepancies. While a "judgement" of the interpretations of Cohen and Horne which follow will not be rendered, this example does provide some insight into the basic philosophies of the two authors. In the context of administrative authority over Indians in instances where specific legislation is lacking, Cohen observes:

> The question of whether internal affairs of Indian tribes, in the sense of statute, are to be regulated by the tribe itself or by the Department of the Interior was squarely before the Supreme Court in the case of Jones v. Meehan. One of the questions presented by that case was whether inheritance of Indian land, in the absence of statute, was governed "by the laws, usages, and customs of the Chippewa Indians" or by the rules and regulations of the Secretary of the Interior. In line with numerous decisions of lower courts, the Supreme Court held that the Secretary of the Interior did not have the power claimed, and that in the absense of statute such power rested with the tribe and not with the Interior Department. [C:102]

After a lengthy verbatim passage from Cohen which continues on with the exception of this case, Horne writes the following:

> The question of the application of tribal laws, usages, and customs, in the absence of Federal statute, was before the Supreme Court in the case of Jones v. Meehan. Title to the lands, in that case, having vested in the Indian chief by reason of a treaty grant of a "reservation" to him, that grant descended to his son under the laws and usages of his tribe—there being no controlling Federal statute at that time on this matter. Accordingly, when Congress misconceived the nature of this "reservation" in passing legislation directing the Secretary of the Interior to take action to protect the interest of the heir, the Supreme Court said the grant in fee was beyond such control. [H:56]

There are some obvious differences in these two accounts. For instance, Horne's rendition emphasizes "reservation" and "grant in fee," and one could easily construe from his account that it was the grant in fee itself that was beyond the control of Congress. Cohen's commentary, in addition to addressing more clearly the relevant issue of <u>blanket</u> power of the Secretary of the Interior and tribal "laws, usages, and customs," identifies the power of the tribe as that element beyond the control of Congress in absence of federal statute. Fundamental differences, such as those cited above, are not happenstance but instead carefully calculated strategies. In their discussion of administrative power over tribal membership, these philosophical gymnastics become more concise as both authors reflect on the phase of Indian/federal relationships prior to the Indian Reorganization Act of 1934:

> During the periods when the federal policy was designed to break up tribal organization . . . [Cohen:114]

During the periods when the Federal policy was designed to integrate the Indian and curtail tribal government . . . [Horne:89]

The inevitable resolution to this "misguided" federal policy would lie in the Indian Reorganization Act for Cohen, and the Termination Acts of the 1950's for Horne. A clue to these respective philosophies is contained in the interpretations of the history of federal Indian legislation.

Horne's analysis of federal Indian legislation is in almost perfect agreement[6] with Cohen's through the 1850's. However, in line with his sentiments on the General Allotment Act of 1887 (24 Stat. 388), Horne chose to omit a comment Cohen makes on Indian misgivings with the climate of future federal legislation:

This legislation [specifically, "An Act to protect the property of Indians who have adopted the habits of civilized life" (12 Stat. 427)] is evidence of the resistance which the new allotment system was already encountering from tribal Indians who did not wish to see tribal lands checker-boarded with private boundary lines. [C:77]

Despite the historical lesson of the Allotment Act (Dawes Act) which in effect put tribal land on the open market, it might be expected that Horne would defend, if only in theory or by deletion as in this case, the underpinnings of this legislation: he does not. Before the federal government could justify alloting <u>individual</u> title to <u>tribal</u> lands, it was necessary that they clarify the status of tribes. In a general sense, this was amply accomplished through the Appropriation Act of 1871 (16 Stat. 566) which ended treatymaking with Indian tribes. Cohen

notes, however, that "the termination of treaty-making did not stop the process of treating with the Indians by agreement." [C:77] Horne comes to essentially the same conclusion in language more indicative of increasing federal control of Indians and tribes: "The termination of treaty-making was followed by legislative oversight or approval of agreements made by Congress with the Indians." [H:114]

In his commentary on federal Indian legislation from 1910-1919, Cohen notes that "the attempt to wind up tribal existence reaches a new high point and various powers formerly vested in the tribes are transferred by Congress to administrative officials." [C:81] This point is noticeably absent in the Horne discussion, as are all references to "past wrongs" for which Cohen sees the Indian Reorganization Act of 1934 as rectification:

> Through the series of general and permanent laws enacted in the field of Indian affairs during this decade [1930-1939] there runs the motive of righting past wrongs inflicted upon a nearly helpless minority. [C:83]

Horne also disregards the lengthy quotations on the analysis of the Indian Reorganization Act. This is in part clarified by his rendition of federal Indian legislation between 1940 and 1957 (which intervened between the publication of Cohen's volume and his own). For instance:

> Much of what was done in the 1930-40 decade had to be adjusted and in some cases undone. Despite limitations imposed pursuant to the Indian Reorganization Act, Indians continued to demand and obtain authority for, or actual removal of, restrictions on their individual property. [H:133]

Of tribal affiliations and identity, two predominant components of the Indian Reorganization Act, Horne is especially "enlightening:"

> The Indian Claims Commission Act of August 13, 1946, established a legislative court affording an opportunity to settle permanently old claims which with tribal property, have been an incentive to the Indian to retain tribal membership and residence on the reservation. [emphasis mine—H:133]

The termination policies, which for the most part commenced in the 1950's, were further justified by Horne because of the "layer upon layer of residues left by the treaties and laws of the past" [C:88] for which, "incongruous as it may seem, Congress took time" [H:134] to enact special legislation to accomplish very simple objectives. The termination of wardship restrictions would then benefit the Indian:

> These legislative items [on the "equity" of termination] are indicative of the assumption by Indians and Indian tribes of their places and responsibilities in the life of the States and the Nation. [H:136]

The importance of Indian treaties and the manner in which they are interpreted as being part of the "supreme law" which governs our relations with foreign nations will have particular bearing on the sovereignty issue of aboriginal peoples. Cohen and Horne present two very different approaches to this question. Cohen, for his part, never loses sight of the validity, based on Constitutional license, of Indian treaties and the legal obligation of the federal government to honour these agreements. The Indian Appropriation Act of 1871

brought to a close the treatymaking strategy which had been pursued since the inception of the Republic, but it did not diminish the impact of the treaties which preceded the Act. Horne's account, while acknowledging those vital points of Cohen's presentation, emphasizes a "historical" context approximating ambivalence, which is becoming for Horne an acceptable method of dealing with the un-enlightenment of the past. Stressing first the termination of treatymaking on the basis of the 1871 Act, Horne proceeds:

> The early treaty arrangements with Indian tribes present nothing historically and legally strange or anomolous. Eventual civilization and citizenship for the primitive tribes of Indians were vague objectives in our early history and in the beginning days of the Republic. Indian tribes, to a large extent during those periods were considered dependent nationalities, and the status of a tribal Indian was that of an alien, insofar as the Government of the United States was concerned. . . . Treaty arrangements were the accepted method of that time for dealing with the Indians . . . [H:138]

From Horne, then, we are to understand that as goals of "civilization and citizenship" became more defined and indeed crystallized in the late 1800's, Indian tribes ceased to be nations. Horne says further that from the time the United States was established under the Constitution, Indian tribes "have had no real standing internationally." [H:149] Cohen insists that the international status of the tribe was evident from the terminology of treaties "familiar to international diplomacy" and "certain clauses relating to war, boundaries, passports, extradition, and foreign relations." [C:39] However, Cohen qualifies this argument by outlining the dependent character of Indian tribes—

for Horne, this character was never in doubt: "Their status was clearly that of dependent nations." [H:152]

The dependence of Indian tribes upon the federal government is manifest through provisions in law dealing with criminal and civil jurisdiction, the gamut of commercial relationships from land cessions to payments and services, and finally the control of internal tribal affairs. In this latter class of provisions, the differing philosophies of tribal reorganization versus tribal termination are again apparent. The Presidential power to allot tribal Indian lands to individual Indians constitutes a "breach in the scope of tribal self-government" and "encroachment" for Cohen [C:46] while posing a "limitation" on tribal self-government and power for Horne [H:163]. The history of treaties between tribes and the federal government is given considerable attention by Cohen and for the most part, Horne retains the original accounting. It is interesting to note, however, that Horne finds it necessary to "clarify" the section on the end of treatymaking and the Indian Appropriation Act of 1871:

> Thus ended the "legal fiction" of the status of Indian tribes in the field of treaty lawmaking. The agreements which continued to be made [after 1871] and thereafter approved by both Houses of Congress, are acts of Congress. Congress also could legislate without a previous agreement or without even attempting to secure one. [H:212]

This, then, becomes Horne's most succinct commentary on Indian tribes and their bargaining position and status after the Act of 1871.

Cohen maintains that agreements between Indian tribes and

the federal government did not differ in substance from treaties: the difference between a treaty and an agreement is that the latter is ratified by both Houses of Congress instead of by the Senate alone, which had been the case with treaties. Horne vigorously disagrees with Cohen's appraisal:

> What heretofor may have been the nomenclature designation and notwithstanding loose use of terms applicable to international law or treaty lawmaking, these agreements can now be easily recognized as sort of a congressional lawmaking device known as "legislative oversight." [H:212]

In their final remarks on Indian treaties and specifically on Indian agreements, both Cohen and Horne present us with a very clear picture of those antagonisms basic to their conflicting philosophies:

> Thus, while the form of treaty-making no longer obtains the fact that Indian tribes are governed primarily on a basis established by common agreement remains, and is likely to remain so long as the Indian tribes maintain their existence and the Federal Government maintains the traditonal democratic faith that all Government derives its just powers from the consent of the governed. [Cohen:67]

> Thus, while the form of treaty-making no longer obtains, the fact that many Indian tribes are municipally governed primarily on a basis established by common agreement remains, and is likely to remain so long as the Indian tribes maintain their segregated existence under exclusionary politics of the Federal Government. [Horne:214]

The scope and substance of federal control over Indian affairs, here briefly reviewed, raise several poignant issues that are directly related to Indian sovereignty. The breadth and mandate of federal control, legislative and administrative power, the "propriety"

of treatymaking etc. are concerns which vacillate in intensity relative to the philosophies of reorganization and termination. The often times contradictory interpretations of federal power over Indian affairs are amply reflected in the following discussion of the function and policy of the designated administrative agency charged with "creating" the relationship between the federal government and Indians, the Bureau of Indian Affairs.

Administration of Indian Affairs

The development of the Indian Service, or what is today called the Bureau of Indian Affairs, was and still is one of the most controversial issues of the Indian question.[7] Predictably, the matter is not resolved in these versions of Federal Indian Law. For instance, the"uncontrolled"discretionary powers over Indian life which the Indian Service came to enjoy was in part due to "jurisdictional aggrandisement" [C:12] according to Cohen. For Horne, Bureau powers were "considerable" and were due in part to "jurisdictional accretion" [H:222] which, contrary to Cohen's "aggrandisement," implies a natural growth. With the enactment of the Indian Reorganization Act, Cohen felt these earlier tendencies had been reversed: for Horne, the Termination Acts "adjusted" the earlier policies of the Bureau of Indian Affairs.[8]

Horne does not indulge in Cohen's introductory remarks on the history of federal services for Indians, the tenor of which is meant to challenge stereotyped notions of Indian/federal relationships.

One such misconception for Cohen is the idea that Indians are charity wards of the federal government. Horne would certainly seem to imply that some [9] Indians enjoy such a status. In this regard, Horne is consistent throughout his discussion of Indian policies and law. On the strength of such a contention, it is understandable that Horne would avoid possible explanations and clarifications for what Cohen calls the "erroneous notion [that] Indians have been the regular recipients of unearned bounties." [C:237] Cohen proceeds to offer some justification:

> In reality, federal services were, in earlier years, largely a matter of self-protection for the white man or partial compensation to the Indian for land cessions or other benefits received by the United States. In recent years such services have been continued, partly as a result of the failure of the states to render certain essential public services to Indians, because of their special relationship to the Federal Government. [C:237] [10]

Of those federal services which Cohen and Horne specifically address, several discordant variations in the discussions highlight their respective philosophies. Horne, when speaking of Indian education during the period of 1940 to 1957, for instance, points to the dynamic ongoing changes in education which have resulted from this atomic age. He further states that "this accelerated program also has as objectives the preparation of Indians for termination of Federal supervision, for acceptance of State jurisdiction, and for placement of Indians in industry and their relocation [11] for that purpose." [H:280]

In the area of Indian health services, the discussion differs

noticeably between the two authors principally because of the Act of 5 August 1954 (68 Stat. 674) which transferred this federal service to the Department of Health, Education, and Welfare. At the time of the Cohen writing, of course, this activity rested with the Bureau of Indian Affairs as did all other federal services to Indians. Aside from the obvious implications of moving these health services into a department which deals with the problem on a national basis,[12] a fair reading of Horne points out several safeguards which generally address "the retention of a priority to meet health needs of Indians over non-Indians." [H:284]

With regards to federal loans made to Indians, Horne eclipses Cohen's discussion of provisions of federal policy affected by the "reorganization" climate of the middle-thirties, in favor of subsequent legislation which qualifies Cohen's earlier version of Federal Indian Law. Likewise, the section on reclamation and irrigation projects for Indians contains Cohen's original text but also outlines specific new legislation which has a direct bearing on these projects.

When introducing the scope of federal legal services for Indians, Cohen says that the "United States without specific statutory authority represents the Indian generally in legal matters in which the United States has an interest." [C:252] Horne is less certain of this interpretation and points out that section 175 of Title 25 (1926)[13] provides legal representation to Indians by U.S. District Attorneys. Cohen, while he makes a similar observation, voices concern over an interpretation of this statute which limits its applicability to those

legal questions in which the United States has an interest. Cohen states:

> The Department of Justice has not been consistent, however, in the use of this construction, and has on occasion given a less narrow interpretation to the words of Congress. Carried out consistently, this narrow construction would nullify the statute [section 175], since, as we have noted, the United States has represented Indians in such cases without special statutory authorization. [C:253]

The Horne text does not speak to this issue and seems instead content with the interpretation which is strictly dependent upon the specific interests of the United States.

The administration of Indian affairs is by no means a simple issue. First and foremost, it assumes license in the power of the federal government to control Indian affairs. Other considerations revolve around that power and mandate of the Bureau of Indian Affairs, issues such as the administration of federal services to Indians, policy for determining the eligibility for these services etc. The logical extension of the concern with power of the federal government is the growth of administrative power vested in the Bureau of Indian Affairs. A further extension of the scope of power over Indians is jurisdictional power, and specifically in terms of the contrasting philosophies of Cohen and Horne, of particular interest is criminal jurisdiction.

Jurisdiction

With regards to criminal jurisdiction in the area of Indian affairs, Horne emphasizes the predominant role of the federal courts

and bemoans, it would seem, the relatively small historical influence of the states:

> In the exercise of its plenary power over Indian affairs, Congress has largely excluded, until recently 14/ State jurisdiction, and, because Federal courts are courts of limited jurisdiction, as heretofore noted, there has resulted, in many instances, a jurisdictional vacuum—a situation abhorred in law. This gap has been filled by the exercise, of assumption, of tribal jurisdiction—a situation that will prevail until Congress legislates otherwise to place Indians in the same status as other citizens of the United States, that is, under the jurisdiction of the States wherein they reside. [H:307]

Cohen's introduction to criminal jurisdiction is significantly different: "Criminal jurisdiction in Indian law involves an allocation of authority among federal, tribal, and state courts." [C:353] [15] The net result is that for Horne, tribal jusrisdiction is an inferior expedient which will be eliminated when Indians are treated no differently than ordinary citizens. Given his previous thoughts on tribal sovereignty, this interpretation is consistent. Horne further clarifies his position:

> Caution, however, should be exercised in discussing tribal jurisdiction to avoid indiscriminate reliance on such mystical words as "inherent power" or "inherent rights." Residual sovereignty exercised de jure or assumed and recognized de facto should not be confused with or mistaken for something called "inherent power" or "inherent sovereignty." [emphasis mine—H:311]

The allocation of jurisdictional authority among federal, state, and tribal governments obviously entails a complex set of issues, not the least of which is Indian sovereignty. Horne's discussion consistently brackets out tribal considerations, while Cohen perhaps

suggests a more egalitarian distribution of power. In either case, the right of complete sovereignty and its historical expression was usurped with the coming of the white man. The degree of infringement upon tribal governments is reflected in the power remaining to Indian tribes under federal law.

Tribal Self-Government

The concept of tribal self-government, as has been demonstrated, is a sensitive area of Indian affairs particularly for those persons, Horne included, who espouse a terminationist philosophy. It is Cohen, however, who emerges as the most sensitive of all. While Horne buries the issue of self-government "in the light of the historical tradition of his [the Indian] relationship to the Government of the United States from an early status akin to that of an alien to his present status of full citizenship [H:395], Cohen makes quite a different case:

> The most basic of all Indian rights, the right of self-government, is the Indian's last defense against administrative oppression, for in a realm where the states are powerless to govern and where Congress, occupied with more pressing national affairs [sic], cannot govern wisely and well, there remains a large no-man's-land in which government can emanate only from officials of the Interior Department or from Indians themselves. Self-government is thus the Indians' only alternative to rule by a government department. [C:122]

Both authors emphasize that the source of tribal self-government is not congressional statutes: the statutes are the limitations

of self-government. For Cohen, those powers which are not expressly accounted for by statute remain vested in the tribal government on the basis of its inherent sovereign right to self-govern. Horne again relegates these "residual" powers to the necessity of avoiding a jurisdictional vacuum between the federal government and the Indian, as state powers are limited by the Constitution. As was noted previously, Horne has considerable difficulty retaining those elements of Cohen's discussion which reinforce the existence of a basic contradiction between inherent sovereign rights and the judicial recognition of those rights, and the conduct and purview of administrative officials in the Indian Service. Several of Cohen's passages, entirely deleted in the 1958 revision, illustrate both Cohen's particular bias in the direction of the Indian Reorganization Act of 1934 (which reiterates the right of tribal self-government), and Horne's skepticism of tribal sovereignty:

> John Marshall's analysis [16] of the basis of Indian self-government in the law of nations has been consistently followed by the courts for more than a hundred years. . . . The doctrine has not always been so highly respected in state courts and by administrative authorities. [C:123]
>
> Administrative officials for a century afterwards continued to ignore the broad implications of the judicial doctrine of self-government. But . . . [as the courts ruled in its favor] administrative officials, state and federal, were forced . . . to surrender powers of Indian tribes which they sought to usurp. [C:123]

It is evident that Horne was far less concerned with possible contradictions of law, as interpreted by the Supreme Court and then interpreted through policy of federal and state officials, with regards to tribal self-government than Cohen. It would appear that Horne rallies in

defense of administrative officials by what he doesn't say e.g., Horne continually ignores Cohen's "preoccupation" with the motives of the courts. For instance, Horne does not address the following contention which Cohen makes:

> The acknowledgement of tribal sovereignty or autonomy by the courts of the United States has not been a matter of lip service to a venerable but outmoded theory. The doctrine . . . has been administered by the courts in a spirit of wholehearted sympathy and respect. [C:125]

One could easily get the impression, throughout the discussion of tribal government, that Horne is waging a terse battle with Cohen. His timely qualifications in the text tend to subtly (?) question the more basic tenets of Cohen's philosophy of tribal sovereignty etc. Examples of this strategy proliferate, and when coupled with instances when both authors obviously disagree, we can better appreciate the philosophy Horne is driving at. Seemingly innocent text becomes troublesome for Horne in light of Cohen's original form: one might speculate on the intent of such revision when so much of the Horne volume is exact replication. The following two passages, for instance, <u>cannot</u> be construed to be compatible:

> Recognition of tribal governments and tribal powers may be found not only in acts of Congress and in treaties but also in state statutes, which, when adopted with the advice and consent of the Indians themselves, have been accorded special weight. [Cohen:127]

> Recognition of tribal governments and tribal powers may be found not only in acts of Congress and in treaties but also in State statutes, which, when adopted "at the request of the Indians" themselves, and

without challenge by the Federal Government, have been accorded special weight. [Horne:406]

Horne reiterates, with the inclusion of the clause on the federal government, his infatuation with "plenary" federal power. Horne feels that until the Indian relinquishes his "privileged" position in our society, he is subject to complete domination by the federal government; the option then "logically" lends itself to the termination of this federal relationship. Cohen, on the other hand, continually attempts to qualify the restrictive "plenary" notion by positing that the federal government, specifically the administrative officials in the BIA, enjoy powers in excess of mandate and thereby infringe (usurp) on inherent tribal powers. A second qualification Horne makes in the above passage on tribal government was clearly meant to be more than a mere "revision." Horne's counterpart " 'at the request of the Indians' " does not approach the meaning of Cohen's phrase, "advice and consent." Suffice it to say that the qualified "request" could imply that people more knowledgeable about Indian affairs than Indians were needed to advise and consent. A bevy of like issues are discarded or created through the many qualifications which Horne feels obligated to make. Due to their relative frequency in this portion of federal Indian law, only the most notable will be briefly addressed.

Horne does not delve into the Goyaneshogowa, the constitution of the Five Iroquois Nations, or discuss its legal counterpart, our Constitution, as Cohen does. Logically, to do so would be to concede that the "power to define a form of government" was exercised fully by

Indians. For Horne, "it is said" that such a power existed, and with that, the issue is left to dangle. [H:407] The subject of Indian constitutions has special significance for Cohen because of his belief in the reorganization of Indian tribal government. Because Horne chooses to omit the following text, it is plausible to assume that he is not so inclined:

> . . . it is possible to hope that some of the political wisdom that has already stood the test of centuries of revolutionary change in Indian life has been embodied in the constitutions of the hundred or more tribes which have been organized under that [IRA] act. [C:129]

When speaking of the "substantive powers of tribal self-goverment vested in the various Indian tribes," [C:130] Horne carefully speaks of such powers which are "exercised," [H:410] again challenging the inherent powers of tribes which Cohen continually alludes to.

Within the general rubric of power over tribal membership, Cohen discusses a trend in the tribal constitutions which excludes from shares in tribal assets those children of Indians who "no longer take part in tribal affairs, who do not live upon the reservation, [and] who marry non-Indians." [C:136] Horne replicates this passage in addition to offering what he has considered before as a sound justification for termination of federal services to Indian tribes: "The obvious consequence of such denial and trend are curtailment of individual tendencies to relocate, assimilate, or abandon the tribal relationship." [H:422]

The discussion of tribal rights over property elicits from

Horne two ideas that complement his general disposition toward the concept of "Indian nation" or "tribal sovereignty." Cohen initially points out that "In its capacity as a sovereign, and in the exercise of local self-government, it [a tribe] may exercise powers similar to those exercised by any state or nation in regulating the use and disposition of private property." [C:145] Horne does not contest the idea behind such a statement, although he can and does limit its scope by substituting "quasi-sovereign" for "sovereign" and "municipal corporation" for "nation." [H:443-4] This same sense is applied to the powers in the administration of justice, which are said by Cohen to fall within the "domain of tribal sovereignty" [C:145] while for Horne they are within the "domain of tribal municipal law." [H:444] The difference here is as absolute as the chasm which exists between the laws of a nation and the ordinances of a city.[17] Both authors point out the following:

> Responsibility for the maintenance of law and order is therefore squarely upon the Indian tribe, unless this field of jurisdiction has been taken over by the states or the Federal Government. [C:145]

Horne, however, adds that "the fact that they have not taken over [the states and the federal government] accounts largely for the extent of tribal law." [H:445] Thus tribal sovereignty counts for very little. To avoid jurisdictional "vacuum" (discussed previously), tribal law is allowed to exist: "These facts must be kept in mind if problems relating to tribal powers in the administration of justice

are to be rationalized." [H:444]

Generally, the remainder of Horne's discussion of tribal self-government mirrors Cohen's text, with the exception of specific commentary on relevant new (1940-1956) legislation, qualifications consistent with those cited above, and the general application of the termination philosophy which Horne espouses.

The notion of tribal self-government and the many satellite issues which revolve around the "legality" of Indian tribes are at the heart of federal Indian law. If the inherent sovereign right of tribes to govern had been honoured from the inception of relations between Indians and whites, there may well have never been "federal Indian law." Certainly, power over Indians would not have been "distributed" among the federal government, the tribes, and as will now be pointed out, the states.

The Scope of State Power Over Indian Affairs

Horne's introduction to state power over Indian affairs differs considerably from that offered by Cohen, principally because he attempts to qualify the then limited state powers in terms of the capacity for future power as federal supervision of Indian affairs was terminated. Horne carefully emphasizes that the relationship of the federal government to Indians was based on the principle that Indian tribes were political entities "at the time of adoption of the Constitution." [H:501] However:

> The plenary constitutional power of the Federal Government in its sovereign capacity over Indian tribes, their affairs and their property cannot be limited by treaties or by any "legal fiction" so as to prevent repeal, modification, or amendment of those treaties, or other similar arrangements it has made with them as political entities, by later acts of Congress. [H:501]

While the general principles Horne is pointing out are not contested, the tenor of this passage which suggests that upon the termination of federal supervision, state powers over Indian affairs will drastically increase and states will <u>not</u> be bound to treaty stipulations, obligations etc. made between the Indians and the federal government should be questioned. Horne attempts to lend further creedence to the logic of termination of "privileged status" when, with regards to treaties, he concludes that "such arrangements, especially to the extent that they survive as domestic legislation [versus, I presume, international law] applicable to <u>citizens</u> rather than aliens, are not immutable." [emphasis mine—H:504] It would seem the feasibility or validity of tribal affiliations is herein questioned due to the fact of citizenship. Horne's further exposition of the scope of state power over Indian affairs is consistent with the above mentioned emphasis on increasing state power, as well as with the Act of 15 August 1953 (67 Stat. 588) which gave particular states jurisdiction "over offenses committed by or against Indians, and over civil causes of action involving Indians which arise in designated areas of Indian country within those States." [H:509]

Horne's discussion of state power over Indian affairs elucidates two vital principles on which the termination strategy is

based, namely, denial of Indian treaty rights and federal obligations, and denial of "tribe" in favor of "citizen." These themes, as noted, are predominant in other substantive areas of federal Indian law, such as federal power over Indian affairs and tribal self-government. Having therefore examined power and control at the federal, state, and tribal levels, it is important to turn our attention to the legal status of the individual Indian in the United States.

Rights, Liberties, and Duties of Indians

"The doubts that have existed as to whether an Indian is a person or something less than a person have infected with uncertainty much of the discussion of Indian personal rights and liberties," says Cohen. [C:152] Horne's introduction to the rights and liberties of Indians is appreciably abridged, particularly at the expense of Cohen's discussion of attitudes toward Indians. Cohen continues:

> Whatever the causes of this confusion may be, the fact remains that erroneous notions on the legal status of the Indian are widely prevalent. Large sections of our population still believe that Indians are not citizens, and recent instances have been reported of Indians being denied the right to vote because the electoral officials in charge were under the impression that Indians have never been made citizens. Indeed, some people have persuaded Indians themselves that they are not citizens and can achieve citizenship only by selling their land, by having the Indian Office abolished, or by performing some other act or benefit to those advisors who have volunteered aid in the achievement of American citizenship. [C:152]

Because some early treaties granted citizenship to specific

tribes, in cases dependent on the removal of Indians to reservations or the acceptance of allotments, both authors acknowledge some difficulty with the "thought that citizenship was incompatible with continued participation in tribal government or tribal property." [C:153] For Cohen, this notion, "removed from its specific treaty context and generalized, has become one of the most fruitful sources of contemporary confusion on the question of Indian citizenship." [emphasis mine—C:153] Horne, on the other hand, identifies the same as "a fruitful source of contemporary argument" [emphasis mine—H:517] which is a logical expectation given his earlier de-emphasis of tribal government and tribal property in favor of common, equal citizenship. In addition to the problematic nature of the combined status of "citizen" and "tribal Indian," Horne is particularly disturbed with what he feels is the incompatible relationship of "wardship" to "citizenship." As has been pointed out before, equal citizenship cannot be realized by Indians if they persist to be wards of the federal government:

> In discussing this subject, and in using other related terms such as "guardianship" or "trusteeship," consideration should be given to the fact that it rests with Congress to determine when and in what manner the special relationship thus referred to shall attach, or when it shall cease. Until the termination of this relationship so described, it is probable that a tribe will continue to be referred to as "a semi-autonomous political entity" and that there will be discussions of "the fiduciary duty of the [Federal] Government to its Indian wards." [H:557]

"Wardship" as it is used in the tribal sense can be construed in its constitutional or private law contexts. The differences between the two applications are pronounced, say both authors. While private

law wardship means that the "guardian is subject to court control in the administration of the ward's affairs and property," [H:561] Cohen defines constitutional wardship by saying that "the guardianship relation has generally been invoked as a reason for relaxing court control over the action of the 'guardian.' " [emphasis Cohen—C:171] Horne, however, does not point out this "relaxing" dimension and instead attributes the difference between private law wardship and constitutional law wardship to "Government purposes." [H:561] One cannot help feeling that the entire notion of wardship is taxing for Horne, who saw welcome relief in the Termination Acts which would lay to rest all aspects of "privilege":

> Acts of Congress providing for the termination of Federal supervision over certain Indian tribes generally will terminate the special relationship between the United States and the tribe and also will make the special Indians laws of the United States thereafter inapplicable to members. [H:562]

The civil liberties of Indians pose unique legal problems because such liberties are "restricted" [H:567] as a result of government action. Cohen is a bit more emphatic, and uses terms such as "infringements" and "discrimination" [C:173] in the original text: the discussion proceeds along these differences. For instance, Cohen's section of "Discriminatory federal laws" [C:174] (a section, incidently, that Horne largely ignores) begins by pointing out that "During much of the history of the United States, the original occupants of the continent were imprisoned on reservations." [C:174] This language is obviously too strong for Horne

who rewrites the passage to read "During much of the constitutional history of the United States, the Indians have been relegated to reservations." [H:568] Such qualifications by Horne are evident throughout this discussion in terms of administrative action which is felt to threaten or deny civil liberties. A particularly poignant qualification which Horne makes has to do with tribal customs and religion, aspects of Indian life which both authors point to as having been interfered with by administrators of the Indian Service. Horne has one last point to make in this regard, and he says that "it must be remembered that the first amendment to the Constitution does not license, in the name of religion, overt acts made criminal by the law of the land." [H:571] Another notable example of "clarification" has to do with the observation—made by Cohen—that Indians held on reservations were treated as prisoners of war. Horne goes on to explain: "considering the fact that in many instances Indians were held under restraint following hostilities or to prevent further hostilities, this is understandable." [H:571]

A glaring contradiction in the philosophies of Cohen and Horne becomes evident in their discussion of possible remedies to "infringement" upon civil liberties. Concerning the right of expatriation, Cohen observes:

> Oppression against a racial minority is more terrible than most other forms of oppression, because there is no escape from one's race. The victim of economic oppression may be buoyed up on the struggle by the hope that he can improve his economic status. The victim of religious oppression may embrace the religion of his oppressors. The victim of political oppression may change his political affiliation.

But the victim of racial persecution cannot change his race. For these victims there is no sanctuary and no escape.

If special legislation governing Indians refers to a racial group, there is no way in which the individual Indian can avoid the impact of such laws. [C:177]

Horne fully collapses these passages to say simply "If special legislation governs Indian tribal affairs the way in which the individual Indian avoids the impact of such laws is to terminate that membership." [H:573-4] It is difficult to imagine how the two ideas expressed above are the least bit equivalent. Horne further abridges the Cohen text by stating that "The right of renunciation of tribal membership is an answer not only to Federal oppression but to tribal oppression as well." [H:575] In context, Cohen says something quite different:

The right of expatriation . . . remains a significant human right, even where Indian tribes are actually moving in an organized way toward the ideal of freedom from Indian Bureau supervision. The right of expatriation is an answer not only to federal oppression but to tribal oppression as well. It would be remarkable if the development of Indian self-government failed to give rise to dissatisfied individuals and minority groups who consider their tribal status a misfortune. History shows that nations lose in strength when they seek to prevent such unwilling subjects from renouncing allegiance. [C:178]

These separate and distinct expressions provide for the reader a very succinct basis on which to delineate between the philosophies of tribal reorganization and termination of federal services.

In terms of the rights, liberties, and duties of Indians,

Horne again questions the status of Indians as Cohen proposes that status. Horne translates the special legal position of Indians, guaranteed in treaty, into "wardship" and "privilege" by challenging the propriety of treatymaking and the legal power of treaties in the twentieth century. He emphasizes citizenship, and those equal rights and duties Indians share under the law. Termination, as it has developed over the years, means more than ending the special status of Indians under the law. In the final substantive areas of federal Indian law to be examined here, property and taxation, it becomes clear that termination entails legislating against a critical facet of "Indian," namely, land. Stealing land and defining new relations of property have been primary functions of federal Indian law and undoubtedly the most successful strategy employed to subjugate the aboriginal.

Property

For the most part, Horne's rendition of "tribal property" does not differ to any appreciable degree from Cohen's original text. Many of the differences which do occur are attempts by Horne to clarify ambiguities in this facet of Indian affairs which the courts had addressed in the interim 1940-1956. Unlike many of the discrepancies which have been discussed to this point, Horne's revision of this section, with some exceptions, generally contributes to the spirit of Cohen's work. Whether or not that is due to the tenor of court rulings

and subsequent legislative activity is an issue in and of itself, and something that will not concern us here. What does deserve our attention are the exceptions to the noteworthy harmony of the two authors: while these differences are clearly less profound than many examined thus far, they nonetheless contribute to the general philosophies of interest.

In terms of tribal conveyances and restraints on the alienation of land, Cohen and Horne appear to have differing opinions on the complexity or validity of "Indian title" and "title in the sovereign." Cohen states:

> . . . defects in the theory of "Indian title" do not show that all tribes hold property in fee simple or that any tribe can alienate any property at will, but they should serve to direct our consideration to well-established restraints on alienation toward the field of commercial legislation rather than the morass of medieval doctrine that surrounds the feudal fiction of "title in the sovereign." [C:321]

Horne does not consider "Indian title" a defective theory, but rather, when viewed in conjunction with historical practices and court decisions, it becomes "a readily understandable and rational view." [H:676] Horne does not concur with the "feudal fiction" notion of Cohen, as the following appears to attest:

> The fact that a tribe may have lacked authority to convey title in fee to individuals did not preclude necessarily a grant of use or occupancy of a particular tract to those individuals. Such grants were, and still are, subject generally to a possibility . . . that the existing sovereign or national government might exercise a preemptory power to acquire or extinguish the tribal title and thus terminate the occupancy or use of that tract by those individuals. [emphasis mine—H:676]

The discussion of ceeded lands (to the United States) which Cohen presents includes an "insight" as to the character of the validity of such cessions:

> . . . as we have noted, most of the historical peculiarities of Indian land law were designed to encourage the cession of tribal lands to the United States . . . The problem in this field is, therefore, primarily one of the construction of treaties, agreements, and statutes, rather than their validity. [C:334]

Horne, it appears, does not consider such commentary pertinent. However, given the complexity of powers (and limitations) to which Indians are subject when disposing of private property, the fact that ceeding land to the United States is supposedly so simple—for the benefit of whomever—is a curious proposition and seemingly requires a brief clarification: this is not provided. A justifiable conclusion would be that Cohen's explanation does not contribute to the "readily understandable and rational view" for Horne.

In the section that deals with the right of tribes to receive income, Cohen resurrects the discussion of the charity ward Indian. Noting that the sale of land, and surface and subsurface mineral rights, are the primary sources of tribal income, Cohen makes the following observation:

> Failure to appreciate the basis of such payments helped to create the popular misimpression that all payments made by the United States to Indians were matters of charity. An illustration of this sentiment is found in section 3 of the Act of June 22, 1874, which provides that able-bodied male Indians receiving supplies pursuant to appropriation should perform useful labor "for the benefit of themselves or of the

tribe, at a reasonable rate, to be fixed by the agent in charge, and to an amount equal in value to the supplies to be delivered." [C:340]

Horne finds it necessary to add the following:

A more rational view [of this sentiment] is that Congress thereby was seeking to foster industry, rather than permit indolence on the part of the Indians and thus perform its duty in advancing them in the arts and crafts of civilization. [H:725-6]

The "wardship" mentality never falters in Horne's rendition of Federal Indian Law: Cohen, on the other hand, unceasingly attempts to eradicate its premises. With respect to the notion of exchange of supplies for Indian labor, Cohen points out that "the popular outcry that would have followed the application of a similar rule to white holders of Government bonds or pensions may well be imagined." [C:340] Says Cohen:

It is important to recognize that funds due to Indian tribes under treaties and agreements were viewed by the Indians either as commercial debts for value received or as indemnities due from a foe in war. The fact that such payments were otherwise viewed by the public and by many administrators helps to explain some of the bitter controversies which formerly were decided on the field of battle and are now decided in the Court of Claims. [18] [C:340]

Another facet of property, individual rights in real property, evokes several confrontations between Cohen and Horne, specifically on the notion of allotments. One such issue concerns heirship and estate, and in terms of Horne's approach to the subject, this area of Indian affairs is volatile. Cohen's rendition of the

"heirship problem," though lengthy, allows to view the scope and complexities involved:

No feature of the allotment system has provoked more criticism than the "heirship problem" and it is against the background of this problem that existing law must be reviewed. "It is doubtful if the serious nature of this problem was appreciated at the time the allotment acts were passed. Because of this feature of the allotment system the land of the Indians is rapidly passing into the hands of the whites, and a generation of landless, almost penniless, unadjusted Indians is coming on. What happens is this: The Indian to whom the land was allotted dies leaving several heirs. Actual division of the land among them is impracticable. The estate is either leased or sold to whites and the proceeds are divided among the heirs and are used for living expenses. So long as one member of the family of heirs has land the family is not landless or homeless, but as time goes on the last of the original allottees will die and the public will have the landless, unadjusted Indians on its hands." [Meriam, The Problem of Indian Administration (1928), p. 40]

The problem of the landless younger generations on those reservations which were earliest allotted was the chief problem leading to the termination of the allotment system. In place of alienable titles, the tendency today is to grant, out of tribal lands, "assignments" of land which are to be used by the "assignee" and which revert to the tribe for reassignment when no longer so used. This development has occurred on reservations which still retain sufficient areas of unallotted land. As for the other areas, any development along these lines depends upon (a) federal acquisition of land for the tribe, under section 5 of the Wheeler-Howard Act or restoration of ceded lands, under section 3; or (b) the acquisition of land by a tribe, through exchange of allotments for assignments, or through land purchases or through other legal means.

Meanwhile, on the allotted reservations, the complexities of the "heirship" problem increase in geometric progression. . . .

The chief reasons for this complexity appear to be:(1) The Indian allottee does not ordinarily have ready cash or credit facilities for the settlement of estates where physical partition is not practicable.

(2) The Indian allottee frequently does not consider land in a commercial aspect, and in many cases he could not get as much cash income from the land as a non-Indian, and therefore cannot outbid non-Indian purchasers of heirship lands.

(3) It may be that Indian family relations are more complicated than the family relations of non-Indians in rural areas, although there do not appear to be any authoritative figures on this point.

(4) The Indian population, on most allotted reservations, is without channels by which members of families too large for the family homestead and too poor to increase it move off to other rural or urban areas. The application to the allotted Indians of state inheritance laws adapted to a more fluid population and economy has therefore had striking and largely unforeseen results.

(5) Under existing law the cost of administration is borne by the Federal Government rather than by the individual Indians concerned in the estate. There is thus no economic incentive on the part of the Indians concerned to simplify the status of heirship lands. [C:229-30]

Horne's response to the above speaks for itself:

It is not the purpose of this revision to examine, much less attempt to evaluate or reconcile, divergent views on allotment or the so-called "heirship problem." Further, it is not intended either to explore the question of whether or not the allotment acts created a situation whereby land of Indians passed rapidly to non-Indians leaving Indians landless and impoverished, or to attempt to determine if retention of the tribal form of communal land holding so effectively deprived the individual Indian of disposable assets as to effectuate a form of serfdom from which escape was difficult if not virtually impossible. Nor is it intended to summarize those administrative rules relating to the determination of heirs and the approval of wills which are intended to cope with the problem and are readily found in the Code of Federal Regulations. 19/

. . . Many answers to heirship problems will depend on future legislation. Congress, of course, has the power to impose restrictions on Indian lands and it, accordingly, has the power to decide when and in what manner Federal guardianship over Indians shall attach. Having this power, it can confine the taking of restricted or trust property by inheritance or by will to enrolled members of a tribe. [H:809-10]

Horne does not usually hesitate to answer or account for complexities in other areas of Indian law. However, his balk in this instance does have some precedent in that Horne consistently avoids those topics

which necessarily involve loaded questions of historical significance e.g., was the allotment system an attempt to erode the tribal and communal lives of Indians? Horne's "objective" analysis of those questions endemic to the "heirship problem" is, for myself, immediately suspect. For Horne to question this form of serfdom would contradict his philosophical exposition to this point. The primary difference between Cohen and Hornes' treatment of heirship—aside from Cohen's attempt to explicate the issue—is stated simply by Horne: "Congress, of course, has the power . . ." [above] Again, with regards to the trust status of allotments, Horne provides the element which largely accounts for the differences in these two philosophies:

> . . . it is the stated policy of Congress, as rapidly as is feasible, to terminate the wardship status of Indians and make them subject to the same laws and responsibilities, and entitled to the same privileges, as other citizens. [H:817]

The disparate postures taken by Cohen and Horne in terms of the relevance of Indian title, land cessions by tribes, and allotment of tribal lands underline the discrepent philosophies each author is espousing. While this essay does not address the general tenor of <u>law</u> which dictates individual rights in tribal and real property, it is apparent that relative to the terminationist mentality, Cohen's treatment of property lends itself more to the "proposition" of Indian sovereignty (supra). In much the same way, the topic of taxation is limited by the fact that taxation is an issue at all. It is the subtleties of property ownership and jurisdiction which foster

taxation problems. Such "peculiarities" are at the roots of federal Indian law.

Taxation

It has been apparent that a particularly sensitive issue with Horne is the supposed privilege which Indians enjoy at the expense of ordinary citizens. The discussion of taxation as it relates to Indians is one example of legal and political complexity in Indian affairs which Horne attributes to the supposed double standard of citizenship in the United States. The resolution to this problem, he says, is well within the jurisdictional powers of Congress:

> Legislation for the termination of Federal supervision of Indian tribes also focuses attention on general problems of Indian taxation. In this connection, it has been said that Congress has the power, which it is privileged to exercise at any time, to terminate Federal supervision and control over Indian property, real or personal, tribal or individual. Such termination of Federal supervision and control, it is said, ordinarily would carry with it the subjection of Indian property to State taxation. Treaty arrangements, as heretofore indicated, are not necessarily a legal impediment to termination by Congress of tax immunities enjoyed by Indians allotted thereunder. . . . With respect to tribal lands, it is said that they enjoy no federally enforced immunity from taxation which cannot be terminated by Congress. [H:844]

Horne admits, after Cohen, that Indians do indeed pay federal, state, and tribal taxes. However, "it is also a fact that Indians do not pay a variety of other Federal, State, and local taxes <u>which non-Indians</u> are required to assume." [emphasis mine—H:845] In a similar vein,

Horne questions "whether Indians should be permitted to vote in large numbers so long as they remain on reservations where the governmental authorities of the States cannot apply the laws or policies [in this case, of taxation] which the Indians participate in making by voting." [H:867]

In terms of limitations on the power of the federal government to tax Indians, Horne emphasizes again the power of Congress to "change the operation of a treaty" and the logic implicit in such power:

> . . . [The] argument, as a general proposition, that various tax limitations or benefits obtained by agreement were required by Indians or granted to them in perpetuity, necessarily assumes either that those Indians were to remain in a noncitizen status of perpetual tutelage by reason of inherent or permanent retardation, or that they were, as citizens, in the future to be unrealistically privileged by birth. Neither assumption is tenable. [H:877]

Cohen's "reaction" to this position had been consistent; with regards to the federal taxation issue, Cohen reasserts that the treaties and agreements made between the Indian tribes and the United States are more binding than the future <u>disposition</u> of the federal government. For example, Cohen observes:

> [If] the Federal Government, pursuant to an agreement with an Indian tribe, issues a trust patent promising clear title to the patentee after a fixed period, it seems probable that any attempt, for example, to impose federal inheritance tax upon such land would be held violative of the Fifth Amendment. [C:265]

We might expect Horne to be doubly distressed with such an analysis which relys upon the combination of treaties and agreements with tribes and the protection afforded by the constitutional amendment for citizens.[20] His retort—an answer used by politicians in the past, present, and most likely in the future—is termination of that special status of "Indian." The ultimate outcome for Indians would be the "right" of citizenship in a world not of their choosing. In the absolute, federal Indian law guarantees chaos for the Fourth World of the aboriginal.

Chapter 3

Synthesis and Implications

Summary

The respective texts of Cohen and Horne, briefly reviewed, represent two rather diametrically opposed philosophies of Indian affairs. As was stated much earlier, the broad implications which emanate from theories that saddle the Collier program (reorganization) with the initial impetus for the termination era are not accepted. Such a contention—stated simply, the contention is that the termination policy merely attempted to accomplish Collier's intent of assimilation in a more speedy fashion than reorganization[1]—is countered on several fronts, not the least of which are Collier's own writings. Analysis to the contrary appears to lack authoritative documentation. In the larger view, however, termination was not spontaneous; certainly the most shallow political-historical analysis can demonstrate that the termination mentality, which had one of its heydays in the late forties through the early sixties in this century, was firmly entrenched in the temperament of the federal government almost since its inception.[2] In a similar fashion, the reorganization era should not be construed as a total departure from the historical Indian policy which preceded it. Clearly, the final legislative package was frought with difficulites

and naive assumptions about Indian tribes which certainly had precedent in earlier Indian policy. However, when we contrast the philosophies behind reorganization and termination, there emerge such fundamental discrepancies in what could be called—in the larger view—a relatively homogeneous policy toward Indians that we can justifiably examine these two phases out of this time continuum. It is only through such historical dismemberment that we could hope to analyze any portion of federal Indian legal philosophy.

Felix S. Cohen's Handbook of Federal Indian Law and Frank G. Horne's Federal Indian Law epitomize the rather profound metamorphosis of Indian policy in the last fifty years. The latter volume does not reject the strict legal interpretations that Cohen outlined: it does, however, reinterpret and challenge Cohen's philosophical contributions to the field of federal Indain law both by clarifying the statutes and judicial decisions which gained legitimacy in the interim 1940-1956, and by offering Horne's own historical analysis of the federal relationship with Indians. Cohen and Horne contributed to, and drew from, popular sentiments of their day. For Cohen, the phase of federal policy which guided his volume was reorganization. Horne, on the other hand, was very much influenced by the termination era, and despite the general tenor of Cohen's work, he was able to communicate this terminationist sentiment clearly. Following, then, is a brief summary of the major contradictions in the interpretation of federal Indian law which reflect these disparate policies.

Horne, from a very early point in his rendition of federal

Indian policy, chooses to obviate the past history of the federal/Indian relationship in favor of a more recent historical event, the conferral of citizenship upon Indians throughout the United States. In his view, citizenship and historical federal obligations to Indians are incompatible phases of Indian policy. Horne explicitly attempts to account for the guardianship role of the federal government by postulating that it has been only in the interest of "fancied injustices" to Indians in years past that such a role continues to the present. The "burden," which is seemingly without foundation for Horne, is a primary concern of Cohen who illustrates throughout his Handbook the many obligations which were accepted by the federal government for various concessions etc. by Indian tribes. While indeed Cohen's historical analysis needs some ambitious clarification, it is a far better testament of the special status of the Indian than Horne's revision.

An obvious outcome of these historical discrepancies is evident in any discussion which touches upon the power of treaties and the sovereignty of Indian tribes. Because Horne relegates Indian treaties and the judicial decisions which uphold such treaties to "historical situations then existing," it seems logical enough that he would also do likewise with the concept of Indian "nation." It is on this point that Cohen and Horne collide the most. Cohen, consistent with the intent of Indian reorganization, emphasizes the sovereign character of Indian tribes and the necessity of having conducted international agreements (treaties) between sovereign nations. Horne simply ignores Cohen's preoccupation with such issues, and states

throughout his volume that the status of Indian tribes and Indian treaties must be consistent with the "latest statutory law and judicial determinations." In other words, federal power over Indians is plenary: Indians enjoy only those rights and privileges which the federal government has allowed. This is an ample expression of the termination policies of the fifties.

Federal control over Indian affairs is a rather straightforward issue for Horne, not to be muddled with notions of federal "responsibility" or "obligations" as Cohen has done. The existence of the federal government, says Horne, is justified only in terms of the common good, and federal statutes pursuant to that end have precedence over prior treaties or agreements with Indian tribes. Again, the relevant disposition of federal law is its expression through statute. It is doubtful that Horne would conceive of other international pacts and agreements of the United States in a similar vein. However, Indians are for Horne a domestic problem which must be dealt with by application of policy reflective of the license and limitations of the Constitution: this paramount expression of our nationhood was not the expression of sovereigns. Cohen interprets the conscious construction of federal Indian law, prior to the Indian Reorganization Act of 1934, as an attempt to dissolve the tribe. For Horne, such law was designed to integrate the Indian, and thus eradicate the Indian "problem." The Indian Reorganization Act, despite its serious shortcomings, could then only interrupt this policy of integration; the Termination Acts, we might infer, were attempts to make up for lost time. Horne, as might

be expected, was not enthusiastic with the IRA. The only compliment he could muster concerned the Indian Claims Commission Act of 1946 which, according to Horne, allowed Indians who had retained their tribal relationship because of outstanding claims against the United States to at last resolve these claims and terminate their tribal membership. The Termination Acts were felt to be incomparably more direct, cleaving through residues left by past treaties and laws in order to establish a proper perspective of Indian responsibility to state and nation. This is a particularly logical contention by Horne who felt that such dynamics could have justifiably come into play as early as the Indian Appropriation Act of 1871 which "ended the 'legal fiction' of the status of Indian tribes in the field of treaty lawmaking."

Horne's preoccupation with the "jurisdictional vacuum" (resulting from the lack of state participation in Indian affairs) complements his earlier sentiment toward tribal sovereignty. Where the state has not assumed jurisdictional power, for instance, Horne begrudgingly concedes that the tribes have such power. He does so, not because of a conviction that all powers not specifically assumed by the federal government remain with the tribe, but because of the intolerable void that would exist if no one assumed this responsibility. The exercise of tribal self-government is again, for Horne, justifiable only in these terms. Cohen is not concerned about a "vacuum," stating firmly that all powers which have not been limited by federal statute remain with their only legitimate source, the tribe. In the instance of tribal property, Cohen clearly states that tribes have the power

to administer their property as any nation would. Horne's rendition is severely limited in this regard: the nomenclature is one of "municipal corporation" and "municipal law" and not "nation" or "tribal sovereignty" as was the case for Cohen.

Many of the above-mentioned contradictions range across the entire breadth of federal Indian law. It would be difficult, if not impossible, to conceive of a proper resolution to the opposed philosophies of Cohen and Horne when the issues at stake are so basic to the discussion. It is Horne, because of his intention to provide the revision as he has done, who proposes the alternative interpretation. Generic issues of Cohen's philosophy of federal Indian law are confronted with Horne's supposedly enlightened explication e.g., Cohen maintains that federal recognition of tribal sovereignty is rooted in treatymaking with Indian nations and the assumption of treaty obligations, while Horne relegates sovereignty to "jurisdictional vacuum," treatymaking to "legal fiction," and federal obligations to "fancied injustices." These rigid discrepancies are part and parcel of the respective federal legislation—reorganization and termination—which dominated Indian affairs from the 1930's through the 1950's.

Toward Comparative Legal Philosophy: Implications for Research

The objective of this thesis has been to examine some of the major tenets of federal Indian law in order to be able to point out the philosophical constructs of Indian law which reflect changing

federal attitudes toward Indians. The essay could by itself be considered a legitimate historiographical inquiry very suggestive for comparative research. Hopefully the method utilized herein does not diminish the emphasis on the examination of contemporary facets of a "reality" which legislates against the moral order of the Fourth World. Though the scope of this endeavor has been consciously limited, the precedence and basis for this type of research on any level appears to be grossly understated. Legal systems generally reflect a large array of "reality." Examination of the legal structure of a particular entity can illuminate many clues as to the nature of political, economic, and social relations. However, without concentrated and astute scrutiny, a legal system is capable of shrouding the true nature of such relations. One has only to look at federal Indian law in the United States to understand those dynamics of law which substitute some figment of "citizenship" for inherent sovereignty. "Refined," "sophisticated," and "civilized" federal Indian law has assumed a logical legitimacy in the United States as well as within the international theater. It is perhaps the more obvious condition of aboriginal peoples througout the world which has prompted the United Nations to address the problem specifically. While the U.N. research does not rely on comparative analysis of legal philosophy, a brief appraisal of the methods actually employed and the resulting "data" can indicate the pitfalls of a less-than-intensive examination of law as it has evolved to deal with the aboriginal.

The research presently being conducted by the United Nations entitled the "Study of the Problem of Discrimination Against

Indigenous Populations"[3] has not been completed. Most documents which the subcommission on Prevention of Discrimination and Protection of Minorities (Commission on Human Rights of the United Nations Economic and Social Council) has generated are not available for general deposit. However, the American Indian Law Center at the University of New Mexico recently published the response of the United States which was submitted to the commission;[4] this response is perhaps an apt indicator of the administrative sentiment toward Indian affairs in the 1970's.

The United Nations study is based upon a questionnaire which was sent to participant members. The response of the United States, for instance, was to provide part of the basis on which the subcommission would make their recommendation to the Commission on Human Rights. Immediately, a couple of problems become apparent. The historical experiences of indigenous populations are not so equivalent that a single questionnaire could hope to address the unique situations which prevail. Portions of the questionnaire would then be inapplicable or incomplete. A second problematic feature of the questionnaire is that its reliability is minimal given the image that any self-respecting nation would want to project to the world. Certainly, the response of the United States is tainted by both an inept appraisal of the Indian dilemma in the United States as well as a curious portrayal of the basis of tribal and federal relationships. It seems rather insidious that a nation, which feels it can justifiably terminate living cultures by the mere conferral of "citizenship," would be capable of honestly evaluating its policies toward aboriginals. Perhaps the analysis of legal philosophy,

which has been attempted in this essay, would be a more fruitful venture if a comparative overview of discrimination against aboriginals is the desired end result. These problems are further clarified and accentuated by an examination of the U.S. response.

The tenor of the federal response to the United Nations survey is not to be construed an an accident. It is a carefully worded thesis which could be said to "over-compensate" the Indian for his mere existence on this continent. Several glaring examples—noticeably the subjects of concern throughout this essay—more than adequately point this out. Consider the following:

> Although the indigenous population has certain privileges, such as those cited, they have no corresponding obligations or responsibilities. Thus an Indian on an Indian reservation is subject to tribal law and order and tribal government, in many cases, but may vote in a county, State, or Federal election, the results of which will affect all United States citizens. The non-Indians in the county, State, and the Nation have no corresponding right or opportunity to exercise control over that same Indian community. 5/

Note that this argument is very reminiscent of Horne's objection to the "special status" of Indians: it was his contention and the contention of the response cited, that tribal status and citizenship are incompatible. The entire U.S. document will not be analyzed in such a manner here: this has been succinctly done by the American Indian Law Center. Their general conclusions essentially address three of the most blatent shortcomings of the U.S. interpretation of its own policy and relationship with Indians. 6

The first area of concern deals with federal recognition

of its indigenous population. The U.S. poses for itself a rather basic contradiction. On the one hand, the basis of federal recognition of Indians is federal recognition of the status of Indian tribes. However, the obligations and responsibilities of the historical treaty-based relationship between the federal government and Indians have in many instances been "terminated." The end result is, of course, that there are Indians who are no longer federally recognized (in addition to those who have never been recognized) and who receive no benefits pursuant to federal obligations. This issue, particularly in the international legal context of treatymaking, is a volatile discrepancy in the U.S. response. Simply, the United States is able to deny a responsibility to discharge its obligations to Indians if such people have "resolved" their aboriginal character by becoming acculturated (or meeting the relevant criteria on which the Termination Acts were based). It is certainly not within the purview of the authors of the U.S. response to detail federal involvement in this process of "freeing" oneself from aboriginal status. The allotment of tribal resources to individual Indians, various assimilation policies which included non-Indian dress, religion, and occupations, relocation programs which offered urban duress for reservation destitution etc. were (are) all expressions of federal concern for the Indian's future as a non-Indian.

A second problem with the U.S. response is the lack of reflective examination of the flaunted 1968 Civil Rights Act (82 Stat. 73) which supposedly guarantees certain basic rights to Indians although the Act denies the right of tribes to regulate their own affairs:

In 1968 Congress imposed upon tribes by statute a version of the Bill of Rights, which is found in the U.S. Constitution. Although well-meaning, this gesture could have disastrous effects on the tribal exercise of self-government by imposing Western-style rights on members of tribal societies without due consideration to the appropriate definition of these rights in context. The intent of Congress in passing this act was to control problems in the tribal administration of justice, but a good deal of the recent litigation under the act has been aimed at voting and membership practices. Voting and citizenship regulations are among the most essential questions for any government to determine, and the imposition upon already-threatened tribal societies of the standards of urban America could well be crippling for Indian tribes. 7/

A third area of concern deals with expatriation, an issue that Cohen speaks to in his Handbook. The crux of this criticism involves not the processes by which Indians become assimilated, but those mechanisms through which Indians lose their "Indian-ness," i.e., their identity (and self-identity) as Indians. For instance, if those elements of Indian life such as culture and social, political, and economic institutions are forcibly changed, through federal law and administration, to the point where they represent nothing but misery, an Indian's only hope might be expatriation. However, it is impossible to conclude that such an action is analogous to the "right of expatriation" which Cohen supports. The choice, clearly, is not voluntary.

Other criticisms of the U.S. response mirror many of Horne's interpretations of Indian status in the United States. Property tax exemptions, for instance, are made to appear terribly outdated; the implication that Indians are "getting away with something" is less than subtle. Another issue which has been addressed before involves the

wardship status of tribes. The questionnaire response implies throughout that the special status of Indians is by and large a product of the unstable economies of tribes. Problems of this sort continue on through the gamut of Indian affairs. Unless an international forum could be expected to analyze these responses to the U.N. survey in terms of historical and present reality—and there is no reason to expect such—and thus extract a more accurate picture of discrimination against aboriginal populations, conclusions and recommendations from the United Nations study will prove to be diluted. The legitimacy which could emanate from such an insipid accounting of discrimination might well have dire implications for any efforts made to effectively eradicate the out and out destruction of indigenous cultures. This U.N. undertaking, while seemingly ambitious, is not nearly extensive enough to offer more by way of solution than the problems it is sure to create.

The comparative analysis of legal philosophy does not necessarily entail the international spectrum as it would, for instance, in terms of the United Nations' study. There exist within the history of federal Indian law "comparative" elements much in line with the particular, distinct philosophies drawn on for this essay. Limiting the research to the concern of federal Indian law in the United States, there are some vital questions which must be addressed in future study.

Reorganization and termination, as philosophies and law, are in the absolute congruous. In fact, all federal Indian law is a logical progression of the undying principle of "manifest destiny."

Manifest destiny is a philosophy which simply confronts the Indian with the "best" of life; capitalism, democracy, and God. Throughout the history of the United States, manifest destiny has been an all-pervasive expression of what was wrong with the Indian. His less exploitive economy, his consensual form of government, and his "gods" were the justification on which was built the colossus of federal Indian law. If the Indian could not accept the white culture at face value, he could certainly be made to "appreciate" the white man's option if law legislated against Indian life. Manifest destiny was the legitimizer of advocate justice i.e., justice which advocates the "manifest" character of the superior, white culture. Advocate justice "has its way" with Indians despite a reactionary type of justice which appears to give Indians a repreave against the onslaught of manifest destiny. Such an analysis helps to frame the Indian Reorganization Act in proper perspective, as a type of reactionary justice to the overt intent of earlier legislation and finally, the Termination Acts. A host of important issues arise in terms of advocate and reactionary justice. For instance, what is the scope of advocate justice in the 1970's? This essay has talked about the termination "era" in Indian affairs: is there any justification for the assumption that "termination" is dead? Can we in fact point to ongoing programs as well as proposed programs and legislation which operate solely (soul-ly) on the manifest destiny principle? Is it possible that ours is a period of relative calm in Indian affairs because of reactionary justice which in fact is a reaction to the disastrous results of tribal termination?

The questions proposed above are suggestive of even larger concerns for the area of federal Indian law. The analysis of history, left as it is to the domain of dates and places, is not a very productive instrument for Indians. History, as it is taught or preached, can too easily be used to defend "enlightenment," which usually refers to the current state of affairs. As such, history cannot illuminate facets of advocate and reactionary justice. The analysis of legal philosophy, as it has been proposed here, is not as dependent on dates, and is better suited to defining tendencies and phases. For instance, termination was not begun with the House Concurrent Resolution in 1953. The idea, the attitude, and finally the mentality of termination began in the 1930's before reorganization programs were really off the ground. In the strictest sense, termination cannot stand alone and apart from the body of federal Indian philosophy which fueled the ever-present "manifest destiny."

Perhaps the most vital question indicated by the philosophical overview of Indian law is the correlation of philosophy to its overt manifestation in law. In other words, can philosophical tendencies "predict" the direction of federal Indian legislation? It would appear that this would have been possible for reorganization and termination. Such an analysis of philosophy, in conjunction with astute scrutiny of ongoing programs etc. in Indian affairs, might well indicate those times of "regression" from the manifest destiny of Indian law, and thereby clear away the rhetoric and nonsense of "enlightenment." It would only be under such conditions that a meaningful resolution to the Indian

"problem"—federal Indian law—could be addressed.

Conclusion

The very widespread tendency throughout the literature on federal Indian policy to romanticize the intent and scope of the Indian Reorganization Act has inhibited the analysis in this thesis. The evident contrast between reorganization and termination is perhaps the license with which such "romanticism" prevails. Hopefully, this analysis has not been so encumbered. The introductory portions of this essay tried to propose as a general framework for the discussion, the Fourth World of the aboriginal. Relative to such a conceptualization of the world order, federal Indian policy is utterly devoid of enlightenment. The implications of the Fourth World do not suggest a <u>new</u> philosophy of life and living, for these ideas are much older than our culture and our history—they have survived. The Fourth World is not ahistorical; it is precisely because this world order must address itself to the relentless attempts to undermine its legitimacy in history—since the initiation of Indian/white contact—that the issue of the Fourth World is a <u>moral</u> issue. Federal Indian policy, in my opinion, bears the stigma of a very conscious attempt to legislate against the morality of the Indian world. If what has been relegated to the minds and hearts of men (due to the extermination of its overt vestiges) is "romantic," then perhaps the task of the social sciences is simply to quantify the fiction of aboriginal existence. If a choice is made to do otherwise,

the immensity of the task might well cause us to redefine our institutionalized, fictitious morality.

The Fourth World is not an Olympus, Atlantis, or Camelot. It is instead a "global village," an act of faith, if you will, that by setting out upon a new world order we might hope to reestablish the Old World. The task is of mutual interest: "We have heard your children crying in the night for peace and comfort as much as we have heard our own." [8]

I have set down here our own needs as Indian peoples for the Fourth World. We know that we cannot move very far in that direction unless you also choose to move. Do you know how far you can move without us? [9]

Indian people have never completely left our Old World, the Aboriginal World which I have tried to describe. European North Americans are already beginning to work their way out of a value system based on conquest and competition, and into a system that may be at least compatible with ours.

. . . These are my words. Now, I must pick up my burden and go with my children and their children. I hope you join with us along the way. Please understand if we do not feel we can wait for you. These are my words. [10]

NOTES

Notes

Chapter 1

[1] Henry Rowe Schoolcraft, History of the Indian Tribes of the United States (Philadelphia: J.B. Lippincott & Co., 1857), pp. 27-28.

[2] George Manuel and Michael Posluns, The Fourth World (New York: The Free Press, 1974), pp. 11-12.

[3] Ibid., p. 256.

[4] Ibid., p. 216.

[5] Ibid., p. 222.

[6] Vine Deloria, Jr., Behind the Trail of Broken Treaties (New York: Delta Publishing Co., 1974), pp. 160-163. Deloria goes on to compare existing sovereign nations in the world with what he feels is the Indian "potential" for sovereignty (pp. 163-186).

[7] Ibid., p. 201.

[8] See note #22, chapter 1, p. 84.

[9] Two additional areas should be mentioned here. Religious freedom on the reservations, which Collier had hoped would be conferred without strings, was in the end tied up in qualifications which resulted in little actual change. Such religious freedom was subordinate to federal statute. Likewise, the organization of tribal government did not resemble its original (traditional) form, and was instead an imposition of "simple majority" where before there might have been only "consensus." See Robert Burnette and John Koster, The Road to Wounded Knee (New York: Bantam Publishing, 1974), pp. 294-295.

Chapter 1 (cont.)

[10] S. Lyman Tyler, A History of Indian Policy. (Washington D.C.: U.S. Department of the Interior, 1973), p. 146.

[11] Murray L. Wax and Robert W. Buchanan, eds., Solving "The Indian Problem": The White Man's Burdensome Business (New York: New York Times, 1975), p. 36.

[12] John Collier, The Indians of the Americas (New York: W.W. Norton & Company, 1947), p. 261.

[13] Theodore W. Taylor, The States and Their Indian Citizens (Washington D.C.: U.S. Department of the Interior, 1972), p. 22. See also, Philip Reno, Taos Pueblo (Chicago: Swallow Press, 1963), especially the introduction by John Collier.

[14] Wax and Buchanan, p. 38.

[15] Report, No. 310 (Washington D.C.: 78th Congress, 1st Session, U.S. Senate, 11 June 1943).

[16] Jennings C. Wise, The Red Man in the New World Drama, edited by Vine Deloria, Jr. (New York: Macmillan Publishing Co., 1971), p. 366.

[17] Kirke Kickingbird and Karen Ducheneaux, One Hundred Million Acres (New York: Macmillan Publishing Co., 1973), Chapters 9 and 10.

[18] From a report made to Senator Henry M. Jackson by Commissioner Bennett 11 July 1966. See Tyler, pp. 198-199.

[19] Special Message on "The Forgotten American" by President Lyndon B. Johnson to the U.S. Senate, 6 March 1968, p. 2. See Tyler, p.200.

[20] Vine Deloria, Jr. in Wise, op. cit., Chapter 33.

Chapter 1 (cont.)

[21] Felix S. Cohen, editor, Statutory Compilation of the Indian Law Survey: A Compendium of Federal Laws and Treaties Relating to Indians (Washington D.C.: U.S. Department of the Interior, 1940), 46 volumes.

[22] Again, this is not an exhaustive examination of every substantive area of federal Indian law. Horne speaks of "new" legislation and judicial rulings which Cohen's work could not have incorporated. For the most part, this new material remains untouched in the thesis: the more obvious contradictions found in equivalent portions of the texts are the major concern here. Horne replicates, verbatim, a major part of Cohen's Handbook, and particular subsections proceed without incident. The area of "civil jurisdiction" is an apt example. This duplication feature will not be pointed out in every instance. The chapter entitled "Trade and Liquor Laws" is not included in this thesis as it poses no unmentioned contribution to the legal philosophies of interest. Cohen and Hornes' discussion is very similar except for the Act of 15 August 1953 (67 Stat. 586) which in effect removed most restrictions imposed by earlier laws which regulated liquor sale to Indians. Also, the material on special groups of Indians has been omitted. These groups are unique in that the federal laws which govern their affairs were patterned after the particular status of Indians under Spanish and Mexican law (Pueblos), the status of Indians under Russian law and after annexation by the U.S. (Alaskan Natives), the status of Indians who were treatied with prior to the Constitution and who have been involved in special dealings with the state (New York Indians), and the status of Indians who were "removed" to west of the Mississippi (Oklahoma Indians). While Cohen and Horne wage a terse battle with regards to the philosophy of special law governing these four groups of Indians, to present this material in the essay would be both disjoint and confusing. Explication of the historical basis for the special federal relationship to these tribes would be prohibitively involved. The simple objective here of elucidating legal philosophies is best served by deleting this area of federal Indian law.

Chapter 2

[1] John Marshall was Chief Justice of the United States Supreme Court from 1801 to 1835, and among the more favorable decisions made for Indians during this period was Worcester v. Georgia (6 Pet. 515).

Chapter 2 (cont.)

Marshall's analysis of Indian tribes as "distinct, independent, political communities" (559) based on original tribal sovereignty was a decision that heavily influenced subsequent court action. Then President Jackson was not particularly impressed with the application of the law of nations to Indian tribes, and purported to have said, "John Marshall has made his decision: now let him enforce it." (from Cohen, p. 123)

[2] With the Appropriation Act of 1872 (16 Stat. 566: 3 March 1871), treatymaking "as proper matters of international concern" [H:25] was terminated between the United States and Indian tribes.

[3] Indians had become citizens of the United States through specific treaty provisions, by the acceptance of land in severalty, through participation in the military etc. On 2 June 1924 all Indians were made citizens by virtue of the Citizenship Act (43 Stat. 253).

[4] Horne's treatment of the administrative power of the Secretary of the Interior differs considerably from that of Cohen's. Many of the discrepancies are due to recent legislative activity in the interim 1940-1956. Cohen, discussing the range and scope of administrative powers with regards to Indian affairs, notes that such powers have been conferred upon "the President, the Secretary of the Interior, and the Commissioner of Indian Affairs. [C:100] Horne, on the other hand, says something appreciably different: "Federal administrative power over Indian affairs, vested in the Secretary of the Interior, is virtually all-inclusive." [H:49] This contradiction, and others like it, represents new statutes. Another example concerns the consolidation of Indian tribes on federal reservations. Cohen identifies as one of the administrative powers of the President the right (with tribal consent) to consolidate Indian tribes. However, Executive Order 10250 (issued in the context of the McCormack Act) vests in the Secretary of the Interior the power to consolidate tribes. Horne's original statement of the power of the Secretary of the Interior is "justified" by this new legislation.

[5] The Bureau of Indian Affairs is often a target of such criticism and many such accusations are well founded. In the State of Michigan, for instance, most Indians are not eligible for BIA services because of policy (BIA) which is in direct conflict with existing federal law. While the Snyder Act of 1924 (42 Stat. 208) entails these services for Indians "throughout the United States," BIA policy has limited its

Chapter 2 (cont.)

services to Indians living "on or near" reservations. Morton v. Ruiz (94 S.Ct. 1055: 1974) is a recent expression of this basic dilemma. Ernest L. Stevens et al. outlined the problem of policy versus law in "Indian Eligibility for Bureau Services" (5 April 1972) which points out very clearly the illegal tenor of BIA policy. This in-house report has been squelched effectively by the Bureau, although the Supreme Court has looked favorably upon its substance. It is quite probable that the American Indian Policy Review Commission will examine this issue in detail between now and its final commission report in January, 1977.

[6] There are in fact only two minor deletions that Horne makes which have any real bearing on this thesis. The first is in regards to the statutes that were passed on 30 June 1834. Cohen identifies this date as "perhaps the most significant date in the history of Indian legislation." [C:73] Horne is less convinced, and calls it "one of the most" significant dates for Indians. [H:103] This small variation is amply accounted for by the nature of one the statutes passed, namely, "An act to provide for the organization of the department of Indian Affairs." (4 Stat. 735) Broadly speaking, this Act represented in the 1800's what the Indian Reorganization Act would a century later. A second deletion which Horne makes is specifically the underlined portion of the following: "Other sections of the 1834 act providing for the organization of the department of Indian Affairs seek to restore and guarantee tribal rights upon which administrative encroachments had apparently been made . . . " [C:74] This, as we shall see, reflects a consistent sentiment for Horne with regards to tribal rights.

[7] See, for instance, Robert Burnette and John Koster, The Road to Wounded Knee (New York: Bantam Publishing Co., 1974).

[8] The reports of the Commissioners of Indian Affairs and the commentary on administrative changes in the BIA are fairly equivalent in the Cohen and Horne volumes until Horne outlines the period from 1940 to 1957. This era, in effect, is "The beginning of termination of Federal supervision of Indian affairs." [H:260] The "present" administration of the BIA likewise differs.

[9] This should be qualified to the extent that Horne does say that "some Indians were no more 'charity wards' than were holders of Federal bonds or other legal obligations of the Federal Government." [emphasis mine—H:269]

Chapter 2 (cont.)

[10] Cohen goes on to detail the genesis of "need" for federal services: "In the treaty period of our Indian relations, in order to induce the Indian to cease active resistance to further encroachment upon his domain, it was thought wise to educate him in the white man's culture. The Indian's white neighbors would instruct him to seek paths of peace rather than the ways of war, to replace the tomahawk with a religion of love for his fellow man. To obviate responsibility for his support, or the alternative of slow starvation, they would instruct him in the ways of the farm, in the arts of the fireside, and in means of earning a livelihood on this greatly reduced land. This offered a practical alternative to a policy of warfare, which, it has been estimated, cost the Federal Government in the neighborhood of one million dollars for each dead Indian. . . . Reservations were located in the vicinities of army posts. In the panic of an epidemic of smallpox, as a matter of protection to prevent the spread of the disease through the entire population, a statute was enacted which provided for vaccination of Indians by army surgeons. This statute is illustrative of the way in which the Indian health service and other federal services originated." [C:237]

[11] The relocation program began in earnest under Dillon Myer as "Relocation Services" in 1952. Myer had been involved in a similar program which assisted Japanese who had been interned in the United States during World War II. Virgel Vogel, in <u>This Country Was Ours</u> (New York: Harper and Row, 1972) describes the effort as follows: "Since the early 1950's a government-sponsored relocation program has been in operation, by which selected reservation Indians are given financial assistance in moving to designated cities. For a brief period, they are helped to find housing and employment, after which the government terminates all responsibility for them."(p. 206) This program, which many feel was indicative of the termination era, was renamed "Employment Assistance" in 1962.

[12] Interestingly, Burnette and Koster, op. cit., cite the transfer of health services from the BIA to HEW as the <u>only</u> bright spot for Indians in the 1950's (p. 160).

[13] Title 25 of the United States Code is entitled "Indians" (Washington D.C.: Office of the Federal Register, 1975).

Chapter 2 (cont.)

[14] Specific reference is here made to the Act of 15 August 1953 (67 Stat. 588) which extends state jurisdiction to Indians.

[15] Horne says essentially the same: "Criminal jurisdiction in the field of Indian law involves a division of authority, among Federal, Indian, and State courts . . ." [H:308] There are many occasions in the Horne volume when his discussion is muddled or incongruous because of his religious adherence to replicating the Cohen volume. Often times, verbatim passages of Cohen are integrated with his own original material in a manner which is both awkward and immediately suspect. Cohen's Handbook of Federal Indian Law was constructed from an original study consisting of 46 volumes, and despite its relative brevity, it reads fairly well; Horne's qualifications and interpretations significantly complicate the reading. It must be remembered that Cohen did flavor many of his comments in line with the reorganization philosophy. When Horne fails to delete these comments, he creates contradictions within his own text.

[16] See note #1, chapter 2, p. 84.

[17] While Cohen does utilize "municipality" he does so in contexts which differ dramatically from those circumstances under which Horne employs the concept. What Horne calls "the domain of tribal municipal law" [H:444] cannot be construed to resemble Cohen's text: "In effect, then, an Indian tribe bears a relation to the Government of the United States similar to that which a territory bears to such government, and again to that relationship which a municipality bears to a state. An Indian tribe may exercise complete jurisdiction over its members and within the limits of the reservation subordinate only to the expressed limitations of federal law. [emphasis mine—C:148] Horne duplicates this last passage in his own text, and in doing so contradicts himself yet again.

[18] When discussing per capita payments versus payments made to tribal officials, Horne makes a comment which, though not particularly central to the issue of the tribal right to receive funds, nonetheless is an attempt to play down the importance of treaties as opposed to federal statutes. The following passage (Payment of Certain Moneys to the Cherokees, 5 Op, A.G. 320, 1851) appears in both Cohen and Horne: "Ordinarily a debt due to a nation by a treaty, ought to be paid to the constituted authorities of the nation: but where the treaty

Chapter 2 (cont.)

and the law appropriating the money both direct the payment to all the individuals of the nation per capita, the treaty and the statute must prevail." [C:341] To this, Horne states that "this was said more than 100 years ago, long before Indians generally had become citizens of the United States. International aspects of this problem no longer exist." [H:729] This severely challenges the "international aspect" of treaties which would seemingly have precious little to do with citizenship. Horne is very reluctant to accord Indian tribes, even in a historical context, with some semblance of autonomy and independent existence.

[19] Cohen does proceed to review pertinent administrative rules governing heirship [C:230-231]—Horne has deleted this section.

[20] This brief section does not imply that the area of federal, state and tribal taxation is likewise brief. There is a considerable discrepancy between Cohen and Hornes' account of taxation, but as before, most of this can be attributed to the legislation and court opinions rendered in the interim 1940-1956.

Chapter 3

[1] See Tyler, op. cit., p. 51 and Wax and Buchanan, op. cit., p. 36.

[2] Jennings C. Wise, op. cit., is an apt example of an analysis which illustrates this contention.

[3] SO 243(18), 24 November 1972.

[4] American Indian Law Newsletter (Albuquerque: University of New Mexico, School of Law), vol. 7, no. 11.

[5] Ibid., section 2, p. 12.

Chapter 3 (cont.)

[6] Ibid., section 3, pp. 1-12.

[7] Ibid., section 3, p. 7.

[8] Manuel and Poslins, op. cit., p. 261.

[9] Ibid., p. 261.

[10] Ibid., p. 266.

APPENDICES

Appendix I

A. Indian Reorganization Act, 1934 (48 Stat. 984)

An Act

To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

Sec. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

Sec. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: PROVIDED, HOWEVER, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: PROVIDED FURTHER, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: PROVIDED FURTHER, That the order of the Department of the Interior signed, dated, and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: PROVIDED FURTHER, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the

Secretary of the Interior but not to exceed the cost of said improvements: PROVIDED FURTHER, That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: PROVIDED FURTHER, That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: PROVIDED FURTHER, That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

Sec. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: PROVIDED, HOWEVER, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: PROVIDED FURTHER, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

Sec. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights,

and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: PROVIDED, That no part of such boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Sec. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

Sec. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: PROVIDED, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment of by tribal membership to residence at such reservations.

Sec. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

Sec. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

Sec. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.

A report shall be made annually to Congress of transactions under this authorization.

Sec. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: PROVIDED, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

Sec. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Sec. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska: PROVIDED, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with member of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Commanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chicksaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

Sec. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat. L. 894), of their commuted cash value under the Act of June 10, 1896 (29 Stat. L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

Sec. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures

for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

Sec. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In additon to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe of its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Sec. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: PROVIDED, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Sec. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

Sec. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendents of

such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Approved, June 18, 1934.

Appendix I (cont.)

B. Termination Resolution, 1953 (HCR 108)

Whereas it 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 the rights and prerogatives pertaining to American citizenship; and

Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens; Now, therefore, be it

RESOLVED BY THE HOUSE OF REPRESENTATIVES (THE SENATE CONCURRING), That it is declared to be the sense of Congress that, at 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 individuals 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 Potowatamie 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 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. It is further declared to be the sense of Congress that the Secretary of the Interior should examine all existing legislation dealing with such Indians, and treaties between the Government of the United States and each such tribe, and report to Congress at the earliest practicable date, but not later than January 1, 1954, his recommendation for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution.

Passed, August 1, 1953.

Appendix I (cont.)

C. Termination Legislation

Tribe	Date of Act	Date of Termination	Tribal Membership	Tribal Land (acres)
Alabama-Coushatta Tribes of Texas	6/23/54 (68 Stat. 768)	7/1/55	450 (est.)	3,200
California Rancherias and Reservations	8/18/58 (72 Stat. 619) 8/11/64 (78 Stat. 390)	35 rancherias as of 6/30/69	1,107	4,315.5
Catawba Indians of South Carolina	9/21/59 (73 Stat. 592)	7/1/62	631 (final roll)	3,388
Klamath Tribe of Oregon	8/13/54 (68 Stat. 718)	8/13/61	2,133 (final roll)	862,662
Menominee Tribe of Wisconsin	6/17/54 (68 Stat. 250)	4/30/61	3,270 (final roll)	233,881
Ottawa Tribe of Oklahoma	8/3/56 (70 Stat. 963)	Proclamation deferred until claim settled*	630 (final roll)	0
Paiute Indians of Utah	9/1/54 (68 Stat.1099)	3/1/57	232 (est.)	42,839
Peoria Tribe of Oklahoma	8/2/56 (70 Stat. 937)	Proclamation deferred until claim settled*	640 (final roll)	0
Ponca Tribe of Native Americans of Nebraska	9/5/62 (76 Stat. 937)	10/27/66	442	834

(continued)

Appendix I (cont.)

Tribe	Date of Act	Date of Termination	Tribal Membership	Tribal Land (acres)
Uintah & Ouray Ute Mixed Bloods of Utah	8/27/54 (68 Stat. 868)	8/27/61	490 (final roll)	211,430
Western Oregon Indians (60 bands)	8/13/54 (68 Stat. 724)	8/18/56	2,081 (est.)	3,158
Wyandotte Tribe of Oklahoma	8/1/56 (70 Stat. 893)	Deferred by disposition of cemetery	1,157 (final roll)	94.36
		Totals	13,263	1,365,801.86

* Although tribal claims determination has delayed formal termination of trusteeship of these tribes, it has been completed in most respects and tribal members are no longer receiving Bureau aid.

[from Theodore W. Taylor, The States and Their Indian Citizens (Washington D.C.: U.S. Department of the Interior, 1972), p. 180.]

Appendix II

Federal Indian Law: Format

Frank G. Horne's organization of Federal Indian Law differs from Felix S. Cohen's Handbook: Horne's chapters are listed below, followed by Cohen's in brackets.

Chapter I. The Field of Federal Indian Law

[Chapter 1 — The Field of Federal Indian Law: Indians and the Indian Country]

II. Federal Power Over Indian Affairs

[Chapter 5 — The Scope of Federal Power Over Indian Affairs
Chapter 4 — Federal Indian Legislation
Chapter 3 — Indian Treaties]

III. Administration of Indian Affairs

[Chapter 2 — The Office of Indian Affairs
Chapter 12 — Federal Services for Indians]

IV. Jurisdiction

[Chapter 18 — Criminal Jurisdiction
Chapter 19 — Civil Jurisdiction]

V. Trade and Liquor Laws

[Chapter 16 — Indian Trade
Chapter 17 — Indian Liquor Laws]

VI. Tribal Self-Government

[Chapter 7 — The Scope of Tribal Self-Government
Chapter 14 — The Legal Status of Indian Tribes]

(continued)

Appendix II (cont.)

Chapter VII. The Scope of State Power Over Indian Affairs

[Chapter 6 — The Scope of State Powers Over Indian Affairs]

VIII. Rights, Liberties, and Duties of Indians

[Chapter 8 — Personal Rights and Liberties of Indians]

IX. Property

[Chapter 15 — Tribal Property
Chapter 9 — Individual Rights in Tribal Property
Chapter 11 — Individual Rights in Real Property
Chapter 10 — The Rights of the Indian in His Personalty]

X. Taxation

[Chapter 13 — Taxation]

XI. Special Groups and Laws

[Chapter 20 — Pueblos of New Mexico
Chapter 21 — Alaskan Natives
Chapter 22 — New York Indians
Chapter 23 — Special Laws Relating to Oklahoma]

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