

Felix S. Cohen, *On the Drafting of Tribal Constitutions*. David E. Wilkins ed., Norman, Oklahoma: University of Oklahoma Press, 2007 (unpublished memoranda 1934), pp.190. \$34.95  
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**It was November 1934**, and yet another chapter in federal Indian policy had just drawn to a close. From George Washington's Revolutionary War-era policy of accommodating Indian tribes through treaties (he needed their help), to the Supreme Court's early nineteenth-century tribal-sovereignty-protective policies, to Andrew Jackson's policies of removing eastern tribes to the West (often, Oklahoma), to the confinement-on-the-reservation policies that made famous the name of George Armstrong Custer, to the assimilationist "gentleman farmer" policies of breaking up and "allotting" the reservations, to the early-twentieth century policies of aggressive land-base encroachments and not-so benign neglect, federal Indian policy had oscillated wildly before. By 1928, the famous Merriam Report had recognized that the breakup of tribal land bases effectuated by late nineteenth-century "allotment" policies (and subsequent Hobbesian non-Indian predation) had proved disastrous to most tribal members.

But in 1933, Franklin Roosevelt appointed John Collier Commissioner of Indian Affairs, and Collier had a new vision. Convinced that both allotment (the breakup of communally-held reservations into discrete parcels more-or-less "owned" by tribal members and others *really* owned by non-Indians) and federal dominance over tribal-management matters had been counter productive, Collier was determined to end

them, and he enlisted the help of Felix S. Cohen in so doing. Cohen, who had just earned graduate degrees in philosophy (Harvard M.A. 1927, Ph.D. 1928), and law (Columbia LL.B.1931), joined the Department of Interior as an Assistant Solicitor in 1933. His task was to help draft the legislation that Collier hoped would ring in the new era.

Cohen was well-suited to the mission. A political idealist sympathetic to the plight of the underprivileged, and (as so frequently coincides with such views) a “legal realist” suspicious of legal formalism, Cohen was anything but averse to social engineering. To Cohen, Indian policy seemed a promising arena since its status quo had been generated not only by naked avarice but by *other* (sometimes well-intentioned) social engineering, the effects of which Cohen might undo. The Collier/Cohen plan would be reflected in the Indian Reorganization Act [“IRA”] that Franklin Roosevelt signed into law on June 18, 1934.

Except with respect to Oklahoma’s Indian tribes (which were added to the new regime in 1936), the IRA was a sea change in federal policy. Recognizing that both the quantity and quality of lands beneficially owned by tribes and tribal members had been rather spectacularly diminished since allotment had begun in the 1880s, the IRA ended allotment and extended the federal trusteeship over lands previously allotted to tribal members; those lands were thus protected against improvident and/or exploitative sale. But equally importantly, the IRA’s new policies would re-empower tribal members *governmentally* by explicitly authorizing tribes to organize and, upon majority vote and approval by the Department of the Interior, adopt tribal constitutions. Collier, Cohen, and Congress reasoned that such legislation would facilitate tribal *self-government*, lift the heavy hand of federal bureaucracy, empower tribal entrepreneurship, and make “tribal sovereignty” something more than a slogan once again.

Even before the IRA’s enactment, sixty tribes had filed constitutions or documents in the nature of constitutions with the Department of Interior; the unwritten Iroquois constitution traced back to the fifteenth century, and the Cherokee, Choctaw, Chickasaw, and Osage constitutions were reduced to writing during the nineteenth. It would turn out that under their inherent sovereignty, tribes already possessed such governmental and organizational powers as the IRA sought to “give” them as a matter of federal law; the Navajos and other tribes who rejected the IRA’s offer of structure (that part of the IRA was strictly voluntary)

would generate their own constitutions and/or regenerate their own governmental structures independent of the IRA's framework. But the federal-court case law clearly establishing those propositions would come later, and the issue was unsettled as of early 1934.

So to help those tribes who adopted the IRA framework and who sought federal assistance in reorganizing, the Department of the Interior prepared to lend a hand, and again came Felix Cohen to the fore. His *Basic Memorandum on the Drafting of Tribal Constitutions* was promulgated as an informal Bureau of Indian Affairs (then, "Indian Service") document on November 19, 1934. An addendum on the drafting of tribal bylaws—which remain an arcane remnant of Cohen's approach in some tribal (re-)constitutive documents to this day—followed on November 28.

Cohen's *Basic Memorandum* remained solely an internal Indian Service document, and it was never adopted as formal federal policy. The reasons behind its lack of its formal adoption remain unclear, but it may well be that Cohen's potentially-embarrassing editorializations contributed to that result. Passages such as "The whole history of the Indian Office has been one of continued encroachment upon the affairs of the tribe" (p. 55), and "It is important that the Indians give their best thought to devising ways of eliminating the spirit of selfishness and narrow partisanship which has disgraced some Indian tribal councils" (p. 96) convey some of Cohen's frank and unvarnished tone. It may also be that the sheer quantity of issues spoken to by Cohen's *Basic Memorandum*—and the diversity of the tribes it would potentially affect—counseled both Cohen and the Indian Service against promulgating a potentially exhaustive official document that might ultimately prove *too* influential among tribes, and/or too limiting of the Service's flexibility.

But serve as a guideline to the Indian Service's criteria for approving IRA tribal constitutions it did. Cohen's *Basic Memorandum* was a comprehensive one (along with his accompanying *Bylaws* memorandum, running to 171 pages as printed in the book now being reviewed). The topics it discusses—and many of the issues it sought to effectively address—are often strikingly relevant to present times, running the gamut from suggestions regarding the selection of a tribal name and statement of tribal purposes to membership qualifications, tribal governmental structure, officials' titles, the incorporation of still respected traditional forms of tribal government (not all were, or are), elections, criminal law,

tribal welfare, and individual rights.

Cohen was not a deity; while virtually all of the *issues* Cohen addressed still vex modern tribal governments in varying degrees, some of his *suggestions* would prove prescient, others not. Among the former are his suggestion for the inclusion of a "saving clause" in tribal constitutions (p. 75) so as not to constitutionally foreclose tribal exercises of power not recognized by federal law as of 1934 but that might be recognized in the future. Among the latter were Cohen's expressed preference (perhaps influenced by the New Deal's early experiences with the Supreme Court?) for one-branch tribal government (and resistance to separation-of-powers) on efficiency grounds (pp. 28-32). As experience has shown, one-branch governments are as potentially susceptible to gridlock as multibranch ones, and may be more susceptible to venality and corruption where the temptations to venality and corruption are strong.

Cohen sought mightily (if imperfectly) to be appropriately deferential to the fact that it was the *tribes'* sovereignty—not his—that he was helping to structure. Though both his work on the Indian Reorganization Act and his tribal-constitution-drafting project, he was attempting no less than to facilitate the (re)building of new worlds. While none of the resulting tribal governments proved remotely utopian (many, indeed, became dysfunctional and were replaced), Cohen's IRA and constitutional-drafting projects left Indian country better than what had gone immediately before. As John Collier would note in 1963, the post-1934 period of tribal-constitution drafting, which was accompanied by some urgency, probably reflected "the greatest number [of constitutions] ever written in an equivalent length of time in the history of the world" (p. xxiv), and while it is not always the case, sometimes, as Louis Brandeis reminded us, it is more important that a matter be settled than that it be settled right. Cohen's work helped to settle many things, and he often (if not always) helped to settle them right.

The University of Minnesota's David Wilkins rediscovered the unpublished manuscript of Cohen's *Basic Memorandum* at Yale's Beinecke Library (which holds most of Cohen's papers), and along with the (lightly edited) *Basic Memorandum* Professor Wilkins has included a helpful and well-referenced contextualizing introduction to Cohen's work. The volume being reviewed also contains (as appendices) the controversial "Model Constitution," "Model Corporate Charter," and a proposed tribal-constitutional outline, all of which were distributed

by the Indian Service to at least some tribes during 1934 and 1935. Those documents, along with Cohen's *Basic Memorandum*, will be of vast interest to all scholars in the field, and as published are sufficiently readable (sometimes, self explanatory) to be of great value to serious students of tribes and tribal governments at all levels. The University of Oklahoma Press—which has since 1932 published the enormously influential “Civilization of the American Indian” series—has with this volume begun a new series, the “American Indian Law and Policy” series, to parallel its venerable *Civilization* series. Under the insightful and energetic leadership of Professor Lindsay Robertson of the University of Oklahoma's College of Law, the new *Law and Policy* series has the promise to make an enormous contribution to the Indian-law field, and the publication of Cohen's *Basic Memorandum* as its inaugural volume only reinforces that potential.

The 550 or so Indian tribes in the United States have taken things quite far since 1934, the IRA, and Cohen's *Memorandum*. A careful reading of this book will reward the reader with historical perspectives and will spark creative thoughts about the future. I recommend it to all readers of this review.

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