American Indian Law Review

Volume 5 | Number 1

1-1-1977

Administrative Law: Self-Determination and the Consent Power: The Role of the Government in Indian Decisions

Charles Scott

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

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

Recommended Citation

Charles Scott, *Administrative Law: Self-Determination and the Consent Power: The Role of the Government in Indian Decisions*, 5 AM. INDIAN L. REV. 195 (1977),
<https://digitalcommons.law.ou.edu/ailr/vol5/iss1/6>

This Note 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.

NOTES AND COMMENTS

ADMINISTRATIVE LAW: SELF-DETERMINATION AND THE CONSENT POWER: THE ROLE OF THE GOVERNMENT IN INDIAN DECISIONS

*Charles Scott**

The Basis and Scope of the Consent Power

The United States government, through its delegated officials such as the Secretary of the Interior and the Commissioner of Indian Affairs,¹ has broad authority over the "management of all Indian affairs and of all matters arising out of Indian relations."² This broad power, commonly referred to as the "plenary power," has traditionally furnished a mandate for nearly total control over many aspects of Indian life.³ One aspect of the plenary power is the requirement that many Indian decisions, both tribal and individual, must secure the approval of the government before they become effective. Specific statutory examples include the approval of all contracts with Indian tribes,⁴ approval of tribal membership rolls for trust asset distribution,⁵ approval of wills disposing of trust or restricted property,⁶ approval of sales or mortgages of trust or restricted land,⁷ and approval of tribal constitutions and bylaws⁸ of tribes organized under the Indian Reorganization Act (hereafter referred to as IRA).⁹ In addition, further consent power is vested in the government under the terms of nearly all of the tribal constitutions of groups organized under the IRA. For example, most constitutions give the Secretary of the Interior¹⁰ power to rescind all tribal ordinances and resolutions "for any cause,"¹¹ and often give the Secretary veto power over the expenditure of even nonrestricted tribal funds,¹² although these powers are not statutorily required. Both the granting of these additional powers and the fact that nearly all of the tribal constitutions employ identical language are not surprising because nearly all of the constitutions were prepared by the Bureau of Indian Affairs (hereafter referred to as BIA) and its attorneys. As Homer Jenkins, who heads the Tribal Programs Branch of the BIA, stated in testimony before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee:

These constitutions, which are complex legal documents, were not an Indian invention . . . Rather, they were the pro-

*1977 Graduate, School of Law, University of California. Member, *California Law Review*.

duct of exhaustive study by the legal officers of the Department . . . This accounts for the great similarity in the documents . . . The Bureau of Indian Affairs, through its field staff, wrote most of the tribal enactments.¹³

The effect of inserting these additional nonstatutory requirements was to further cement BIA control over tribal decisions in the very documents that were intended to restore self-control and initiative to the tribes and to remove the former "paternalism and oppression."¹⁴

The consent power is particularly dangerous inasmuch as there are few standards for the control of its exercise. The Code of Federal Regulations gives a few general guidelines,¹⁵ and by law consideration must be given to certain aspects of leases before approval is granted.¹⁶ However, by and large, the scope of the Secretary's discretion in vetoing Indian decisions is not specifically delineated. In order to understand the possible limits and controls over this seemingly absolute power, it is necessary to briefly examine the origins, history, and present state of the relationship between the government and the Indians.

Sources and Evolution of the Consent Power

The history of the white man's dealings with the Indians has been one of oppression, false dealings, and massacre.¹⁷ The early legal notions of the Indian tribes as semisovereign and respected nations, as expressed in the early Marshall Court opinions,¹⁸ was at odds with the ruthless expansionism and "manifest destiny" concepts illustrated by the Removal Act.¹⁹ The United States imposed its sovereignty over the Indian lands and people through military, economic, and colonial force, treating the Indians in general as a conquered and inferior race.²⁰ This power-based subjugation led to the concept of the so-called "plenary power" over Indian affairs.

At the same time, however, another concept was interwoven: a quasi-humanitarian concern for the welfare of the people who had been reduced to a desperate condition by both the actions and inaction of the government.²¹ The government's policy of separation was replaced by one of eventual assimilation, culminating in the General Allotment Act of 1887.²² Pending full assimilation, the government assumed the role of a protector and guardian for the Indian people.²³ This "wardship" analogy, which had first been suggested in *Cherokee Nation v. Georgia*,²⁴ gained popularity as the actual sovereign power of the Indians waned, to the point

where Congress eventually chose not to acknowledge tribes as sovereignties for treaty purposes.²⁵ The "wardship" idea was judicially developed in such cases as *Lone Wolf v. Hitchcock*²⁶ and *Rainbow v. Young*,²⁷ which expressed a "duty of care and protection owing to [Indians] by reason of their state of dependency and tutelage."²⁸

These two ideas, that of absolute plenary power over Indians and that of a guardian-ward relationship for their protection and benefit, merged into the awkward concept of a self-imposed "trust" relationship, with a judicially recognized duty on the part of the government to exercise its great authority only in the best interests of the Indians. As it was expressed in *Seminole Nation v. United States*²⁹:

Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the Government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards.³⁰

Thus, as the legal role of the government evolved from that³¹ of a conqueror to that of a protector, the Indians were given back more and more of their former powers of self-government, under such provisions as the IRA. However, as discussed above,³² the exercise of such power is usually effective only upon government approval. Theoretically, the consent power is exercised for the good of the Indians, as required by the trust relationship. In practice, the largely controlled consent power seriously limits the exercise of self-determination and provides the government a potent tool with which to control the Indian people for improper ends.³³

Problems With the Consent Power

Several specific problems are particularly troublesome under the present system. The consent power requires affirmative Secretarial action to implement Indian decisions, as opposed to a general review/veto power. This can be used as a means of control because withholding approval requires only inaction rather than a specific disapproval, and can lead to the use of delaying tactics³⁴ to avoid the controversy that would be caused by an adverse decision. Because of the many levels of delegated Indian power, it may take a great deal of time to secure any decision whatsoever. The BIA-prepared tribal constitutions generally allow a total of 100 days—over three months—to the government to approve tribal

decisions.³⁵ After an adverse decision is rendered, the internal review system, as set out in the Code of Federal Regulations, is extremely cumbersome and time-consuming. Evidently, no time limit at all is imposed on decisions appealed to the Area Director after an adverse decision by the local BIA official.³⁶ Appeals from the Area Director's decisions to the Commissioner of Indian Affairs can be held for 30 days without decision, then referred to the Board of Indian Appeals for decision.³⁷ The Board of Indian Appeals procedure similarly seems to have no maximum time limit,³⁸ but would evidently take a minimum of 60 days for filing briefs, answers, etc.³⁹ Thus, it could easily take six months to a year for a tribe to exhaust its administrative remedies, by which time the issue could well be moot.

In the context of approving tribal attorney contracts, the delays in pressing legal matters, coupled with the "pocket veto" technique of neither approving nor disapproving the contract, led to the passage of Section 1331 of Title 25 of the United States Code,⁴⁰ providing for automatic approval of the contract if no decision is rendered within 90 days. The necessity for the law was explained by Senator Sam Erwin in the bill's legislative history: "Frequently, these delays in approving contracts extend for periods exceeding a year and, consequently, impose so severe a hardship upon tribes in need of counsel that they constitute a denial of due process of law."⁴¹ This is certainly a step in the right direction. However, all other decision approvals are still subject to the above-mentioned long delays, with no provision for such automatic validation. In many situations, such as approval of delicately negotiated multi-party business contracts where time is a crucial factor, such delays amount in practice to an unreviewable adverse decision.

Another problem with the consent power is its potential for political misuse. Indian history is full of instances of "sweetheart" contracts for mining and mineral exploitation approved by the government, contrary to the Indians' best interests and for a fraction of their true value.⁴² So long as the BIA is given final review power over such contracts, it is likely that such situations will continue. Furthermore, there are conflicts of interest within the Department of the Interior that make decisions in the Indians' best interests unlikely. Within that Department, in addition to the Bureau of Indian Affairs, are the Bureaus of Mines, Land Management, Sport Fisheries and Wildlife, and Reclamation,⁴³ all of which have substantial interests adverse to Indian rights.⁴⁴ Such conflicts result in decisions that compromise Indian interests rather than

carrying out the stated fiduciary duty to protect such interests wholeheartedly, as in the Paiute Tribe's Pyramid Lake controversy.⁴⁵ The existence of these conflicts was recognized by former President Nixon, who stated: "There is considerable evidence that the Indians are losers when such situations arise."⁴⁶

The consent power also suffers from the lack of articulated standards for review. These would logically be found in the Code of Federal Regulations, but the few standards found there are of little guidance. For instance, on the question of the qualifications of tribal attorneys, the Regulations state only that the attorney must be a "reputable member of the bar, and fully competent to carry the case" through all appeals,⁴⁷ thus leaving room for nearly total governmental control. While standards are set forth for lease approval,⁴⁸ these look only to the financial aspects and do not specify guidelines for social, cultural, and other special considerations.⁴⁹ The Secretary is given discretion to approve leases which are not financially advantageous, but only when "in his judgment such action would be in the best interest of the landowners."⁵⁰ This gives the Secretary extremely broad power to veto Indian decisions as to the social, cultural, or environmental desirability of a lease perhaps not as lucrative as others.

The problem is not helped by the boilerplate language of the tribal constitutions, most of which specifically allow the Secretary to disapprove tribal decisions "for any cause."⁵¹ Even if the language has minimal legal effect (due to other laws and cases that would require a minimally reasonable cause), it still represents an underlying attitude of the government *vis-a-vis* the Indians that must be considered.

This attitude itself is another drawback to the present situation. By its existence and use, the consent power perpetuates the "suffocating pattern of paternalism" that has characterized the Indian-government relationship.⁵² In essence, it treats the Indians as legal incompetents whose decisions must be scrutinized carefully to protect them from "their own improvidence and from over-reaching by others."⁵³ While this view was widespread fifty years ago, a sensitivity to the modern values of self-determination and internal sovereignty would argue against the current use of the consent power to protect a people who neither require nor desire such two-edged "protection." It reduces the role of the tribal government to little more than a "civics class," and demeans the dignity of the Indian people and their tribal governments.⁵⁴

It can be argued that the government today is actively trying to implement the current values of Indian self-determination by us-

ing its disapproval power only in extreme situations.⁵⁵ Even if this is true, and disregarding for the moment all of the other problems discussed above, the continued existence of the consent power represents a serious future threat. Many reservations contain valuable mineral and energy resources. Historically, the government has encountered little effective opposition to their exploitation.⁵⁶ However, as self-determination increases, it seems likely that the tribes will begin to resist resource exploitation pressures, at the same time that the government becomes more and more in need of the resources. The reserved consent power could then be used to undercut Indian power gains and once again allow the exploitation of the Indians' resources by refusing to approve antidevelopment Indian decisions.

Current Procedures for Review

Internal Agency Review

As discussed earlier, one major problem with the consent power is that it can be used to delay decisions to the point of meaninglessness. However, once an Indian decision has been formally disapproved, questions of review of the adverse decision arise. As with most agency decisions, exhaustion of administrative remedies is a precondition to seeking judicial review.

The internal appeals procedure is found in the Code of Federal Regulations.⁵⁷ Basically, the adverse decision on the reservation level is appealed first to the Area Director of the BIA, then to the Commissioner of Indian Affairs. The Commissioner may either decide the case, or refer the appeal to the Board of Indian Appeals in the Department of the Interior for decision.⁵⁸ If it is decided on the basis of the exercise of discretionary authority, the decision is final for the Department of the Interior; if it is decided based on an interpretation of law, the decision is appealable to the Board of Indian Appeals.⁵⁹ That decision is then final for the Department.⁶⁰

This administrative hearing procedure is cumbersome, time-consuming, and lacks many features generally considered desirable for such review.⁶¹ The only formal hearing provided for is that of the Board of Indian Appeals to resolve a "genuine issue of material fact."⁶² All other decisions are made by departmental officials rather than by a disinterested hearing officer. Pleadings are written, without provision for oral argument, and appeals can be summarily dismissed for procedural failings.⁶³ Bonds, unlimited in amount, can be required as a condition to the appeal.⁶⁴ Throughout the proceedings, the burden is on the Indian to over-

turn the disapproval, rather than on the BIA to justify its decision. However, the procedure has survived due process challenges.⁶⁵

Availability of Judicial Review

The traditional view was that the Secretary had virtually unlimited discretion in Indian matters by reason of his vested authority and the nature of the government-Indian relationship, and the Secretary's actions were not reviewable by the courts. As it was stated in *Rainbow v. Young*⁶⁶:

There is no provision for a re-examination of the question of fact so committed to him for decision, and, considering the nature of the question, the plenary power of Congress in the matter, and the obvious difficulties in the way of such a re-examination, we think it is intended that there shall be none.⁶⁷

Under this view, the Indians' rights were seen as comparatively insignificant: the Supreme Court observed in *LaMotte v. United States*,⁶⁸ referring to Secretarial lease approval: "Without doubt the regulations prescribed operate to restrain the Indian from leasing in his own way and on his own terms, but this is not a valid objection." The discretion of the government was nearly absolute. In Senate hearings on the IRA, Senator Wheeler observed that the local Indian agent on a reservation had the power of a "czar."⁶⁹ At that time there was no "provision for appeal from the decision of the Secretary giving the court revisory power."⁷⁰

Even after the passage of the IRA and the Administrative Procedure Act (hereafter referred to as APA),⁷¹ it was long held that sovereign immunity, the plenary power, and the broad grant of Secretarial discretion made Indian decisions generally unreviewable. This was sometimes explained by virtue of the curious "approval" structure: because the Secretary "*may* [as opposed to *shall* or *must*] ratify and approve amendments to the tribal constitution," such actions were held discretionary and hence not subject to APA review.⁷²

Eventually, though, some courts began to examine Secretarial decisions more closely. *Oliver v. Udall*,⁷³ while refusing to overturn the Secretary's approval of a tribal ordinance, nonetheless examined the merits of his action before affirming the lower court's summary judgment on mootness grounds. *Udall v. Littell*⁷⁴ was one of the first cases to review the Secretary's actions under APA standards, although without any discussion as to the Act's applicability. There, the court upheld the right of the Secretary to

cancel a tribal attorney's contract by administrative action for good cause.

Many doubts concerning the reviewability of Secretarial action were resolved by the Supreme Court in *Tooahnippah v. Hickel*.⁷⁵ While the case did not clearly establish standards for review, it held that Secretarial action in disapproving an Indian will was subject to review under the APA, overturning some lower courts' holdings of nonreviewability.⁷⁶

Tooahnippah involved the disposition by will of restricted lands. Such wills are subject to approval by the Secretary under Section 373 of Title 25 of the United States Code.⁷⁷ The decedent's will left his restricted land to his niece, and made no provision for his adult illegitimate daughter. There was considerable conflict concerning the daughter's true paternity, and the niece had evidently taken the decedent into her home and provided for him when the rest of his family had deserted him. The will was eventually disapproved by the Secretary for failure to provide for the daughter, and the niece sought review of the disapproval.

Recognizing the conflict in the circuits on the reviewability of such decisions,⁷⁸ the Court discussed the competing considerations. Noting that the APA allows review except to the extent that statutes preclude judicial review or the agency action is one committed to agency discretion,⁷⁹ and in view of the "presumption that aggrieved persons may obtain review of administrative decisions unless there is 'persuasive reason to believe' that Congress had no such purpose,"⁸⁰ the Court held that the action was reviewable under the APA.

The Court did not discuss the problem of sovereign immunity. There is a current conflict in the circuits on the issue of whether the APA operates as a waiver of sovereign immunity.⁸¹ The Supreme Court has been soundly criticized for its failure to resolve the problem.⁸² For instance, in reply to a holding by the District of Columbia Circuit that "the Administrative Procedure Act constitutes a waiver of sovereign immunity,"⁸³ the Court decided the case on standing grounds, stating, "We do not reach the question of . . . whether there is a statutory or immunity bar to this suit."⁸⁴ Professor Davis points out that three circuits currently hold that the APA constitutes a waiver of sovereign immunity, and other circuits have found ways around the doctrine when they wished to do so.⁸⁵

The approach of the court in *Littell v. Morton*⁸⁶ is illustrative of a balancing approach that recommends itself as a reasonable compromise between the desirability of a decision on the merits and

the policy of protecting the government from "substantial bothersome interference."⁸⁷ The court in *Littell* concluded that, while sovereign immunity can sometimes apply independently of the APA review provisions, a careful balancing of the values involved favored full review. The Secretary's actions, if *ultra vires* as alleged for APA review, are not protected by the doctrine, and it is one that has been under considerable attack in recent years,⁸⁸ especially as it relates to the APA. Noting the liberal application policy of the APA and the general silence on the part of the courts as to sovereign immunity problems, the court felt that even though the doctrine was not totally rejected in this context, it was weakened to the point that it would only be invoked in exceptional cases, where review could seriously undermine the functions of the government.⁸⁹ While the issue will not be settled until the Supreme Court takes definite action, the trend of the lower courts has been either to get around the doctrine by holding the APA to be a partial waiver⁹⁰ or by ignoring the issue entirely.⁹¹

The separate problem of *reviewability* of an ordinary administrative decision has been called "so difficult and complex that it remains largely unsolved."⁹² The APA applies, except to the extent that agency action is committed to agency discretion by law.⁹³ However, cases such as *Tooahnippah*, *Littell*,⁹⁴ and *Akers*⁹⁵ suggest that the courts are willing to review so-called discretionary decisions in Indian matters more readily than those in other areas, probably because of the underlying trust responsibility.⁹⁶ Professor Chambers has called such judicial review "clearly appropriate" due to the underlying fiduciary duties.⁹⁷ The distinction between review of ordinary and Indian decisions was expressed in *United States v. Seminole Nation*.⁹⁸ The court, in holding that judicial review was appropriate, observed that "cases cited to us by the appellant which serve to limit judicial review of administrative decisions where that same element of 'trust' is lacking are of little assistance here."⁹⁹

The leading case on reviewability of discretionary decisions is *Citizens to Preserve Overton Park v. Volpe*.¹⁰⁰ Under *Volpe*, reviewability turns on whether or not there is "law to apply."¹⁰¹ The vagueness of the standard has been criticized.¹⁰² It seems, however, that in most Indian decisions, there is clearly "law to apply" so as to enable the courts to review the actions meaningfully, either in the specific statutes requiring Secretarial approval¹⁰³ or in the body of Indian case law and departmental precedents. Inevitably, the decision by the courts to review administrative decisions is often bottomed on policy determinations as to the ap-

propriateness of such review.¹⁰⁴ The historical willingness of the courts to grapple with complex Indian legal questions¹⁰⁵ indicates a policy favoring judicial review and, because of the past treatment of Indians, the courts have generally been willing to protect their interests.¹⁰⁶ While some commentators have suggested the possibility of other means of attacking governmental decisions,¹⁰⁷ the APA seems to provide the easiest and best-recognized means of access to the courts in this area.

Standards for APA Review

The APA allows the court to compel agency action unlawfully withheld or unreasonably delayed¹⁰⁸ and to set aside actions found to be "arbitrary, capricious, or otherwise not in accordance with law."¹⁰⁹ Conceivably, the first section could be used to compel an approval decision in cases of unreasonable delay.¹¹⁰ The main concern, though, is the standard to which the Secretary will be held in reviewing his adverse decision under Section 2(A).

Most cases use the terms "abuse of discretion" and "arbitrary and capricious" nearly interchangeably. To be sure, these are broad standards and they serve a basically conclusory purpose, inasmuch as both serve as a shorthand way of indicating a finding by the court that the agency action was improper or unreasonable in the overall context. APA review operates as a check on otherwise uncontrollable agency power. As Justice Douglas observed: "Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions."¹¹¹ At the same time, of course, efficient administration requires a certain quantum of discretion in decision making, within the bounds of reasonableness. In other words, agencies have only the authority to exercise their discretion reasonably, and the basic question for the reviewing court is whether the decision falls within the permitted "zone of reasonableness."¹¹² If it is outside of this zone, it is referred to as an "arbitrary and capricious" decision or an "abuse of discretion."¹¹³

There are, of course, certain clear limits. Decisions made cannot reflect improper purposes,¹¹⁴ or be influenced by extraneous considerations. On the other hand, a failure to consider relevant considerations amounts to an abuse of discretion.¹¹⁵ To provide a basis for review, the official must articulate the rational basis for his decision,¹¹⁶ at least where there has been an adjudicatory hearing, and possibly in other cases as well.

Indian decisions on review are subject to the statutory APA review criteria.¹¹⁷ *Tooahnippah* refused to define strictly the scope

of the Secretary's power in holding that he abused it,¹¹⁸ but concluded that under the facts the decision was "arbitrary and capricious."¹¹⁹ Justice Burger, writing for the majority, refused to limit the Secretary's power of will approval to a determination that the technical requirements of a valid testamentary instrument had been met, but rejected the idea that the official could revoke or rewrite a rational will based on subjective notions of equity and justice, and in essence substitute his preferences for those of the Indian testator. He reasoned that the granting of the power of testamentary disposition would be meaningless if the Secretary had equal power to substitute his own judgment, but nonetheless felt that there remained some sort of undefined subjective discretion to disapprove dispositions "lacking in rational basis," even though the will might be technically able to "pass muster in a conventional probate proceeding."¹²⁰ Justice Harlan, in a concurring opinion, expressed general philosophical agreement with the idea of limiting the Secretary's discretion to merely determining whether the technical requirements of a will have been met, but felt constrained on the basis of the legislative history of Section 373 to allow the Secretary some additional review power. The overall holding is not a model of clarity. At least one court has interpreted *Tooahnippah* to require approval of wills that violate public policy but cannot be said to be clearly irrational.¹²¹ On the other hand, the Department of the Interior has interpreted *Tooahnippah* as sanctioning disapproval "where approval of such devise would be contrary to the public policy."¹²²

*Littell*¹²³ was similarly vague on the precise scope of the Secretary's discretion, defining decisions as an abuse of discretion if made without a rational explanation, inexplicably departing from usual policies, or based on improper considerations—the usual criteria.¹²⁴ Thus, as discussed above, the essential standard of review of the Secretary's action is reasonableness in light of the totality of the circumstances. Cases have not directly considered the unique nature of the relationship between the government and the Indian in analyzing the overall reasonableness of the decision, using instead traditional discretionary standards applicable to ordinary government-citizen dealings. Recognition of the uniqueness of the Indians' situation as a factor in the totality of circumstances might well mandate a higher standard of review.

Toward a Higher Standard of Review

The government has a self-imposed trust obligation to the Indian people, and its actions are to be judged "by the most exacting

fiduciary standards."¹²⁵ Such fiduciary standards require the decision to be made for the positive good of the Indian people, more than conduct that is merely not arbitrary or capricious by ordinary standards.¹²⁶ Failure to hold to such high standards can be viewed as a violation of the government's responsibility, which would itself be an abuse of discretion.¹²⁷ The courts, in reviewing the exercise of the trust responsibility, have the obligation to make this determination,¹²⁸ which involves more than just finding a rational basis for an Indian decision. As it was expressed in *United States v. Seminole Nation*¹²⁹: "A breach of that [fiduciary] obligation by the Government may obviously involve conduct less than arbitrary, capricious, or fraudulent by an official charged with the position of trust. Judicial review of the Government's actions, whether they be termed discretionary or not, is called for in that situation."¹³⁰ While this case arose under the Indian Claims Commission Act,¹³¹ and hence is not controlling authority here, it furnishes a philosophical basis for a higher standard of review. Under this view, cases limiting judicial review of other agency decisions would be inapplicable, and a failure to consider the special status of the Indian would be grounds for attacking the decision as a breach of trust responsibility. This would require particularly close examination in cases where there are conflicts of interest within the Department of the Interior,¹³² and such dealings would be "carefully scrutinized," giving "adequate weight to 'fiduciary standards'."¹³³

Secretarial disapproval of Indian decisions seems especially vulnerable to judicial attack because disapproval of a decision runs directly contrary to mandated goals of advancing self-determination and tribal autonomy by placing greater decision-making power in the hands of Indians. This has been the articulated policy of the government since the enactment of the IRA, one of the goals of which was to "get away from the bureaucratic control of the Indian Department, and . . . give the Indians the control of their own affairs and of their own property."¹³⁴ This purpose of the IRA was recognized recently by the Supreme Court.¹³⁵ The present policy of the government is to "reject the suffocating pattern of paternalism"¹³⁶ by "encouraging Indians to exercise greater self-determination."¹³⁷ These values have been consistently endorsed by the courts. In *Mescalero Apache Tribe v. Jones*¹³⁸ the Supreme Court recognized that the purpose of the IRA was to "disentangle the tribes from the official bureaucracy."¹³⁹ One of the clearest statements of the policy of self-government was the opinion in *McClanahan v. Arizona Tax Commission*,¹⁴⁰

which recognized the Indians as "a separate people, with the power of regulating their internal and social relations."¹⁴¹

Post-IRA legislation clearly indicates a congressional policy favoring increased Indian self-determination. Such measures include the 1955 act allowing long-term leases of Indian land,¹⁴² the Indian Civil Rights Act,¹⁴³ and the Indian Self-Determination and Education Assistance Act.¹⁴⁴

The latter includes a clear statement of congressional policy favoring "meaningful Indian self-determination,"¹⁴⁵ and finds a failure on the part of the government to allow Indians the "full opportunity to develop leadership skills crucial to the realization of self-government."¹⁴⁶ It provides for grants for "strengthening" tribal government.¹⁴⁷ The law's legislative history traces the concept of tribal sovereignty, the problem of excessive BIA control, and the current policies of self-determination.¹⁴⁸ It endorses the concept of tribal sovereignty as an original reserved power, whose exercise is not merely newly granted but is instead being recognized, defined, and protected by current laws.

This impressive executive, congressional, and judicial recognition and endorsement of increased Indian rights to decision making would seem to furnish a clear mandate to the Secretary to advance these goals whenever reasonably possible in the exercise of his discretionary power. While the legislative history of many of the consent power acts imply a broad grant of discretionary power,¹⁴⁹ the essence of legally allowable discretion is reasonableness in the totality of the circumstances.¹⁵⁰ The changing focus of government policy, while preserving the broad legal basis of the discretionary power, serves to limit the exercise of that discretion because the Secretary's overriding obligation is to use his authority to carry out the proper purposes of the government. Allowing the freest possible rein to Indian decision making, far from being in competition with the plenary power, instead advances the unambiguous government policy of using the consent authority to preserve and enhance true Indian self-government. In other words, the Secretary still has the power itself, but his superiors have clearly indicated that the power should be used to advance rather than impede Indian self-determination.

Judicial recognition of this concept of a Secretarial approval power limited by constraints of self-determination would in essence shift the burden of justification of adverse decisions to the Secretary. Because of the Secretary's high fiduciary duty to act in the best interests of Indians, and the clear mandate to advance self-determination by allowing Indians to make their own deci-

sions free of bureaucratic interference, any disapproval of an Indian decision would require a very strong justification. Deference to the values of Indian decision making should require something along the lines of a "minimum-rationality" test, where an Indian decision would be upheld if there was a conceivable rational basis for it, and the reviewer—either the Secretary or the court—could not overturn the decision merely because it might have been decided differently. This would protect the Indian people from fraudulent or improper decisions by the tribal authorities, while greatly strengthening the powers of self-determination.

Abolishing the Consent Power

The above discussion centers on changing the scope of the existing consent power to reflect current values of Indian self-determination. These changes could be made without making substantive statutory changes, relying instead on the judicial process. However, this method has the disadvantage that the statutory consent power remains. Future government policies may not be so receptive to concepts of tribal autonomy, and the mere fact of its existence might represent a temptation for future misuse. Thus, it may be better in the long run to eliminate the consent power itself.

It has been argued that doing so would be the functional equivalent of the government's termination policies, the "disastrous effects" of which are still being felt.¹⁵¹ Few people today would advocate the return of such a policy, which, while superficially attractive as giving the Indians "true" self-determination, actually operated to their disadvantage by forcing them into the mainstream of society without adequate preparation, education, or protection from unscrupulous whites.¹⁵² But removal of the consent power is not in the same category as across-the-board termination, with the loss of support services, the possibility of loss of land through tax debts, and all of the other problems. Instead, it can be viewed as entirely consonant with the articulated goals of "self-determination without termination."¹⁵³ Many of the problems of the 1950's termination can be traced to the abruptness of the action: without education, without preparation, and without support or guidance, Indians were expected to assimilate into white society.¹⁵⁴ Today, many of these problems are being overcome through a gradual transfer of powers and responsibilities to the tribes,¹⁵⁵ an increased solidarity and cultural awareness on the part of the Indian people, and a greater social sensitivity to the situation of racial minorities. Abolishing the consent power would not

have the radical consequences of the 1950's termination because the magnitude of the changes would not be so great and the Indians would be far better prepared.

One difficult problem is the need for the preservation of the land base. In a sense, the government holds Indian land in trust not only for the present generation of Indians, but for future generations of Indians as well.¹⁵⁶ Treaty language speaks of perpetuity, implying a permanent commitment on the part of the government.¹⁵⁷ The land base protects the cohesiveness of the tribe and, hence, its cultural identity. It serves as a buffer zone against the pressures of the outside world, a condition perhaps necessary to the continuation of tribal identity. Removing restrictions on the land could result in the disappearance of Indians as a distinct group, a loss not only to the Indian culture but to the dominant American society as well because cultural differences are said to be a "national resource."¹⁵⁸

Thus, the question of the desirability of retaining some form of government control over land base disposal¹⁵⁹ is a complex one, involving competing values of Indian autonomy and cultural preservation. The retention of alienage controls implies a lack of faith in Indian judgment in such matters; yet, on the other hand, the dangers involved and the unique trust status of Indian lands argues for extreme caution. Perhaps the decision should be made by those most directly affected—the Indians themselves. Aside from decisions directly affecting the land base, though, there appears to be little justification for continuing the consent power, particularly in situations such as hiring attorneys and amending tribal constitutions.

The mechanism for change is twofold: first, and easiest, constitutions and laws should be changed by the tribes in order to maximize their current self-determination powers. Grants of Secretarial approval power which are not statutorily required¹⁶⁰ should be eliminated, and other consent provisions should be clearly limited to the legal minimum, in order to lessen their effect. The power of the Secretary to disapprove measures "for any cause"¹⁶¹ should be eliminated, and other consent provisions should be conditioned on the continued existence of the applicable federal laws. For instance, the constitution of the Wahpeton Sioux Tribe now provides that attorney contracts must be approved only "so long as such approval is required by federal law."¹⁶² The proposed new constitution of the Cherokee Nation provides: "Laws or enactments which are required by Federal statute to be approved shall be transmitted . . . to the President of the United

States or his authorized representative.”¹⁶³ Such amendments would serve both legal and political purposes. They would immediately increase Indian decision-making power, and remove any possibility of nonrequired consent power. Further, they would increase Indian awareness of their right to self-government, and publicity could draw public and governmental attention to their insistence on further autonomy. The Secretary has shown his willingness to approve such amendments to the tribal constitutions by his approval for referendum of the new Cherokee constitution.¹⁶⁴

The next step would be to work for repeal of the various provisions of law that give the Secretary approval power over Indian decisions.¹⁶⁵ However, care should be taken not to give away too much. Termination of the consent power should not allow federal abdication of all responsibility in the decision-making process. Part of the continuing obligation of the trust responsibility, based as it is on quasi-contractual principles rather than merely altruistic concerns for a disadvantaged people,¹⁶⁶ is an obligation to continue to provide support services even after the direct federal authority is eliminated. The role of the Secretary should change to that of a counselor and a resource base. One possibility is that the Secretary could be required to prepare an “impact statement” on the effects of proposed major tribal decisions,¹⁶⁷ particularly those that affect the land base. The legal staff of the BIA could assist with the amending of tribal constitutions and counsel individual Indians on wills and other legal matters. Business advisors could similarly help with contract matters, appraisals, and the like. The Indian Self-Determination Act¹⁶⁸ illustrates some of the directions this assistance might take, in its emphasis on the Secretary as a cooperative advisor rather than administrator.¹⁶⁹

While political prediction is risky, it would seem that such proposed legislation would stand a good chance of passage, given the current government policy of encouraging Indian self-determination. The elimination of veto authority could be offset by a requirement of mandatory consultation, at least on major decisions. It is conceivable that the BIA itself might support the change because it would eliminate much confrontational pressure inherent in the present system. In terms of the evolving Indian-government relationship, it is logical to relinquish control as self-determination increases. Perhaps there is even some relevance to the historical guardian-ward concept: as the ward comes of age, the function of the guardian is less to dictate and more to advise.

Conclusion

The current Indian-government relationship is characterized by a pervasive pattern of restraints on Indian decision making. The broad discretionary power of the Secretary of the Interior should be reexamined and reformulated to guarantee adherence to the mandated goals of tribal self-determination and internal sovereignty. Ideally, the government's role in Indian decision making should change from one of authority to an advisory capacity. This can best be achieved through tribal constitutional amendments and carefully thought out legislative change.

NOTES

1. 25 U.S.C. § 1a (1970).
2. 25 U.S.C. § 2 (1970).
3. *See, e.g.,* *Armstrong v. United States*, 306 F.2d 520 (10th Cir. 1962).
4. 25 U.S.C. §§ 81, 476 (1970).
5. 25 U.S.C. § 163 (1970).
6. 25 U.S.C. § 373 (1970).
7. 25 U.S.C. §§ 379, 483, 483a (1970).
8. 25 U.S.C. § 476 (1970).
9. Act of June 18, 1935, ch. 576, § 16, 48 Stat. 987, *codified at* 25 U.S.C. § 476 *et seq.* (1970).
10. When powers of the Secretary are referred to herein, they include powers delegated by him to lower officials unless noted otherwise. Also, unless noted otherwise, references to "the Secretary" refer to the Secretary of the Interior.
11. *See, e.g.,* art. IV § 4 of the Oglala Sioux Const.; art. VII of the Hualapai Const.
12. *See, e.g.,* art. IV § 1(g) of the Oglala Sioux Const.
13. *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 165 (1962).
14. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); H.R. REP. NO. 1804, 73d Cong., 2d Sess. 6 (1934).
15. *E.g.,* 25 C.F.R. §§ 72 (attorney contracts), 131 (leases).
16. 25 U.S.C. § 415(a) (1970).
17. *See generally* V. Vogel, *THIS COUNTRY WAS OURS* 149-50 (1972) [hereinafter cited as *VOGEL*].
18. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).
19. Act of May 28, 1830, ch. 148, 4 Stat. 411 (1830), providing for the "removal west of the Mississippi" of Indians.
20. *See Report of General Sherman*, H. EXEC. DOC. NO. 1, 48th Cong., 1st Sess., serial 2182, 45-46 (1883).
21. *See Comment, The Indian Battle for Self-Determination*, 58 CAL. L. REV. 445, 456; *VOGEL supra* note 17, at 150. These ideas stemmed in part from Darwinian evolutionary theory and Spencer's views on the evolution of society, expressed in the idea of the "white man's burden" to civilize native cultures. *See also* Haas, *The Legal Aspects of Indian Affairs from 1887 to 1957*, 311 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 12 (1957) [hereinafter cited as *ANNALS*].
22. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887), *as amended*, 25 U.S.C. §§ 331-416j (1970).

23. For an interesting explanation of the humanitarian "wardship" philosophy, see G. MANNYPENNY, *OUR INDIAN WARDS* (1880).
24. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).
25. 25 U.S.C. § 71, Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566.
26. 187 U.S. 553 (1903).
27. 161 F. 835 (8th Cir. 1908).
28. *Id.* at 838.
29. 316 U.S. 286 (1941).
30. *Id.* at 296-97.
31. Compare *Annual Report of the Commissioner*, H. EXEC. DOC. No. 2, 22d Cong., 2d Sess. serial 233, 163 (1832) with *Annual Report of the Commissioner*, H. EXEC. DOC. No. 1, 47th Cong., 2d Sess., serial 2100, 3-4 (1882).
32. See text accompanying notes 4-9, *supra*.
33. For an example of uncontrolled discretion, see the discussion of the 1967 Pine Ridge grazing ordinance disapproval in M. PRICE, *LAW AND THE AMERICAN INDIAN* 720-21 (1973).
34. See text accompanying notes 40-41, *infra*.
35. See, e.g. art. IV § 2, Rosebud Sioux Const.
36. 25 C.F.R. § 2.18 (1975).
37. 25 C.F.R. § 2.19 (1975).
38. 43 C.F.R. § 4.369 (1976).
39. 43 C.F.R. §§ 4.359, 4.362 (1976).
40. Pub. L. 90-384, tit. VI, § 601, Apr. 11, 1968, 82 Stat. 80.
41. [1968] U.S. CODE CONG. & AD. NEWS 1866.
42. See Israel, *The Reemergence of Tribal Nationalism and its Impact on Reservation Resource Development*, 47 U. OF COLO. L. REV. 617, 643 (1976) [hereinafter cited as *Tribal Nationalism*].
43. UNITED STATES GOVERNMENT ORGANIZATION MANUAL 261 (1973).
44. Most Indian interests are essentially private in nature, for the benefit of a small group, while the other bureaus seek to advance the interests of the general public against conflicting private rights. For example, recreational sport fishing use may be incompatible with Indian treaty rights and subsistence needs.
45. For a more detailed examination of the conflict of interest problem, see Comment, *Interagency Conflicts of Interest: The Peril to Indian Water Rights*, 1972 LAW & SOCIAL ORDER 313.
46. R. Nixon, *Message From the President*, H.R. DOC. No. 91-363, 116 CONG. REC. 23131 (1970) [hereinafter cited as *President's Message*].
47. 25 C.F.R. § 72.22 (1975).
48. 25 C.F.R. § 131 *et seq.* (1975).
49. 25 C.F.R. § 131.5(b) (1975). There are exceptions for leases to family, religious organizations, and public agencies at nominal rental. 25 C.F.R. § 131.5(b)(1)-(2) (1975).
50. 25 C.F.R. § 131.5(b)(3) (1975). Chambers states that the BIA has interpreted this power very narrowly. Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, n.75 (1974) [hereinafter cited as *Chambers & Price*].
51. See, e.g., art. IV, § 4, Oglala Sioux Const.
52. *President's Message*, *supra* note 46, at 23132.
53. *LaMotte v. United States*, 254 U.S. 570, 577 (1921).
54. The traditional view has been that the reservations are "schools" teaching Indians to join the mainstream of American life, with the tribal government a mechanism for instilling ideas of democracy and citizenship rather than an effective governing entity. See *United States v. Clapox*, 35 F. 575, 577 (D.C. Ore. 1888); M. PRICE, *LAW AND THE AMERICAN INDIAN* (1973), at 677, 780.
55. This would appear to be the policy mandated by the *President's Message*, *supra* note 46.
56. Within the past twenty years, the Senecas have lost much of their reservation to the Kinzua Dam and to freeway expansion. See VOGEL *supra* note 17, at 214-15, and

WILSON, APOLOGIES TO THE IROQUOIS (1960). *See also Tribal Nationalism, supra* note 42, at 643.

57. 25 C.F.R. § 2 *et seq.* (1975); 43 C.F.R. §§ 4.350 *et seq.* (1976).

58. 25 C.F.R. § 2.19(a) (1975).

59. *Id.* at § 2.19(c).

60. 43 C.F.R. § 4.369 (1976).

61. The basic requirements of a hearing required by due process, as established in *Goldberg v. Kelly*, 397 U.S. 254 (1970) include the right to be heard orally in person, the right of confrontation and cross-examination, the right to retain counsel, and the right to have the decision based "solely on the legal rules and evidence adduced at the hearing." *Id.* at 271. The reasoning underlying the oral hearing right in *Goldberg, i.e.*, the lack of educational attainment to write effectively, seems particularly applicable to Indian proceedings. While a *Goldberg*-type hearing may not always be constitutionally required here, it would seem desirable to incorporate some of the due process safeguards.

62. 43 C.F.R. § 4.361(a) (1976).

63. 25 C.F.R. § 2.17, 18 (1975); 43 C.F.R. § 4.361(a) (1976).

64. 25 C.F.R. § 2.3(b) (1975).

65. *United States v. Pawnee Business Council*, 328 F. Supp. 54 (N.D. Okla. 1974).

66. 161 F. 835 (8th Cir. 1908).

67. *Id.* at 838.

68. 254 U.S. 470, 477 (1920).

69. 78 CONG. REC. 11125 (1934).

70. *Red Hawk v. Wilbur*, 39 F.2d 293, 294 (D.C. Cir. 1930).

71. 5 U.S.C. § 700 *et seq.* (1970).

72. *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1966).

73. 306 F.2d 819 (D.C. Cir. 1962).

74. 366 F.2d 668 (D.C. Cir. 1966).

75. 397 U.S. 598 (1970).

76. *Id.* at 605-607.

77. Act of June 25, 1910, § 2, 36 Stat. 856, *as amended by* Act of Feb. 14, 1913, 37 Stat. 678.

78. 397 U.S. 598, 605 n.10 (1970).

79. 5 U.S.C. § 701(A) (1970).

80. 397 U.S. 598, 606 (1970), *citing* *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

81. *Compare* *Schlafly v. Volpe*, 495 F.2d 273 (7th Cir. 1974) *with* *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967).

82. *See, e.g.*, *Schlafly v. Volpe*, 495 F.2d 273, 281 (7th Cir. 1974); DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 27.00.

83. *Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278, 1283 (D.C. Cir. 1974), *vacated* —U.S.—, 96 S.Ct. 1917 (1976).

84. *Simon v. Eastern Kentucky Welfare Rights Organization*, —U.S.— 96 S.Ct. 1917, 1923 (1976).

85. DAVIS *supra* note 82, at § 27.00-10.

86. 445 F.2d 1207 (4th Cir. 1971).

87. *Id.* at 1214.

88. *Id.*

89. *Id.*

90. *As in* *Schlafly v. Volpe*, 495 F.2d 273 (7th Cir. 1974).

91. *See, e.g.*, *Akers v. Morton*, 499 F.2d 44 (9th Cir. 1974).

92. DAVIS, *supra* note 82, at § 28.16.

93. 5 U.S.C. § 701(a)(2) (1970).

94. 445 F.2d 1207 (4th Cir. 1971).

95. *Akers v. Morton*, 499 F.2d 44 (9th Cir. 1974).

96. *See* text accompanying notes 29-30, *supra*.

97. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1913, 1938 (1975).

98. 173 F. Supp. 784 (Ct. Cl. 1959).
99. *Id.* at 789.
100. 401 U.S. 402 (1971).
101. *Id.* at 410.
102. See, e.g., DAVIS, *supra* note 82, at § 28.16.
103. See text accompanying notes 4-12 *supra*.
104. See DAVIS, *supra* note 82, at 28.16-1.
105. See Comment, *The Indian Battle for Self-Determination*, *supra* note 21, at 463.
106. United States v. Kagama, 118 U.S. 375, 384 (1886).
107. See, e.g., Chambers, *supra* note 97 (suggesting independent actions for breach of trust).
108. 5 U.S.C. § 706(1) (1970).
109. 5 U.S.C. § 706(2)(A) (1970).
110. This has been suggested by commentators. See B. SCHWARTZ, ADMINISTRATIVE LAW § 219 (1976); DAVIS *supra* note 82, § 8.08.
111. United States v. Wunderlich, 342 U.S. 98, 101 (1951) (dissenting opinion).
112. *C.f.* Mobil Oil Co. v. FPC, 417 U.S. 283, 307 (1974).
113. SCHWARTZ, *supra* note 110, at § 217, at 609.
114. Morrill v. Jones, 106 U.S. 466 (1883).
115. Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (failure to consider environmental effects).
116. In formal adjudication, this is required by 5 U.S.C. § 557(c)(3)(A) (1970). The requirement of articulated reasons for informal action is currently unclear, but would seem to be required by § 555(e) of the APA, although the Supreme Court has yet to so hold. An excellent discussion can be found in DAVIS, *supra* note 82, at § 16.00.01. Findings are clearly required in decisions by the Board of Indian Appeals, 43 C.F.R. § 4.369 (1976), and would seem to be implicitly required in the Commissioner's decision on appeals, 25 C.F.R. § 2.18(c) (1975).
117. See text accompanying notes 92-107, *supra*.
118. 397 U.S. 598, 608-609 (1970).
119. *Id.* at 610.
120. *Id.*
121. Akers v. Morton, 499 F.2d 44 (9th Cir. 1974).
122. *In re Estate of Wellknown*, 78 I.D. 179, 187 (1971).
123. 445 F.2d 1207 (4th Cir. 1971).
124. *Id.* at 1211.
125. Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).
126. 316 U.S. 286, 297 n.12 (1941), *citing* Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928).
127. See discussion in Chambers, *supra* note 97, at 1232-34.
128. See text accompanying notes 92-107, *supra*.
129. 173 F. Supp. 784 (Ct. Cl. 1959).
130. *Id.* at 789.
131. 25 U.S.C. § 70 (1970).
132. See text accompanying notes 43-46, *supra*.
133. Navajo Tribe of Indians v. United States, 364 F.2d 320 (Ct. Cl. 1966) (oil and gas leases).
134. Statement of Sen. Wheeler, 78 CONG. REC. 11125 (1934).
135. Morton v. Mancari, 417 U.S. 535, 542 (1974).
136. *President's Message*, *supra* note 56, at 23132.
137. *Id.* at 23133.
138. 411 U.S. 145 (1973).
139. *Id.* at 153.
140. *Id.* at 164.
141. *Id.* at 173.
142. Act of Aug. 9, 1955, Pub. L. No. 255, ch. 615, 69 Stat. 539, *codified at* 25 U.S.C. § 415(a) (1970).

143. Act of Apr. 11, 1968, Pub. L. 90-284, tit. II, 825 Stat. 77, *codified at* 25 U.S.C. §§ 1301-41 (1970).
144. Act of Jan. 4, 1975, Pub. L. 93-638, 88 Stat. 2203.
145. *Id.* at § 3(b).
146. *Id.* at § 2(a)(1).
147. *Id.* at § 104(a)(1).
148. [1974] U.S. CODE CONG. & AD. NEWS 7780.
149. See Justice Harlan's dissent in *Tooahnippah v. Hickel*, 397 U.S. 598 (1970).
150. See text accompanying notes 108-113, *supra*.
151. *President's Message*, *supra* note 46, at 23132.
152. See *Tribal Nationalism*, *supra* note 42, at 621-22.
153. *President's Message*, *supra* note 46, at 23132; [1974] U.S. CODE CONG. & AD. NEWS 7781.
154. For example, many could not obtain state benefits or licenses because they had no birth certificates and could not prove their age. Complex land titles made loans impossible to secure. Lack of English fluency and extreme poverty made integration into the mainstream culture virtually impossible. See discussion in W. BROPHY & S. ABERLE, *THE INDIAN: AMERICA'S UNFINISHED BUSINESS* 193-99 (1966).
155. As in the Indian Self-Determination Act, note 144, *supra*.
156. This has been analogized to a "life estate," where each generation is obliged to pass the land base on to the next. See Chambers & Price, *supra* note 50, at 1080.
157. *Cf. Shoshone Tribe v. United States*, 299 U.S. 476 (1937).
158. Remarks of Sen. R.F. Kennedy, quoted in VOGEL, *supra* note 17, at 245. See also Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAW. 600, 634 (1976).
159. In realistic terms, this would include long-term (99-year) residential leases as well as outright sales, because the permanence of such leases would have the same effect. See PRICE, LAW AND THE AMERICAN INDIAN 603 (1973).
160. See text accompanying notes 10-14, *supra*.
161. See text accompanying note 11, *supra*.
162. Wahpeton Sioux Const., art. VII § 1(e).
163. Proposed Constitution for the Cherokee Nation, art. V, § 7, approved for referendum 9/5/75.
164. *Id.*
165. See text accompanying notes 4-9, *supra*.
166. *President's Message*, *supra* note 46, at 32132.
167. Chambers & Price, *supra* note 50, at 1088.
168. Act of Jan. 4, 1975, Pub. L. 93-638, 88 Stat. 2203.
169. See, e.g., § 204(e) of the Act.