

MAKING A DIFFERENCE:
THE FEDERAL POLICY OF INDIAN TRIBAL
SELF-DETERMINATION AND SELF-GOVERNANCE

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(Florida and Christ Church '54)

IN 1970, President Nixon sent to the Congress a Message on Indian Affairs which represented the most innovative and far reaching approach to change in the field of Indian affairs since so-called "Indian New Deal" in the Roosevelt Administration. The centerpiece of the Nixon Indian policy was the proposal to permit tribes to contract with the Bureau of Indian Affairs and Indian Health Service to operate services for their members (social services, law enforcement, road construction and maintenance, resource development, health care, etc.) These services classically had been provided on Indian reservations by federal employees working under the direction of federal officials in Washington. Indeed, the Nixon proposal was to require these programs to be turned over to tribes to operate within 120 days of a tribal request.

I got involved at the early stage of this new policy when I was assigned by a non-profit organization, the Association on American Indian Affairs, to represent the Miccosukee Tribe in Florida in negotiating a contract with the BIA to run all BIA services for the Miccosukees. This was before the Message had even gone to Congress and five years before the Indian Self-Determination Act, which gave Congressional sanction to the policy, was enacted in 1975. I believed, nevertheless, that there was no legal impediment to such a BIA contract with the Miccosukees. The Nixon proposal was needed to take away the discretion of the BIA to refuse to contract, not merely to authorize a contract. What was unprecedented about the Miccosukee proposal was not that it was a contract for BIA funded services, but that it covered substantially *all* BIA services provided locally and would lead to the abolition of the BIA Miccosukee Agency. Most of the functions of the BIA reservation superintendent would be turned over to the elected tribal chairman, Buffalo Tiger.

The Miccosukees live in the Florida Everglades, where they withdrew during the nine year Second Seminole War (1835-1844). The fact that they remain in Florida after all these years indicates the failure of the pri-

mary war aim of the United States in that war, which was to remove all Indians from Florida to Oklahoma. They were known in the 19th Century as "the implacable and intransigent Miccosukee." For many years following the war they lived in the Everglades and had very little contact with the non-Indian population, for most of whom the Glades had little appeal. However, in the twentieth century the construction of the Tamiami Trail highway across the Glades and the establishment of the Everglades National Park, from which the Park Service attempted to evict the Miccosukee although the federal legislation establishing the Park protected their right to live there, led the Miccosukees to conclude that they needed a new relationship with their big neighbor, the United States.

Dissatisfied with the federal position that they were really Seminoles and could deal with the United States through the Seminole tribal government, a Miccosukee delegation, including Buffalo Tiger, visited Cuba in the late 1950's. When they returned to the Glades, they found that the BIA had changed its position and was ready to do business with them. For the first time the BIA established a local Miccosukee Agency and started a school and other programs. A permit was issued by the Secretary of the Interior which allowed the Miccosukee to reside in a 500 foot strip at the northern edge of the Park, and a health program operated by the Indian Health Service followed. Even the State of Florida issued a license which recognized the right of the Miccosukees to continue to live in the Glades on land the State claimed to own north of the Park.

After ten years experience with the BIA, the Miccosukees decided that they could run the programs better themselves. When I called BIA officials on their behalf in 1970, I was met with enthusiasm. This is just what the President's message to Congress next week is going to urge—let the Indians do it themselves, said Bill King.

Under Commissioner Louis Bruce, the BIA was then run by a group known as the "Young Turks" (Ernie Stevens, Sandy McNabb, and Bill King, among others). With the help of Brad Patterson and Bobbie Kilberg at the White House, they had put together the new tribal self-determination policy.

In January 1971, the Commissioner of Indian Affairs agreed to contract the Miccosukee Agency funding to the Tribe for the balance of the fiscal year just as soon as a contract could be drawn up. Then the Department of the Interior establishment reacted. Various agencies in the DOI concluded that the contract would be illegal unless Congress first passed the Nixon self-determination bill. However, DOI lawyers (frequently more creative than they get credit for in Indian affairs) decided that the

BIA could not make such a contract directly with the Tribe but that it could with a "private corporation" under an old 1930's law known as the Johnson O'Malley Act.

The Miccosukees were prepared to go through whatever federal hoop appeared to promise success, so the Tribal Council, acting under its inherent sovereign authority, chartered the Miccosukee Corporation as a wholly-controlled subsidiary to run its BIA-funded programs (the corporation still exists although even DOI now agrees that the BIA can contract with tribes). In June, with only a few weeks to go in the fiscal year all the BIA programs were contracted, and they have been under tribal management ever since. Not long afterward the Indian Health Service also contracted with the Tribe (or rather with the Miccosukee Corporation).

In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (the ISDA), the Miccosukees serving as a model for what tribes can do if allowed to govern themselves. Today, the Miccosukees operate a \$3,000,000 program under their BIA contract. They have continued their aggressive involvement in the surrounding community, benefiting from the experience gained through tribal self-determination. When the State of Florida took fill from their reservation to build Alligator Alley without their consent, they sued and recently settled the case for a monetary settlement, as well as additional land rights. Recently, the Congress confirmed their land rights within the Park, expanding the Tribe's reserved area within the Park to 1000 feet.

Taking advantage of the rights afforded by the Federal Indian Gaming Regulatory Act and the freedom of Indian tribes from state regulatory control, the Miccosukees have operated for several years a bingo facility just west of Miami on lands where they once camped, fished and hunted. This summer they opened a high class resort hotel with a first class restaurant. Visitors can view the Everglades from their hotel rooms and, a few miles away, can take an airboat ride through the Glades visiting traditional Miccosukee campsites, spending time with the alligators, raccoons, interesting birds, and other Everglade wildlife. They can also hear a Miccosukee guide explain the poisonous effect on the Glades ecology of the massive sugar production to the north.

As a result of my experience in assisting the Miccosukees to achieve tribal self-determination, most of my professional career has involved the federal policy of self-determination. In the 1970's I represented a number of tribally established school boards that broke the iron control of the backward BIA education bureaucracy, then notorious for its opposition to the use of Indian languages in Indian schools where many children

came to school speaking only their Indian language. In the late 1970's and early 1980's I represented regional consortia of Indian tribes in Alaska (generally referred to as Alaska Native villages) in a successful effort to achieve tribal self-determination over the IHS-funded health program for Alaska Natives. Today, under the variation of self-determination known as "self-governance" (a model demonstration program included in the ISDA as Title III), almost all of the federal health services in Alaska are operated by Native villages either independently or through regional tribal consortia.

The present Miccosukee chairman, Billy Cypress, recently described tribal self-determination as the most successful Indian policy the United States has ever had. Not only has the policy justified itself through allowing the Indian communities to set their own priorities and find shortcuts around bureaucratic obstacles that at one time impeded federal efforts to meet the federal obligation to Indians, but the experience gained through shouldering the responsibility for federally funded programs has led to more creative and successful tribal efforts across the board. An example is the development during 1999 from the grass roots up of a comprehensive tribal proposal to extend the Indian Health Care Improvement Act (the IHCA).

The IHCA was passed in 1976 to give more specific authority and guidance to the Indian Health Service in providing health care to Indians. Previously, the IHS was simply authorized by old legislation to spend money for the health care of Indians. IHCA provided some self-executing provisions as to how health care should be provided and authorized a number of health care projects (some of which have never been funded by Congress). The Act also declared that it is the national policy of the United States to assure the highest possible health status for Indians and to provide all resources necessary to effect that policy. The IHCA was reauthorized in 1988 and is now due to expire in September 2000.

While the IHS has significantly improved the health status of Indians since it was established in 1955, Indians continue to experience a significantly higher mortality rate than the general population in many areas (liver disease, diabetes, pneumonia, and tuberculosis, for example). The overall mortality rate is higher than the general population. Thus health care is a major priority for all tribes. In 1998-99, tribes established a national steering committee with representatives from tribes in every IHS administrative area and chaired by tribal chairpersons Rachel Joseph and Henry Cagey. The 1988 reauthorization bill, which contained significant modifications in the Act, was drafted by Hill staffers supportive of the

goals of the Act. The steering committee was asked by Hill staffers to provide concepts for improvements in the health program with the drafting to be done on the Hill as in the past. Instead, the steering committee decided to draft its own bill which could stand as a statement of the health goals set by Indian people for themselves.

Based on regional and national conferences of Indian people the steering committee produced a bill which was introduced as H R. 3397 in the form developed by the committee on November 16, 1999, by Rep. George Miller and twenty-seven Congressional co-sponsors from both major political parties.

The steering committee made several significant policy judgments during the preparation of the bill. It included provisions it considered necessary to further the goal of improving the health status of Indians without regard to criticism that the Congress would never go along. Generally, it provided for programs benefiting all tribes and excluded tribal-specific projects. It balanced the interests of reservation Indians and urban Indians (who were represented on the committee and participated actively in the drafting process) by providing that some (but not all) programs hitherto limited to tribal Indians on reservations would be available to Indians living in off reservation urban areas. It deferred the argument that Indian health care should be an entitlement (many Indians feel that health care is part of the bargain which the United States made with Indians in exchange for most of the present national territory) to a commission which would be set up under the bill to study entitlement issues. For example, to what services exactly does the entitlement extend? And to whom does it run?

The steering committee bill converts many model demonstrations into ongoing programs, provides for innovative approaches to constructing desperately needed new health facilities in Indian country, and requires that the IHS provide information to Congress on the total need for new health facility construction, not just the top ten projects approved by IHS. It also provides for greater availability to the Indian health program of funding sources other than IHS (Medicare, Medicaid, etc). It contains many tribal-friendly provisions in keeping with the era of tribal self-determination (such as a requirement that regulations under the Act be developed through a negotiated rulemaking by a committee including tribal representatives).

It remains to be seen how the Congress will react to this ambitious new recipe for meeting the national goal of raising Indian health status to the highest possible level. However, the process by which the bill was de-

veloped has already demonstrated the capacity of tribal and other Indian leaders to work together to identify and promote goals common to all Indian people, a capacity fostered and encouraged by the federal policy of tribal self-determination. I was privileged to serve on the committee of lawyers which provided assistance to the steering committee in the drafting process.

Finally, I should note a less positive development in 1998-99 affecting the future of tribal self-determination. In the fiscal year 1999 appropriation legislation, Congress imposed for the first time since 1975 a moratorium on any new contracts under the ISDA and any expansion to include new programs in existing contracts. This extraordinary pause in the federal policy resulted from the so-called "contract support" crisis. Early in the history of the ISDA the BIA and IHS realized that the policy would work only if funds were provided to tribes to cover administrative functions which under federal operation were either not required (although required of a government contractor—such as audits and other reporting) or were provided in support of federally operated programs from source not under contract. The agencies asked Congress to provide this funding in the late 1970's and it has done so every since. In 1988, Congress amended the ISDA to require the agencies to provide a "reasonable amount" for such contract support funding to a tribal contractor in addition to the funds the agency would have had for federal operation of the program.

The federal agencies had established a process for negotiating the "reasonable amount" to be provided with the tribes. However, in many years the agencies ran out of sufficient funds to cover the negotiated amounts. In 1994 Congress added appropriations to cover past years' shortfalls but included a bar in the future on meeting such shortfalls except from the amounts specifically earmarked by Congress. This issue has resulted in several lawsuits by tribes based on the apparently mandatory language of the ISDA itself. When the Miccosukee Tribe won a case on contract support before the Secretary of the Interior's own contract appeals board, the Secretary appealed, and in 1999 a federal court of appeals held that the BIA is not obligated to pay the negotiated amount if Congress imposes a limitation on the available contract support funding (even when the limitation is imposed long after the tribe has signed an agreement providing for payment and has commenced performance in reliance on the agreement).

In an attempt to address this issue, the Administration proposed to increase contract support funding in 2000 by \$11,447,000 for the BIA and

\$35,000,000 for the IHS and proposed elimination of the moratorium. The increases would have significantly alleviated, though not eliminated, the shortfall. The Administration request was supported by the bipartisan leadership in the House and Senate authorizing committees and by the chairman of the Senate Appropriations Committee, Ted Stevens from Alaska. However, Senator Gorton, chairman of the Senate appropriations subcommittee, opposed elimination of the moratorium. In addition, the position of the House appropriations committee was that the most serious shortfall problem (in IHS contracts) could be resolved by distributing contract support funding pro rata so that all tribal contractors would have the same shortfall. Although general tribal opposition to the pro rata approach caused its removal from the House bill, both Houses passed a bill for the President's signature which continued the moratorium on new or expanded contracts for FY 2000 and provided no increase for contract support funding.

However, that bill never got to the President for signature. The active efforts of the National Congress of American Indians and of tribal leaders throughout the country resulted in a quite different result when FY 2000 appropriation legislation finally passed: increases of \$10,000,000 for BIA and \$25,000,000 for IHS and the elimination of the moratorium.

While this was a significant victory for tribes, it left the future of the federal policy of tribal self-determination still in doubt, especially in view of the negative court decision. The question remains whether the split between the authorizing committees which devised "the most successful Indian policy the United States has ever had," and the appropriations committees which seem reluctant to provide for the modest budget increases necessary to make the continuation of the policy viable, can be healed. Both the BIA and IHS continue to operate about half of their respective programs directly. Tribes which have not yet exercised their full right to run their own programs (the Navajo Nation and many large Northern Plains tribes, among others) are unlikely to do so if a self-determination contract means that funding for services must be reduced in order to pay for audits and other federally imposed costs which the federal government does not impose on itself.

Thus this account of the federal policy of tribal self-determination breaks off in the middle of things. I look forward to assisting tribes to implement the policy for a number of years yet and am confident that many tribes, at least, will continue to exercise their right to set their own priorities and carry programs which, though federally funded, are structured to address the needs of tribal Indians as they see them. That approach seems

more consistent with “our values” (as the current expression has it) than the old system under which federal bureaucrats in Washington governed the “Indian country.”

Bobo Dean, who went up to Christ Church in 1954, began representing Indian tribes as an attorney in Washington, D.C., in 1965. In 1982 he helped establish his present firm, Hobbs, Straus, Dean & Walker, LLP, with offices in Washington, Portland, Oregon, and Norman, Oklahoma. The firm’s practice is limited almost exclusively to federal Indian law. In addition to the Miccosukee Tribe, Bobo Dean’s clients include the Metlakatla Indian Community in Alaska, the Mississippi Band of Choctaw Indians, and a number of tribal consortia that operate hospitals and other health programs for Indians and Alaska Natives funded by the Indian Health Service.