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THE "DE-SELECTED" SENATE COMMITTEE ON INDIAN AFFAIRS and its Legislative Record, 1977–1992

On 4 February 1993, Senators Daniel K. Inouye (D. HI) and John McCain (R. AZ) introduced Resolution 67 which had a dual purpose: Section one changed the name of the Select Committee on Indian Affairs by deleting the term "select"; section two changed the name of the hearing room assigned to the Indian Affairs' Committee in the Richard Brevard Russell Center Office Building from "Room 485" to "Room of the First Americans." While the room redesignation has some symbolic importance, it is section one—the changing of the Committee's name—that warrants more serious scrutiny.

This change, which was adopted by the Senate by resolution twenty days later (CR 139 [Feb. 24]:S1978), was of symbolic importance because neither the status nor the function of the committee was altered, but also has an important substantive dimension. The redesignation (minus the "select" heading) means that the U.S. Senate for the first time since 1947¹ has a full standing committee devoted to the study and oversight of Indian affairs.

This essay has three major sections. In section one, I examine the Congress's constitutional responsibility for administration of the federal government's affairs with tribes. In section two, I describe the history of the various Indian committees from 1820 to 1977. Section three details the legislative record of the Senate Select Committee during its sixteen-year existence (1977–1993) as a "select" entity. Sub-stantive policy content analysis of the committee's legislative activity, which is the next logical step leading to the construction of a theory or theories about congressional committees and their impact on the development of sound federal Indian policy, must await additional research. I then offer some concluding remarks.

Congressional Exclusivity in Indian Affairs

Over the last two-hundred years, the

various tribal nations and the federal government have assumed an untold number of reciprocal political, legal, social, and cultural obligations toward each other. From 1775 to 1914 these obligations, especially the political/legal variety, were most clearly espoused in the hundreds of treaties and dozens of agreements negotiated between a majority of tribes and the federal government. These documents, many of which—from a Western perspective—are binding legal contracts, were drawn up and executed U.S. President via the treaty-making authority vested in the executive branch by Article II, section 2 of the Constitution, and ratified by the Senate. They were then implemented by congressional laws necessary to fulfill the United States treaty obligations. Congress receives the authorization to deal with tribes under Article 1, section 8, clause 3 of the Constitution, where it is stated that the legislative branch is empowered to "regulate commerce ... with the Indian tribes."

The indigenous perspective on treaty approval is much more complex, of course, because of the tremendous degree of tribal differentiation reflected in the hundreds of tribal groups with whom the United States entered into treaties (see, e.g., D. V. Jones 1982), and more importantly, because treaties were not viewed as merely legal instruments by the tribes but as sacred covenants (DeMallie 1977:3). While the various Iroquois nations, for example, had clearly delineated individuals responsible for the negotiation and signing of such covenants and a well-defined process by which the inter-cultural relations were codified and ratified, other less politically centralized groups like the Navajo, Apache, and Lakota often had individuals empowered to deal with alien nations but these persons and the tribal nation itself lacked institutions that could effectively wed non-participatory bands or clans to the agreed upon instrument.

The U.S. Constitution's treaty and commerce clauses have been of

important, if inconsistent, benefit to tribes and individual Indians. They provide a certain structural level of protection to Indians that is virtually non-existent for most other indigenous groups worldwide (indigenous peoples in Canada and New Zealand are important exceptions). Unfortunately, there is nothing in either of these clauses or in any other provision of the U.S. Constitution which emphatically declares that the federal government has a constitutional obligation to protect tribes or even individual Indians from itself. In fact, "the Constitution itself is the greatest barrier Indians have faced in attempting to deal with the United States" (Deloria 1992:284) because of the division of sovereignty inherent in the federal system of government, which is further complicated by the checks and balances and separation of powers theories. In other words, no individual branch of either the state or the federal government actually represents the "whole functioning of that political entity unless the two remaining branches refuse to become involved in the issue under consideration."

Thus, when Madison proposed in *The Federalist* No. 42 that the clause regarding the regulation of commerce with Indian tribes outlined in the Articles of Confederation was "obscure and contradictory" and needed correction because while it authorized federal control of Indian affairs it did so only so long as that control did not interfere with each individual state's freedom to legislate in its own affairs with tribes, he set the stage for the federalization and congressionalization of Indian affairs. The U.S. administration of its affairs with tribes, in other words, was to be the exclusive province of the Congress. Initially, Congress's principal responsibility was in the carrying out of the obligations and the execution of the powers outlined in the presidentially executed treaties. Many of these obligations were articulated in statutes "relating to or supplementing treaties" (Cohen 1972: 91) and included the following:

YEAR(S)	SENATE	HOUSE
1820	Standing Committee on Indian Affairs	
1821		Standing Committee on Indian Affairs
1838		Select Committee on Indian Fighters
1878	Joint Committee on Transfer of the Indian Bureau	
1879–1880	Select Committee to Examine into Removal of Northern Cheyennes	
1881	Select Committee to Examine into Circumstances Connected with Removal of Northern Cheyennes from the Sioux Reservation to the Indian Territory	
1886–1892	Select Committee on Indian Traders	Select Committee on Expenditures for the Indians and Yellowstone Park
1888–1892	Select Committee on the Five Civilized Tribes	Select Committee on Indian Depredation Claims (1888-1891)
1893–1908	Select Committee to Investigate Trespassers on Indian [Cherokee] Lands. Select Committee on the Five Civilized Tribes Standing Committee on Indian Depredations	
1909–1920	Standing Committee on Indian Depredations Standing Committee on the Five Civilized Tribes Standing Committee to Investigate Trespassers on Indian Lands	
1921	Committee on Indian Affairs (all existing Standing Senate Committees were consolidated in this committee)	
1947	Public Lands Committee (subsumes Committee on Indian Affairs and four others)	Public Lands Committee (subsumes Committee on Indian Affairs)
1948	Interior and Insular Affairs (subsumes Public Lands Committee and Indian Affairs)	
1951		Committee on Interior and Insular Affairs (subsumes Public Lands Committee)
1951	Joint Committee on Navajo-Hopi Administration (64 St. 44). This committee abolished by the Navajo-Hopi Settlement Act of 1974 (88 St. 1712)	
1975		Committee on Education and Labor (given jurisdiction over Indian education)
1977	Select Committee on Indian Affairs (temporary two-year status) Committee on Interior and Insular Affairs abolished	Subcommittee on Indian Affairs and Public Lands (within the Committee on Interior and Insular Affairs)
1978	Select Committee on Indian Affairs (granted two-year extension)	
1979		Subcommittee on Indian Affairs abolished (Jurisdiction vested in entire committee)
1980	Select Committee on Indian Affairs (granted three-year extension)	
1984	Select Committee on Indian Affairs (becomes permanent committee)	
1993	Select Committee redesignated as Committee on Indian Affairs	Subcommittee on Native American Affairs (within newly formed Committee on Natural Resources)

Table 1 Committees having jurisdiction over Indian Affairs, 1820–1993. (Based on R. S. Jones 1987.)

"... to secure them in the title and possession of their lands, in the exercise of self-government, and to defend them from domestic strife and foreign enemies" (Cohen 1972:91n18, quoting from *House Report* No. 474, Commissioner of Indian Affairs, 23rd Cong., 1st Sess., 20 May 1834).

The second principle of congressional power is in the regulation of commerce with Indian tribes. This, we have already noted, is the only explic-

it grant of power to the government mentioned in the Constitution. The question of what constitutes "commerce," and what are the jurisdictional boundaries of such trade, if any, have been debated over time. A quick review of the legislation enacted and policies pronounced by Congress from 1789 to 1834 reveals, as Prucha has shown, that the federal government needed to control and police its own citizens in their intercourse with

Indian tribes, and it dealt primarily with establishing trading houses or factories, with issuing licenses for the Indian trade, and with fulfilling specific treaty provisions that spoke to the question of commerce (Prucha 1962).

There was, in fact, no federal effort to regulate Indians or tribes per se. Gradually, however, Congress, reflecting the general sentiment of many high-level policy makers, and Christian missionaries, began to uni-

laterally introduce laws designed to (1) assimilate individual Indians into the American polity (see, e.g., *The Civilization Fund Act*, 3 St. 516 [1819]) and (2) the introduction of western criminal law proceedings against interracial crimes involving Indians (see, e.g., *An Act to Provide for the Punishment of Crimes and Offenses Committed Within the Indian Boundaries*, 3 St. 383 [1817]). These early laws were ad hoc precursors to much more systematic and sophisticated eras of federal Indian policy: first, from 1871 when treaty-making was unilaterally ended, to the period just before the *Indian Reorganization Act* of 1934; second, after World War II through the termination/relocation period of the 1950s and 1960s, when Congress enacted a litany of laws and policies aimed at the ultimate destruction of tribalism.

Conversely, the Indian Reorganization period (1934 to the early 1940s) and presently the Indian Self-Determination/Self-Governance era (1970 to present) represent congressional efforts to show some respect for the sovereignty of tribal nations by restoring tribal lands, enforcing vested tribal treaty rights, protecting Indian religious rights, and the reaffirmation of tribal governing authority.

Congress has certainly not operated alone² in administering the federal government's affairs with tribes; nevertheless, it remains the focal point of much scrutiny because of the U.S. Constitution's clauses and because tribes are keenly aware that it is to the political branches of the federal government that they must look for proper enforcement of their vested extra-constitutional treaty-based (tribe) or constitutionally-defined citizenship-based rights (individual Indian).

Congressional Committees and Indian Affairs—1820 to 1977

Congressional committees are at the heart of governance in the federal government. Committees, the subdivisions³ of legislatures, prepare legislation for action by the respective houses and they also may conduct investigations. Most standing (full) committees are divided into subcommittees which study legislation, hold hearings, and report their recommendations to the full committees. However, only the full committee can report legislation for action by the entire legislature (Vogler 1983:ch. 4). First, a review of the historical process is in order.

During the first several decades of federal administration of Indian affairs, Indian-related matters involving war, trade, treaties, boundaries, and general Indian-White intercourse were handled either by the entire Senate or House, by select committees, or by other committees. It was not until 1820 that the Senate first established a Standing Committee on Indian Affairs (R. S. Jones 1987:79). This was followed the next year by similar action in the House of Representatives.

Throughout the remainder of the 19th century and through the late 20th century there were numerous other standing committees in the Senate, and various select and joint committees in both Houses, that exercised jurisdiction over Indian issues. Table I is a chart of all the committees that have had a direct role in Indian affairs. Although Indian affairs are the purported exclusive domain of Congress because of the constitutional allocation of authority to this body, in reality the executive branch (via the treaty-making authority) and the judicial branch (via the Supreme Court's development of numerous legal doctrines) were the coordinate powers during the first three-quarters of the first century that articulated tribal political status, tribal property rights vis-a-vis the federal government, and the federal and state positions in relation to tribes. Notwithstanding the fact that both Houses of Congress had full standing committees by the early 1820s, the legislature "paid little attention to its role as the architect of Indian fortunes apart from providing legislative confirmation of presidential policies such as forced removal" (Deloria 1984:106).

This legislative acquiescence, however, began to change by the mid-nineteenth century when Congress began to authorize federal commissions to treat with the western tribes. Over the next two decades, congressional power to define Indian policy waxed, while the president's role as chief treaty negotiator was reduced from that of a "negotiator of treaties to an administrator of domestic disputes" (Deloria 1984:106).

The zenith of legislative power over Indian affairs was reached in 1871 when, after several years of internal conflict over which house would control Indian policy, the House Committee on Indian Affairs attached an amendment to the Department of Interior's appropriation bill which declared that the U.S. would no

longer recognize tribes as sovereigns capable of making treaties with the U.S. (16 St. 544, 566). The ramifications of this rider and its effect on tribal political status and the tribal-federal relationship have been widely debated by federal policy-makers⁴ and scholars (see, e.g., Rice 1977:239–253; but also see Wunder 1985:39–56). And although preexisting ratified treaties remained in force and Congress continued to negotiate "agreements" with tribes until 1914, which Cohen (1972:67) says "differed from formal treaties only in that they were ratified by both houses of Congress instead of by the Senate alone," the relationship between tribes and the federal government had been seriously affected. "Indians as a subject of congressional debate," says Deloria (1984:107), "were moved from the national agenda to an item on a committee agenda, and they were never again seen as having an important claim on the national government."

In the subsequent twelve decades Indian affairs and tribal political status have been dominated by the confluence of a Supreme Court which is extremely deferential to congressional enactments (the Court has never invalidated a single Indian-related law as being beyond Congress's authority), congressional committees, the states, and the Bureau of Indian Affairs (which has been delegated much of its authority by Congress, but which has also by a process of "jurisdictional aggrandizement" self-empowered itself to act in ways sometimes destructive of tribal interests but usually as a paternalizing influence that refuses to allow tribes to act on their own behalf). Tribes, we have already shown, "are not part of this system; they lobby all [four] ... but have no independent power of their own to exact compromises" (Barsh and Henderson 1980:222).

The confluence is far from smooth or consistent and sometimes the converging influences cross-cut one another in vicious and unpredictable ways. At various times state interests have had a dominating influence; at other times the bureaucracy has stifled tribal efforts at self-government, and at still others, like the present, the Supreme Court functions in a way that directly clashes with congressional policy which favors self-determination and self-governance. The role of Congress and the various committees and subcommittees addressing Indian affairs have been equally spo-

radic, haphazard, and conflicting—vacillating between policies designed to assimilate Indian tribes to policies created to perpetuate tribal dependency and wardship to policies centered on enhancing tribal autonomy. However, Congress alone has ultimate responsibility for federal Indian policy and under the Constitution it has plenary (read: exclusive and pre-emptive) power to act.

As noted earlier, as a result of the *Legislative Reorganization Act of 1946* (60 St. 812) the Indian Affairs Committees in both houses were reduced in status to minor subcommittees. This was the state of things from 1947 until 1977. On the Senate side, a subcommittee existed under the auspices of the Committee on Interior and Insular Affairs. On the House side, Indian issues were subsumed by a subcommittee under the Public Lands Committee, which in 1951 became the Committee on Interior and Insular Affairs (R. S. Jones 1987:81). During this thirty-year period, this subcommittee arrangement "failed to provide a truly adequate forum of legislating appropriate solutions to problems affecting Indian people. Indian legislation could no longer be reported to the floor of the Senate directly from a full Indian Affairs Committee, and legislative jurisdiction over Indian affairs was fragmented in a number of committees" (U.S. Congress 1983:1).

The activism and political and social disquiet of the 1960s and 1970s, fueled by the civil rights movement, Vietnam, Watergate, and a number of disturbing events in Indian Country centered around the aftermath of the federal government's "termination" policy, Bureau of Indian Affairs (BIA) incompetence and mismanagement of tribal and individual trust property, and tribal reassertion of once dormant cultural and political attributes, convinced the Johnson and later the Nixon administrations of the need for a new policy: a policy of Indian self-determination. This was followed closely by Congress's establishment of a bipartisan committee which was charged with the responsibility "to conduct a comprehensive review of the historical and legal developments underlying the Indians' relationship with the Federal Government and to determine the nature and scope of necessary revisions in the formulation of policy and programs for the benefit of Indians" (U.S. Congress 1977:iii). This two-year congressional investigation culminated in 206 policy

recommendations in areas as diverse as (1) trust responsibility, (2) tribal government, (3) federal administration of Indian policy, (4) economic development, (5) community services, (6) off-reservation Indians, (7) terminated and non-reservation Indians, etc.

For our purpose, recommendation 77 under the category "Federal Administration of Indian Affairs" is the most important one. It read: "Congress establish permanent standing or special select committees for Indian affairs in each House or place all jurisdiction, oversight, and legislative authority in a joint select committee" (U.S. Congress 1977:24). In providing a detailed rationale for why the establishment of permanent committees on Indian affairs in both houses was essential, the American Indian Policy Review Commission gave several reasons. First, congressional plenary (read: exclusive) authority in the administration of the federal government's legal obligations to tribes is constitutionally well established.

Second, the distinguished status of tribes as the only group of people specifically identified in the Constitution as separate polities with whom Congress is charged to regulate trade with, clearly evidences their separate political status. Congress is the most essential actor on the federal side of the tribal-federal relationship because it ratified the legally-binding treaties and agreements and has enacted subsequent policies and laws regarding tribes and Indian citizens. Congress has a clear responsibility for maintaining the treaties, policies, and laws it has participated in or created (U.S. Congress 1977:294). While acknowledging that Indians and tribal-related issues no longer warrant the nation's full-fledged attention as they did during the first century and a quarter of the United States existence, the political and legal obligations—both reciprocal and unilateral—of the United States to the tribes and their members remain intact.

Third, the Commission noted that when the standing Indian committees were terminated in the 1946 reorganization, the subsequent merger of the subcommittees into the Interior Committees gave "rise to severe conflicts of interest," with tribes and individual Indians often in direct competition with powerful governmental and non-governmental organizations and monied interests like the Army Corps of Engineers, mining companies, recreation and fish and wildlife interest, etc (U.S. Congress 1977:295).

Finally, the bipartisan committee acknowledged that "the complexity and volume of Indian law and the many problems affecting the Indian people call for a permanent standing committee on Indian Affairs" (U.S. Congress 1977:295). Some of the complexities mentioned included the resolution of eastern Indian land claims cases against the state and federal governments; a review, consolidation, and codification of Title 25 of the U.S. Code; and most important, the tedious and ongoing oversight responsibilities the Congress has as a result of its legal obligations to tribes.

The Senate, under S.J. Resolution 4, had earlier in the 95th Congress (4 Feb. 1977) created a temporary Select Committee on Indian Affairs with full jurisdiction over all proposed legislation and other matters relating to Indian affairs. However, this committee was to be abolished at the start of the 96th Congress, with jurisdiction over Indian matters going to the Human Resources Committee.

It became increasingly evident that if Congress was to keep pace with its constitutional, legal, moral, and historical responsibilities to tribes and Indian people, then an ongoing committee with sufficient expertise and resources needed to be established. Hence, the Senate Select Committee continued to be reauthorized for several years until it was made a permanent, though still "select" committee in 1984 (CR [6 June 1984]:S6669).

The life, therefore, of the Senate Select Committee on Indian Affairs extended a full sixteen years: 4 February 1977 to 24 February 1993. And despite the sound reasons given by the American Indian Policy Review Commission as to why there was a need for permanent standing committees of Indian affairs, the Committee remained "select" for sixteen years. Moreover, on the House side, which will not be examined in this paper, Indian affairs in 1977 were vested in a newly created subcommittee on Indian affairs and Public Lands within the Committee on Interior and Insular Affairs. But in 1979, the subcommittee was abolished and jurisdiction was vested in the entire committee. This was the "first time since 1820 that a body of Congress had neither a committee nor a subcommittee on Indian Affairs" (R. S. Jones 1987:84). This was changed recently, however. In January 1993, a subcommittee on Native American Affairs, chaired by Rep. Bill Richardson (D. NM) was formed under the newly created

Committee on Natural Resources (*Congressional Quarterly Weekly* [9 Jan. 1993] 51(2):67).

Senate Select Committee: The Legislative Record—1977 to 1992

The 4 February 1977 Senate Resolution 4, which contained the committee system reorganization amendments, charged the temporary Select Committee as follows:

"It shall be the duty of the Select Committee to conduct a study of any and all matters pertaining to problems and opportunities of Indians, including but not limited to, Indian land management and trust responsibilities, Indian education, health, special services, and loan programs, and Indian claims against the United States" (U.S. Congress 1990:1).

The existence of the Committee as "Select" spanned eight congresses—95th Congress (1977–1979) to the 102nd Congress (1991–24 Feb. 1993 when it was redesignated.)

Although the focus in this paper is on the historical evolution of Congress's Indian committees and, in particular, the Senate Select Committee's legislative activity, and not the motives or goals of individual senators, it is appropriate to note in passing that the membership has been predominantly from western states. This is understandable when we consider that the majority of reservations⁵ and Indians in general⁶ live in states west of the Mississippi.⁷ Follow-up research is necessary, however, to determine the motives of western, and the handful of eastern, state senators who joined the committee. Using Vogler's approach we would try to ascertain whether the senators see this as a *power committee*, a *policy committee*, or as a *constituency committee* (Vogler 1983:160). Or whether because of the unique nature of tribes and their members, senators have other reasons prompting them to serve on this committee which do not fit the standard goals posited by the literature.

In terms of the states which have been represented, North Dakota, South Dakota, Montana, Arizona, Washington, Oregon, Alaska, Nevada, Hawaii, New Mexico, and Colorado are represented. The only non-western states with representation are Ohio (Metzenbaum in the 95th), Maine (Cohen in the 96th and 97th), Mississippi (Cochran in the 101st and

102nd), Minnesota (Wellstone in the 102nd), and Illinois (Simon in the 102nd). It also appears that partisanship has historically had little significance in the way senators vote on Indian bills (Tyler 1973:8). Votes on controversial bills tend to follow regional rather than party lines.

Finally, though not surprisingly, each of the chairs of the committee, both individual and joint (beginning in the 100th Congress the Select Committee has had a chair—majority party, and vice-chair—minority party) were also from western states, with the single exception of William S. Cohen, who hailed from Maine. Cohen, it is important to note, assumed the chairmanship of the committee during the height of eastern Indian land claims, in which a number of tribes, beginning with the two in his own state—the Penobscot and the Passamaquoddy—successfully argued that huge chunks of their aboriginal lands had been taken away from them illegally by eastern states without federal approval. The Maine cases were the leading and potentially most disruptive of these land claims. Confronted with a series of federal suits against individuals and companies with large land holdings, Maine reluctantly agreed to an out-of-court negotiated settlement, with the federal government picking up the bulk of the bill. The *Maine Indian Claims Settlement Act* of 10 October 1980 (94 St. 1785) saw the Penobscot and Passamaquoddy tribes receive a \$27 million federal trust fund and 300,000 acres of forest land purchased with federal dollars. By the time this conflict had been legislatively resolved, fourteen other tribes had filed suits against the states and federal governments (see, e.g. Hagan 1988). Cohen's tenure as chair is, therefore, much less puzzling when placed inside this larger political/economic context.

The Select Committee on Indian Affairs is the authorizing Committee for programs of the Bureau of Indian Affairs, the Indian Health Service, and the Administration for Native Americans in the Department of Health and Human Services, and the Office of Indian Education in the Department of Education. Furthermore, the Committee has oversight responsibility for operation of programs in all other federal agencies with programs affecting Indians, including the Indian Housing program of the Department of Housing and Urban Development.

These responsibilities dovetail with

those specified in Senate Resolution 4, which includes matters relating to tribal and individual lands, the federal government's trust responsibilities, Indian education, health, Indian claims, natural resources, etc. In effect, this committee (and the sub-committee in the House) is charged with an enormous task: the oversight of Congress's continuing historical, constitutional, and legislative responsibilities for over 500 distinctive tribal entities. This is a situation and a relationship of extremely broad scope, "literally spanning the breadth of federal, state, and local government responsibilities, but with the additional responsibility for the protection and management of Indian trust resources for which the U.S. has a trust responsibility" (U.S. Congress 1990:1).

It should come as no surprise therefore, to learn that the Senate Select Committee has had an exceptionally active agenda. Senator Inouye (D. HI) recently stated that this committee turns out more bills, and has more bills approved than any other Senate committee (Anonymous 1993:7). An analysis of the data drawn from the *Congressional Information Service Index* (CIS) from 1977 through 1992 bears this out in dramatic form. The CIS Index contains information on virtually all the publications generated by Congress, but does not include bills introduced. It includes committee hearings, committee prints, house and senate reports, documents, and special publications, senate executive reports, and senate treaty documents.

The Select Committee examined a plethora of issues which can be broadly grouped in forty-four categories⁸ ranging from land-related issues, health concerns, housing, education, economic development, claims to water, land, and trust funds, gaming, recognition, natural resource and environmental concerns, religious freedom, the committee itself, Alaska Natives, Indian child welfare, tribal-state relations, etc. Some of the hearings and reports combine more than one issue (i.e. tribal courts and civil rights).

Not surprisingly, the top tier of these broad categories encompasses the major themes distinguishing the tribal-federal relationship: the perpetuation of tribal sovereignty and the unique rights generated from this doctrine, treaty derived rights, and the trust relationship as defined by the federal government. The issues producing the most documentation are: land

(125), claims (115), health-related items (64), education (59), and environment/natural resources (50). The next grouping, "Committee" (46), represents documents pertaining to the Select Committee's own activities: This includes legislative summaries of the activities during the previous Congress, reports on the committee's budget, and hearings on the nomination and confirmation of various administrative personnel (i.e. Assistant Secretary of the Interior, National Gaming Commission members, and members of various special committees).

The next two categories, recognition/acknowledgement and restoration (RAR) (36) and water rights (35) are also self-evidently important. The RAR category issue is actually a fairly contemporary category. This subject matter, the establishment or reestablishment of political relations between tribes and the federal government, has generated a decent amount of legislative activity largely because of two developments: (1) efforts to restore tribes, bands, and rancherias which had been terminated by the federal government in the 1950s and 1960s (cp. the *Termination Resolution*, 67 St. B132) and (2) the BIA's establishment in 1978 of regulations and criteria to establish or deny "that an American Indian group exists as an Indian tribe" (*Federal Register* 43:39362-64).

The water rights category, by contrast, entails a complex issue that has been on the congressional agenda for well over a century. Beginning in 1867, the federal government enacted laws for the construction of canals for purposes of irrigation of Indian land as part of the larger plan to "civilize" Indians by forcing them into agricultural pursuits.⁹ The *Winter vs. United States* decision of 1908 (209 U.S. 564) held that where land in territorial status was reserved by treaty to an Indian tribe, there was an implied reservation of water to the tribe. This "reserved" water right was to be protected by the federal government and legally neither the states nor the federal government were supposed to act in such a way as to reduce the amount of water inside a reservation below the amount necessary for the irrigation of Indian lands.

The subsequent history of Indian water rights and the federal government's record in protecting this essential right, however, indicates that the tribes' well established legal ("paper") right to water has often not

translated into an appropriation or into protection of actual ("wet") water that they are legally entitled to. As Burton (1991:x) recently wrote: "It is nevertheless possible to characterize the last two centuries as a period during which state governments and some federal elected officials generally did what they could to divest indigenous people of their natural resource heritage, while (until quite recently) federal judges generally did what they could to preserve that heritage for the tribes' use and enjoyment."

Burton's parenthetical statement, "until quite recently," is important because as he shows later in his study, since 1970 judicial carnage has been wreaked by the Supreme Court, which is now an inhospitable arena for tribes seeking to have their water rights protected. For example, tribes have "lost six of the seven water-related cases to come before the High Court—mostly on jurisdictional grounds" (Burton 1991:39-40). These judicial losses have compelled a number of tribes to seek negotiated legislative solutions to their water rights with states. Hence, the surge of legislative activity published by CIS in 1992 (11 items). For example, legislative action on the *Ft. McDowell Indian Water Rights Settlement Act*, the *Northern Cheyenne Indian Reserved Water Rights Settlement Act*, and the *San Carlos Apache Tribe Water Rights Settlement Act*, were each considered in the 102nd Congress.

When we vault to the low end of the committee's activity scale, we see that a number of important topics generated little legislative attention. Categories with three or less hearings, reports, or prints include: Mental Health, Allotment, Aging, Civil Rights/Constitution, Reburial/Repatriation,¹⁰ the National Indian Policy Research Institute, Indian Self-Determination/Self-Governance, Impact Aid, Indian Veterans, Eastern Indians, Emergency Assistance, and California Indians.

Gauging the committee's workload by legislative session also reveals some interesting though still tentative findings. First, it is too early to draw any conclusions about the amount of committee activity generated and the relationship, if any, between the political party occupying the White House or controlling the Senate. For example, while Republicans controlled the executive branch for the last twelve years of the select committee's existence, they controlled only three of the eight congresses—the 97th through the 99th. Jimmy Carter (20 Jan. 1977

to 20 Jan. 1981) had no Indian policy per se, although a number of important laws were enacted during his embattled presidency: *American Indian Religious Freedom Resolution* (92 St. 469-470), *Tribally-Controlled Community College Assistance Act* (92 St. 1325-1327), *Indian Child Welfare Act* (92 St. 3069), the *Maine Indian Claims Settlement Act* (94 St. 1785), and several crucial Supreme Court cases were handed down: *Oliphant vs. Suquamish* (435 U.S. 206 [1978]), *United States vs. Wheeler* (435 U.S. 322 [1978]), *Santa Clara Pueblo vs. Martinez* (436 U.S. 56 [1978]), and *United States vs. Sioux Nation* (448 U.S. 374 [1980]). The fact that the committee produced only eighteen documents in 1979, by far the least amount of documentation, may be more a result of previous activity being resolved legislatively, administratively, and judicially; in effect, a clearing of the agenda. Legislative activity picked back up in 1980 as new issues were placed on the agenda or old ones resurfaced.

Second, the Reagan and Bush years represented a period of neo-federalism (states reasserting rights with administrative and judicial acquiescence), a severe down-sizing of the federal budget for social service programs aimed at assisting Indian tribes (and minority and poor people in general), and a federal Indian policy enunciated on 24 January 1983 (reaffirmed by Bush on 14 June 1991) devoted to reducing tribal reliance on federal financial support and increasing tribal dependence on the private sector and individual entrepreneurship. Despite their massive losses in federal revenue, tribal political status was emboldened, whether inadvertently or not, by Reagan and Bush's description of the "government-to-government" tribal-federal relationship and by Congress's and tribes' mutual call for a return to negotiated agreements.

Conclusion

This committee's work will remain complex and tedious. Complicating factors are legion. They include

(1) the sheer diversity of tribes in Indian Country (517 tribal polities, including 226 Alaska Native villages), a number which also happens to be growing (the number of tribes continues to increase as previously ignored or terminated tribes establish or reestablish political ties

with the United States government); (2) the genuine political and economic powerlessness of a majority of these tribal groups who must turn to Congress for necessary assistance;

(3) the generally contentious role of the western states (i.e. the Indian Gaming issue);

(4) the inherent conflicting goals within the BIA¹¹ and larger conflicts of interests with the Department of the Interior sometimes acting in ways that benefit its other constituencies (Bureau of Reclamation, Bureau of Land Management, Fish & Wildlife, National Park Service, etc.) to the clear detriment of tribes, notwithstanding the trust relationship the U.S. maintains towards tribal lands and resources (Burton 1991:130);

(5) the fact of the tribes' persistent extra-constitutional status, based on preexisting treaties and agreements and inherent sovereignty; and finally

(6) the generally anti-Indian stance of the Rehnquist Court on various substantive issues: criminal jurisdiction, religious freedom, state taxation, zoning of Indian lands, etc., which necessitates almost constant oversight by the committee of the Court's Indian case law.

How the newly titled Committee on Indian Affairs, now under Republican leadership, interacts with its sister House subcommittee, with President Clinton and his Indian affairs appointees, but more importantly, with the BIA, the general public, and the tribes, will largely determine what the future of the United States' Indian policy will be. The Committee, under the joint, bipartisan leadership of Senator's McCain and Inouye, has developed fairly amicable political relations with many tribes. It is questionable at this point whether this fairly constructive relationship will be sustained in light of GOP gains at both the federal and state level, although there is no way to accurately predict which direction federal Indian policy will go.

We can accurately say in hindsight, however, that this committee's "select" legislative record was one that generally favored tribal self-determination during a time when the Supreme Court and the executive branch actively sought to diminish both tribal autonomy and the federal-tribal trust relationship.

NOTES

1. See the *Legislative Reorganization Act* of 1946 (60 St. 812) which resulted in the abolishment of both the House and Senate Standing Committees on Indian Affairs. This will be discussed more later.
2. In fact, beginning in the 1880s, Congress has delegated much of its constitutional authority to oversee and administer Indian affairs to administrative officials. This has, in many instances, been even more disastrous for Indians because they have discovered that their sovereign as well as their political and property right are often subject to the whims of federal bureaucrats. As Deloria (1985:6) has observed: "Regardless of the posture of any national administration toward Indians and their problems, the lower-level bureaucracy largely determines what the actual policy of the government will be."
3. As of 1992 the Senate had 15 standing committees, 87 subcommittees, 6 joint committees, and 5 special or select (beside the Indian committee there was the Special Committee on Aging, Select Committee on Ethics, Select Committee on Intelligence, and the Select Committee on POW/MIA Affairs) committees. On the House side, there were 23 standing committees, 136 subcommittees, and 5 select (Aging; Children, Youth and Family, Hunger; Permanent Select Committee on Intelligence; and Narcotics Abuse and Control) committees.
4. See Commissioner of Indian Affairs Hiram Walker's comments in his Annual Report of 1872 where he stated that "this action of Congress [treaty termination] does, however, present questions of considerable interest and of much difficulty, viz: What is to become of the rights of Indians to the soil, over portions of territory which have not been covered by treaties at the time Congress put an end to the treaty system? What substitute is to be provided for that system with all its absurdities and abuses? How are Indians never yet treated with ... to establish their rights?" (U.S. Commissioner of Indian Affairs 1872:471). And see also the comments of Commissioner T. J. Morgan in 1891 when he stated that the 1871 rider "was not regarded as depriving the several tribes or nations of their condition as alien dependent powers ..." (U.S. Commissioner of Indian Affairs 1891:16).
5. This term includes as well rancherias, Pueblos, and dependent communities (tribal communities in Oklahoma, except the Osage Reservation). The BIA administers the federal government's affairs with tribes inhabiting 278 reservations.
6. Over one-half of all Indians do not reside on reservation or trust land, per se.

7. States with the greatest Indian (BIA service) population as of 1989: Oklahoma (231,952), Arizona (165,385), New Mexico (126,346), Alaska (91,106), South Dakota (58,201), Washington (40,893), Montana (34,001), and North Dakota (23,629) (U.S. Bureau of Indian Affairs 1989:1).
8. Special thanks to two former research assistants, Samuel Cook and Stan Wonn, for their invaluable assistance on this project. Sam did the initial and time-consuming categorization of the Senate Select Committee's hearings by subject matter; Stan fine-tuned the categories and tabulated the data. I also owe a mountain of debt to my department's Word Processing Specialist, Trish Morris, who encoded the data into the computer and created the tables (not included here).
9. See Cohen 1972:chapter 12, section 7 on "Reclamation and Irrigation" for a good discussion of early Indian irrigation projects.
10. The committee's work ultimately culminated in the passage of an important 1990 law, *The Native American Graves Protection and Repatriation Act* (104 St. 3048).
11. It is simultaneously charged with "managing all Indian Affairs," but is also charged with helping tribes become "self-determined," an obvious irreconcilability.

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