

American Indian Law Review

Volume 33 | Number 2

1-1-2009

Felix Cohen, Anti-Semitism and American Indian Law (review of Dalia Tsuk Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism*)

Kevin K. Washburn
University of New Mexico School of Law

Follow this and additional works at: <https://digitalcommons.law.ou.edu/ailr>



Part of the [Indigenous, Indian, and Aboriginal Law Commons](#)

Recommended Citation

Kevin K. Washburn, *Felix Cohen, Anti-Semitism and American Indian Law* (review of Dalia Tsuk Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism*), 33 AM. INDIAN L. REV. 583 (2009),
<https://digitalcommons.law.ou.edu/ailr/vol33/iss2/7>

This Book Review is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

BOOK REVIEW

FELIX COHEN, ANTI-SEMITISM AND AMERICAN INDIAN LAW

Kevin K. Washburn*

Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism. By Dalia Tsuk Mitchell. Ithaca and London: Cornell Univ. Press. 2007. Pp. xi, 368.

Introduction

On the morning of Wednesday, November 1, 1939, a bright young government lawyer who had been detailed to the United States Department of Justice was summoned to his supervisor's conference room. When he arrived, Felix S. Cohen found not only his boss, Assistant Attorney General Norman Littell, but also the entire editorial staff of the recently launched Indian Law Survey, for which he was serving as chief. The purpose of this unusual meeting soon became apparent to everyone in the room. Assistant Attorney General Littell announced Cohen's termination as head of the Indian Law Survey and ordered the members of Cohen's legal staff transferred to scattered units of the Department of Justice.¹ Cohen finished the term of his special detail at the Department of Justice performing clerical duties, such as copying

© 2009 Kevin K. Washburn

* 2007-08 Oneida Nation Visiting Professor of Law, Harvard Law School; Dean and Professor of Law, University of New Mexico School of Law. Special thanks to Libby Rodke Washburn, Carol Rose, Laura Seigle, Joseph Singer, and especially Carole Goldberg, for discussing with me some of the ideas discussed herein, and to Professors Christian W. McMillen, Dalia Tsuk Mitchell, and David Wilkins, for producing such thought-provoking works on Felix Cohen. Thanks also to Ethel Billie Branch (Harvard, J.D., 2008) for invaluable research and editorial assistance.

1. Memorandum from Felix Cohen, Assistant Solicitor, U.S. Dep't of Interior, to the Solicitor, U.S. Dep't of Interior 2 (Feb. 10, 1940) [hereinafter Memorandum for the Solicitor] (box 12/folder 169) (on file with the *American Indian Law Review*). This document is part of a collection titled "The Private Papers of Felix S. Cohen" housed in the Yale Collection of Western Americana, at the Bienecke Rare Book and Manuscript Library at Yale University in New Haven, Connecticut. Documents from this collection will be cited hereinafter as "Cohen Papers, box ____ / folder ____."

and filing, and then returned to his regular position as Associate Solicitor for Indian Affairs at the United States Department of the Interior.²

The firing of Cohen ended the Department of Justice's participation in the development of the *Handbook of Federal Indian Law* and temporarily brought the project to a standstill. It did not, however, end the project. When Cohen left Justice and returned to Interior, he asked his supervisors for resources to finish the job. He then pursued the project with a vengeance, eventually completing the work under the imprint of the Department of the Interior. The work became the *Handbook of Federal Indian Law*. In its original form and in its ensuing editions, it has been cited dozens of times by the U.S. Supreme Court and is still relevant today. It was cited several times in last term's opinion in *Plains Commerce Bank v. Long Family Land & Cattle Company, Inc.*, issued in June 2008.³

If the Department of Justice had succeeded in blocking the Indian Law Survey, the field of federal Indian law might look dramatically different today. Despite being a non-Indian, Cohen has become one of the central figures in the development of federal Indian law and in tribal law as well. The theoretical structure presented in his *Handbook* has been influential in charting the path of Indian law in the federal courts through much of the twentieth century, and he drafted tribal constitutions that have endured for decades.

So while Felix Cohen died an untimely death in 1953 at the age of forty-six, his legacy is very much alive in the law. In 2005, his *Handbook* was revised and republished a third time (or fourth or even fifth, depending on how one counts the intervening editions),⁴ and two recent books have been published on Cohen and his work. One is an intellectual biography titled *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism* by

2. *Id.* at 3. Cohen, who was classified as a "senior attorney" and had a \$6500 salary, was dismayed that the Assistant Attorney General asked him to spend the remainder of his time at the Department performing tasks normally completed by a \$2600 clerk.

3. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 128 S. Ct. 2709 (2008) (holding that a tribal court lacked jurisdiction over transactions involving non-Indian fee lands within a reservation).

4. The *Handbook* was revised in 1958, 1982, and 2005. Some scholars refuse to count the 1958 revision by the Department of the Interior, which was ideologically motivated and, many believed, bastardized Cohen's 1942 work. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 232 (2002) (criticizing Justice Scalia for relying on the 1958 edition in a recent decision). On the contrary, some scholars credit a 1971 facsimile reprint of the original 1942 work, conducted under the auspices of the American Indian Law Center. See Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 219 n.27 (1991) (discussing the various prints, including the 1971 facsimile edition).

Professor Dalia Tsuk Mitchell.⁵ The other is a reprint of one of Cohen's most influential works on tribal law, his [*Basic Memorandum*] *On the Drafting of Tribal Constitutions*, with a careful introduction by Professor David E. Wilkins, a professor of American Indian Studies whose work focuses on Indian law and politics.⁶ Cohen's work is also profiled in an important recent legal-anthropological work, *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory* by Professor Christian W. McMillen,⁷ which discusses the development and litigation of *United States v. Santa Fe Pacific Railroad Co.*⁸

Felix Cohen was a complex man whose passage left mysteries, some of which are answered, and some of which are not, by Mitchell's biography. This review will comment on some of the insights reflected in these works and offer some thoughts on Cohen's legacy—his continuing relevance in contemporary developments in federal policy making and in amending tribal constitutions. It will conclude with a discussion of the lingering questions surrounding the motives for Cohen's firing at the Department of Justice and the effect the firing and some of its anti-Semitic implications may have had on Cohen. It ultimately concludes that the pervasive anti-Semitism experienced by Cohen may have given him profound empathy with Indian tribes and their desire to avoid assimilation. Thus, anti-Semitism may have inadvertently helped motivate positive developments in federal Indian law.

Cohen and Indian Affairs

Cohen stumbled into Indian affairs quite unexpectedly. When Cohen arrived at the Department of the Interior as a young man, still fairly fresh out of law school, it had not been his life's mission to help Indian tribes.⁹ Indeed, he found himself in the job with no apparent prior interest in Indian affairs. He had never met an Indian or given the "Indian problem" a "shred of thought."¹⁰ However, Cohen was far from rudderless. He came to Indian affairs with a highly developed world view.

5. DALIA TSUK MITCHELL, *ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* (2007).

6. FELIX S. COHEN, [*BASIC MEMORANDUM*] *ON THE DRAFTING OF TRIBAL CONSTITUTIONS* (David E. Wilkins ed., 2006) (1934) [hereinafter *COHEN MEMORANDUM*].

7. CHRISTIAN W. McMILLEN, *MAKING INDIAN LAW: THE HUALAPI LAND CASE AND THE BIRTH OF ETHNOHISTORY* 128-32, 152-54, 158-73 (2007) [hereinafter *MAKING INDIAN LAW*].

8. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941).

9. MITCHELL, *supra* note 5, at 63-64, 74-75.

10. *MAKING INDIAN LAW*, *supra* note 7, at 128.

Cohen had been an unusually sophisticated student. He was raised in a household that embodied a robust Jewish intellectual tradition of diversity and disagreement, and he frequently engaged in debate with his father, Morris Cohen, an ambitious academic once called "the Paul Bunyan of Jewish Intellectuals."¹¹ After college, Cohen spent two years working toward a Ph.D. in philosophy at Harvard before entering Columbia Law School, having reached the "all but dissertation" stage of his Ph.D.¹² In his first year of law school, Cohen finished his Harvard dissertation¹³ and published it as a book.¹⁴ During his time on the Columbia Law Review, he published three case notes and two legislative comments¹⁵, a level of productivity unusual even at the time.

Cohen worked briefly at a law firm before being hired at the Department of the Interior by Solicitor Nathan Margold, an old friend of the family.¹⁶ Reformer John Collier ran the Bureau of Indian Affairs at the time and the New Deal was just getting under way.¹⁷ Cohen was among a wave of technocratic and idealistic intellectuals who would change government forever.¹⁸ Though Cohen was still a young lawyer, he had highly sophisticated views of the law's purpose and was working toward the development of a broader philosophy of cultural and legal pluralism.¹⁹ Indeed, his dissertation had addressed this theme, albeit in a broad theoretical manner.²⁰ Cohen's public service gave him an opportunity to put his theoretical vision to work in the real world.

In Mitchell's narrative, Cohen's commitment to legal pluralism made him ideal as a reformer of Indian policy. Cohen and other progressives of the time were concerned with two developments in the increasingly capitalistic culture

11. MITCHELL, *supra* note 5, at 16 (citing David A. Hollinger, *Ethnic Diversity, Cosmopolitanism and the Emergence of the American Liberal Intelligentsia*, 27 AM. Q. 133, 139 (1975)).

12. *Id.* at 42, 47.

13. *Id.* at 47.

14. FELIX COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM* (1933).

15. MITCHELL, *supra* note 5, at 42.

16. *Id.* at 63.

17. *Id.* at 64-65.

18. An important biography of another of the members of the so-called New Deal "brain-trust" is ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* (1985).

19. MITCHELL, *supra* note 5, at 75-77. The philosophy was reflected in Cohen's dissertation. See generally *id.* at 63-64, 74-75.

20. *Id.* at 48-51.

of the twentieth century: the accelerating consolidation of disparate business enterprises into single entities and the heavy concentration of these single entities—known at the time as “trusts”—into the hands of a shrinking pool of wealthy individuals.²¹ Cohen saw Indian tribes as a refreshing contrast. In his view, they were egalitarian entities, more like labor unions. He appreciated their collective forms of ownership, viewing their structures as obstacles to concentrations of wealth and economic power.²² In short, “Cohen believed that Indian reservations held a promise for a better national future—a future that would implement his legal pluralist vision.”²³ Conversely, Cohen was also skeptical of efforts to assimilate Indians, viewing assimilation as “cultural death.”²⁴

Cohen and Tribal Consultation

Cohen’s first major imprint on federal Indian law was his assistance in drafting, lobbying for, and then implementing the Indian Reorganization Act (IRA), a federal law enacted in 1934 to modernize and transform tribes by encouraging them to adopt constitutional forms of government. It is also, in some ways, his most enduring legacy, though not always a good one.

Only a person deeply committed to pluralism could have appreciated the job ahead of Cohen when he joined the Department of the Interior. Federal officials who encounter Indian tribes and the vast diversity in tribal viewpoints sometimes find the nuance and complexity of Indian affairs maddening and succumb to frustration.²⁵ From the beginning of the drafting stages of the IRA, Cohen wrestled with questions of how much to include tribal leaders in discussions of federal Indian policy making, a practice now widely followed in the federal government and commonly known as “tribal consultation.”

21. *Id.* at 74-76.

22. *Id.* at 74.

23. *Id.*

24. MAKING INDIAN LAW, *supra* note 7, at 128.

25. One recent example of this phenomenon is Associate Deputy Secretary of the Department of the Interior James Cason’s speech at the Federal Bar Association meeting in Albuquerque, New Mexico, on Thursday, April 19, 2007. Cason vented frustration at tribal attorneys for filing hundreds of applications seeking to place Indian land into trust while simultaneously criticizing the Department of the Interior and suing the agency for mismanagement of Indian trust lands. *Cason Explains Misgivings on Land-into-Trust*, INDIANZ.COM, Apr. 20, 2007, <http://www.indianz.com/news/2007/002514.asp>. Surely Cason knew there were regulatory benefits to having tribal land held in trust. Namely, protection from state and local taxation, but his (nevertheless understandable) aggravation with the constant criticism of the BIA led him to dissemble in front of a large crowd.

To provide a sense of how much tribal consultation has developed since Cohen's time, the IRA was drafted at a time when consultation with tribes occurred through Indian agents assigned to the reservations. Now, tribes are represented by strong national pan-tribal organizations, such as the National Congress of American Indians, the National Indian Gaming Association, and other regional or subject-specific organizations, many with offices in Washington, D.C. They also have Washington-based lawyers and lobbyists keeping vigilant watch for congressional or other federal action on tribal issues. Thus, today tribal views do not arrive in Washington having been filtered by lower-level federal officials. Tribal views are made known directly.

A man ahead of his time, Cohen insisted on tribal consultation on tribal policy and convinced Collier that it was crucial to seek tribal input *before* sending a draft bill to Congress.²⁶ In some ways, Cohen was merely being pragmatic. Even then, tribal consultation was politically necessary because Congress was unlikely to enact a bill without considerable tribal support.²⁷ He also argued that consultation was substantively important to the success of the initiative because Interior would need concrete assistance from tribes in working out the details of reorganization.²⁸

Such participation by interested parties was a hallmark of technocratic governance, and the New Deal reforms eventually led to formal codification of such responsibilities, at least in the agency arena, in the Administrative Procedure Act.²⁹ Today it is apparent that one of the signal achievements of the twentieth century was the growth of innovative and less formal methods of public participation in governance. Most federal law making or agency rule making today involves significant consultation with affected interests.³⁰

While consultation with affected parties is now a hallmark of federal administrative policy making, there is an even greater responsibility for consultation with Indian tribes. Most everyone familiar with the unique political relationship between tribes and the federal government agrees that federal policy makers have a special responsibility to consult with tribal governments early and often in the development of Indian policy. Indeed, it is the official position of Congress and countless government agencies.³¹

26. MITCHELL, *supra* note 5, at 95.

27. *Id.* Mitchell suggests there was tension between Cohen and Collier as to whether tribal consultation was sensible.

28. *Id.*

29. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

30. *See, e.g.*, 5 U.S.C. § 553 (2006).

31. Policies have been adopted by the White House, several cabinet-level departments, and

Despite the wide agreement about the need for consultation, the responsibility to consult with tribes has been a constant challenge for federal Indian policy makers. To formalize the responsibility, a bill was introduced in the last Congress to force the executive branch to engage in tribal consultation when it develops agency policy.³²

Most federal officials agree they must consult early and often with tribal governments as to federal Indian policy. One question that frequently arises, however, is “*how early and how often?*” A consultation policy that merely gives Indian tribes the same public commenting rights as any individual member of the public at the notice and comment stage of a BIA rule making renders the unique legal and political relationship between tribes and the federal government meaningless. A true government-to-government approach to consultation would respect tribes’ rights and authority in developing federal policy, and tribes would be involved at a meaningful time in the formation of that policy. One could make a credible argument that Congress and the Executive ought not treat comments from states, which also have a unique political and legal relationship with the federal government, in the same manner as comments from individual members of the public. Neither should this be the case for Indian tribes whose governmental status is acknowledged and preserved in treaties, executive orders, federal legislation, and the U.S. Constitution. Yet in contrast to states, which have a single document and coherent body of doctrine that describes their structural relationship with the United States, each individual tribe has a unique relationship with the federal government as defined in legislation and treaties.³³ Hence the compelling need for increased consultation with and greater opportunity for tribal comments. The complexity of tribal-federal relations has created circumstances in which federal Indian policy making may well have more fits and starts—more amendments to proposed rules, more extensions of times for comment, and more failed rule makings—than virtually any field of federal agency law.³⁴

numerous sub-cabinet level agencies and branches, from the obvious ones like the Indian Health Service to many others such as the IRS and the Army Corps of Engineers. One law firm has collected thirty-five such policies and has posted them online. See *Orders and Policies Regarding Consultation with Indian Tribes*, <http://www.schlosserlawfiles.com/consult/PoliciesReConsult%20w-IndianTribe.htm> (last visited June 28, 2009).

32. Consultation and Coordination with Indian Tribal Governments Act, H.R. Res. 5608, 110th Cong. (2008). A hearing on the bill occurred in the last Congress on April 9, 2008.

33. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

34. This is a guess; the author is a professor of administrative law and a former general counsel of a federal agency.

So while the dynamics of consultation have changed a great deal since Cohen's time (today many of the key federal Indian policy makers are Indian people), there remains a compelling need for more meaningful consultation with tribes as policy, laws, and rules are developed. Continuing to staff these positions with thoughtful people, especially Indian people who have a comparative advantage in intuiting tribal concerns, is a good start.

Ironically, today the consultation process may be much stronger in the Executive Branch than in Congress. Executive officials are generally inclined to provide opportunities for tribes to be heard in a consultative process. They understand that if they fail to provide such opportunities, they may well be dragged before Congress and publicly criticized for the lack of such process. To their chagrin, such criticism has no payoff to the policy making process, because it gives members of Congress or Senators an opportunity to score political points without the risk that accompanies going on record about the substance of the policy produced.

Congress, on the other hand, has several tricks up its sleeve through the midnight rider and the appropriation processes that allow it to make policy without engaging in any consultation at all. Rarely does Congress make broad policy in such a manner, but the unsophisticated are sometimes surprised with the outcomes. On the contrary, even those disgruntled by Executive decisions will have little cause for complaints about notice—they often will have seen the policy coming for years and will have discussed it extensively with government officials.

Where consultation occurs as it should, the challenges nevertheless are very real. No sensible and self-respecting policy maker should be willing to share a draft proposal with the public before it has been developed internally and taken shape into a fully formed idea. If consultation was required any time a federal official had a partially formulated idea while taking a shower or driving in during the morning commute, an official would never be able to take any action or develop ideas fully. Thus, while federal Indian affairs officials should consult informally as an idea develops, and should consult widely before an idea becomes firmly rooted, federal officials must have some limited and protected space in which they can think about their responsibilities and how to meet them. If we do not allow federal officials to have ideas that are developed in advance of the consultation process, federal policy development in Indian country will atrophy.

In Mitchell's portrait, Cohen seems to have encountered the same diversity in tribal viewpoints that has vexed Indian policy for the last century. Cohen

often even endured direct criticism,³⁵ but he seems to have taken this in stride and avoided significant frustration. Cohen was well-suited to the work, both philosophically and as a matter of personality. His personal comfort with respectful disagreement is apparent in his complicated and deeply intellectual relationship with his father.³⁶ Likewise, his deeply embedded legal philosophy and pluralist agenda also counseled respect for divergent views expressed by others.³⁷ Indeed, it is hard to imagine a non-Indian philosophy more capable of being respectful of tribal autonomy than Cohen's. Cohen was thus perhaps uniquely suited to help transform federal Indian policy in a manner more respectful of tribes as governments. In short, Cohen, the New Deal, and Indian affairs constituted the perfect convergence of the right person at the right place in the right moment in history to set the United States on a new course in dealing with tribes that would accommodate diverse tribal viewpoints in the development of Indian policy.

Cohen's Paradox

For all its benefits to tribes, however, Cohen's pluralist agenda sometimes clearly overcame his vision of tribal self-determination. This happened in numerous small ways during the drafting and implementation of the IRA. For example, for purposes of voting on the adoption of IRA constitutions, Interior seems to have divorced voting rights from tribal membership. This was probably done in an effort to expand the vote among a wider class of Indians, thereby diluting the power of the full-blooded traditional Indians who were resistant to broad innovations in tribal governance.³⁸

Cohen's visions for cultural pluralism and tribal self-determination were also sometimes sacrificed to a third interest: political expediency. The IRA was enacted at a time of transition and uncertainty in Indian policy, and no doubt some naysayers would have preferred not to proceed down a path that served to preserve and acknowledge inherent tribal governmental powers. Thus, Cohen felt an urgent—and politically pragmatic—need to prove swiftly the success of the IRA.³⁹ There is some evidence that this strategy was effective. While opposition from Oklahoma tribes and by the Oklahoma congressional delegation resulted in the IRA being amended before final passage to exclude the Oklahoma tribes, the fragile legislative coalition in

35. See generally MITCHELL, *supra* note 5, at 96-98, 107-08.

36. See generally *id.* at 11-30.

37. *Id.* at 28.

38. *Id.* at 109-11.

39. *Id.* at 103-09.

favor of the IRA held. In the very next Congress, a law was enacted that adopted a similar framework for the Oklahoma tribes.⁴⁰ As an epilogue that will seem familiar to any Indian policy maker today, the New Deal Congress seemed far more willing to adopt reforms supportive of tribal governments than to appropriate funds to help pay for them.⁴¹

In the area of tribal constitutions, Cohen is a paradoxical figure. Though Cohen is perhaps best known for his work in producing the *Handbook of Federal Indian Law*, which is discussed in greater detail below,⁴² his most stubborn legacy was his work in helping draft the IRA constitutions that continue to govern many tribes today. It is because of these constitutions that Cohen remains a highly controversial figure in federal Indian law. For while the *Handbook* has been revised, many tribal constitutions have been stubbornly resistant to change.

Cohen's paradox, which is raised directly in *Architect of Justice* and partially answered there and in the *Cohen Memorandum*, is this: with more than a hundred IRA tribal constitutions in existence across the country, there is a claim widely repeated in scholarly literature that Cohen's IRA constitutions contained "boilerplate" provisions that were not differentiated by tribe.⁴³ This has long troubled Indian law scholars. If Cohen was truly a "legal pluralist," why are tribal constitutions not more reflective of organic tribal traditions of governments? How can it be that so many tribes have "boilerplate" constitutions?

The paradox is quite real. While Cohen insisted that "[the] tribes should write their own constitutions,"⁴⁴ the *Cohen Memorandum* was an influential memo that identified the elements that should be included. Though Cohen apparently believed the Bureau of Indian Affairs should provide only technical assistance, a committee at Interior also apparently prepared a "model" tribal constitution.⁴⁵

40. *Id.* at 108 (alluding to the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (2006)).

41. *Id.* at 105.

42. See *infra* text accompanying notes 56-88.

43. Frank Pommersheim, *Looking Forward and Looking Back: The Promise and Potential of a Sioux Nation Judicial Support Center and Sioux Nation Supreme Court*, 34 ARIZ. ST. L.J. 269, 284 (2002); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 712 (1989); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1076-77 (2007).

44. MITCHELL, *supra* note 5, at 106.

45. COHEN MEMORANDUM, *supra* note 6, at xxii-xxiii, xxv-xxviii, reproduced in *id.* app. A, at 173-77.

It should be no surprise that Cohen's work in this area is controversial. Drafting a constitution is assuredly one of the most controversial activities one can undertake on behalf of any government. Americans even today continue to debate Madison and Hamiltonian views. Since a new constitution has the power to fundamentally change a tribal government, it is an inherently political process. A poorly drawn tribal constitution can tie a tribe in political knots that can prevent effective governance and stymie economic development. In the name of fairness and the rule of law, a tribal constitution can undermine fluidity and flexibility in tribal government and impose instead a strict formalism. It also has the power to entrench existing political factions and, like the Constitution of the United States, undermine majority rights.

Consider, for example, the Constitution of the Minnesota Chippewa Tribe, which created a confederation of several different tribal bands.⁴⁶ Each of the six bands of the Minnesota Chippewa Tribe has two delegates to the overall tribal executive committee.⁴⁷ The White Earth Band, which has in excess of 20,000 members,⁴⁸ argues that it is unfair that it has no more delegates than the Grand Portage Band, which has well under a thousand members.⁴⁹ Though White Earth tribal chairwoman Erma Vizenor has called for constitutional reform,⁵⁰ she has not been successful in obtaining action. It is not an unusual problem. One can imagine California⁵¹ making a very similar complaint about North Dakota⁵² regarding representation in the United States Senate. Constitutions are designed to preserve formal structures, whether they are

46. REVISED CONST. AND BYLAWS OF THE MINN. CHIPPEWA TRIBE, *available at* <http://thorpe.ou.edu/constitution/chippewa/index.html>.

47. *Id.* art. III, § 1.

48. *See* White Earth Band of Chippewa, <http://www.kstrom.net/isk/maps/mn/whitearth.htm> (last visited June 28, 2009).

49. *See* Official Website of the Grand Portage Band, <http://www.grandportage.com/community.html> (last visited June 28, 2009) ("The Grand Portage Community has a population of 518 people, of which half are enrolled members of the Grand Portage Band."); *see also* Grand Portage Band of Chippewa Indians, <http://www.kstrom.net/isk/maps/mn/grandport.htm> (last visited June 28, 2009) (noting a reservation population of 308 and a total enrollment of 790).

50. David Melmer, *Vizenor Wins White Earth Chair*, INDIAN COUNTRY TODAY, June 28, 2004, *available at* <http://www.indiancountrytoday.com/archive/28175234.html>.

51. The population of California is roughly 34 million. Census 2000 Data for the State of California, <http://www.census.gov/census2000/states/ca.html> (last visited June 28, 2009).

52. The population of North Dakota is roughly 642,200. Census 2000 Data for the State of North Dakota, <http://www.census.gov/census2000/states/nd.html> (last visited June 28, 2009).

democratically fair or not. Constitutional reform is, thus, a matter involving tremendously high stakes and inherent controversy.⁵³

Explanations for the gap between Cohen's philosophy of cultural pluralism and the perceived similarity of the constitutions that came out of the IRA drafting process is illuminated by both Mitchell's biography and by the *Cohen Memorandum*.

One way Cohen sacrificed his own cultural pluralist agenda to political expediency was to rush tribes through the constitution-drafting process. Cohen sought to insure that when Congress came back in session the following year, he would be able to demonstrate that the IRA had been a successful initiative.⁵⁴ I am told by people who regularly perform this kind of work, scholars and attorneys such as Carole Goldberg, Duane Champagne, Richard Monette, Robert Lytle, and others, that effective revision is necessarily time-consuming and rushing the process is anathema to good results.

Another problem was the natural legal dynamic that comes with federal review of tribal decision making. Once the Secretary had approved a tribal constitution, for example, a cautious drafter for another tribe would be more likely to recommend that form because there was no doubt it would be approved.⁵⁵ According to Mitchell, "[t]he outcome was a multiplicity of similar constitutions."⁵⁶ Thus, the centralized decision-making structure suffocated Cohen's own pluralist inclinations.

Professor Wilkins discusses this paradox in his introduction to the *Cohen Memorandum*. He suggests that Cohen was disturbed about this uniformity and troubled about the lack of meaningful self-government reflected in such a process.⁵⁷ Yet despite these misgivings, he vigorously pursued the constitutional development initiative and remained deeply committed to proving its success. The ends—the survival of the IRA initiative and congressional support of tribal governance generally—seemed to justify the means. Hence, tribal constitutions were drafted in a hasty manner with little effort made to preserve organic tribal processes. While the IRA thus helped to preserve the platonic notion of tribal governance, it necessarily

53. See, e.g., *Richard Monette Fired as Constitutional Attorney*, SAULT TRIBE TIMES, May 23, 2007, available at http://saulttribetimes.com/news/index.php?option=com_content&task=view&id=299&Itemid=50.

54. MITCHELL, *supra* note 5, at 105, 108.

55. *Id.* at 107.

56. *Id.*

57. COHEN MEMORANDUM, *supra* note 6, at xxviii.

substantively changed tribal governments and helped displace and smother traditional tribal governance.

Only in recent years have scholars effectively begun to survey the damage. The outcome of the IRA constitutional development process was not only harmful to tribal traditions, it may have also handicapped tribes' ability to succeed politically and economically.⁵⁸ Professors Joe Kalt and Stephen Cornell of the Harvard Project on American Indian Economic Development theorize that a tribe cannot thrive without a system of self-governance that matches its cultural values. The Kalt-Cornell Theorem suggests that there must be a "cultural match" between the tribe and its governmental structure.⁵⁹ For many tribes, this "match" is lacking under current IRA constitutions.⁶⁰ Assuming this compelling theory is true, there are nevertheless substantial obstacles to creating cultural match. How does one determine what kind of institutional structure best matches cultural norms? Coming at it from the other direction, how does one reduce cultural processes to written descriptions? The challenges are immense.

Finding cultural match may also be undermined by simple lawyerly norms. Consider the personal dynamics at play when tribal constitutions were drafted. No lawyer would want to be associated with a failed effort, a constitution agreed upon by the tribe and then rejected by the BIA. BIA disapproval would embarrass the tribe and its lawyer. Indeed, the tribe may question the value of an attorney who cannot predict the behavior of the BIA. Ordinary practical norms of lawyering suggest that it would thus have been sensible and prudent to recommend language that had already been reviewed and approved by the BIA. Inertia thus serves as a powerful force toward uniformity. Indeed, this

58. Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN ECONOMIC DEVELOPMENT 15-18 (Stephen Cornell & Joseph P. Kalt eds., 1992), available at <http://www.hks.harvard.edu/hpaied/docs/reloading%20the%20dice.pdf>, reprinted in STEPHEN CORNELL & JOSEPH P. KALT, *RELOADING THE DICE: IMPROVING THE CHANCES FOR ECONOMIC DEVELOPMENT ON AMERICAN INDIAN RESERVATIONS* 18-21 (Native Nations Inst. & Harvard Project on Am. Indian Econ. Dev., Joint Occasional Papers on Native Affairs, No. 2003-02, 2003) available at http://www.jopna.net/pubs/jopna_2003-02_Dice.pdf.

59. *Id.* This theorem was first articulated by the Project in *Reloading the Dice*, but has continued to carry through the Project's work. It is discussed at length in the following texts: HARVARD PROJECT ON AM. INDIAN ECON. DEV., *THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION* 125-26 (2008); *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* 47-52 (Miriam Jorgensen ed., 2007).

60. Cornell & Kalt, *supra* note 58, at 18-21.

is why lawyers are a powerful normative force preserving the rule of law. The fundamental problem with this practical approach to lawyering, of course, is that it elevates expediency above traditional tribal values.

The BIA's influence toward uniformity today is less powerful than it was in the past. In most cases, the BIA no longer has the right to disapprove tribal constitutions unless they conflict directly with federal law, but the issue still arises in myriad circumstances in tribal policy making. For example, no tribe can engage in Indian gaming without first obtaining the approval of the National Indian Gaming Commission for its tribal gaming ordinance.⁶¹

Thus, like the consultation issue discussed above, the dilemma Cohen faced is common even today in the field of Indian law. Any lawyer who has ever worked closely with a tribal government can understand the inherent challenges. When a tribe embarks on drafting a tribal constitution and is wrestling with constitutional language, consider the challenging questions facing the outside attorney: what is the appropriate role of the outside lawyer? Should she give her best advice as to the provisions, no matter that it is burdened with significant normative assumptions? Should she simply stand with her arms crossed and refuse to help? Or should she try a middle ground and devise a menu of choices ("If you are interested in true democracy, choose option A; if you prefer a more representative style of democratic governance, choose option B; if you prefer a strong central leader model, choose option C," etc.)? The multiple choice model seems largely to be the approach used by Cohen in his *Memorandum*. While it gives the illusion of self-determination, it does not create organically generated solutions but offers choices between pre-determined ones.

Formulating constitutions by attempting to describe existing traditional practices likely is a more fruitful approach, but it is also much more challenging. It may take a very talented lawyer to accurately reduce a traditional governance structure to a written constitutional form. It might also be difficult for a lawyer to keep her own normative judgments out of the analysis.

Moreover, drafting constitutions is inherently problematic. A constitutional government is necessarily more resistant to governmental fluidity and evolution. Constitutional theorists have struggled for years with the inherent conflict between constitutional governance and democratic governance, with constitutional governance reflecting adherence to the views of the dead and

61. 25 U.S.C. § 2710(b)(i)(B) & (d)(1)(A)(iii) (2006).

democratic governance more attuned to the needs of the living. It is thus an open question whether tribes should want constitutions at all.

Ironically, one reason the republication by Wilkins of the *Cohen Memorandum*⁶² is so important is that it may assist in constitutional interpretation, a fact that is necessarily in tension with Cohen's pluralistic ideals. Indeed, the *Memorandum* may be much more than a historical artifact. For better or worse, it may be a significant piece of legislative history that ought to help guide our interpretation of tribal constitutions. Mitchell's portrait suggests that Cohen likely would have wanted a different result.

So, why does such a memorandum exist? History suggests, once again, that it was driven by political expediency. Despite his pluralist intentions, Cohen could not have possibly traveled in person to each of the reservations where constitutional reform was occurring. At the time of the IRA's enactment, there were few to no lawyers who were also tribal members,⁶³ so a lawyer providing guidance would necessarily have been an outsider. Local BIA officials, who would naturally have been part of the process on the reservation, likely would not have been law trained either. Those BIA officials likely craved guidance themselves. Moreover, it may be that few of these local BIA officials shared Cohen's ideal of tribal self-determination or appreciated the need for constitution-making to be a tribally generative process. Since the IRA made the process inevitable, perhaps the blame is more appropriately directed at an earlier action, the enactment of the IRA, which forced the speedy development of tribal constitutions. Cohen would nevertheless bear responsibility, for he was also the chief architect of the IRA.⁶⁴

On balance, as an unlikely federal legislative re-affirmance of the principle of tribal sovereignty and self-determination, the IRA may have done substantial good that offsets the harm that it caused. Yet it is impossible to be certain because such an assessment requires imagining a world without the IRA. In sum, Cohen's work in the area of tribal constitutions seems to reflect an extreme example of good intentions never having been realized.

One very real tragedy is that Cohen's tribal constitutions have proven remarkably durable. Though the IRA itself has been amended to remove the

62. See, e.g., COHEN MEMORANDUM, *supra* note 6, § 9, at 37-39 (entitled "The Place of Chiefs in Tribal Government" in which Cohen attempts to mediate the transition from traditional forms of government to the IRA form).

63. See Lawrence R. Baca, *Ignore the Man Behind the Curtain: A Brief History of Thirty Years of the Indian Law Conference*, FED. LAW., Mar./Apr. 2005, at 4, 25 (there are "only 1,853 American Indian lawyers in America today . . . [which] is a tremendous increase over the dozen recorded in the 1960 census . . .").

64. COHEN MEMORANDUM, *supra* note 6, at xix; MITCHELL, *supra* note 5, at 73.

statutory requirement of federal approval of some important tribal decisions, such as adoption of tribal ordinances or the selection of tribal legal counsel,⁶⁵ many tribal constitutions still require federal approval for these same actions.

The irony here is striking. Even though Congress has amended federal laws to make those laws less paternalistic, paternalism nevertheless continues to be mandated by *tribal constitutions*. Though tribes may not like the paternalistic constitutional provisions, many tribes seem politically unwilling to open their constitutions for reform for other reasons. Whether the IRA constitutions were true to tribal traditions or not, the process of constitutionalizing tribal governments has thus had its own ramifications, sometimes making them more rigid and less malleable to tribal needs. This has made it much more difficult to produce the governmental reform that might be necessary to achieve the "cultural match" suggested by Professors Kalt and Cornell.

It is unclear whether Cohen foresaw these problems. Indeed, if anything, Cohen seems to have romanticized tribal governments. As my colleague Sam Deloria would no doubt encourage us to recognize, not all tribal governmental traditions are necessarily normatively healthy or "good." Thus, an even greater paradox that Cohen avoided by providing boilerplate language was this one: how do we account for tribal traditions we might nevertheless find normatively repugnant? While these questions lack easy solutions, it is clear Cohen was one of the first federal policy makers in the modern era to face some of the challenges that would come from greater recognition of tribal self-determination and greater tribal input in federal policy.

The Mystery at Justice

Since Cohen is the central figure in so many important issues involving federal Indian policy, it is important to know what motivated Cohen in this field. Why, for example, did Cohen work so hard to finish the *Handbook* after being so rudely removed from the project? Here, Mitchell provides some guidance but seems to evade the question without taking it on directly.⁶⁶

65. See generally the Indian Reorganization Act (IRA) of 1934, ch. 576, § 16, 48 Stat. 984, 987 (providing for secretarial review of contracts between Indian tribes and legal counsel), repealed by Indian Tribal Economic Development and Contracts Encouragement Act of 2000, Pub. L. No. 106-179, § 3, 114 Stat. 46, 47.

66. See, e.g., MITCHELL, *supra* note 5, at 64 (suggesting the attempt of Christian missionaries to convert the Indians might have "subconsciously triggered Cohen's interest" in the field).

It was five years after the enactment of the IRA, in 1939, that Cohen was detailed to the Department of Justice to run the Indian Law Survey.⁶⁷ At first, Cohen sought to avoid the job.⁶⁸ But because Justice agreed to bear most of the costs, it chose the project supervisor and identified Cohen as a prime candidate. Cohen resisted the temporary assignment to Justice, claiming at the time it was because he enjoyed his working relationships with colleagues and superiors at the Department of the Interior.⁶⁹ Professor Philip Frickey has offered a more compelling insight to explain Cohen's reluctance: as an influential legal realist, Cohen's preparation of a treatise-like work seems to be an odd and uncharacteristic embrace of legal formalism.⁷⁰ Though Cohen urged Justice Department officials to appoint someone else as Chief of the Indian Law Survey, Cohen eventually acquiesced and was appointed to a one-year post as Special Attorney in the Department of Justice.⁷¹ By the time Cohen went to Justice, he was an expert on Indian tribes and had, no doubt, developed strong views about Indian law and policy.

In *Architect of Justice*, Professor Mitchell skates lightly past Cohen's firing at the Department of Justice. Professor Mitchell places the events of late 1939 in the context of a wider ideological disagreement between Cohen and his superiors at Justice.⁷² In presenting the dispute as purely ideological, however, she ignores an important mystery surrounding the motives at play at Justice. For while the clash between Cohen and Justice was surely ideological in part, Cohen himself believed more sinister motives were at play.

In a letter written in the spring of 1940, just a few months after the events played out at Justice, Cohen characterized his firing and his staff's reassignment as a "purge" and implied it was the result of anti-Semitism within the Department of Justice.⁷³ In the letter, Cohen carefully described the harmful actions taken against him and four of his colleagues and staff

67. Felix Cohen, Report of Work as Chief of the Indian Law Survey: 1939-1940 (undated) (Cohen Papers box 12/folder 169) (on file with the *American Indian Law Review*).

68. *Id.*

69. *Id.*

70. Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 651-56 (2006).

71. Cohen, *supra* note 67, at 1-2.

72. These events are described in even greater detail in Jill E. Martin, "A Year and a Spring of My Existence": Felix S. Cohen and the Handbook of Federal Indian Law, 8 W. LEGAL HIST. 35 (1995).

73. Letter from Felix S. Cohen to David Shenker, Esquire (Feb. 12, 1940) [hereinafter Cohen Letter] (Cohen Papers, box 13 / folders 176-182) (on file with the *American Indian Law Review*).

members, listing them in a manner akin to the counts in an indictment. He concluded the letter by suggesting a “need for a careful examination of the entire personnel situation in the Lands Division of the Department of Justice, before critics of the Administration make a campaign incident out of these five cases.”⁷⁴

The campaign to which Cohen referred was the 1940 presidential campaign, then underway. Whether Cohen’s mention of a “campaign incident” was a veiled threat or an innocent concern is unclear. However, the letter shows Cohen was still deeply bothered by the events at Justice, more than three months after they occurred. The reason this mystery is so important is that it may help us to understand what drove Cohen as he completed the *Handbook*. Was Cohen’s interest in Indian law and Indian people purely platonic, intellectual, and ideological, as Mitchell implicitly suggests, or was it driven in part or wholly by a sense of shared experience with other oppressed peoples?⁷⁵

The ideological grounds for the disagreement were simple enough. First were the practical needs of federal lawyering. Justice’s stated goal for the project was the creation of a litigation manual to help it win cases, which were often against Indians and tribes. Indeed, at the time, Justice was defending the United States in cases brought by Indian tribes in the Court of Claims asserting claims of more than \$2 billion.⁷⁶ In some respects, Cohen was simply ill-matched to the task, at least as envisioned by the Department of Justice. Instead of a litigation manual, Cohen wanted to write with greater breadth. He wanted to produce a work that would guide “states, fiduciaries, attorneys, homesteaders, lessees, and contractors” as well⁷⁷ and that would create a framework for an evolving systematization of the laws and treaties that governed this area.⁷⁸ In sum, he hoped to create a book that would be as useful outside the Department of Justice as within it. This clashed strongly with the more targeted book Justice sought to create. Second, however, was the deeper ideology of Indian rights. Cohen may have been too pro-Indian. He was an

74. *Id.* at 3.

75. Some of my own curiosity in this regard was stoked by a recent work of fiction, which offers an account of what it might have been like to grow up Jewish in the United States under slightly different historical circumstances. See PHILIP ROTH, *THE PLOT AGAINST AMERICA* (2004). It has also been stoked by the common parlor game in Indian intellectual circles of asking whether it is the Israeli Jews or the Palestinians whose circumstances are most akin to the Indians.

76. MITCHELL, *supra* note 5, at 167.

77. *Id.* at 168.

78. *Id.* at 166-67.

unabashed supporter of Indian rights. The Department of Justice was much more ambivalent about the protection of tribal rights and tribal lands, even as it was charged with acting as their trustee.⁷⁹

In light of these contrasting agendas, perhaps Cohen and the Department of Justice were destined for a clash. In a larger sense, the disagreement may have represented the inevitable conflict between the legal advocate and the academic. Cohen's integrity as a scholar with a particular normative view of the field seems to have overcome his role as federal advocate. It also may have represented the clash between the near-sighted Department of Justice lawyer, who looks no further than the next case, and the Department of the Interior policy maker, who must necessarily have a view longer and broader than prevailing in the immediate litigation.

Ideological differences aside, the clash with Justice seems to have been uglier and far more personal than a mere dispute between professionals might otherwise have been. Cohen complained to his superiors at Interior that it was gratuitous for the Department of Justice "to humiliate me personally before my staff and later to attack my scholarship and my character[.]"⁸⁰ By most accounts, including Cohen's, the person responsible was Assistant Attorney General Norman Littell.⁸¹ As the head of the Lands Division, Littell took responsibility for terminating the project and told others he was doing so because of the "inferior quality" of the work.⁸² This characterization, no doubt, infuriated Cohen.

It was likely the personal nature of the incident that led to Cohen's suspicions about Littell's motives.⁸³ Cohen never explicitly used the words "anti-Semitism," but by characterizing the Justice actions as a "purge," Cohen's language was laden with insinuation.⁸⁴ All of the staff Cohen described as victims of the purge had Jewish surnames.⁸⁵

The historical record is unclear as to whether Cohen's grievances against the Department of Justice were ever credited or addressed, and it is impossible

79. See, e.g., MAKING INDIAN LAW, *supra* note 7, at 133-52 (discussing the Department of Justice's "anemic" efforts on behalf of the Hualapai Tribe in its case against the Santa Fe Railroad and Assistant Attorney General Littell's firing of chief lawyer Richard Hannah in order to take a "dive" on behalf of the government so the railroad would prevail).

80. Memorandum for the Solicitor, *supra* note 1.

81. Martin, *supra* note 72, at 44-48; MITCHELL, *supra* note 5, at 168-70.

82. See Martin, *supra* note 72, at 46-47; MITCHELL, *supra* note 5, at 169.

83. See Cohen Letter, *supra* note 73.

84. *Id.* at 1.

85. See *id.* (including Cohen himself, Abraham Glasser, Bernard Levinson, Theodore Spector, and Jacob Wasserman).

to know all of Littell's motives. Littell was a founding member of the National Committee Against Persecution of the Jews,⁸⁶ but the evidence is mixed. In personal correspondence, Littell attributed the growing tide of American anti-Semitism during World War II to Nazi propaganda, but also to "the merits[.]"⁸⁷ According to Littell, "the Jew, [who was] recently emancipated from the ghetto and political restrictions is, undoubtedly, a shrewder, more astute, and less restrained businessman than the ordinary Anglo-Saxon."⁸⁸ In a private letter contained in his biography, Littell admitted that he could not make such a statement publicly because "it would seem to confess the whole basis for anti-semitism (sic)."⁸⁹ Littell himself was later fired by President Roosevelt in November 1944 after an unrelated conflict with the Attorney General.⁹⁰

It remains uncertain what to make of Cohen's firing. There is substantial evidence of anti-Semitism throughout the ranks of government during this year. The New Deal brought a wave of bright young Jewish lawyers to Washington as part of the "brain trust." The rise of influential Jewish lawyer and legal realist Jerome Frank was stymied by President Roosevelt's own reluctance to appoint a Jew to the D.C. Circuit in 1939, though Roosevelt later appointed Frank to the Second Circuit.⁹¹ Anti-Semitism, and the second class citizenship that such status created, was likely felt as a very real part of the landscape that shaped Cohen's beliefs.

In light of the other reasons for a dispute with Cohen, anti-Semitism may have played only a minor role in the specific decision at Justice to fire him. But the act no doubt had a profound impact on Cohen. When the *Handbook* appeared in 1941, Cohen was vindicated by its strong reviews. Even Attorney General Robert Jackson sent congratulations and a request for a copy.⁹² Justice Felix Frankfurter later praised Cohen for bringing "luminous order" out of "the vast hodge-podge of treaties, statutes, judicial and administrative rulings, and unrecorded practice in which the intricacies and perplexities, the confusions and injustices of the law governing Indians lay concealed."⁹³

86. NORMAN M. LITTELL, MY ROOSEVELT YEARS 220-21 (Jonathan Dembo ed., 1987).

87. *Id.* at 315.

88. *Id.*

89. *Id.*

90. *See id.* at 354.

91. GLENNON, *supra* note 18, at 30.

92. MITCHELL, *supra* note 5, at 170.

93. Felix Frankfurter, *Foreword [to Symposium Issue on Felix S. Cohen]*, 9 RUTGERS L. REV. 355, 356 (1954).

For Cohen, perhaps success was the best revenge.⁹⁴ The enormity of his achievement is underscored by later efforts to update his important work. When Congress asked the Department of the Interior to produce a new edition of the *Handbook* in 1968, it took fourteen years and a slate of gifted legal scholars to produce a revision, even though Cohen's basic structural vision had already provided the intellectual template.⁹⁵ The most recent edition, released in 2005 and updated in 2007, took roughly twelve years, having been started about 1993. This new edition, labeled the third, ultimately involved a small army of forty or more law professors as authors and an executive board composed primarily of senior scholars in the field.⁹⁶

Myriad questions remain. What motivated Cohen to complete this work that he had initially tried to avoid? Was he motivated even more by the injustice he felt had occurred at Justice? Would he have worked so diligently to finish the *Handbook* otherwise? Would he have worked so hard to produce such a monumental book if his competence and reputation had not been on the line? And would he have produced a document so helpful to tribal advocates if this incident had not occurred? Even setting aside allegations of anti-Semitism, one cannot help but wonder about broader questions related to Cohen's work.⁹⁷ Did Cohen's Jewish identity—and his feelings of being an outsider to the then-ruling elite in the United States—affect his views about Indian tribes?

There is ample reason to believe Cohen was the victim of prejudice throughout his career. The Jewish community faces its own issues related to assimilation and protecting the right to preserve different cultural values. Was

94. As the McMillen book demonstrates, he also prevailed against Justice in the Hualapai case. See MAKING INDIAN LAW, *supra* note 7, at 169.

95. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds. 1982).

96. The Editor-in-Chief was Nell Jessup Newton, who was recently appointed Dean of the Notre Dame Law School. The author of this review served as one of the authors for the 2005 edition and now serves on the Executive Board of Editors for the ongoing project of updating the work.

97. There is evidence that Cohen was the victim of anti-Semitism even at the Department of the Interior. In his private diary, Secretary of the Interior Harold Ickes said he originally did not intend to make Cohen the Associate Solicitor for Indian Affairs "because [Cohen] was a Jew." Diary of Harold Ickes 5829-30 (Aug. 9, 1941) (on file at the Library of Congress). Ickes claims he was blackmailed into it when word got out that this was his reason. *Id.* Ickes's diary also reflects that when Cohen's supervisor, Margold, left the Department, Ickes declined to appoint Cohen "not because [Cohen] isn't a first-rate lawyer, but because of his personality and his bad public relations. Moreover, I had decided not to appoint a Jew if I could avoid it[.]" *Id.* at 6826 (July 19, 1942).

Cohen concerned about these pressures? Or was he more inclined to seek assimilation for the Jewish people in the United States and to be able to thereby raise affirmative complaints about discrimination? Or perhaps there is a middle ground.

Cohen's most oft-quoted words hauntingly echo the mystery that remains:

[T]he Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.⁹⁸

Curiously, the statement sidesteps the undeniable truth that Jewish people also faced significant challenges in "our American society." Was Cohen more equipped to assist Indians because he understood some of those challenges as a Jewish person in the United States? Or did he truly believe the implication of his own famous quote, that all was well in the United States for Jews?

We find some evidence to answer this question in the McMillen book. Cohen seems likely to be one who would resist forced assimilation of the Jewish people. Professor McMillen quotes Cohen as saying that he would be inclined to "punch . . . in the nose" any "would-be reformer" who suggested that he, as a Jew of Russian descent, "ought to be beneficially assimilated into the Anglo-Saxon protestant main stream of American life"⁹⁹

But views on identity and assimilation can be as complicated for Jews as for American Indians. *Architect of Justice* discusses Cohen's identity at length in the context of the rich Jewish intellectual tradition in which he was reared and his close, though complicated, relationship with his philosopher father. So while the biography beautifully illuminates the importance of Cohen's Jewishness to his views about cultural pluralism, it fails to cast light on the darker aspects of Cohen's personal experiences as a Jewish-American civil servant in mid-twentieth century America.

A sense of injustice can be a powerful motivator when it is not debilitating. Some lawyers draw a certain adrenaline in a righteous battle. It might have been such righteousness that helped to make the *Handbook* a tour de force. To

98. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953). These words form the inspiration for the title of an important book. See GERALD TORRES & LANI GUINIER, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002).

99. MAKING INDIAN LAW, *supra* note 7, at 170.

read Cohen's biography, though, one would not know that Cohen faced anti-Semitism in such a painfully deep and personal way. As the title of the book suggests, Mitchell places Cohen on a very high pedestal. In many ways, that honor is deserved, but placing him there may have made it more difficult to examine him closely and completely. Thus, some of Cohen's mysteries remain intact.

