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INTRODUCTION

When President Lyndon Johnson's task force finished its report in 1968[1] the scholars, the politicians and the students of civil rights knew what the Indian had long known—our Indian citizens have been overwhelmed by their problems. Although not enlightened as to the nature of the problems the entire American people were made aware of the existence of Indian problems by the confrontation(s) at Wounded Knee. What has not been sufficiently emphasized is that tribal Indians are different from non-tribal Indians and other citizens of the United States. The relationships of the federal government, the tribal governments, individual owners of interests in lands of tribal origin and now held in trust by the federal government for the benefit of both tribes and individuals, heirs at law and devisees of such interests, and those who wish to lease or purchase such interests are responsible for many of the failures to solve portions of the "Indian Problem".

That the American tribal Indian is different continues to impede the application of the "cookie cutter" approach which seems to be the basic principle of American social thought that all are or should be identical in all respects without regard to race, color, creed, marital status, sex (or lack thereof) with the federal courts operating the Procrustean bed. Our first application of that principle was directed toward the Indian in the allotment program; it did not work. The American tribal Indian remains different in two respects. He thinks differently with regard to the social contract, and, more importantly, the

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1. INTERAGENCY TASK FORCE ON AMERICAN INDIANS, REPORT ON AMERICAN INDIAN PROGRAM FOR FY69 (October 23, 1967). This task force carried out the development of a new approach as recommended by the President's Task Force on American Indians in its Report of December 23, 1966.

legal rights and duties and the moral obligations of the federal government to the Indian tribes are different from those pertaining to the rest of the citizens of the United States.

The Indian tribes were here before the European invader arrived. Their territories are now part of the United States, geographically and politically, as the result of formal treaties and agreements which are a part of the law of the land. Congress also has provided special rights and protections for all Indians under the general powers of the Congress. The United States Government has duties and obligations not toward individual Indians, but toward the Indian tribes, based upon those treaties by which the fee title (as opposed to the sovereign power obtained by conquest and discovery) to the land passed from the Indian tribe to the United States government. Even though the Congress has the special power under the Constitution to abrogate, or amend these treaties and agreements with or without the consent of the tribes[2] there is a clear and undeniable moral obligation of the United States to keep its promises to the Indian tribes. Each treaty gave a portion of land to the tribe in perpetuity. Such land was intended to provide the land base which is essential to any civilization. Although each tribe started out with a separately administered land base during the period before the Bureau of Indian Affairs, the federal government currently administers the respective tribal areas under common procedures. Many of the problems confronting tribal Indians are tied to the Indian Land Base.

Before addressing the current status of the Indian Land Base, the conditions which must be corrected, and the possible corrections, it should be helpful to examine the trail covered by the Indians and the Europeans in their interactions from Plymouth Rock to their present locations. Or to put it more simply, how did we get into this fix? History has been and is being rewritten to paint characters and acts only in vivid colors and with slanted brushes. When we read allegations placing responsibility for injustice on the lack of humanitarianism of Thomas Jefferson the time has come to re-examine the record.[3] The road to our present Indian problems, like the road to hell, was paved with good intentions, and led to unforeseen pitfalls.

Next, it must be understood that we do not have an Indian Problem. Rather there are a great number of different problems confront-

2. Lone Wolf v. Hilchcoch, 187 U.S. 553 (1903).

3. J. WISE, THE RED MAN IN THE NEW WORLD DRAMA 188 (edited, revised and with an introduction by V. DeLoria, Jr., 1971).

ing Indians and the governments of the United States and the several states. To speak of the Indian People is no more exact than to speak of the European People. Both descriptions refer to groupings of separate and often dissimilar nations with diverse cultures, separate languages, diverse goals and no common trust. To lump the Cherokee, the Sioux, the Papago, the Navajo, the Mohawk and the Yakima into a common grouping is no more useful than it would be to lump the Spanish, the Germans, the French, the English, the Yugoslavs and the Italians into a single group for all purposes. On the other hand the members of the Indian group have common problems as do the members of the European group.

Another threshold problem is defining the subject matter of Indian Studies. Today we find that the majority of Indians retaining a tribal entity, other than the Choctaw, Chickasaw, Cherokee, Creek and Seminole (the Five Civilized Tribes) and Osage nations, live on reservations, federal or state enclaves, on which federal law, state law and tribal law operate without a uniform pattern. This discussion is limited to those tribes and tribal members whose land is held in trust by the federal government. Since the operation of an Indian reservation and the land thereon is conducted through the Indian tribe, and the social and economic interaction of the inhabitants are established by tribal custom, it is apparent that the point of departure for any examination of the problem must start with an understanding of the Indian tribe and its historical background. The first questions must be what is an Indian and what is an Indian tribe? The definition of an Indian can be a racial one—a matter of genes, a cultural one—a way of thinking, a legal one—a matter of rights, duties and obligations, or a political one—of what political entities he is a citizen.

The racial definition refers basically to identifiable, physical characteristics with one exception: racially one is what one feels that he is even though he may not think, understand, act, react, behave or look like the majority of the race. Perhaps it would be better to say that racial classification includes emotional as well as hereditary physical identification and to remember that neither language or culture are racial characteristics.

As to cultural classification, the standard must be the characteristics of the Indian way of life which are distinct from those of the major society: understanding, evaluation, action and reaction, way of thinking, values and all that go to make up a common culture. I would suggest that a preference for a communal society with governance by con-

sensus, intense family loyalty, belief in an unorganized religion based upon natural spirits rather than teachings of God-directed prophets, absence of dedication to acquisition of personal wealth measured by goods as opposed to personal recognition based upon individual accomplishment, and absence of the European work ethic are the factors which separate the North American Indian from the European and many Central American cultures.

The legal classification as an Indian seems to come solely from the duty which the government owes him. No significant duty arises toward an Indian as opposed to any other citizen unless it can be traced to a specific tribal relationship.

The political classification of an Indian depends wholly upon tribal membership in a specific tribe. A Mohawk visiting on a Navajo reservation would seem to be in a legal class with other visiting non-Navajos rather than in the class with tribal Navajos.

It must be remembered that all Indians as citizens[4] of the United States have the same civil rights as all other citizens, and, therefore, their non-tribal problems must be addressed with those of other citizens with the same problem, such as inadequate education, inadequate diet, racial discrimination, poverty, environmental deprivation, etc.—individual problems, not group problems. Tribal Indians on the other hand have problems, rights and duties which arise solely from membership in specific tribes; the solutions to those problems must be addressed from the tribal, not racial, point of view. It is the tribal Indian whose culture and economic well-being are dependent upon the land base of his tribe. With the exception of the Northeastern tribes practically all tribal land is held by the United States government in trust for the Indian tribe or for specific Indians.

Accordingly the Federal Indian Land Base referred to herein is that land held in trust by the United States government for the use and benefit of the various Indian tribes and their members. This Federal Indian Land Base is all that remains of the land mass of North American over which tribes of Indians once exercised the sole control and which forms the continental United States today. The Indians being considered are only those who have maintained a tribal identity, having neither voluntarily terminated any tribal membership held nor had their membership terminated by the tribe in the exercise of due process of law, and those individual Indians who hold the beneficial interest in trust land.

4. 8 U.S.C. § 1401 (1970).

HISTORICAL BACKGROUND

About 400 years ago three of the principal European cultures, Iberian, Continental, and Anglo-Saxon, arrived in the Western Hemisphere to confront and overwhelm the indigenous cultures. The Anglo-Saxons and the Spaniards came to stay; the French seemed to be on a foraging expedition. The Anglo-Saxons, as opposed to the Spaniards, came with their menservants, their maidservants, their animals and a religion with little tolerance for human frailties. While the Latins came with sword and cross to assimilate and/or subjugate the existing inhabitants for personal or national benefit and the greater glory of the Christian God, the Anglo-Saxons came to create an improved version of English civilization for themselves alone.

The theory apparently adopted by the Anglo-Saxons in their relations with the native inhabitants was one of peaceful co-existence (as it was viewed by the more powerful and aggressive of the contiguous cultures). The result was foreordained. The technical superiority of the European civilization with horses, ferrous metal tools and weapons, and a goal-directed societal organization gave the newcomers power far beyond mere numbers.

Without the technical advantages of ferrous metals and horses (and with major barriers of mountains, rivers and deserts) the North American Indians had remained a highly mobile, unorganized race of hunters, who did a little subsistence fishing and growing of crops. Without the spur of mercantilism and the need of additional land no centralization of power, or even communication, existed across the continent. Racial groupings each with a separate language and domination of a single area made up what are referred to as nations, principally because each was sovereign. Within a nation were sub-groupings of clans, bands, tribes, villages, etc., depending upon the terrain, the climate and the resources of the land. The degree of sophistication of the various nations differed materially; those with more successful agricultural activities leading those residing in the less hospitable portions of the land. The geographical limitations of the areas were not marked by definite terrain fixtures but by less tangible and fluid boundaries. Since there was no shortage of land the nations tended to be separated by "no-man's lands" which shifted with the pressure of the adjacent nation.[5]

Leadership and governance of the tribal subgroupings were

5. Reid, *The Cherokee Thought: An Apparatus Of Primitive Law*, 46 N.Y.U.L. REV. 281, 286 (1971).

accomplished through consensus rather than rule by individuals and political parties—truly hereditary power was rare. Within a nation activities were coordinated only when necessary and then through consensus in councils, called for a specific purpose. Completely different groups of leaders were used for war and for peace.[6] The culture of the "savage Indian" was basic democracy.

The earliest European immigrants did not have an Indian problem. Their first need was food and shelter, not protection from Indians. Had the Indians been more aware of the nature of the threat which these relatively helpless invaders presented they might have ejected the white-skinned strangers by force rather than receiving them in a relatively peaceful manner, giving them land to occupy and food to eat. The North American Indian did not recognize the threat; he had a European problem which would grow and overcome him.

Since the Englishman's goal was expansion of his own civilization rather than subordination of the existing civilization or seizing the existing wealth to be shipped back to a European monarch the general English policy was to ignore the Indian except where it was expedient to deal with him in acquiring the use of his lands or obtaining food and hides through negotiation and barter. The Indians, accustomed to moving with game and fertility of the soil, reacted to the spread of the town-dwelling English who put down roots to stay by moving back into lands unclaimed by other Indians, limiting their own movements in their own lands, and encroaching on neighboring Indian nations. Only when the continued pressure forced the Indian to stand and resist did the Indian tribes realize that they had a white man problem. It was then too late to hurl the invader back into the sea from which he had come.

The Indian was a fierce and accomplished warrior; warfare was a way of life, not a means to an end. He was savage and ruthless in that compassion toward an enemy was unknown; such compassion is relatively unknown even today outside the Western European and North American continents. The Indian's skill in combat in the forest and his willingness to fight made his assistance invaluable to both the French and the English who were warring against each other for control of the new continent.[7] The loss of manpower and of a common Indian position which resulted from the Indians becoming involved as partisans

6. R. Strickland, Cherokee Law Ways From Clan To Court 2-3, 7-8 (S.J.D. Dissertation in University of Virginia Law School Library 1970).

7. W. JACOBS, DISPOSSESSING THE AMERICAN INDIAN 54 (1972).

on both sides of the French and English conflict hastened the downfall of the Northeastern tribes before the onslaught of Western civilization.

Deliberate war of conquest for land (except in times of famine or for trade advantage) was relatively unknown to the Indian. While the land base was essential to the Indians' lives there was more than enough to go around and there was no real competition for land. An Indian warred for more important reasons: to resolve confrontation in the border areas (defense of hunting rights); to avenge and injury to a member of his clan (punishment was recognized as a deterrrent but it was imposed within the unwritten law of the Indian civilization by the relatives of the victim);[8] to provide evidence of maturity and manliness; and as a way of life.[9] Wars of annihilation and defenses to the last man were generally unappealing to the Indian; massacres were not acts of bravery and were not personally gratifying while the Indian early learned the advantages of fleeing to fight another day. This is easier to learn when there is no fortress nor accumulated wealth to be defended. The Indians did not appreciate the true goal of the English: to secure for themselves and their successors the sole and exclusive use of specific areas of land. The Europeans had learned in medieval times that land was almost the only source of wealth[10] and that when it was all occupied the only way to get it was to buy it, with money or with blood (preferably someone else's). The Indian view of real property was that title (if we may call it that) was in the nation. Clans, villages and individuals had the use and occupancy for as long as they wished.[11]

THE CHEROKEE EXPERIENCE AND REMOVAL

By the time the situation had become critical Indian resistance to the western movement of the European had changed from a major threat to a mere obstacle. Although some Northeastern Indians adopted European ways, the tide of Europeans generally pushed the Indians out. The Cherokees were the first tribe large enough and socially advanced enough to attempt complete conversion to European ways. In the period 1800 to 1825 the Cherokee Nation adopted a sufficient similarity to the civilization of the new world European that it

8. J. ADAIR'S HISTORY OF THE AMERICAN INDIAN 423 (S. Williams ed. 1775).
9. JACOBS, *supra* note 7, at 95.
10. A. Goodheart, *Conflicting Principles in English and American Law*, in THE ORGAIN LECTURES 23 (1973).
11. Strickland, *supra* note 6, at 110, 115.

was able to meet the citizens of Georgia as political equals.[12] The most significant occurrence in this adaptation arose from the difference in concepts of the title to real property of the Indians and the European. The English and general European view provided that the ultimate title resided in the sovereign while the practical title rested in the owner in fee simple with all the uses and hereditaments so dear to the student of real property. The Cherokee view was different.

A large proportion of the immigrants to Georgia were Scotchmen and Irishmen. Unlike the Puritans of New England, the merchants of the middle states, or the landed gentry of Virginia, they were mobile, aggressive pioneers. They found a hospitable climate, good soil and the more highly developed Indian civilization of the Cherokee Nation. The Cherokee Nation was the principal Indian grouping living below the severe winter snowline and in agricultural country. As a result agriculture had a greater place in the Cherokee culture than it did in many Northern and Western tribes in which hunting and a nomadic existence were more practical. Town sites and allocations of land for cultivation by Indian families assumed a greater importance. The immigrants entered into business relations with the Cherokee and married Indian women. This did not slow arrival of the day when the European idea of individual ownership of land was to clash with the Indian concept of communal ownership and temporary, non-transferable, non-descendable use by members of the tribe.

The Cherokees had dropped back and had ceded land to the Europeans. They had adopted many European customs, including the use of African slaves as individual property (this was to rise and haunt them when the War Between the States gave them an opportunity to enter into treaties with what was going to be the losing side). Although they were willing to have the white men living in their midst, even to have them intermarry and become tribal members, they had no intention of giving up the Cherokee title to land within the Cherokee Nation or of giving up their exclusive jurisdiction within the lands of the Cherokee Nation.

The Cherokees did not consider that there was a difference between Georgians under the government of Georgia and Cherokees under the government of the Cherokee Nation—both subordinate to the government of the United States. Had not the Cherokee Nation taken the same steps as had the Georgians when the rule of the English

12. *Id.* at 106-07, 115.

king had been eliminated and the states united into the new nation? Long before the Revolution the Cherokees had been governing themselves by a democratic system.[13] After a developmental period which saw the creation of a judiciary of the Anglo-American pattern[14] the Cherokees in 1827 adopted a constitution copied generally from the Constitution of the United States.[15] There seems to be little question that the logical development would have been the creation of an Indian State within the Union. But the discovery of gold changed the picture almost immediately after the adoption of the new constitution. For the Georgians, no different from other men throughout the world, wanted gold and took the position that unoccupied Cherokee land was not sufficiently reduced to possession as to preclude their exploration and perfecting of title in this source of wealth. Chief Justice Marshall in the celebrated cases of *Cherokee Nation v. Georgia*[16] and *Worcester v. Georgia*[17] laid down principles of law covering the relationship of the government of the United States, the several states, and the Indian nations, which preserved the rights of the Indian nations to govern Indian land. President Jackson, however, did not choose to follow the Supreme Court and did not enforce its judgments or incorporate its principles into the then current dealings with the Indians. The pattern for action when the expanding European civilization clashed with the Indian occupancy and sovereignty had been established. The tale of the removal of the Cherokees and others from the Eastern Seaboard to the Indian Territory is too well known to repeat here.[18] The "trail of tears" was not one of America's finer hours.

It is appropriate at this point to mention the frequently inaccurate use of the word "reservation." In the treaties by means of which tracts of Indian land were granted to the federal government and various states the tribe would reserve an area from the ceded territory to provide the land base on which the tribe or a portion thereof would continue to reside with all jurisdiction in these reserved areas retained by the tribe. Since the Indian had no title to the land transferred to the state, he became a trespasser when he re-entered the ceded territory. He would be returned to the reservation. The word reservation should carry the connotation of land reserved to the ownership of the

13. ADAIR, *supra* note 8, at 460-61.
14. Strickland, *supra* note 6, at 38.
15. *Id.* at 38-40.
16. 30 U.S. (5 Pet.) 1 (1831).
17. 31 U.S. (6 Pet.) 515 (1832).
18. G. FOREMAN, INDIAN REMOVAL (1932).

Indian tribe and under the jurisdiction of the tribe, as opposed to an area to which the Indians were to be restricted.

Historians, and to a greater degree anthropologists, have been slow to acknowledge that Jackson took the only course of action open to him at that stage of our national development. The ultimate demand of the Cherokee Nation would have been recognition of the Cherokees as a separate state within the United States. It is futile to dwell upon the viability of the Cherokee Nation as an Indian State. Had Jackson attempted to enforce Marshall's decision the military confrontation between the national government and the state governments would have come some thirty odd years before it finally did in 1861. As Jackson apparently realized, of the choices of assimilation, extermination, separate statehood (isolation), and removal, only removal offered a real chance to avoid bloodshed. While the Indian might have become prepared to adopt peaceful coexistence as a solution, the Englishman was not yet ready. Parallels on other continents and in other times demonstrate that the problem was not unique. Neither the Indian nor the Englishman appear to have considered mutual assimilation as a solution; thus the real choice was extermination or removal.

The removal pattern was applied to the Northern tribes on a smaller scale, and frequently by shorter and successive moves of specific tribes, until practically all the Indian tribes had been moved west of Missouri and Arkansas or into the area of Wisconsin, Minnesota and the Dakotas. For a period of years it appeared that the continent had been divided among the Indians, the Spaniards and the Anglo-Saxons on a more or less permanent basis. This was not to be. The flood of immigrants and ideas from Europe and the British Isles was soon to result in a resumption of westward expansion—the winning of the West with rifle and plow.

ALLOTMENT

While Indian relocation and transfers of land continued, the next incident of major importance was the War Between the States. Many Indian nations which had adopted slavery or which had ties with the states which seceded entered into relations with the Confederate States of America. This provided the opportunity after the war for "re-negotiation" of existing treaties by the United States.[19]

After the war a major push westward by Americans who were

19. Act of July 5, 1862, ch. 135, 12 Stat. 512.

searching for a more abundant life brought them into conflict with the continued possession of land by Indians on reservations or in the territories. The use of Indian land for just hunting and fighting seemed wholly incomprehensible to the European conditioned to cultivation of land and hard work as the only way to wealth and happiness. A civilization in which one pot was adequate and a new model pot uninspiring, in which it was considered not only acceptable but preferrable to spend time hunting rather than acquiring reserves of grain to be traded for goods or other indicia of wealth, and in which the acquisition of unproductive knowledge (culture some call it) was considered a waste of time seemed to the European to be not only ridiculous but a bit immoral as well. What was the ultimate civilization, ultimate governmental organization, and ultimate religion to be given to the Indians? Christianity under a democratic government in which a population dedicated to acquiring more of the better things in life for themselves and their descendants worked as hard as they could in fields they owned and slept in houses which belonged to them was the goal toward which the world should be striving.

With the cultural mode thus settled, and the missionaries spreading the gospel, all that was needed was a fee simple push toward a farmer's paradise. During Reconstruction the carpet-baggers had found that the promise of eighty acres and a mule was a sure ticket to support (this same bounty was trotted out again to the tenant farmers of Missouri in 1934 but with somewhat less success). The Allotment Act of 1887[20] was based upon the same principle. If the Indian could be given that which was offered to the homesteaders and veterans, land enough for a good small farm, then he would throw up a house and start being an American farmer, ready for the award of citizenship in the United States and to forego his position as a member of an Indian tribe.[21] The solution to the Indian question rested in redefining the Indian's relation to his land. From the tribal land base a conversion would be made to the individual land base—from tribalism to Europeanization.

There seems to be a great temptation to us to consider this only as a scheme developed by dishonest politicians and land grabbers in a monolithic conspiracy. I would suggest that this action had the same motivation as the 1954 policy of the Eisenhower administration—termi-

20. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388. This act did not apply to the Five Civilized Tribes.

21. P. PRUSHA, AMERICANIZING THE AMERICAN INDIAN (1973).

nation of the Indian tribe and federal responsibilities to it—and that it was advanced as a boon not only to the homesteaders going west but also to the Indian who would thereby enter the melting pot that had offered and given so much to impoverished immigrants from Europe.

Finding the land would be no problem; there was more than sufficient in the lands reserved to the Indians. Then if there was land left over the United States would purchase this land from the Indian tribe and use it for non-Indian homesteaders. However, this appealing theory was both incompatible with the Indian character and poorly implemented.

It appears that allotment, like removal, was in fact the more pragmatic solution to still another confrontation with the European.[22] So long as the Indian tribes continued to retain their hunting habits and loose tribal organization it was difficult to prevent encroachment on tribal land by squatters. After the squatter had, in effect, homesteaded unused tribal land it was both difficult and inexpedient to eject him in favor of the tribe. When an individual Indian had title to specific acreage and was in possession, both protection of his possession and ejectment of the trespasser became less difficult. Allotment thus had additional appeal to those who would protect the Indian. Realizing that the relatively unsophisticated Indian would be especially susceptible to unscrupulous land buyers, the Davies Commission in developing the allotment statutes provided for an initial period during which the allotee could not alienate his interest in the allotted land.

The scheme for assimilation and Europeanization through conversion from tribal hunter to individual farmer had a major flaw. It was based upon things as they ought to be rather than things as they were. The Indians took the land—there is serious doubt as to whether they really understood the procedure and their rights to refuse—but not with the intent to farm. Many farmers hunt as an avocation but few hunters farm by preference.

The newly landed Indian found that buyers were available for his land, and many Indians sold their land just as soon as it was free from restraints on its alienation. Since much of the Indian land was not suitable for farming and not big enough for ranching, sale seemed to be the better course as viewed by the allottee. Some Indians sold the same piece of land several times. On the other side of the coin more

22. L. PRIEST, UNCLE SAM'S STEPCHILDREN 219 (1969) [referring to Lake Mohonk Proceedings 34 (1887)].

sophisticated Indians and forward looking whites seized opportunities to acquire valuable land for a small investment. Since the Indian conveyor usually was unable to keep or to invest profitably the proceeds from the sale he soon became a burden on the tribe or the local government.

Farming requires considerable practical training; it is not an instinct found in a brain pattern at birth. Although a manual art it requires more than hands: seeds and tools must be provided, the products must be sold, the language of the market and the techniques of pricing and delivery are needed. Of course the desire to farm is essential. While the federal government set up schools to teach English to the Indian youth and encouraged missionaries to lead the way to salvation, there was no significant attempt made to train the adult Indian in farming or to equip him with the tools and skills necessary to successful farming. Even if a transition from a tribal civilization to ordinary United States citizenship had been effected mere land alone was not enough to accomplish the change from tribal Indian to independent farmer. Within 70 years some 90,000,000 acres of Indian land, through allotment and sale or as surplus land, passed from the Indian Land Base to non-Indian owners in fee simple, even though subsequent acts of Congress and executive orders restricted the right of the Indian to alienate his land.

While the allotment acts were changing the pattern of Indian land holding outside what is now Oklahoma, within Indian Territory the Five Civilized Tribes and the Osage were successfully continuing their communal system but with increasing pressure from trappers, drummers, criminals, and others who, in contravention of both United States and Indian law, were in the Territory. It became apparent to the government of the United States that it would not long be possible to maintain the sovereignty of the Indian Territory.[23] It is difficult to hang or imprison many of your own citizens for offenses against other peoples. The decision was made to grant statehood to Oklahoma.[24] Again the question of Indian reservation of land arose, and the Indian land base was further reduced. After the establishment of the reservation could allotment be far behind? With the making of additional treaties and agreements with the Five Civilized Tribes and the Osage the pattern of allotment was complete.[25] The Indian was apparently on his way

23. *Id.* at 75.
24. Act of June 16, 1906, ch. 3335, 34 Stat. 267.
25. Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 645.

to becoming an indistinguishable member of the great mass of Americans, sharing common goals, common values and a common system of government.

To borrow the words President Hoover used in reference to the eighteenth amendment, allotment was a "noble experiment." Like prohibition it did not work, and the result was undesirable and harmful to both the nation as a whole and the individual Indians it was intended to help. Specific allotments passed from Indian hands through the lifting of restrictions on alienation or by passing out of the restraints on alienation by descent or distribution to Indians deemed competent or to those who were not Indians.

DESCENT AND DISTRIBUTION OF LAND

In 1906 the President was authorized to extend the periods of trust on individually allotted land.[26] The problem of descent and distribution of the interests of deceased Indians required further action. The initial regulations provided for passage of interests to heirs.[27] The determination of the heirs, a not uncomplicated task, was made a function of the Secretary of the Interior.[28] In 1910 provisions were made for passage of the allottee's interests by will.[29] As it currently stands the Secretary of the Interior, through the Bureau of Indian Affairs, of and through the Office of the Solicitor supervises the preparation of and approves Indian wills devising interests in trust properties.[30] Upon the demise of the Indian the will is admitted or the heirs determined in a hearing before an Administrative Law Judge of the Office of Hearings and Appeals of the Department of the Interior. Provision is made for review and appellate action before the Board of Indian Appeals.[31]

REBIRTH OF TRIBAL STATUS

The 1934 Indian Reorganization Act[32] finally recognized the inability of the average tribal Indian to attain a competitive position in modern agriculture and commerce and the desire of the Indian to retain the tribal way of life. The pendulum had swung back. The need and

26. 25 U.S.C. § 391 (1970).
27. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.
28. 25 U.S.C. § 372 (1970).
29. 25 U.S.C. § 373 (1970).
30. *Id.*
31. 43 C.F.R. § 4.200, *et seq.* (1973). Except as to the Five Civilized Tribes which have been placed under the jurisdiction of state courts. 25 U.S.C. § 375 (1970).
32. Act of June 18, 1934, ch. 576, 48 Stat. 984.

the right of the Indian who so desired to retain his tribal way of life and his status in that communal organization was recognized and made a part of federal governmental policy. The pendulum continued to swing to and fro.

A new impetus toward termination was given by the Eighty-Second Congress[33] and developed by Dillon Myers, the Commissioner of the Bureau of Indian Affairs. In 1954 the Eisenhower Administration terminated the tribal status of several tribes, ending the claims of tribe members to the protection, management and economic support of the federal government and to the right of self-government within the territory of the tribe,[34] thus eliminating the tax burden of such support.

President Johnson's task force took recognition of the facts of life. They stopped the termination trend and stated a new Indian policy.[35] During the first Nixon Administration the maintenance of tribal identity was stated to be a cardinal principle of the federal government.[36] The Menominee Reformation Act was a first step in carrying out this new policy.[37]

While the experiences of the last eighty years have made clear that allotment and alienation of Indian land and termination were unrealistic attempts at forced implementation of social scientists' theories, even greater importance must be given to the fact that during the period the pattern of American life changed significantly. The small family farm disappeared when farm machinery, central processing and improved transportation facilites made the industrial farm the only economically feasible agricultural method. Eighty acres and a gasoline powered tractor does not bring the self-satisfying life of an independent farmer but rather a dawn-to-dusk scratching for subsistence. The American small farmer, like the allottee, has found his land base inadequate in size and has joined the wage-paid labor force. For the Indian whose allotted land does not contain oil, coal or saleable irrigation water, particularly those in the more arid portions of the West, the small farm is even more impracticable than for the non-Indian whose holdings usually are in more suitable agricultural areas.

What is the tribal Indian to do? The same thing the non-tribal

33. H.R.J. Res. 8, 82d Cong., 1st Sess. (1951).
34. H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953).
35. PUBLIC PAPERS OF THE PRESIDENTS, LYNDON B. JOHNSON, 1968-69 (1970).
36. *The President's Message to the Congress, July 8, 1970*, in WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 6, No. 28 at 883-932 (July 13, 1970).
37. 25 U.S.C. §§ 903-903f (Supp. 1974).

citizen does if he elects to live on profits from the soil. He forms a group with enough land and enough other resources to exploit the land. The non-tribal citizen uses the commercial forms of partnerships, unincorporated associations, and corporations; owning stock, hiring management, and utilizing wage labor. The tribal Indian can use the tribe for management and profit sharing and compensating tribal members for the labor they provide. The communal government procedures of the tribes, developed before the European upset the apple cart, seem to be admirably suited for this purpose. The Eastern Band of Cherokee Indians in North Carolina in a small area with limited resources and the Navajo Indians in a very large area with many resources just beginning to be exploited seem to have employed the tribal organization as an efficient modern economic and social unit, a self-governing political unit in the case of the Navajos. Some other tribes have not done as well, but the first two mentioned would seem to establish the fact that the Indian tribe can function in the latter half of the twentieth century.

Whether all land is held by the tribe with beneficial occupancy being assigned to members (inheritable as in the case of the Eastern Cherokees or otherwise) or with some land held by the tribe and other land held by members (all held in trust by the United States) is a tribal matter to be decided by the individual tribe. Steps must be taken to insure due process and equal protection in any event. Certainly each tribe must make its own rules as to extension of membership to adopted children not of Indian blood and the blood quantum required of children of marriages of members and non-Indians. Unless the decision is arbitrary, capricious or corrupt or manifestly unjust the tribe should be free to make its own rules as to tribal membership.

War, pestilence, assimilation, intermarriage, the allotment program, and economic and political pressures and ambitions have caused many of the original tribes to disappear as political and economic entities. Even though the descendents of the tribal members may retain an identification as Indians for governmental support and in social relationships with other Indians it is unrealistic to consider these former tribes in any plan to strengthen the tribal concept for the benefit of either the Indians or the United States.

CURRENT LAND BASE PROBLEMS

Before any serious attempt can be made to put the tribe into the picture as a semi-autonomous economic and social unit there are a

number of unresolved problems which must be addressed. The first step in the establishment of a land base for each independent unit must be to segregate the tribal Indian land base problem from the muddy waters of the anti-poverty programs in which artificial groupings based upon race, language and sex are stirred together in one large pot by cooks whose experience seems to have been limited to apprentice work at best. Existing individual rights must be protected and due process must be observed. Each tribe must be addressed as a social entity, a political entity and an economic entity in light of the actual land on which it will survive (or fail), the mores and traditions of that tribe which survive and the requirement for federal funding of the costs of civilization beyond those which the land base can meet. Such federal funding is no more than a further application of the principles of revenue sharing that are already being applied in the areas of school lunches, highway construction, support to education of all types, airports and airways, medical facilities and services, aid to federally impacted areas and on and on, all without regard to the financial contribution of the particular locality receiving the aid.

There are specific legal problems with reservation lands. Some land has long since left Indian ownership and is held, free from restrictions, by non-Indians. Some tracts of land still held under trust for the benefit of individual Indians are providing much more than subsistence and homes. Many tracts of land are held in common by various classes of heirs and devisees so that the ownership of the particular tract is held in percentages whose fractional values are becoming unmanageable.[38] Due to a number of factors—the lack of legal knowledge among tribal Indians during the first fifty years of holding of allotted land, the lack of a tradition of descent and distribution of interests in real property, the small value and inalienability of the interests in the land—much of the allotted land passed by intestacy rather than by will. Then the requirements for agreement among the heirs prior to partition and the relatively high Indian birthrate resulted in an awe inspiring multiplication of the interests held in the smaller parcels of allotted land. Many of the holders of these interests are difficult to locate or to determine at all. When they are found it is practically impossible to get agreement among them on any course of action.[39]

38. For example, informal inquiry discloses that Allotment #153 of the Crow Creek Reservation had at last count 444 owners for 320 acres. The 1966 heirs' fraction was 15,925/1,224,440,064.

39. *Hearings on S. 1392 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs*, 87th Cong., 1st Sess. (1961).

The size of some holdings and the problems of management make economic use of the land infeasible. Since a large portion of this fractionated land is managed by the Bureau of Indian Affairs through leasing to farming, grazing, and other interests (the only practical management solution under the present situation) the lessees may be expected to be less than enthusiastic about legislation to eliminate the fractionation in such a manner that the land would be withdrawn from leasing and put to use by the tribe or individual Indians. This opposition in the Western and Southwestern states is not a matter to be ignored.

In those instances in which it would be possible to eliminate fractionation by partition through sale to the tribe, determination of a reasonable price presents difficulties. Tracts, particularly small ones, scattered in a patchwork quilt formation throughout the reservation have little true value other than as part of a larger tract. Establishing value for purchase is complicated by valuation procedure which now uses the nearby non-reservation land of similar characteristics as a guide. The current rush to develop and the compulsion of the general public to become landowners (see the many advertisements for "ranchettes") has given a tremendously inflated value to land in the West whose economic potential for other than development sale is quite limited. Thus the apparent solution of first offer to the tribe is often unrealistic.

Finally, if sales are to be made only to the tribe, where will the money come from? An Indian loan fund has been considered as one solution.[40] We must realize that we have tribes located on the land on which they have always lived (land on which both the Indian and the non-Indians wish them to remain) whose economic potential is not such that future amortization and meeting loan charges of any type can be seriously considered. The money to buy up the fractionated, or alienated, portions can only be a gratuity from the federal government. Similar expenditures are being made (in far greater amounts than could ever be required for any number of Indian operations) to provide the basics to maintain a civilized existence for many of our other problem groups toward whom far fewer historical, moral and legal obligations (if any) exist and under circumstances where there is far less probability of success. A solution which does not require expenditure of tax dollars has been suggested; it is merely that when the values of fractionated interests fall below a certain figure the interest shall

40. S. 522, 91st Cong., 1st Sess. (1969).

escheat to the tribe;[41] however, due process requires payment for any vested right to be taken away.

Another and more serious threat to the Indian tribal land base is the passage by will or descent of the interests in allotted land to non-Indians, particularly relatives by marriage. Certain tribes, namely the Yakima,[42] Warm Springs,[43] and Nez Perce tribes,[44] have solved this problem with the enactment of Congressional statutes which provide that if the heir or devisee is not a tribal member the tribe shall be given the opportunity to buy the land interest from the intended recipient. This solution seems to be both equitable and desirable but it, too, leaves some unresolved problems. There will be problems when the tribe does not have the funds to make the purchase or when the tribal priorities for funds require that funds be expended for other purposes first. Failure to make the purchase leaves the same problem: an increasing number of members of the tribe and a shrinking tribal land base. At a minimum it would seem that restoration of an equivalent of the original reservation, wholly within the ownership of the tribe or members of the tribe, should be the initial goal. Where the surviving spouse wishes to complete the span of life on the same property provision of a life estate would meet the problem.

A decision to stop or reverse the flow of land out of the tribal land base will inevitably require federal funds, some of which will not be reimbursed. Any solution which does not reverse the flow and, insofar as possible, restore the original reservation or a reasonable equivalent will not meet the moral and legal obligations of the United States to the tribes from whom the continental land was taken. The advocates of the larger, more politically powerful, and more easily maneuverable groups, such as the poor blacks, the poor Mexican-Americans, migrant workers, second generation welfare recipients, and unionized school teachers may ask "Why this attention for these little groups outside the mainstream of American life?" There are two overriding reasons. First the nation owes a moral duty to the tribes, a duty which arises from the treaties through which United States citizens gained the beneficial use title of the land. Second, preservation of the tribe as an economic and cultural entity has proved to be a satisfactory

41. Memorandum to Chairman, Board of Indian Appeals, from Hearing Examiner, Phoenix, Ariz., "Fractional Interest Problems", May 17, 1971.
42. 25 U.S.C. § 607 (Supp. 1974).
43. 86 Stat. 530 (U.S. CODE CONG. & AD. NEWS 616 (1972)).
44. 86 Stat. 744 (U.S. CODE CONG. & AD. NEWS 860 (1972)).

way of life for modern Indians while involuntary termination or benign indifference to tribal obligations has been uniformly catastrophic.

Notwithstanding the facts that it is within the power of the Congress to revoke or modify any treaty made with an Indian tribe, that the Indian Claims Act has provided a system for redress of wrongs done to the Indians in violation of treaties, and that the world recognizes that international treaties are kept only so long as their terms carry out the current goals of the contracting parties, honesty demands that we recognize that the treaties with the Indian nations were in fact contracts of sale in which the promises of future action by the United States were the consideration for the transfer of title to land by the Indian tribes. Two facts are paramount: these treaties were not the result of arms length bargaining with a freedom of choice for the tribe, and the United States has only in isolated cases kept the promise to give the tribe the land and the protection in return for which it gained the resources which made it the richest nation on earth (note that the promise was not to guarantee the continued prosperity or existence of the tribe). This legal renunciation of a treaty would have been less reprehensible had not the unkept promises been made by a nation dedicated to freedom and sanctity of contracts and with a history of aid to those in need throughout the world. The United States has a moral, not a legal, duty to restore the land promised and to place the tribe in a position where it has the opportunity to succeed. This duty is to the tribe, not its members or descendants of its members.

The pragmatic basis for restoration of the tribal land base is that experience has shown that a functioning tribe has fewer of the problems of crime, dietary deficiencies, political impotency, economic servitude, educational inadequacy and emotional immaturity than do the non-tribal Indians who have not been successfully intergrated into the general mass of America. North American Indian tribes may be the only racial groups in the United States who have a continuous, relatively unchanged culture. Furthermore, the Indian tribal culture is seemingly incompatible with the individualistic European culture. For these reasons the author believes the Indian has no obligation to adapt. Three hundred years of intensive effort by missionaries, educators and bureaucrats using moral, economic, political and physical force (sometimes in conflict with the principles of freedom of choice and self-determination) as well as persuasion have not caused a significant number of Indians to abandon their tribal cultures. Although restoration of the tribal land base will not alone solve the common problems of

population explosion, economic competition, bureaucratic paternalism (at all levels of all governments toward all citizens) and so forth, the demonstrated effectiveness of tribal operations with an adequate land base recommends serious consideration be given to restoring the tribal land base and giving the respective tribes an opportunity to solve today's problems with the resources which the United States agreed to provide the individual tribes in return for the land which makes up forty-eight of the states.

A PROPOSAL

From the foregoing it appears that the national goal should be the return of a tribal land base to those tribes which have maintained a viable tribal identity. The beneficial title may be held directly by the tribe in its own name or it may be held by tribal members. To be effective the fractionalized interests which are too small for economic use should be returned to the tribe. The testators' interests will be valued following procedures to be designated and when found to be less than economically feasible for separate management will be transferred to tribal beneficial ownership and the designated recipient of the economically infeasible interest will receive the cash value of that interest. Values between $1,500 and $5,000 have been suggested. The exact amount to be used is a politico-economic decision to be made by the Congress. Whether this amount is to be considered a gift to the tribe, revenue sharing, or a guaranteed loan by the federal government is a semantic distinction not meriting the Congressional committee effort it has received in the past discussions of fractionalization and the Indian heirship problems. Far greater sums have been spent without promise of repayment to benefit landowners and others with far less justification in either moral obligation or the common good. The reader may select his own examples according to his own social predilections.

But what of the non-Indian heir? The duty of the federal government was to the tribe, not to the individual Indians, then or now. At the same time the obligations of the Indian holder of the beneficial interest toward the natural objects of his bounty—usually those who are his heirs at law—must be recognized. In a reversal of the principles behind the original allotments it is recommended that the passage of the individually held beneficial interest be limited to the heirs at law or other tribal members and that in the case of those heirs at law ineligible for tribal membership the interest which may pass by will or

by intestacy be limited to a life estate. The decision as to who shall be allowed to share in the tribe's land base and its fruits is properly one for the tribe. Tribal membership (except for the unfortunate determination by the federal government that freedmen of certain tribes would be allowed to participate in allotment of tribal land) has been solely a tribal decision since long before the arrival of the Euorpean invader on this continent.

The adoption of the foregoing proposals must be a Congressional action and, within the limitations of constitutional due process, is clearly within the power of the same Congress that created the problem by voiding the original treaties and alloting in severalty the land held by the tribe and granting the surplus land to non-Indians.