

1-1-2018

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Lobbying as a Strategy for Tribal Resilience

Kirsten Matoy Carlson*

Indian tribes have endured as separate governments despite the taking of their land, the forced relocation of their people, and the abrogation of their treaty rights. Many threats to tribal existence have stemmed from federal policies aimed at assimilating Indians into mainstream American society. In crafting these policies, members of Congress often relied on the input of non-Indians, including the Bureau of Indian Affairs. As a result, American Indians were largely left out of the federal policy-making process. This started to change in the 1970s when Congress adopted the Tribal Self-Determination Policy, which encouraged tribal participation in the creation of federal Indian policy. Tribes have responded to this opening of the political process by increasingly lobbying Congress. This Article explores how tribes have used legislative strategies to influence federal Indian policy. It demonstrates how tribes have used lobbying as a way to build resilience over time by influencing the development of federal Indian policies that protect tribal sovereignty. This Article emphasizes the role of American Indian voices in federal policy-making and shows how tribes have used legislative advocacy to initiate new policies, to reverse court decisions, and to oversee the implementation of existing policies. In conclusion, this Article considers some of the implications of this research for federal Indian law and interest group and advocacy studies more generally.

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I. INTRODUCTION

Today, tribal police cars cruise most reservations, tribal health departments offer traditional and Western-style medical care to tribal members; tribal departments of natural resources monitor environmental quality standards and manage natural resources; tribal education programs teach children in their native languages; and tribal courts exercise jurisdiction over child welfare cases, disputes between members, and misdemeanor crimes.¹

But fifty years ago, Indian nations did not look like this.² Few viable tribal institutions existed. The federal government administered social, educational, and welfare programs in Indian country.³ Most Indian nations did not have their own police forces, courts, or

1. Programs and services vary greatly by tribe.

2. See Reid Peyton Chambers, *Reflections on the Changes in Indian Law, Federal Indian Policies and Conditions on Indian Reservations Since the Late 1960s*, 46 ARIZ. ST. L.J. 729, 733-36 (2014) (describing Indian country in the 1960s).

3. See *id.* at 734 (noting that the Bureau of Indian Affairs “controlled many, perhaps most, actions by tribes and reservation Indians”).

health clinics.⁴ If they had them at all, the Bureau of Indian Affairs (BIA) or the Indian Health Service (IHS) ran them.⁵ Living conditions in many Indian communities were deplorable. In Michigan, for example, Indians lived in homes insulated with newspaper and cardboard, heated by wood stoves, and without running water well into the 1970s.⁶

Indians not only survived these hardships but they thrived at the end of the twentieth century, experiencing a renaissance in tribal sovereignty, institution building, culture, and economic development.⁷ Tribes have demonstrated tremendous resilience, or ability to adapt in the face of adversity.⁸ For centuries, Indians have faced formidable threats to their existence from outsiders who have sought to occupy their lands, develop their natural resources, and destroy their cultures.⁹ Many of these threats came from policies sanctioned by the United States government.¹⁰

4. See, e.g., Donald L. Fixico, *Witness to Change: Fifty Years of Indian Activism and Tribal Politics*, in BEYOND RED POWER: AMERICAN INDIAN POLITICS AND ACTIVISM SINCE 1900, at 2, 8 (Daniel M. Cobb & Loretta Fowler eds., 2007) (“During the first fifty years of the twentieth century, Native people had limited influence. The Bureau of Indian Affairs controlled their lives. As we say, BIA stood for ‘Boss Indians Around.’”).

5. *Id.*; Chambers, *supra* note 2, at 734; Warren H. Cohen & Philip J. Mause, Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1820 (1968) (“Although the normal expectation in American society is that a private individual or group may do anything unless it is specifically prohibited by the government, it might be said that the normal expectation on the reservation is that the Indians may not do anything unless it is specifically permitted by the government.”).

6. See MATTHEW L.M. FLETCHER, *THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS* 166 (2012).

7. See, e.g., STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* (1988); JOANE NAGEL, *AMERICAN INDIAN ETHNIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY AND CULTURE* (1996); *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* 27 (Miriam Jorgensen ed., 2007); *THE HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION* 1-13 (2008).

8. Patrice H. Kunesh, *Constant Governments: Tribal Resilience and Regeneration in Changing Times*, 19 KAN. J.L. & PUB. POL’Y 8, 13-14 (2009).

9. Makere Stewart-Harawira, *Indigenous Resilience and Pedagogies of Resistance: Responding to the Crisis of Our Age*, in RESILIENT SYSTEMS, RESILIENT COMMUNITIES 158, 159 (Jordan B. Kinder & Makere Stewart-Harawira eds., 2018).

10. See Kunesh, *supra* note 8, at 9-10; Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 6-16 (2014). For a discussion of these policies, see DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (6th ed. 2011).

Yet for the past forty years, the federal government has formally adhered to an Indian policy that scholars and tribal leaders have widely described as supportive of Indian nations as governments.¹¹ The Tribal Self-Determination Policy emphasizes “the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.”¹² Some scholars have praised it as the most successful Indian affairs policy ever established by Congress.¹³ Scholars, however, have recently disagreed over whether Congress continues to support the Tribal Self-Determination Policy. While some have yet to see the era as over,¹⁴ others have noted erosion of the policy with Reagan-style budget cuts.¹⁵ A few have observed that federal Indian policy has shifted from self-determination to forced federalism.¹⁶ They claim that a new era in indigenous politics started in 1988 with the enactment of the Indian Gaming Regulatory Act and the devolution of federal powers to state governments in the area of Indian affairs policy.¹⁷ This devolution, they argue, undermines the once exclusive federal-tribal relationship by forcing tribes to enter into legal and political relationships with states.¹⁸ Moreover, it reveals that threats to Indian sovereignty and survival are on the rise again.

This disagreement over the current state of federal Indian policy demonstrates the importance of non-Indigenous governments to the existence of tribal sovereignty.¹⁹ The impact of

11. See Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 781 (2006).

12. 25 U.S.C. § 5302(b) (2012).

13. See Washburn, *supra* note 11, at 781.

14. See, e.g., Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77 (2015) [hereinafter *Congress and Indians*]; Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121 (2006); Jacob T. Levy, *Three Perversities of Indian Law*, 12 TEX. REV. L. & POL. 329 (2008).

15. See Dean J. Kotlowski, *From Backlash to Bingo: Ronald Reagan and Federal Indian Policy*, 77 PAC. HIST. REV. 617, 621–28 (2008).

16. JEFF CORNTASSEL & RICHARD C. WITMER, FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD 5 (2008) [hereinafter FORCED FEDERALISM].

17. *Id.*

18. *Id.*

19. See Stephen Cornell & Joseph P. Kalt, *Two Approaches to Development of Native Nations: One Works, the Other Doesn't*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 3, 27 (Miriam Jorgensen ed., 2007).

congressional policy on Indian nations cannot be overstated. The very survival of Indian nations depends upon their ability to govern their people effectively by building institutions, promoting sustainable economic development within their territories, and protecting their distinctive ways of life.²⁰ Yet Congress can and historically has constrained their efforts.²¹ Congress exercises plenary power over Indian tribes and can divest them of their inherent authority at any time.²² As a result, to some extent, tribes continually face threats to their existence. As history has repeatedly shown, congressional policies unsupportive of the tribal right to self-determination undermine tribal sovereignty and the survival of Indian peoples.²³ This raises the question: How do tribes remain resilient despite this constant threat?

This Article explores how Indian tribes have used lobbying to protect their tribal sovereignty, build their institutions, and maintain control over their lands and natural resources during the Tribal Self-Determination Era. Part II inventories the literature on tribal participation in U.S. politics.²⁴ Historically underdeveloped, this emerging literature has documented a dramatic increase in reported lobbying by American Indians over the past thirty-five years but has yet to explore how and why tribes use legislative strategies.²⁵

Part II then seeks to fill the gap in the existing literature by illuminating some of the various ways in which Indian nations have used lobbying as a strategy for tribal resilience. By lobbying to protect their status as sovereign governments, tribes promote their cultural, economic, and political survival. This Article does not offer a comprehensive account of all the possible ways tribes employ lobbying as a strategy for tribal resilience, but it makes a first attempt to investigate some of the various ways in which tribes have used legislative strategies to protect their sovereignty. It attempts to cumulate knowledge on tribal lobbying strategies by

20. *Id.* at 18.

21. See Kunesh, *supra* note 8, at 9–10; Strommer & Osborne, *supra* note 10, at 1.

22. See U.S. CONST. art. I, § 8, cl. 3.

23. See Kunesh, *supra* note 8, at 9–10; Strommer & Osborne, *supra* note 10, at 1.

24. See *infra* Part II.

25. See Kirsten Matoy Carlson, *Lobbying Against the Odds*, 56 HARV. J. LEGIS. 401, 403, 416–23 (2019) [hereinafter *Lobbying Against the Odds*].

documenting three case studies and situating each within a broader context. The cases show that Indian nations have used legislative advocacy to advance tribal sovereignty by initiating new policies, reversing court decisions, and encouraging the oversight and implementation of existing policies. Unlike previous studies of lobbying by Indians at the federal level, this Article connects lobbying efforts with their policy outcomes and attempts to give voice to the role that Indians have played in the legislative process.²⁶ Thus, the case studies demonstrate how tribes have harnessed strategies used by interest groups within the American political system to advocate for federal Indian laws and policies beneficial to them.

Part III aggregates and analyzes the data from the case studies to demonstrate how tribes have employed lobbying as a strategy for tribal resilience. The case studies emphasize the voices of Indian nations as active participants in the political process, struggling to retain their sovereign governments and distinctive ways of life. Moreover, the cases when read together suggest that lobbying strategies that encourage tribal resilience share common aspects: an emphasis on protecting tribal sovereignty; persistence in tribal lobbying efforts; sophistication and adaptability in tribal strategies; and a commitment to building long-term, sustainable relationships.

In conclusion, Part IV considers some of the implications of this descriptive research on tribal lobbying for federal Indian law and interest group and advocacy studies more generally. This exploratory research indicates that Congress is an important venue for the crafting of federal Indian law. It emphasizes the need for additional research into the success of tribal lobbying as a strategy for advancing policies beneficial to, and opposing policies detrimental to, Indian nations. The research also has implications beyond federal Indian law and suggests that interest group and

26. See generally Frederick J. Boehmke & Richard Witmer, *Indian Nations as Interest Groups: Tribal Motivations for Contributions to U.S. Senators*, 65 POL. RES. Q. 179 (2012) [hereinafter *Tribal Motivations*] (documenting tribal contributions to U.S. Senate campaigns); Richard Witmer & Frederick J. Boehmke, *American Indian Political Incorporation in the Post-Indian Gaming Regulatory Act Era*, 44 SOC. SCI. J. 127 (2007) [hereinafter *Post-Indian Gaming Regulatory Act Era*] (finding an increase in American Indian use of interest group strategies from 1997 to 2000).

oversight theories may merit modification in light of the experiences of Indian nations.

II. ADVOCATING FOR SURVIVAL: TRIBES AND FEDERAL INDIAN LAW AND POLICY

This Part explores some of the multiple ways in which tribes and American Indian organizations have used legislative advocacy to influence federal Indian law and policy to protect tribal sovereignty during the Tribal Self-Determination Era. Section II.A summarizes existing knowledge about American Indian participation in the United States political system. It acknowledges a lack of knowledge about how tribes engage in the legislative process. Section II.B starts to address this gap in existing knowledge by situating tribal legislative advocacy within its historical context as part of a larger pattern of tribal advocacy. Section II.C then uses three case studies to investigate some of the distinct ways in which tribes have employed legislative advocacy to promote tribal sovereignty through the creation and implementation of federal Indian law and policy during the Tribal Self-Determination Era. The cases demonstrate that Indian nations have used lobbying to initiate new policies, to reverse court decisions, and to oversee the implementation of existing policies. The more cumulative approach to understanding Indian legislative advocacy used here provides some useful, initial insights into how tribes use advocacy to advance tribal sovereignty in the legislative process.

A. American Indian Participation in U.S. Politics

Most political scientists exclude American Indians from their studies of American politics.²⁷ As a result, the literature on political advocacy by Indian nations is scant and underdeveloped. The dramatic increase in political activism at the end of the twentieth century has encouraged political scientists, sociologists, and legal

27. See DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* 170 (3d ed. 2011); Jeff J. Comtassel & Richard C. Witmer, II, *American Indian Tribal Government Support of Office-Seekers: Findings from the 1994 Election*, 34 *SOC. SCI. J.* 511 (1997) [hereinafter *1994 Election*].

scholars to study Indian advocacy.²⁸ This growing field has produced studies on individual Indians as voters in mainstream elections,²⁹ Indian protest movements after World War II,³⁰ campaign contributions made by Indian nations involved in gaming enterprises,³¹ and Indian engagement in state and local politics.³² Many of these studies, however, have not considered the legislative strategies used by Indian nations.³³

The studies that do examine legislative advocacy by American Indians often frame their research within the theoretical frameworks used by interest group scholars.³⁴ They expect, and often find, that American Indians act like organized interests.³⁵ These studies have documented the increased use of interest group strategies, especially lobbying and campaign contributions, by Indian tribes at the federal, state, and local levels.³⁶ Aside from a

28. See generally CORNELL, *supra* note 7; NAGEL, *supra* note 7; *Lobbying Against the Odds*, *supra* note 25.

29. See, e.g., DANIEL MCCOOL ET AL., *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* (2007); LAUGHLIN McDONALD, *AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS* (2011).

30. See, e.g., DANIEL M. COBB, *NATIVE ACTIVISM IN COLD WAR AMERICA: THE STRUGGLE FOR SOVEREIGNTY* (2008); NAGEL, *supra* note 7; PAUL CHAAT SMITH & ROBERT ALLEN WARRIOR, *LIKE A HURRICANE: THE INDIAN MOVEMENT FROM ALCATRAZ TO WOUNDED KNEE* (1996).

31. See, e.g., *1994 Election*, *supra* note 27; *Tribal Motivations*, *supra* note 26.

32. See, e.g., FORCED FEDERALISM, *supra* note 16; LAURA E. EVANS, *POWER FROM POWERLESSNESS: TRIBAL GOVERNMENTS, INSTITUTIONAL NICHEs, AND AMERICAN FEDERALISM* (2011); KENNETH N. HANSEN & TRACY A. SKOPEK, *THE NEW POLITICS OF INDIAN GAMING: THE RISE OF RESERVATION INTEREST GROUPS* (2015); W. DALE MASON, *INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS* (2000); Frederick J. Boehmke & Richard Witmer, *State Lobbying Registrations by Native American Tribes*, 2015 POL. GROUPS & IDENTITIES 633 (2015) [hereinafter *State Lobbying Registrations*].

33. For example, in his groundbreaking analysis of changes in collective action by American Indians and Indian nations in the mid-twentieth century, Cornell considered the different strategies used by American Indians and Indian nations, but he did not systematically consider legislative strategies largely because Indian nations did not yet have the resources to pursue them. See CORNELL, *supra* note 7.

34. See, e.g., HANSEN & SKOPEK, *supra* note 32; STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE* (2005); MASON, *supra* note 32; *1994 Election*, *supra* note 27; *State Lobbying Registrations*, *supra* note 32.

35. *Post-Indian Gaming Regulatory Act Era*, *supra* note 26, at 129; *State Lobbying Registrations*, *supra* note 32, at 5.

36. See, e.g., EVANS, *supra* note 32; HANSEN & SKOPEK, *supra* note 32, at 211–13; *1994 Election*, *supra* note 27; *State Lobbying Registrations*, *supra* note 32; *Tribal Motivations*, *supra* note 26, at 181; Kirsten Matoy Carlson, *Making Strategic Choices: How and Why Indian Groups Advocated for Federal Recognition from 1977 to 2012*, 51 L. & SOC'Y REV. 930 (2017) [hereinafter *Making Strategic Choices*].

few case studies, most of these studies have not tried to connect the lobbying efforts of tribes with policy outcomes.³⁷ As a result, these studies have not investigated the multiple ways in which Indian nations may use the legislative process to influence policy outcomes.

Scholars have conducted a few descriptive case studies of legislative advocacy by Indian nations at the federal level.³⁸ These studies demonstrate how the advocacy efforts of tribes have influenced policy outcomes in particular cases. Their focus on either one issue or one Indian nation, however, limits the insights they can provide about the legislative strategies used by Indian nations more generally. The 573 Indian nations in the United States may use legislative strategies for different purposes and in diverse ways to influence federal Indian policy.³⁹ The landscape of advocacy in Indian country thus remains largely unknown. Case studies are helpful, but in isolation they leave unanswered

37. See, e.g., *Post-Indian Gaming Regulatory Act Era*, *supra* note 26, at 129; *State Lobbying Registrations*, *supra* note 32, at 5. For example, studies on campaign contributions provide some insights into legislative advocacy by Indian nations, but they do not link campaign contributions to specific policy proposals or evaluate the success of campaign contributions as a strategy. See, e.g., *Tribal Motivations*, *supra* note 26, at 179.

38. See, e.g., MARGARET D. JACOBS, *A GENERATION REMOVED: THE FOSTERING & ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD* 127–61 (2014) (describing Indian efforts to enact the Indian Child Welfare Act); Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5 (2004) (recounting Indian efforts to enact legislation restoring tribal criminal jurisdiction over non-member Indians); Clayton W. Dumont, Jr., *Contesting Scientists' Narrations of NAGPRA's Legislative History: Rule 10.11 and the Recovery of "Culturally Unidentifiable" Ancestors*, 26 WICAZO SA REV. 5, 10 (2011) (discussing the efforts of Indian nations, pantribal organizations, and Native Hawaiians to secure passage of the Native American Graves and Repatriation Act); Patrick Haynal, *Termination and Tribal Survival: The Klamath Tribes of Oregon*, 101 OR. HIST. Q. 270, 294–96 (2000) (recounting the efforts of the Klamath tribes of Oregon to regain federal recognition congressionally from 1987 to 1990); Mark Miller, *The Timbisha Shoshone and the National Park Idea: Building Toward Accommodation and Acknowledgement at Death Valley National Park, 1933–2000*, 50 J. SW. 415, 434–38 (2008) (describing the successful efforts of the Timbisha Shoshone to obtain legislation providing them with homeland from 1994 to 2000). Some scholars have also included short descriptions of Indian legislative advocacy on a particular bill in articles focused on the bill and how it changed the law. See, e.g., Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 TULSA. L.J. 541, 582–84 (1993) (describing the tribal dissatisfaction with mineral leasing on Indian lands leading up to the enactment of the Indian Mineral Development Act of 1982).

39. For example, one recent study found that 124 non-federally recognized Indian groups used different legislative advocacy strategies in seeking federal recognition. *Making Strategic Choices*, *supra* note 36, at 930–33.

questions about variation among Indian nations in terms of legislative approaches taken, issues of importance, and the kinds and amounts of legislative activities. The next section starts to fill this gap in the literature by situating tribal legislative advocacy within a longer historical context.

B. Tribal Legislative Advocacy Past and Present

Indian nations have a long and rich history of engaging with other governments.⁴⁰ Indian tribes made alliances with one another long before Europeans arrived in the Americas.⁴¹ They started petitioning colonial governments almost as soon as Europeans landed on American soil.⁴²

Indians have not always been successful, but they have continually attempted to influence non-Indigenous governments to craft policies that recognize and protect their tribal sovereignty. During the nineteenth century, Indian nations used the treaty-making process to retain their existing governmental and property rights.⁴³ Indian nations also petitioned and sent delegates to

40. See Daniel M. Cobb, *Continuing Encounters: Historical Perspectives*, in *BEYOND RED POWER: AMERICAN INDIAN POLITICS AND ACTIVISM SINCE 1900*, at 57, 58 (Daniel M. Cobb & Loretta Fowler eds., 2007); see also EDWARD LAZARUS, *BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT* (1991) (documenting over two decades of Sioux advocacy for a congressional act authorizing the bringing of the Black Hills claim in federal court); see generally FREDERICK E. HOXIE, *THIS INDIAN COUNTRY: AMERICAN INDIAN POLITICAL ACTIVISTS AND THE PLACE THEY MADE* (2012). This section adopts an encounters perspective for understanding the relationships between Indian and non-Indian governments. Cobb, *supra* at 57. An encounters approach describes the interactions among Indians and non-Indians as reciprocal and mutual rather than one sided. *Id.* In contrast to earlier versions of these interactions, this approach emphasizes Indians as active agents in their relations with non-Indians. *Id.*

41. BASIC CALL TO CONSCIOUSNESS 14 (Akwesasne Notes ed., 2005).

42. HERMAN J. VIOLA, *DIPLOMATS IN BUCKSKINS: A HISTORY OF INDIAN DELEGATIONS IN WASHINGTON CITY* 13–21 (1995); Daniel Carpenter, *On the Emergence of the Administrative Petition: Innovations in Nineteenth-Century Indigenous North America*, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW* 349, 349 (Nicholas R. Parrillo ed., 2017).

43. See 1-1 PHILIP P. FRICKEY ET AL., *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* § 1.03[1] Lexis (Nell Jessup Newton ed., 2017); INDIAN LAW RES. CTR., *NATIVE LAND LAW GENERAL PRINCIPLES OF LAW RELATING TO NATIVE LANDS AND NATURAL RESOURCES* (lawyers ed. 2012). For example, Anishinaabek nations in present-day Wisconsin and Minnesota negotiated the retention of their hunting, gathering, and fishing rights even when they ceded lands to the United States government. Treaty with the Chippewa, Chippewa Nation of Indians-U.S., July 29, 1837, 7 Stat. 536; see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

Washington, D.C., to meet with members of the executive branch and Congress.⁴⁴ They continued to petition and send delegations to Washington, D.C., after Congress unilaterally terminated treaty-making in 1871.⁴⁵

Indian involvement in federal policy-making ebbed in the late nineteenth and early twentieth centuries as members of Congress and the executive branch prioritized the views of the Bureau of Indian Affairs and other non-Indians over those of Indians in crafting Indian affairs policy.⁴⁶ Indian nations did not discontinue their advocacy despite their lack of political influence. But they faced tremendous obstacles and were unable to prevent Congress from enacting the allotment and termination policies that sought to destroy tribal organizations and assimilate American Indians into mainstream American society.⁴⁷

Even in these bleak times, some Indian nations overcame powerful opposition to persuade Congress to enact legislation beneficial to them.⁴⁸ Other tribes resisted these congressional policies and managed to prevent the passage of legislation terminating their tribal existence or subjecting them to state jurisdiction.⁴⁹

Indian activism gained publicity in the late 1960s and early 1970s with the rise of the civil rights movement. The Indian lobby,

44. HOXIE, *supra* note 40, at 70–71 (documenting Choctaw delegations to Washington, D.C., in the 1820s); MASON, *supra* note 32; Carpenter, *supra* note 42, at 349.

45. VIOLA, *supra* note 42, at 190–99.

46. EMMA R. GROSS, *CONTEMPORARY FEDERAL POLICY TOWARD AMERICAN INDIANS* 77 (1989).

47. CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 66 (2005). Allotment and termination were two of the most detrimental Indian affairs policies ever enacted by the United States Congress. The allotment policy undermined Indian nations by allotting tribally held land into alienable fee simple properties held by individual Indians and assimilating Indians into mainstream American culture as farmers. See Dawes Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887), http://digital.library.okstate.edu/kappler/Vol1/html_files/SES0033.html. The termination policy ended the political and legal relationship between the United States and over 110 tribal governments, liquidated tribal assets, and converted tribally held lands into fee simple properties. See Termination Act of 1953, H.R. Con. Res. 108, 83d Cong. (1953).

48. For example, Congress returned Blue Lake to the Taos Pueblo in 1972. WILKINSON, *supra* note 47, at 210–17.

49. For example, Indian advocacy prevented the termination of the Flathead reservation in 1954, and the Sioux defeated efforts to extend PL 280 to them in 1964. *Id.* at 106, 123–25.

however, remained weak.⁵⁰ Indian nations had limited financial resources and little experience in federal policy-making.⁵¹ A confluence of factors—including changes in the political environment, the availability of resources, the development of political capacity, and dramatic shifts in the receptivity of federal institutions toward Indian claims—would start to alter this in the 1970s.⁵²

As a result of these changes, reported lobbying by Indian nations and organizations has dramatically increased since the late 1970s.⁵³ My earlier research documents an almost 700% increase in reported lobbying by Indian nations from 1978 to 2012.⁵⁴ Indian tribes have exhibited tremendous variation in their reported lobbying over time. Some tribes have not reported lobbying at all, while others have reported lobbying some years but not others, and a few have lobbied almost every year.⁵⁵ Some tribes have also invested considerable amounts of money in lobbying since 1997.⁵⁶

Tribal governments lobby on a wide range of issues related to the protection of their sovereignty. They have reported lobbying on issues related to and beyond Indian affairs. Tribes have reported lobbying on federal appropriations, taxation, transportation, and natural resources.⁵⁷ They have testified before congressional committees on a variety of issues, including agriculture, children and youth, claims, courts, culture, economic development, education, employment, energy development, environmental regulations, federal recognition, gaming, health care, housing, hunting and fishing, intergovernmental relations, land

50. GEORGE PIERRE CASTILE, *TO SHOW HEART: NATIVE AMERICAN SELF-DETERMINATION AND FEDERAL INDIAN POLICY, 1960-1975*, at 19 (1998).

51. The BIA had denied tribes the ability to use their own trust funds to finance lobbying visits to Washington well into the late 1940s. *Id.* at xxiii–xxv.

52. *Lobbying Against the Odds*, *supra* note 25, at 406–07, 454.

53. *Id.* at 416–24.

54. *Id.* at 418.

55. *Id.* at 417–22.

56. *Id.* at 420–22. Data on lobbying expenditures made by tribes and tribal organizations are not available before 1997.

57. Frederick J. Boehmke & Richard Witmer, *Tribal Political Expenditures in California and Washington DC*, in *THE NEW POLITICS OF INDIAN GAMING* 25, 34 (Kenneth N. Hansen & Tracy A. Skopek eds., 2011).

(including land into trust), law enforcement, military, natural resources, self-government, taxation, and welfare.

Recent studies demonstrate that Indian lobbying has increased and suggest that tribes are extensively lobbying to influence federal policy-making.⁵⁸ This escalation in lobbying activities raises significant questions about what tactics and strategies tribes use and whether their lobbying efforts translate into changes to substantive policy or its implementation.⁵⁹ A few studies have looked at how Indians advocate but none has considered the range of ways in which tribes lobby. A 1989 study looked at whether tribal lobbying contributed to the creation and implementation of the Tribal Self-Determination Policy.⁶⁰ It found that “[e]ffective lobbying by Indians was a very important source of their influence on congressional policy development processes in the seventies.”⁶¹ In discussing the role of Indian advocacy, the study explained that congressional committees on Indian Affairs

58. See, e.g., *Lobbying Against the Odds*, *supra* note 25, at 416–23; *Post-Indian Gaming Regulatory Act Era*, *supra* note 26, at 134–35.

59. *Lobbying Against the Odds*, *supra* note 25, at 458.

60. GROSS, *supra* note 46, at 75–92. Scholars generally disagree over the ability of advocacy organizations, including social movements and interest groups, to facilitate substantive law and policy change. See PAUL BURSTEIN, *AMERICAN PUBLIC OPINION, ADVOCACY, AND POLICY IN CONGRESS: WHAT THE PUBLIC WANTS AND WHAT IT GETS* 6–16 (2014). While belief in advocacy group influence is high, little consensus exists about whether advocacy organizations actually affect policy outcomes. *Id.*

Scholars have struggled to show empirically how groups influence legislators through lobbying. See, e.g., FRANK R. BAUMGARTNER & BETH L. LEECH, *BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND POLITICAL SCIENCE* 36 (1998) (“Scholars have long attempted to observe and document the exercise of influence in politics. They have yet to succeed.”). Aside from finding that interest groups protecting the status quo are the most successful, empiricists have found that “it is difficult to find aspects of the policy environment that consistently foreshadow policy change.” FRANK R. BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 221 (2009) [hereinafter *LOBBYING AND POLICY CHANGE*]. Studies demonstrate that interest groups that are repeat players engaged on an issue for a long time are more successful, but that the success of interest group advocacy depends on a range of different factors, including presidential support, the existence and strength of opposition, and congressional support. *Id.* at 236–38. The applicability of these interest group theories to Indian lobbying, however, remains largely unknown because large comprehensive studies of legislative advocacy omit Indian nations and Indian issues. See, e.g., *id.* at 284 tbl.A.1 (not listing a single Indian issue among the ninety-eight issues studied).

61. GROSS, *supra* note 46, at 83. Other factors identified as affecting policy change included presidential support and support of the leadership of the Senate Committee on Indian Affairs. *Id.* at 76.

provide Indian advocates with unique, structural opportunities to make their policy preferences known.⁶² It also indicated that Indians who developed well-researched policy proposals, developed relationships with congressional staffers, and looked like Indians (e.g., wore traditional clothing instead of business suits) fared better in lobbying members of Congress.⁶³ Another study, which evaluated Indian policy influence on the state and local level, found that Indian tribes succeeded politically by building expertise and relationships with governmental actors over time. The study highlighted the importance of relationship building by advocates to gain governmental support and the development of and commitment to a long-term, gradual plan for achieving and implementing policy change.⁶⁴ As such, it confirmed other interest group studies finding that repeat players fared better in influencing policy over time.⁶⁵ The study did not, however, focus on legislative lobbying by Indian nations.

The next section builds on this research by describing some of the ways in which tribes have used legislative advocacy to develop and implement federal Indian laws and policies that protect tribal sovereignty. It neither offers a comprehensive account of all the possible ways that tribes utilize lobbying as a strategy nor does it attempt to fully explain why the policy changes occurred.

C. Exploring Tribal Lobbying Strategies in the Era of Tribal Self-Determination

This section uses multiple case studies to build on the existing literature and provide a broader view of how tribes use lobbying to influence policy development, enactment, and implementation. These case studies are not representative nor exhaustive of all the ways in which tribes lobby. Their purpose is to illustrate some of the different ways in which tribes have used lobbying in their attempts to influence policy-making to protect and promote tribal sovereignty. The case studies do not fully evaluate whether tribes

62. *Id.* at 77.

63. *Id.* at 82–85.

64. EVANS, *supra* note 32, at 6–7.

65. LOBBYING AND POLICY CHANGE, *supra* note 60, at 78.

succeeded in influencing the policy-making process. Rather, the thick description in each case provides context and deeper understanding of how, when, and why tribes use lobbying strategies. Multiple case studies allow for tentative, comparative analysis across the cases. Three cases do not provide definitive information, but they impart initial insights into possible trends or patterns in tribal lobbying over time. They present an initial description of the landscape of tribal advocacy at the federal level and allow for the exploration and discovery of potential patterns and trends in lobbying behaviors across cases.

1. Case selection and methodology

The cases presented here were selected from a larger database of all Indian-related legislation introduced in the United States Congress from 1975 to 2012.⁶⁶ Preliminary analysis of 256 bills with congressional hearings involving Indian advocacy suggested that Indian nations use various lobbying strategies.⁶⁷ The analysis indicated that Indian tribes respond to threats to their sovereignty

66. Indian-related bills are defined as congressional bills with provisions involving American Indians, Native Americans, Native Hawaiians, Alaska Natives, and their respective governments or organizations. For a more thorough discussion of Indian-related bills, see *Congress and Indians*, *supra* note 14, at 82.

67. The original database included 7799 Indian-related bills introduced in the 94th through the 112th Congresses. *Id.* at 77, 95-98. I collected and coded all the hearings from the 539 bills with hearings in five congressional sessions (97th, 100th, 103rd, 106th, 109th). These congressional sessions were selected because they are evenly spaced over time and reflect variation in several important variables, including the party in control of Congress, enactment rate, and enactment rate by bill type. Of these bills, 256 had hearings that included testimony from an Indian witness. I defined an Indian witness as any witness explicitly identifying as an Indian or testifying on behalf of an Indian tribe, an Indian nonprofit organization, a tribal consortium, a tribal business, and/or an Alaska for-profit or nonprofit corporation. Representatives of state, local, or federal agencies (e.g., BIA) were not counted as Indian witnesses even if the witness identified as Indian and spoke to the Indian issues in the bill because the witness was not representing Indians. For similar reasons, I also excluded friends of the Indians, e.g., nonprofits that seek to assist Indians but are not made up of Indians such as the Friends Committee on National Legislation. When a hearing included at least one Indian witness, I coded all the testimony in the hearing. If the hearing did not include any Indian witnesses, it was not coded. Each legislative hearing, including the oral statements, responses to questions, and written statements, were coded by the witness's affiliation (e.g., tribe, tribal consortium, state, etc.); the witness's position on the bill (e.g., for, against, unclear); and the committee holding the hearing. This coding scheme allowed me to identify and analyze the different strategies and positions that Indians took on each bill.

in two primary ways, either offensively by supporting Indian-related policy proposals or defensively by opposing Indian-related policy proposals. Both offensive and defensive strategies can be further categorized into specific kinds of offensive and defensive strategies.

The cases presented here are an initial attempt to improve upon existing understandings of offensive strategies by distinguishing among the various ways in which Indians use them. Offensive strategies were further subdivided into three categories of ways in which Indian nations have employed lobbying to encourage the enactment of federal Indian law and policies beneficial to them: (1) to initiate policy change, (2) to reverse judicial decisions, and (3) to oversee the implementation of congressional policies.⁶⁸ These categories reflect trends observed by other scholars. The few scholars investigating Indian lobbying have focused on Indian efforts to initiate policy change, suggesting the relevancy of that category. Similarly, federal Indian law scholars have increasingly examined efforts of Indian nations to reverse judicial decisions.⁶⁹ The third category emerges from a gap in the existing literature, which has yet to explore the role of Indian advocacy in congressional oversight of federal Indian law and policy. These categories are not meant to be definitive or exhaustive but to provide a framework for investigating offensive strategies used by tribes.

Cases were then selected within each category to explore that particular strategy. To allow for exploration of lobbying behaviors over time, each case chosen occurs in a slightly different time period.⁷⁰ The cases were also selected to vary in terms of subject matter and type of bill as a way to investigate what role, if any, subject matter and bill type play in lobbying strategies. The purpose of the research was not to evaluate lobbying outcomes, so

68. Tribes often employ advocacy efforts for multiple reasons, which overlap and are not necessarily mutually exclusive. *Making Strategic Choices*, *supra* note 36, at 948–58. For example, Indian groups lobbying Congress for federal recognition often sought to influence agency-congressional dynamics and educate the public as well as persuade members of Congress to recognize them legislatively. *Id.*

69. Berger, *supra* note 38, at 12; Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109, 110 (1992).

70. Some overlap exists as the ISDEAA efforts have spanned almost forty years.

less attention was paid to the outcomes in the cases. In each case, however, Indian tribes appear to have achieved at least some of their goals. All of the cases were chosen because scholars had not previously analyzed the lobbying efforts in them.⁷¹

Several limits exist to these case studies. First, they are not generalizable. Case selection was not random nor meant to be representative. Second, the case studies do not provide a definitive or exhaustive list of how tribes use lobbying to promote their interests and resist policies detrimental to them.⁷² Third, the case studies were only selected from pantribal and general bills even though tribes have lobbied on tribe-specific bills as well.⁷³ Thus, they do not present any information on how and when tribes advocate for tribe-specific bills even though tribes have used tribe-specific bills to initiate policy change, overturn court decisions, and encourage legislative oversight.⁷⁴ Finally, the case studies only explore lobbying within the era of Tribal Self-Determination from 1975 to the present. The case studies, thus, do not provide

71. I intentionally chose not to include the *Duro* fix because scholars have extensively written about it. I included the ISDEAA even though scholars have examined implementation of it because the existing accounts do not focus on the role of tribal advocacy in implementation efforts.

72. For example, a full discussion of tribal strategies opposing legislation detrimental to their interests is beyond the scope of this Article, which focuses on tribes using lobbying to initiate policies, overturn court decisions, and encourage legislative oversight. Tribes, however, have also opposed legislation detrimental to their interests. See, e.g., *Internet Gambling Prohibition Act of 1999: Hearing on H.R. 3125 Before the Subcomm. on Telecomm., Trade, & Consumer Prot. of the H. Comm. on Commerce*, 106th Cong. 59 (2000) (testimony of Richard Williams, Lac Vieux Desert Band of Lake Superior Chippewa Indians) (opposing the Internet Gambling Prohibition Act of 2000 because it would make gaming that is legal under the Indian Gaming Regulatory Act illegal); *Indian Land Consolidation Act Amendments; and to Permit the Leasing of Oil and Gas Rights on Navajo Allotted Lands: Joint Hearing on S. 1315 and H.R. 3181 Before the S. Comm. on Indian Affairs and the H. Comm. on Res.*, 106th Cong. 56 (1999) (testimony of Indian Land Working Group) (opposing amendments to the Indian Land Consolidation Act because they do not provide options for individuals to consolidate land); *Clallam Judgment Funds: Hearing on S. 1340 Before the S. Select Comm. on Indian Affairs*, 97th Cong. 9 (1981) (testimony of Ted George, Rep. of Port Gamble Indian Community, Lower Elwha Tribal Community, and the Jamestown Band of Clallam Indians) (opposing a bill drafted by the Bureau of Indian Affairs to distribute judgment funds awarded to them by the Indian Claims Commission).

73. I chose not to select any cases of tribe-specific bills because most tribe-specific bills do not generate the same kind of advocacy as general and pantribal bills, which tend to affect Indian tribes across the country.

74. See *infra* Section II.C.2.

any information about how, when, and why tribes lobbied prior to 1975.

To develop the case studies, I examined primary data collected from congressional hearings and committee reports on Indian-related bills, oversight hearings held by Congress on specific issues, and primary materials documenting tribal advocacy efforts when they were available. I supplemented this information with secondary sources describing tribal advocacy efforts. My intent is to provide a thick description of the advocacy strategies used by Indian nations in each of the three cases. I closely read congressional testimony and reports to track the development, enactment, and implementation of specific policies. I used the hearings and primary advocacy documents to trace the positions taken, arguments made, and strategies used by Indian nations in the policy-making process and to observe the interactions among Indian tribes, legislators, and bureaucrats over time.⁷⁵ The major limitation of relying on committee hearings is that they may reflect more the preferences of the committee than the advocacy of the witness.⁷⁶ To address this concern, I reviewed both solicited and unsolicited testimony by Indian nations and organizations at committee hearings and used additional sources to confirm my findings.

75. Congressional hearings allow for identification of the positions taken, arguments made, and concerns raised by Indian nations and organizations on particular issues or bills. BURSTEIN, *supra* note 60, at 134–40. This information provides insights into what Indian nations advocated for or against and the proposals they made on a specific issue at a particular time.

76. Some scholars have suggested that committee hearings reflect more the preferences of the committee chair and members than the advocacy of the witness. While committee members select the witnesses testifying orally, my data includes unsolicited, written testimony as well. Moreover, committee hearings present an opportunity for targeted advocacy on a specific legislative proposal. As a result, “individuals and organizations invited to testify at congressional hearings may legitimately feel that their testimony will have an impact.” *Id.* at 104. By linking advocacy to a particular legislative proposal, the hearing data allow for evaluation of the impact of that advocacy on the legislative outcome (enactment or non-enactment) of the legislative proposal.

2. Case studies of tribal lobbying

The following sections use case studies to explore each of the three ways in which tribes have employed lobbying to protect tribal sovereignty.

a. Initiating policy change. Tribes have long used legislative advocacy to initiate new policies, to change existing ones, and to expand policies into new areas. Some of the earliest tribal legislative initiatives sought legislation allowing federal courts to hear tribal claims against the United States government.⁷⁷ Indian tribes have initiated other kinds of tribe-specific legislation,⁷⁸ including, *inter alia*, bills seeking federal recognition, restoration or affirmation,⁷⁹ taking land into trust,⁸⁰ and settling land and water rights claims.⁸¹ Indian nations have sought to change

77. Indian tribes had to solicit special federal legislation to bring claims against the United States government. LAZARUS, *supra* note 40, at 124. For a more general discussion of Indian claims, see DAVID E. WILKINS, *HOLLOW JUSTICE: A HISTORY OF INDIGENOUS CLAIMS IN THE UNITED STATES* (2013).

78. *Congress and Indians*, *supra* note 14, at 103, 123–26 (defining tribe-specific bills and presenting data on the prevalence of tribe-specific bills introduced in Congress from 1975 to 2012).

79. *Making Strategic Choices*, *supra* note 36, at 945–58 (discussing the various legislative strategies used by non-federally recognized Indian groups from 1975 to 2012); see also CASTILE, *supra* note 50, at 148–52 (describing the Menominee campaign to reverse their termination); Haynal, *supra* note 38, at 294–96 (recounting the efforts of the Klamath tribes of Oregon to regain federal recognition congressionally from 1987 to 1990); Mark Moberg & Tawnya Sesi Moberg, *The United Houma Nation in the U.S. Congress: Corporations, Communities, and the Politics of Federal Acknowledgment*, 34 *URB. ANTHROPOLOGY* 85, 110–16 (2005) (describing the experiences of the United Houma Nation in seeking federal recognition from Congress).

80. See, e.g., *Status of Certain Land Held in Trust for the Mississippi Band of Choctaw Indians: Hearing on S. 1967 Before the S. Comm. on Indian Affairs*, 106th Cong. 5–6 (2000) (testimony of Chief Philip Martin, Mississippi Band of Choctaw) (arguing to have land taken into trust for the tribe); *H.R. 4364 – S. 2418 – H.R. 4365: Hearings on H.R. 4364 and S. 2418 and H.R. 4365 Before the S. Select Comm. on Indian Affairs*, 97th Cong. 13–14 (1982) (testimony of David G. Ramirez, Representative of the Pascua Yaqui) (arguing to have land taken into trust for the tribe); *Restoration of Land to the Colorado River Indian Reservation: Hearing on S. 1652 Before the S. Select Comm. on Indian Affairs*, 97th Cong. 15–17 (1982) (testimony of Anthony Drennan, Sr., Colorado River Indian Tribes) (seeking restoration of land to the Colorado River Indian Tribes); WILKINSON, *supra* note 47, at 210–18 (recounting the almost seventy-year struggle of the Pueblo of Taos to regain sacred lands around Blue Lake).

81. See, e.g., *Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement Act: Hearing on S. 438 Before the S. Comm. on Indian Affairs*, 106th Cong. 40–42 (1999) (testimony of Jim Morsette, Chippewa Cree Tribe of Rocky Boy's Indian Reservation) (supporting water rights compact negotiated by the tribe and the U.S.

pantribal and general legislation as well. They have advocated to establish new federal policies beneficial to their interests,⁸² to remove discrepancies in existing federal policies,⁸³ to expand existing policies that work well for them,⁸⁴ and to refine how they are treated in general legislation.⁸⁵

The Indian Tribal Government Tax Status Act of 1982 serves as one example of tribes initiating policy change to protect their tribal sovereignty. Indian tribes formulated the Indian Tribal Government Tax Status Act of 1982 to clarify the application of the

government); *Chitimacha and Mashantucket Pequot Indian Land Claims: Hearing on S. 2294 and S. 2710 Before the S. Select Comm. on Indian Affairs*, 97th Cong. 65–66 (1982) (testimony of Dan Darden, Chitimacha Tribe of Louisiana) (seeking legislation to resolve the tribe's land claims); *Conferring of Jurisdiction on the U.S. Court of Claims with Respect to Certain Claims of the Navajo Tribe: Hearing on S. 1196 Before the S. Select Comm. on Indian Affairs*, 98th Cong. 35–40 (1981) (testimony of Guy Gorman, Navajo Nation) (seeking jurisdiction so the Indian Court of Claims could hear specific claims of the Navajo Nation); Miller, *supra* note 38, at 434–38 (describing the successful efforts of the Timbisha Shoshone to obtain legislation providing them with homeland from 1994 to 2000). For more detailed information on tribes seeking to resolve water rights claims, see DANIEL MCCOOL, *NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA* (2002); Benjamin A. Kahn, *Sword or Submission? American Indian Natural Resource Claims Settlement Legislation*, 37 AM. INDIAN L. REV. 109 (2012).

82. See, e.g., *Elevate the Position of Director of the Indian Health Service to Assistant Secretary for Indian Health Alaska Native and American Indian Direct Reimbursement Act: Hearing on S. 299 and S. 406 Before the S. Comm. on Indian Affairs*, 106th Cong. 24–25 (1999) (testimony of Ron Allen, National Congress of American Indians) (arguing for the creation of an Assistant Secretary for Indian Health within the Department of Health and Human Services); *Indian Self-Determination and Education Program: Hearings on S. 1017 Before the Subcomm. on Indian Affairs of the S. Comm. on Interior & Insular Affairs*, 93d Cong. (1973); *Indian Self-Determination: Hearing on S. 3157 and S. 1573 and S. 1574 and S. 2238 Before the Subcomm. on Indian Affairs of the S. Comm. on Interior & Insular Affairs*, 92d Cong. (1972); Dumont, *supra* note 38, at 10 (discussing the efforts of Indian nations, pantribal organizations, and Native Hawaiians to secure passage of the Native American Graves and Repatriation Act).

83. See, e.g., *1981–82 Miscellaneous Tax Bills, XVI: Hearing on S. 1298 and S. 2197 and S. 2498 Before the Subcomm. on Taxation & Debt Mgmt. of the S. Comm. on Fin.*, 97th Cong. 86 (1982) (statement of Barry E. Snyder, President, Seneca Nation of Indians) (explaining that the Association on American Indian Affairs instigated the drafting of the Indian Tribal Governmental Tax Status Act).

84. See, e.g., *Native American Housing Assistance and Self-Determination Act of 1996*, Pub. L. No. 104-330, 110 Stat. 4016 (codified as amended in scattered sections of 12 U.S.C., 20 U.S.C., 25 U.S.C., and 42 U.S.C.) (expanding the self-determination model of having tribes assume the administration and control over federal programs to low-income housing).

85. For example, Indian tribes have advocated for treatment like a state in environmental statutes. James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J.L. & PUB. POL'Y 191, 218 (2006).

Internal Revenue Code (IRC) to tribal governments. In the 1960s and 1970s, the Internal Revenue Service (IRS) handed down a series of rulings on transactions involving Indian tribes.⁸⁶ These rulings left tribes in an anomalous position compared to other governmental entities in the United States.⁸⁷ While at least one ruling stated that tribes were not taxable entities, the IRS found in other rulings that tribes were not eligible for the favorable tax treatments extended to the federal government and states and their subdivisions.⁸⁸ In short, the IRS had failed to develop a coherent policy toward Indian tribes over time. This failure undermined tribal sovereignty by treating tribes differently from other governments in the United States. It further disadvantaged tribes as governments because they did not benefit from the favorable tax treatment that state and local governments in the United States received under federal tax laws and thus did not have the same opportunities to foster economic development on tribal lands.

Indian tribes, led by the Association of American Indian Affairs, initiated legislation to amend the tax code to treat tribes like other governments.⁸⁹ In 1975, they persuaded Congressman Al Ullman (D-OR) to introduce the Indian Tribal Governmental Tax Status Act⁹⁰ in the House, and Senator Bob Packwood (R-OR) to introduce a companion bill in the Senate.⁹¹ These bills sought to amend the tax code to treat Indian tribal governments like federal, state, and local governments and allowed tribes to issue a wide

86. Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335, 359 (1985).

87. For a discussion of these rulings, see *id.* at 360–61. The IRS refused to consider a decedent's gift to the Zuni Nation a charitable deduction in 1974. *Id.* at 360. It also concluded that the sale of an automobile to an Indian tribe for governmental purposes to be subject to federal excise taxes. *Id.* at 310–61. According to Williams, the IRS aggressively sought to collect excise taxes from tribes. *Id.* at 361.

88. *Id.* at 359–62 (describing the tax status of tribes prior to the enactment of the Indian Tribal Governmental Tax Status Act).

89. 1981–82 *Miscellaneous Tax Bills*, XVI, *supra* note 83. (statement of Barry E. Snyder, President, Seneca Indian Nation) (explaining that the Association on American Indian Affairs instigated the drafting of the original bill). The Association of American Indian Affairs was an organization of 50,000 Indian and non-Indian taxpayers. *Id.*

90. Indian Tribal Government Tax Status Act, H.R. 8989, 94th Cong. (1975).

91. Indian Tribal Government Tax Status Act, S. 2664, 94th Cong. (1975).

variety of tax-exempt bonds.⁹² The influential House Committee on Ways and Means held a hearing on the bill. At a hearing, the Department of the Treasury stated that it would not oppose the bill if it only applied to Indian tribes exercising substantial government functions.⁹³ Some tribes expressed concerns about this language,⁹⁴ but tribes universally supported the bill.⁹⁵ Tribal representatives advocated for the bill, arguing that it would ensure that the IRS, like other federal agencies, treated Indian tribes like sovereign governments and would enable tribes to respond more effectively to the needs of their communities.⁹⁶ The House Committee on Ways and Means amended the bill to limit the issuance of tribal bonds and recommended the bill's passage,⁹⁷ but the House did not have time to act on the bill before the end of the session.⁹⁸

Indian tribes and their allies did not give up their quest for tax parity. Senator Packwood and Congressman Ullman reintroduced

92. *Id.*; H.R. 8989.

93. *Miscellaneous Minor Tax Bills: Hearing on H.R. 8989 Before the H. Comm. on Ways & Means*, 94th Cong. 21 (1976) (Department of Treasury report).

94. *See, e.g., id.* at 33-35 (statement of Emil Farve, Chickasaw Nation).

95. Witnesses testified in support of the bill on behalf of the Oglala Sioux Tribe of South Dakota, the Rosebud Sioux Tribe of South Dakota, the Cheyenne River Sioux Tribe of South Dakota, the Nez Perce Tribe of Idaho, the Metlakatla Indian Community of Alaska, the Salt River Pima-Maricopa Indian Community, the Hualapai Tribe of Arizona, the Pueblo of Laguna of New Mexico, the Seneca Nation of New York, the Association of American Indian Affairs, Confederated Tribes of the Warm Springs Reservation of Oregon, and the Chickasaw Nation of Oklahoma. Statements were submitted by the Confederated Salish and Kootenai Tribes of the Flathead Reservation of Montana, the Three Affiliated Tribes of the Fort Berthold Reservation of North Dakota, the Hoopa Tribe of the Hoopa Valley Reservation of California, the Cheyenne Arapahoe Tribe of the Wind River Reservation of Wyoming, the National Congress of American Indians, the Makah Tribe, the Confederated Tribes of the Colville Reservation, the Puyallup Tribe of Indians, the Quileute Tribe, and the Quinault Indian Tribe. *Id.* at 24-43. No tribes or American Indians appeared on the record to oppose the bill. *See id.* One advocate representing several tribes explained, "In our opinion, enactment of H.R. 8989 would be one of the single most positive steps taken by Congress to better the condition of American Indian tribes in the United States since the Indian Reorganization Act of 1934." *Id.* at 35-36 (statement of Richard Anthony Baenen on behalf of the Confederated Salish and Kootenai Tribes of the Flathead Reservation of Montana, the Three Affiliated Tribes of the Fort Berthold Reservation of North Dakota, the Hoopa Tribe of the Hoopa Valley Reservation of California, and the Cheyenne Arapahoe Tribe of the Wind River Reservation of Wyoming).

96. *Id.* at 24-26 (statement of Richard Schifter).

97. H.R. REP. NO. 94-1693 (1976).

98. *Miscellaneous Tax Bills: Hearings on H.R. 4089 Before the Subcomm. on Misc. Revenue Measures of the H. Comm. on Ways & Means*, 95th Cong. 106 (1977).

the Indian Tribal Governmental Tax Status Act in 1977.⁹⁹ The House Committee on Ways and Means held another hearing on the bill. Once again, tribes suggested minor amendments but overwhelmingly supported its passage.¹⁰⁰ They argued that the bill was essential to the realization of tribal self-determination,¹⁰¹ consistent with recent federal legislation recognizing tribes as separate sovereigns,¹⁰² and necessary to ensure equal treatment for state and tribal governments in the United States.¹⁰³ At the same time, they pointed out that the bill would not lead to a significant revenue loss to the United States.¹⁰⁴ The Department of the Treasury opposed the bill.¹⁰⁵ The House Committee on Ways

99. H.R. 4089, 95th Cong. (1977); S. 2130, 95th Cong. (1977).

100. Witnesses submitted testimony in support of the bill on behalf the Oglala Sioux Tribe of South Dakota, the Rosebud Sioux Tribe of South Dakota, the Cheyenne River Sioux Tribe of South Dakota, the Nez Perce Tribe of Idaho, the Metlakatla Indian Community of Alaska, the Salt River Pima-Maricopa Indian Community, the Hualapai Tribe of Arizona, the Pueblo of Laguna of New Mexico, the Seneca Nation of New York, the Association of American Indian Affairs, Confederated Tribes of the Warm Springs Reservation of Oregon, Miccosukee Tribe of Florida, the Confederated Tribes of the Colville Reservation, the Makah Tribe, the Quileute Tribe, the Nooksack Tribe, Lummi Tribe, Suquamish Tribe, and the Northern Cheyenne Tribe of Montana. Some of these tribes also submitted statements. Statements were also submitted by the Confederated Salish and Kootenai Tribes of the Flathead Reservation of Montana, the Three Affiliated Tribes of the Fort Berthold Reservation of North Dakota, the Hoopa Tribe of the Hoopa Valley Reservation of California, the Cheyenne Arapahoe Tribe of the Wind River Reservation of Wyoming, the National Congress of the American Indian, the Puyallup Tribe of Indians, the Quinault Indian Tribe, and the Navajo Nation. *Miscellaneous Tax Bills*, *supra* note 98, at 107–26. The Papago Tribal Council indicated its support of the bill in a tribal council resolution sent to and submitted into the record by Congressman Morris Udall. *Id.* at 123–24. As in previous committee hearings on earlier versions of the bill, no tribes or American Indians appeared on the record to oppose the bill.

101. *Id.* at 107 (statement of William E. Sudow) (“This bill is critically important to our tribal clients, for it will provide the basis for further realization of true self-determination for Indian tribes.”); *see also id.* at 116 (statement of Ernest Clark, Colville Confederated Tribes).

102. *Id.* at 107–08 (statement of William E. Sudow); *id.* at 121 (statement of the National Congress of American Indians).

103. *Id.* at 110–11 (statement of William E. Sudow); *id.* at 123 (statement of the Navajo Nation) (“It has been ironic and inequitable that the Indian Governments of this Nation, which are the poorest governments, have been required to pay taxes not imposed on more wealthy governments within the United States.”).

104. *Id.* at 112. Tribes suggested minor amendments to the bill, *id.*, and supported other amendments, *id.* at 113.

105. *Id.* at 111 (stating that the Department of the Treasury opposed the inclusion of “recognized” in the definition of Indian tribe). Senator Packwood recalled a different version of the Department of the Treasury’s opposition to this bill in 1982. 1981–82 *Miscellaneous Tax Bills*, XVI, *supra* note 83, at 64. He attributed the death of the bill to

and Means amended the definition of an Indian tribe and favorably reported out the bill in the Ninety-Fifth Congress, but the House never voted on it.¹⁰⁶ The bill was reintroduced in the House again during the Ninety-Sixth Congress, but no action was taken.¹⁰⁷

Despite the failures of bills introduced in earlier congressional sessions, tribes did not stop lobbying for an amendment to the tax code. Their efforts gained momentum in the Ninety-Seventh Congress.¹⁰⁸ Senator Malcolm Wallop (R-WY) introduced S. 1298 and a companion bill was introduced in the House.¹⁰⁹ In a Senate Subcommittee on Taxation and Debt Management hearing on S. 1298, the Department of the Treasury, which had a reputation for not testifying in favor of any legislation at the time,¹¹⁰ supported the bill for equity reasons, explaining that if tribes act like governments, they should be treated like governments.¹¹¹ The Department of the Treasury also endorsed the bill because it would not cost the United States anything.¹¹² The Department of the Interior testified in favor of the bill for similar reasons.¹¹³ Tribes, tribal consortiums, and Indian organizations continued to enthusiastically support the bill.¹¹⁴ Tribal leaders testified as to

Treasury's opposition and suggested that it may have related to their longstanding, general opposition to industrial development bonds. *Id.*

106. H.R. REP. NO. 95-843 (1978); Williams, *supra* note 86, at 365 (noting that the House adjourned before voting on the bill).

107. Indian Tribal Governmental Tax Status Act of 1979, H.R. 5918, 96th Cong. (1979).

108. Williams, *supra* note 86, at 365.

109. H.R. 3760, 97th Cong. (1981).

110. 1981-82 *Miscellaneous Tax Bills*, XVI, *supra* note 83, at 46-47 (recording Senator Packwood interrupting, "I would like to interject that the last is very unusual. The Treasury Department normally has the position at these hearings of being in opposition to almost all of the bills that are here."); *see also id.* at 69 (recording Senator Packwood noting "how unusual it is to have the Treasury Department testifying in favor of a bill").

111. *Id.* at 46-47, 50 (statement of William S. McKee, Tax Legislative Counsel, U.S. Department of the Treasury). Aside from these statements, the Department of the Treasury does not explain why it changed its position on the bill.

112. *Id.*

113. *Id.* at 58-59 (statement of Roy H. Sampsel, Deputy Assistant Secretary for Indian Affairs, U.S. Department of the Interior).

114. Witnesses submitted testimony in support of the bill on behalf of the Confederated Tribes of the Warm Springs Reservation of Oregon, the Ak-Chin Indian Community, the Confederated Tribes of the Colville Reservation, the Kickapoo Tribe of Kansas, the Minnesota Chippewa Tribe, the Navajo Nation, the Northern Arapaho Indian Nation, the Seneca Nation of Indians, the Shoshone Tribe of the Wind River Reservation,

how the IRC undermined economic development and tribal governments' abilities to improve conditions for their people.¹¹⁵ They supported the bill for many of the same reasons that they had in the past: it would ensure the equitable treatment of all governments in the United States, strengthen tribal economic self-sufficiency, and recognize the appropriate role of tribal governments.¹¹⁶ They also testified to the enormous support for the bill throughout Indian country.¹¹⁷

Tribal support for the bill encouraged the Senate Committee on Finance to ensure its enactment. The Senate Committee on Finance did not report out the bill but recommended its passage as a separate title to the Periodic Payment Settlement Act of 1982.¹¹⁸ The House had already passed the Periodic Payment Settlement Act of 1982 (without the Indian Tribal Government Tax Status Title) so a conference committee met to resolve the differences.¹¹⁹ The version of the bill that emerged from the conference committee retained the Indian Tribal Tax Status Title but

the Tohono O'Odham Nation, the Tulalip Tribes of Washington, the Ute Mountain Tribe, the Council of American Indians, the National Congress of the American Indian, the Council of Energy Resource Tribes, the National Tribal Chairman's Association, the Native American Rights Fund, and the Association of American Indian Affairs. *Id.* at 70–91. As in previous committee hearings on earlier versions of the bill, no tribes or American Indians appeared on the record to oppose the bill.

115. *Id.* at 73 (statement of Delbert Frank, Sr., Confederated Tribes of the Warm Springs Reservation of Oregon); *see also id.* at 77 (statement of Judy Knight, Council of American Indians) (“[O]ne of the major obstacles confronting tribal governments . . . is their inability to generate sufficient revenues . . . [in] that they do not have a number of Federal tax advantages enjoyed by other governments in the United States . . .”).

116. *Id.*; *see also id.* at 86 (statement of Barry E. Snyder, President, Seneca Nation of Indians of New York).

117. *Id.* at 86 (statement of Barry E. Snyder, President, Seneca Nation of Indians of New York) (“As I believe the other speakers on this panel have made more than clear, S. 1298, the Indian Tribal Governmental Tax Status Act, enjoys enormous support among Indian tribes all across the Nation—Eastern tribes as well as Western tribes.”); *see also id.* at 84 (statement of Alfred Ward, Cochairman of the Business Council of the Shoshone Indian Tribe of the Wind River Reservation) (noting that Indians have worked toward the enactment of this bill for years). Tribal leaders engaged in efforts to mobilize Indian country to support the legislation. For example, the National Tribal Chairman's Association urged tribes to contact their representatives about S. 1298 and included information on submitting written testimony to the Senate Subcommittee on Taxation and Debt Management in its July News Update. Nat'l Tribal Chairman's Ass'n, News Briefs 7 (July 15, 1982).

118. S. REP. NO. 97-646 (1982).

119. Williams, *supra* note 86, at 368.

amended it by limiting the ability of tribal governments to engage in tax-exempt financing and to issue private activity bonds.¹²⁰

After almost a decade of lobbying, tribes had made tremendous inroads toward tax parity with the enactment of the Indian Tribal Governmental Tax Status Act.¹²¹ Admittedly, tribes may not have achieved everything they wanted in the Act,¹²² but the bill promoted tribal sovereignty by substantially changing the way the IRS treated tribes.¹²³ It extended the ways in which the IRS treated tribes like states and was an important first step toward tax parity.¹²⁴

The Indian Tribal Governmental Tax Status Act is one example of how tribes have initiated legislation as a way to address a problem that they face or that pervades Indian country more generally. It illustrates how sustained legislative advocacy by tribes transformed a law reform proposal into changes to the federal tax code. Indians initiated the bill because they had identified a threat to tribal sovereignty, namely the inequitable treatment tribes experienced under the IRC, and found a solution to it in proposing amendments to the IRC that would treat tribes

120. *Id.* The amendments restricting the issuance of tribal bonds responded to concerns raised by Representative Sam Gibbons (D-FL) about Indian gaming. KATHLEEN M. NILLES, 2D ANN. NATIVE AM. FIN. CONF., TRIBAL BONDAGE: A BRIEF HISTORY OF THE TAX-EXEMPT FINANCE RULES APPLICABLE TO TRIBES 1, 4 (2005), https://www.drinkerbiddle.com/-/media/files/insights/publications/2005/01/tribal-bondage-a-brief-history-of-the-tax-exempt-_/tribal-bondage-a-brief-history-of-the-tax-exempt-finance-rules-applicable-to-tribes.pdf. As enacted, the Indian Tribal Government Tax Status Act excluded from taxation the interest on tax-exempt bonds used for essential governmental functions and exempted tribes from paying certain federal excise taxes when they are engaged in essential governmental functions. Indian Tribal Government Tax Status Act § 202(a), I.R.C. § 7871(a)(2), (b), (c)(1) (2012). It also allowed for the deductibility of charitable contributions to governments for exclusively public purposes, of gifts and bequests for public purposes, and of taxes paid to federal governments. § 202(a), I.R.C. § 7871(a)(1), (a)(3).

121. Act of Jan. 14, 1983, Pub. L. No. 97-473, 96 Stat. 2605.

122. *See, e.g.*, NAT'L CONG. AM. INDIANS, CURRENT TAX NEEDS IN INDIAN COUNTRY 3-5, http://www.ncai.org/initiatives/partnerships-initiatives/ncai-tax-initiative/NCAI_Tax_Reform_Briefing_Paper.doc (explaining that the Act "did not live up to its original promise of treating tribes on par with states for federal tax purposes" and that NCAI continues to advocate for tribal governments to be treated like states for all tax purposes). Unlike states, tribal exemptions for bonds and federal excise taxes are restricted to essential governmental functions. Tribes wanted bonds to enhance their economic development so these limitations may have done little to improve their already limited financing options. Williams, *supra* note 86, at 368-69.

123. Williams, *supra* note 86, at 340.

124. *Id.*

like other governments. Tribes then worked to get their solution enacted. Over time, they built relationships with members of Congress. Indian nations navigated and developed relationships with members of the House Committee on Ways and Means and the Senate Committee on Finance in advocating for tax parity. Their success suggests that Indian nations can exercise influence outside of the House Committee on Natural Resources and the Senate Committee on Indian Affairs, the two congressional committees with jurisdiction over Indian affairs.

The strategy used by advocates evolved as they increasingly mobilized other Indians and Indian nations to advance legislation to ensure tax parity.¹²⁵ By the early 1980s, Indian nations had solidified support across Indian country to present a unified front to Congress.¹²⁶ Moreover, Indian nations crafted sophisticated testimony at the hearings, which detailed the impacts of the existing inequalities on tribal economic development and highlighted the inconsistency between the IRC and the Tribal Self-Determination Policy. They refined and expanded their arguments over time, responding to the election of a fiscally conservative President by adding arguments about the cost-neutral impact of the change to the tax code. Indian nations employed these arguments emphasizing tribal sovereignty and its importance for tribal economic development to persuade members of Congress to amend the tax code to treat Indian nations more like other governments in the United States.

b. Reversing judicial decisions. Another strategy increasingly employed by tribes and tribal organizations has been to persuade Congress to overturn unfavorable decisions made by the Supreme Court.¹²⁷ Tribes frequently turned to this strategy after the Supreme Court handed down a number of decisions that undermined tribal sovereignty in the late 1980s and early 1990s. But the strategy of leveraging Congress against the courts has a longer historical tradition. For example, after the Court of Claims had dismissed their claims that the United States had illegally taken

125. Nat'l Tribal Chairman's Ass'n, *supra* note 117.

126. 1981-82 *Miscellaneous Tax Bills*, XVI, *supra* note 83, at 86 (statement of Barry E. Snyder, President, Seneca Nation of Indians of New York).

127. Berger, *supra* note 38, at 12; Newton, *supra* note 69, at 110.

the Black Hills from them and the Supreme Court had declined to review the decision, the Sioux Nation persuaded Congress to enact legislation in 1978 to instruct the Court of Claims to review the merits of the claim without regard to the defense of *res judicata*.¹²⁸

Recently, advocates have proposed legislation to overturn specific court decisions. While the majority of these efforts have targeted Supreme Court decisions, including *Oliphant v. Suquamish Indian Tribe*,¹²⁹ *Duro v. Reina*,¹³⁰ *Seminole Tribe of Florida v. Florida*,¹³¹ *Nevada v. Hicks*,¹³² and *Carcieri v. Salazar*,¹³³ a few have sought to reverse or clarify appellate court decisions that undercut tribal sovereignty.¹³⁴ Some tribes have adopted a similar strategy to address decisions unfavorable to them. For example, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians turned to Congress after the Supreme Court allowed a non-Indian individual to challenge the Secretary of the Interior's acquisition of 147 acres in trust for the tribe.¹³⁵ Congress enacted the Gun Lake Trust Land Reaffirmation Act, which affirmed the trust acquisition and removed the matter from federal court jurisdiction.¹³⁶

128. LAZARUS, *supra* note 40, at 344.

129. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

130. *Duro v. Reina*, 495 U.S. 676 (1990).

131. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

132. *Nevada v. Hicks*, 533 U.S. 353, 353 (2001) (holding that tribe could not hear civil rights claims against state police arising out of search on-reservation for evidence of off-reservation crimes).

133. *Carcieri v. Salazar*, 555 U.S. 379 (2009); *see, e.g.*, Rob Capriccioso, *Senate Carcieri Report Blames Supreme Court for Mess in Indian Country*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 24, 2012); Gale Courey Toensing, *Tester Re-introduces 'Clean Carcieri Fix,'* INDIAN COUNTRY TODAY MEDIA NETWORK (Mar. 19, 2015), <http://indiancountrytodaymedianetwork.com/2014/04/01/tester-introduces-clean-carcieri-fix-154275>; Rob Capriccioso, *Tribal Lease Bill Clears Senate After Carcieri Wrangling*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 18, 2012); Gale Courey Toensing, *Carcieri: Indian Country's 'Number One Priority,'* INDIAN COUNTRY TODAY MEDIA NETWORK (Dec. 1, 2011).

134. *Soaring Eagle Casino & Resort v. Nat'l Labor Relations Bd.*, 791 F.3d 648 (6th Cir. 2015); *Nat'l Labor Relations Bd. v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015); Tribal Labor Sovereignty Act of 2017, H.R. 986, 115th Cong. (2017); Tribal Labor Sovereignty Act of 2017, S. 63, 115th Cong. (2017).

135. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012).

136. Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014). The Supreme Court upheld the statute in *Patchak v. Zinke*, 138 S. Ct. 897 (2018).

Tribal advocates' success in persuading Congress to reverse two Supreme Court decisions—*Duro* and *Oliphant*—demonstrates how they have used lobbying to correct detrimental federal Indian law policies made by the Supreme Court. Scholars have documented the efforts made by tribal advocates to enact legislation overturning *Duro v. Reina*,¹³⁷ thus this section focuses on the tribal advocacy leading to the partial *Oliphant* reversal in the Violence Against Women Act of 2013.

Tribal advocates have engaged in a long-term campaign to overturn the Supreme Court's decision in *Oliphant v. Suquamish*, which undercut tribal sovereignty by stripping tribal governments of criminal jurisdiction over non-Indians.¹³⁸ As a result of the *Oliphant* decision, Indian tribes, unlike most local communities in the United States, do not have the authority to investigate and prosecute all misdemeanor and felony crimes committed within their territories.¹³⁹ The *Oliphant* decision has had tremendous practical consequences because it forces Indian tribes to rely on state or federal law enforcement to arrest and prosecute non-Indians committing crimes in Indian country.¹⁴⁰ In reality, the federal and state governments rarely exercise this criminal jurisdiction, allowing non-Indians to perpetrate crimes with impunity and leaving Indian communities with little recourse.¹⁴¹

Tribal advocates, led by the National Congress of American Indians Taskforce on Violence Against Women (NCAI Taskforce), have pursued a partial *Oliphant* fix as part of the reauthorization of the Violence Against Women Act (VAWA).¹⁴² They argue that protecting Native women from violence requires the restoration of

137. See, e.g., Berger, *supra* note 38, at 12; Newton, *supra* note 69, at 110; *Lobbying Against the Odds*, *supra* note 25, at 443–46. In *Duro v. Reina*, the Supreme Court held that Indian nations did not have criminal jurisdiction over non-member Indians. 495 U.S. 676, 679 (1990). The decision created a jurisdictional gap in Indian country because no government (state, tribal, or federal) had the authority to prosecute non-member Indians for crimes in Indian country.

138. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

139. Kirsten Matoy Carlson, *Jurisdiction and Human Rights Accountability in Indian Country*, 2013 MICH. ST. L. REV. 355, 357 (2013).

140. *Id.* at 357–58.

141. *Id.*

142. See, e.g., RESTORATION OF NATIVE SOVEREIGNTY AND SAFETY FOR NATIVE WOMEN, Mar. 2013 (vol. 10, issue 1) [hereinafter RESTORATION 2013].

criminal authority over all perpetrators of violence against Native women to tribal governments. The NCAI Taskforce perceived the periodic reauthorizations of the VAWA as an opportunity to persuade members of Congress of the need to overturn the Supreme Court's decision in *Oliphant* and restore tribal criminal jurisdiction over non-Indians. Studies have reported incredibly high incidences of non-Indian violence against Indian women.¹⁴³ Federal laws restricting tribal criminal jurisdiction have left tribes and Indian women with very little recourse against non-Indian perpetrators.¹⁴⁴ Tribal advocates were optimistic that these facts might convince members of Congress to reverse *Oliphant* at some point. But they were cautious and adopted an incremental strategy to changing the law.¹⁴⁵ They intended to educate the public and members of Congress about the idea over several years. Once members of Congress were comfortable with the idea, tribal advocates would suggest including a partial *Oliphant* fix in a VAWA reauthorization bill.

The NCAI Taskforce was in the process of implementing their incremental approach before VAWA faced reauthorization in 2010.¹⁴⁶ They had started educating members of Congress and the

143. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), <https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf>.

144. *Id.*; Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, AM. CONST. SOC'Y (Mar. 23, 2009), https://www.acslaw.org/issue_brief/briefs-2007-2011/addressing-the-epidemic-of-domestic-violence-in-indian-country-by-restoring-tribal-sovereignty/.

145. Incremental approaches appear to be common among Indian advocates. EVANS, *supra* note 32, at 54–55, 96.

146. American Indian women have a long history of organizing and advocating to end violence against them. In the 1970s, Tilly Black Bear, a member of the Sicangu Lakota Nation/Rosebud Sioux Tribe, joined the domestic violence movement. She became a founding member of the National Coalition Against Domestic Violence (NCADV) and for the next four decades continued to bring Native women's issues to its attention. NAT'L INDIGENOUS WOMEN'S RES. CTR., *NATIVE HERSTORY: THE GROWTH OF THE MOVEMENT TO END VIOLENCE AGAINST NATIVE WOMEN* (2014), <https://www.nrcdv.org/wp-content/uploads/2018/03/NIWRCHistoryDVAM.pdf>; *The National Center for Victims of Crime Remembers Tillie Black Bear*, NAT'L CTR. FOR VICTIMS OF CRIME (July 23, 2014), <http://victimsofcrime.org/media/news-releases/2014/07/23/the-national-center-for-victims-of-crime-remembers-tillie-black-bear>. The movement contributed to the enactment of key domestic violence prevention legislation throughout the 1980s and 1990s. In 2003, NCAI responded to Native women's demands for tribal leaders to take violence against women seriously by creating the NCAI Taskforce on Violence Against Women. NATIVE HERSTORY:

public. Their efforts sought to influence Congress from both the bottom up and the top down. For example, they allied with other domestic violence groups to persuade Congress to include a specific title to protect Native women in the 2005 VAWA reauthorization,¹⁴⁷ they collaborated with Amnesty International to publish a report on the epidemic of sexual violence against Indian women,¹⁴⁸ and they convinced several international human rights bodies to condemn the United States for its failure to recognize tribal sovereignty and protect Native women from non-Indian perpetrators.¹⁴⁹ They also started to circulate the idea that tribes could and should exercise criminal jurisdiction over non-Indian perpetrators of violence against Native women in Indian country.¹⁵⁰

By 2010, Native women's advocates had crafted draft language to share with members of Congress and the Department of Justice.¹⁵¹ Their draft provision adopted language similar to that used in the previously enacted *Duro* fix, which had "recognized and affirmed" the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians."¹⁵² The first section read,

Congress hereby affirms that the inherent sovereign authority of a federally recognized Indian tribe includes the authority to enforce and adjudicate any crime of domestic violence, dating

THE GROWTH OF THE MOVEMENT TO END VIOLENCE AGAINST NATIVE WOMEN, *supra*. The movement increased its advocacy by collaborating with Amnesty International to produce a report titled "Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA." AMNESTY INT'L, *supra* note 143.

147. Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, 109th Cong. (2005).

148. AMNESTY INT'L, *supra* note 143

149. See, e.g., Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America*, ¶ 26, U.N. DOC. CERD/C/USA/CO/6 (May 8, 2008); VIOLENCE AGAINST WOMEN IN THE UNITED STATES AND THE STATE'S OBLIGATION TO PROTECT (2011) (Civil Society Briefing Paper on Community, Military and Custody, submitted to the United Nations Special Rapporteur on Violence Against Women, Rashida Manjoo, in advance of her 2011 mission to the United States); see also RESTORATION OF NATIVE SOVEREIGNTY AND SAFETY FOR NATIVE WOMEN, Feb. 2011 (vol. 8, issue 1) [hereinafter RESTORATION 2011], <http://www.niwrc.org/files/Restoration-V8.1.pdf>.

150. AMNESTY INT'L, *supra* note 143.

151. Draft Language for Violence Against Women Act § 2265B (Mar. 23, 2011) (unpublished draft) (on file with author).

152. 25 U.S.C. § 1301 (2012).

violence, sexual assault, or stalking, as defined by tribal law, committed by or against any Indian person on land under the jurisdiction of the tribe.¹⁵³

A second section ensured that anyone prosecuted by a tribal court would have all the rights guaranteed under the Indian Civil Rights Act and a right to expedited habeas corpus review in a federal district court.¹⁵⁴

Advocates relied heavily on the language used in the *Duro* fix for several reasons. Like the drafters of the *Duro* fix, they expected that if Congress ever enacted a partial *Oliphant* fix, non-Indians would challenge it in the federal courts. Prominent Indian law experts had crafted the *Duro* fix language to withstand constitutional scrutiny and prevent the Supreme Court from interpreting the statute as delegating power to the tribes rather than recognizing inherent tribal authority.¹⁵⁵ The NCAI Taskforce wanted a restoration of sovereignty, not a delegation, because a restoration would make it harder for the Supreme Court to overturn the fix. This strategy had worked previously—the Supreme Court upheld the constitutionality of the *Duro* fix in *United States v. Lara*.¹⁵⁶ Moreover, the Court's decision in *Lara* established a precedent, which could be relied on in challenges to a partial *Oliphant* fix.

When they circulated the language to the Department of Justice, the NCAI Taskforce received a favorable response, so they moved up their timeline.¹⁵⁷ With a Justice Department supportive of the partial *Oliphant* fix, advocates stepped up their lobbying efforts and, like in the case of the *Duro* fix, mobilized Indian

153. Draft Language for Violence Against Women Act § 2265B (Mar. 23, 2011) (unpublished draft) (on file with author); see also RESTORATION 2011, *supra* note 149.

154. *Id.*; see also RESTORATION 2013, *supra* note 142.

155. Berger, *supra* note 38, at 13.

156. *United States v. Lara*, 541 U.S. 193 (2004).

157. Letter from Ronald Weich, Assoc. Att'y Gen., to Joe Biden, Senate President (July 21, 2011), <http://www.tribaljusticeandsafety.gov/docs/legislative-proposal-violence-against-native-women.pdf>. Native women had built relationships with key members of the Justice Department while working in the Office of Violence Against Women during the Clinton Administration. The receptivity of the Justice Department to their proposals most likely reflected the strength of these relationships. As other scholars have suggested, the nurturing of these relationships early on most likely helped to facilitate policy change later. EVANS, *supra* note 32, at 74, 88–97.

country to support the effort.¹⁵⁸ In October 2011, Senator Daniel Akaka (D-HI) introduced the Stand Against Violence and Empower Native Women Act (SAVE Native Women Act), which included a provision restoring tribal jurisdiction over non-Indian perpetrators of violence against women in Indian Country.¹⁵⁹ Senator Patrick Leahy (D-VT) incorporated the same provision restoring tribal criminal jurisdiction over non-Indians committing intimate partner violence into a bill to reauthorize VAWA and introduced it the next day.¹⁶⁰ Less than six months later, Representative Dan Boren (D-OK) introduced an identical bill in the House.¹⁶¹ The Senate passed S. 1925 on April 26, 2012, but despite broad bipartisan support for the provision restoring limited tribal criminal jurisdiction over non-Indians, the House Judiciary Committee failed to include it in the bill they reported out to the full House.¹⁶²

158. Tribal advocates used a similar strategy in advocating for the Indian Tribal Government Tax Status Act. *See supra* Section II.C.2.

159. S. 1763, 112th Cong. (2012). The provision's text changed over time, but each version of the bill included language recognizing and affirming inherent tribal sovereignty. *Id.* at § 201; *see also* RESTORATION OF NATIVE SOVEREIGNTY AND SAFETY FOR NATIVE WOMEN, Mar. 2012 (vol. 9, issue 1), at 4, <http://www.niwrc.org/files/Restoration-V9.1.pdf>.

160. Violence Against Women Reauthorization Act of 2012, S. 1925, 112th Cong. § 904 (2011).

161. Stand Against Violence and Empower Native Women Act, H.R. 4154, 112th Cong. (2012).

162. Ryan D. Dreveskracht, *House Republicans Add Insult to Native Woman's Injury*, 3 U. MIAMI RACE & SOC. JUST. L. REV. 1, 12 (2014) ("[D]uring the House Judiciary Committee markup of the Bill, Committee Chairman Lamar Smith (R-TX) refused to allow consideration of a substitute amendment offered by Ranking Member John Conyers, Jr. (D-MI) that would reinsert the tribal provisions. Representative Darrell Issa (R-CA) attempted to offer a similar amendment, which was also disregarded by the Judiciary Committee Chairman."); Jodi Gilette & Lynn Rosenthal, *Addressing Violence Against Native Women in the Violence Against Women Act Reauthorization*, WHITE HOUSE BLOG (May 14, 2012, 12:20 PM), <https://obamawhitehouse.archives.gov/blog/2012/05/14/addressing-violence-against-native-women-violence-against-women-act-reauthorization>. Some Republicans opposed the Senate bill because it would restore limited criminal jurisdiction over non-Indians to tribal governments that are not bound by the United States Constitution. Caroline P. Mayhew, *Opinion: Race, Tribal Authority and Violence Against Women Act*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 29, 2012), http://indiancountrytodaymedianetwork.com/ict_sbc/vawa-tribal-provisions-and-race-discrimination-arguments ("Following passage of the Senate bill, Senator Jon Kyl of Arizona released a statement claiming that 'by subjecting individuals to the criminal jurisdiction of a government from which they are excluded on account of race,' the tribal jurisdiction provision 'would quite plainly violate the Constitution's guarantees of Equal Protection and Due Process.'"). They insinuated that tribal governments would infringe on the human rights of non-Indian criminal defendants.

Tribal advocates increased their advocacy, calling on Congress to enact legislation that protected all victims of violence. In June, the NCAI Taskforce met with congressional leaders, sponsored a rally on Capitol Hill to show solidarity against the House bill, and partnered with the National Task Force to End Sexual and Domestic Violence Against Women on a ten-day national campaign to raise awareness about the importance of enacting an inclusive version of VAWA.¹⁶³ Native women expanded their efforts by reaching out to their existing allies including, but not limited to, the National Coalition Against Domestic Violence, Amnesty International, and the Indian Law Resource Center.¹⁶⁴ These allies further contributed to the effort by spreading the word to their contacts and circulating PSAs to educate members of Congress and the general public about violence against Native women.¹⁶⁵ The NCAI Taskforce and its allies mobilized organizations throughout Indian country and the United States to support their efforts and urge their members to take action.¹⁶⁶ Fifty law professors answered their calls to advocate for Native women by drafting a letter to several senators explaining the

See Letter from the Nat'l Ass'n of Criminal Def. Lawyers & the Nat'l Ass'n of Fed. Defenders, to Sen. Harry Reid, Majority Leader; Sen. Patrick Leahy, Chairman, Comm. on the Judiciary; Sen. Mitch McConnell, Minority Leader; and Sen. Charles Grassley, Ranking Member, Comm. on the Judiciary (Apr. 23, 2012), <http://nacdl.org/WorkArea/DownloadAsset.aspx?id=24053> (on the Violence Against Women Reauthorization Act of 2012 (S. 1925)) (arguing that enactment of the bill to reauthorize VAWA would deprive non-Indian defendants of basic constitutional rights with no effective remedy).

163. *Advocating and Protecting Native Women; NCAI Violence Against Women Task Force Leads VAWA Meetings on Capitol Hill*, NAT'L CONG. AM. INDIANS (July 5, 2012), <http://www.ncai.org/news/articles/2012/07/05/advocating-and-protecting-native-women-ncai-violence-against-women-task-force-leads-vawa-meetings-on-capitol-hill>.

164. Over time, Native women had built partnerships with these groups. See *supra* note 146.

165. IndianLawResourceCenter, *To the Indigenous Woman Long Format, Poem by 1491s*, YOUTUBE (Jan. 9, 2012), <https://www.youtube.com/watch?v=P4Up0drnXX4>; IndianLawResourceCenter, *To the Indigenous Woman, Indian Law Resource Center, by the 1491s*, YOUTUBE (Oct. 21, 2011), <https://www.youtube.com/watch?v=AUt6sxF2s2U> (urging viewers to do something like call their member of Congress).

166. See, e.g., *VAWA Reauthorization, S. 1925, Passes Senate*, INDIAN L. RESOURCE CTR., <http://indianlaw.org/safewomen/vawa-reauthorization-s1925-passes-senate> (last visited Feb. 1, 2019) (urging readers to contact their members of Congress and tell them to reauthorize VAWA); Laura Garbes, *SAVE Native Women Act: Addressing Domestic Violence on Reservations*, CULTURAL SURVIVAL (July 12, 2012), <https://www.culturalsurvival.org/news/save-native-women-act-addressing-domestic-violence-reservations>.

importance of tribal sovereignty in protecting Native women from violence and the legality of the partial *Oliphant* fix in the Senate bill.¹⁶⁷ Neither the House nor the Senate was willing to compromise, and the 112th Congress ended without reauthorizing VAWA.

The NCAI Taskforce and their allies relentlessly continued advocating for a bill that would restore tribal criminal jurisdiction over non-Indians committing intimate partner violence. Senator Patrick Leahy reintroduced a VAWA reauthorization bill complete with the tribal jurisdiction provisions on January 22, 2013.¹⁶⁸ The NCAI Taskforce immediately launched a grassroots campaign, sending out a toolkit for advocating to tribal nations, coalition partners, and supporters.¹⁶⁹ Their partners continued to apply pressure as well.¹⁷⁰ The Senate moved quickly to pass the bill and rejected two amendments that would have weakened the restoration of tribal criminal jurisdiction, but the House was not expected to move on the legislation.¹⁷¹ At the end of the 112th Congress, Representatives Tom Cole (R-OK) and Darrell Issa (R-CA) had introduced a compromise bill that would grant non-Indian defendants the ability to remove the case from tribal court to federal court if they believed their rights had been violated.¹⁷² The House did not act on the bill, but its sponsors were expected to reintroduce it in the 113th Congress.¹⁷³

167. Letter from Law Professors, to Senator Patrick Leahy, et al. (Apr. 21, 2012) (on the Constitutionality of Tribal Government Provisions in the VAWA Reauthorization) (on file with author).

168. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

169. NAT'L CONG. OF AM. INDIANS, SPEAK OUT & ACT NOW! ADVOCATING FOR THE REAUTHORIZATION OF THE VIOLENCE AGAINST WOMEN ACT: A TOOLKIT FOR TRIBAL NATIONS (on file with author) (including a fact sheet, talking points on tribal criminal jurisdiction provisions in S. 47, tips for meeting with policymakers, sample call script, sample letter to a member of Congress, and social media ideas).

170. See, e.g., *New Legislation to End Violence Against Native Women*, AMNESTY INT'L, <https://www.amnestyusa.org/new-legislation-to-end-violence-against-native-women/> (last visited Feb. 1, 2019) (urging readers to tell their senators and representatives to vote for the reauthorization of VAWA and the SAVE Native Women Act).

171. *General Memorandum 13-017: Senate Passes VAWA Reauthorization with Tribal Provisions Intact; Defeats Two Amendments Seeking to Strip Tribal Authority*, HOBBS STRAUS DEAN & WALKER (Feb. 15, 2013), <http://www.hobbsstrauss.com/general-memorandum-13-017>.

172. *Id.*

173. *Id.*

The NCAI Taskforce and Indian nations knew the fight was not over yet and persisted in their efforts. The House continued to entertain a bill identical to the one it passed in the 112th Congress. The bill excluded protections for gay, bisexual, and transgender survivors of domestic abuse and recognition of tribal criminal jurisdiction.¹⁷⁴ Thus, it came under intense scrutiny from Indian nations, Democrats, women's groups, immigrant groups, the LGBT community, and human rights groups, and failed to pass the House.¹⁷⁵

In the end, tribal advocates built a strong coalition to overcome the opposition to the restoration of limited tribal criminal jurisdiction over non-Indian perpetrators of intimate partner violence. With public pressure mounting, Speaker John Boehner (R-OH) decided to bring the Senate bill to the floor without having the support of most House Republicans. After lengthy debate, the House passed the Senate version of the bill.¹⁷⁶ President Obama signed the VAWA Reauthorization Act into law on March 7, 2013.¹⁷⁷ The Act included a section restoring the inherent power of tribal governments to exercise special domestic violence criminal jurisdiction over all persons committing specific intimate partner-related crimes in Indian country.¹⁷⁸

The VAWA Reauthorization of 2013 represents a recent trend of Indian nations using lobbying to protect tribal sovereignty by countering detrimental Supreme Court decisions.¹⁷⁹ It demonstrates how astute Indian advocates have leveraged institutions against one another in a sophisticated way to protect tribal sovereignty and limit the ability of the federal government to

174. Ashley Parker, *House Renews Violence Against Women Measure*, N.Y. TIMES (Feb. 28, 2013), <https://www.nytimes.com/2013/03/01/us/politics/congress-passes-reauthorization-of-violence-against-women-act.html> (noting that "more than 1,300 women's and human rights groups signed a letter supporting the Senate legislation").

175. *Id.*

176. *Id.*

177. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

178. *Id.* at § 904; *see also* 25 U.S.C. § 1304.

179. *See, e.g.*, Tribal Labor Sovereignty Act of 2017, H.R. 986, 115th Cong. (2017) (seeking to overturn two decisions of the Court of Appeals for the Sixth Circuit holding that the National Labor Relations Act applies to Indian tribes); Tribal Labor Sovereignty Act of 2017, S. 63, 115th Cong. (2017) (same).

undermine tribal rights in the future.¹⁸⁰ Native women borrowed elements of their strategy from the earlier success of tribal advocates in their efforts to enact the legislation overturning *Duro v. Reina*. In particular, they crafted legislative language that would curb judicial authority to undercut legislative recognition of their sovereignty.¹⁸¹ Native women also built on their previous advocacy to protect Native women from sexual and domestic violence in advancing a campaign to restore tribal criminal jurisdiction over non-Indian perpetrators in cases of intimate partner violence. They capitalized on the relationships they had developed over time with government officials and other interest groups and utilized the reauthorization of general legislation condemning violence against women to partially reverse a court decision detrimental to them. Their persistent employment of a multi-front strategy—mobilizing both at the grass roots and international levels to apply pressure to legislators—in the face of strong opposition persuaded legislators to enact the reforms they wanted.¹⁸²

c. Overseeing policy implementation. Tribes have also used legislative advocacy to encourage congressional oversight of Indian affairs.¹⁸³ Congress has the responsibility to make and oversee the administration of Indian affairs under the Constitution.¹⁸⁴ Oversight is “the review, monitoring, and supervision of the implementation of public policy.”¹⁸⁵ Congress exercises oversight

180. American Indians have employed lobbying to leverage federal institutions against each other in other contexts as well. See, e.g., *Making Strategic Choices*, *supra* note 36, at 949–50.

181. Federal courts do not appear to have adjudicated the issue of the VAWA fix’s constitutionality yet.

182. Tribes are in the process of implementing the reaffirmation of jurisdiction in VAWA 2013. Eighteen tribes are currently exercising the special domestic violence criminal jurisdiction to combat violence against women in their territories. NAT’L CONG. OF AM. INDIANS, VAWA 2013’S SPECIAL DOMESTIC VIOLENCE: CRIMINAL JURISDICTION FIVE-YEAR REPORT 6 (2018), http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf. Across these tribes, there have been 143 arrests, 73 guilty pleas, 6 trials, 5 acquittals, and 1 jury trial conviction. *Id.* at 7.

183. Indian nations have long petitioned Congress and the Bureau of Indian Affairs to improve implementation of federal Indian law policies. Carpenter, *supra* note 42, at 349.

184. U.S. CONST. art. I, § 8, cl. 3.

185. ALISSA M. DOLAN, ET AL., CONG. RESEARCH SERV., CONGRESSIONAL RESEARCH SERVICE CONGRESSIONAL OVERSIGHT MANUAL 1 (2014); see also Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28

through a broad range of activities investigating and monitoring agency actions, including informal contacts with agency officials, hearings, and reporting requirements.¹⁸⁶ Advocates often encourage oversight activities to educate Congress about implementation issues and recommend substantive changes in legislation that will curb agency discretion in implementing statutes.¹⁸⁷

Tribal leaders have encouraged congressional committees to exercise oversight by educating members of Congress about the issues arising in Indian country generally, as well as drawing attention to problems in the implementation of existing federal Indian policies. Congress has held oversight hearings on a range of issues affecting Indians including, but not limited to, gaming,¹⁸⁸ land,¹⁸⁹ crime and law enforcement,¹⁹⁰ the trust responsibility,¹⁹¹ Indian child welfare,¹⁹² economic development,¹⁹³ tribal lobbying¹⁹⁴

AM. J. POL. SCI. 165, 165 (1984) (defining oversight as attempts by Congress “to detect and remedy executive-branch violations of legislative goals”).

186. MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 5-6 (2017); Jack M. Beerman, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 122 (2006).

187. Beerman, *supra* note 186, at 99.

188. See, e.g., *Oversight Hearing on the Regulation of Indian Gaming: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. (2005).

189. See, e.g., *Oversight Hearing on Taking Lands into Trust: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. (2005); *Oversight Hearing on Tribal Proposals to Acquire Land-in-Trust for Gaming Across State Lines and How Such Proposals are Affected by the Off-Reservation Discussion Draft Bill: Hearing Before the H. Comm. on Nat. Res.*, 109th Cong. (2005).

190. See, e.g., *Law Enforcement in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. (2007); *The Problem of Methamphetamine in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. (2006).

191. See, e.g., *Proposed Reorganization of Major Agencies and Functions Related to Indian Trust Reform Matters Within the Department of the Interior: Hearing Before the S. Comm. on Indian Affairs*, 108th Cong. (2004); *Oversight Hearing on Possible Mechanisms to Settle the Cobell Versus Norton Lawsuit: Hearing Before the S. Comm. on Indian Affairs*, 108th Cong. (2003).

192. See, e.g., *Oversight Hearings on the Indian Child Welfare Act: Hearing Before the S. Select Comm. on Indian Affairs*, 100th Cong. (1987); *Oversight on the Implementation of the Indian Child Welfare Act of 1978: Hearing Before the S. Select Comm. on Indian Affairs*, 98th Cong. (1984).

193. See, e.g., *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. (2010); *Oversight of Economic Development on Indian Reservations: Hearing Before the S. Select Comm. on Indian Affairs*, 97th Cong. (1982).

194. See, e.g., *Oversight Hearing Regarding Tribal Lobbying Matters, et al.: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. (2005); *Oversight Hearing Regarding Tribal Lobbying Matters, et al.: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. (2005).

tribal natural resources,¹⁹⁵ housing,¹⁹⁶ and the BIA's mission and responsibilities.¹⁹⁷

Despite the numerous hearings that Congress has held overseeing federal Indian policy over the past two centuries, very little scholarship exists on congressional oversight of Indian affairs and the role that tribes have played in encouraging it.¹⁹⁸ Tribes have used oversight hearings to advocate for Congress to implement policies it enacted, to improve regulatory policies, and to encourage Congress to address problems arising in Indian

195. See, e.g., *Hearings Before the Subcomm. on Fisheries & Wildlife Conservation & the Env't on Great Lakes Fishing Rights*, 96th Cong. (1980); *Federal Timber Sale Policies: Joint Hearings Before a Special Subcomm. on the Legislative Oversight Function of the S. Comm. on Interior & Insular Affairs and the Subcomm. on Pub. Works of the H. Gov't Operations Comm.*, 84th Cong. (1955).

196. See, e.g., *Innovative Solutions to Addressing Housing Needs in Our Indian Communities: Hearing Before the S. Comm. on Banking, House, & Urban Affairs and the S. Comm. on Indian Affairs*, 111th Cong. (2010); *Oversight Hearing on Housing Issues in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. (2007).

197. See, e.g., *Bureau of Indian Affairs' Capacity and Mission: Hearing Before the S. Comm. on Indian Affairs*, 106th Cong. (1999).

198. Scholars have yet to develop a robust literature on congressional oversight of Indian affairs. They have yet to address questions of how, when, and why Congress exercises oversight over Indian affairs, consider whether congressional oversight over Indian affairs differs from its oversight of other policies, determine the role of Indian tribes in oversight, or study how congressional oversight of Indian affairs has changed over time. A few scholars have studied congressional oversight of specific Indian policies. See, e.g., Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 IND. L.J. 955 (2016) [hereinafter *Congress, Tribal Recognition*] (discussing congressional oversight of federal recognition policy); E. Fletcher McClellan, *Implementation and Policy Reformulation of Title I of the Indian Self-Determination and Education Assistance Act of 1975-80*, 6 WICAZO SA REV. 45 (1990); Kathryn R.L. Rand & Steven Andrew Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform*, 13 VA. J. SOC. POL'Y & L. 396, 396 (2006) (reviewing congressional oversight of Indian gaming). Others have looked at the implementation of specific policies or programs. See, e.g., Kevin K. Washburn, *Agency Conflict and Culture: Federal Implementation of the Indian Gaming Regulatory Act by the National Indian Gaming Commission, the Bureau of Indian Affairs, and the Department of Justice*, 42 ARIZ. ST. L.J. 303 (2010). The literature on Indian advocacy has largely overlooked the role of Indians in encouraging oversight. A few existing accounts of legislative histories implicitly acknowledge that tribes use lobbying to encourage oversight by describing Indian lobbying efforts as precursors to specific Indian-related statutes, see, e.g., *Making Strategic Choices*, *supra* note 36, at 950 (explaining how Congress responded to concerns raised by non-federally recognized Indian groups in enacting the Federally Recognized Tribe List Act of 1994); Royster, *supra* note 38, at 1075-76 (describing the Indian Mineral Development Act as a reaction to Indian complaints about the mineral leasing process), but scholars have yet to consider fully the relationships between Indian advocacy and congressional oversight.

country.¹⁹⁹ This section explores how tribes have used advocacy to oversee and improve the implementation of the Indian Self-Determination and Education Assistance Act (ISDEAA).

A radical transformation in federal Indian policy occurred in 1975 when Congress formally adopted a new policy in the ISDEAA.²⁰⁰ The ISDEAA shifted Indian policy from terminating Indian nations and assimilating Indians into mainstream American society to promoting tribal sovereignty. It fosters the building of tribal institutional capacities and economies by transferring control over federal programs to the tribes.²⁰¹ It required the Secretaries of the Interior and Health and Human Services, upon the request of any Indian tribe, to contract with tribal organizations to operate federal programs for Indians.²⁰² Scholars and tribal leaders have praised the ISDEAA as the most successful federal Indian policy ever enacted by Congress,²⁰³ but the federal government has struggled to implement it fully.²⁰⁴

Tribes have played a key role in the implementation of the ISDEAA by repeatedly lobbying Congress to improve both the ISDEAA and its implementation. They have sought to ensure that the ISDEAA is implemented to fulfill its goals of promoting tribal sovereignty through “the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.”²⁰⁵ They have not achieved all their goals in seeking full

199. *Congress, Tribal Recognition*, *supra* note 198, at 997–98; *Making Strategic Choices*, *supra* note 36, at 956–57.

200. 25 U.S.C. § 5302 (2012) (original version at § 450(a), 88 Stat. 220, 93-638 (1975)). Several scholars trace the origin of the policy to an earlier statement made by President Richard Nixon. *See, e.g.*, GROSS, *supra* note 46, at 34. Others contend that initiation of the policy began in the Johnson Administration. *See, e.g.*, Rebecca L. Robbins, *The Forgotten American: A Foundation for Contemporary American Indian Self-Determination*, 6 WICAZO SA REV. 27 (1990).

201. GROSS, *supra* note 46, at 20–21.

202. *See* Washburn, *supra* note 11, at 781.

203. GROSS, *supra* note 46, at 20–21.

204. *See, e.g.*, S. Bobo Dean & Joseph H. Webster, *Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination*, 36 TULSA L.J. 349, 352 (2000); Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1263–67 (1995); McClellan, *supra* note 198, at 46–48; Strommer & Osborne, *supra* note 10, at 20; Paul H. Stuart, *Financing Self-Determination: Federal Indian Expenditures, 1975-1988*, 14 AM. INDIAN CULTURE & RES. J. 1, 5–6 (1990).

205. 25 U.S.C. § 5302 (2012) (original version at § 450(a), 88 Stat. 220, 93-638 (1975)).

implementation of the ISDEAA, but their efforts have led to significant amendments to the ISDEAA and improvements in its implementation.²⁰⁶ This case study focuses on tribal advocacy leading to the amendment of the ISDEAA in 1988 and how that advocacy changed oversight and implementation of the ISDEAA.

Despite consultation in the creation of the ISDEAA and its regulations,²⁰⁷ tribal advocates began identifying problems in the implementation of the ISDEAA almost immediately after its enactment.²⁰⁸ Concerns raised by tribes led to several early oversight efforts by the federal government, including a 1977 oversight hearing held by the Senate Select Committee on Indian

206. Strommer & Osborne, *supra* note 10, at 48–49.

207. Scholars disagree about the extent to which Congress consulted tribes in formulating the ISDEAA. Wilkinson admits that Indian people did not play a direct role in formulating the Self-Determination Policy, WILKINSON, *supra* note 47, at 189, but notes that the arrival of American Indians as staffers to the Senate Interior Committee and the House Interior Committee in the early 1970s contributed to the change in policy and explosion of Indian legislation. *Id.* at 195. Strommer and Osborne similarly report a lack of tribal input on the ISDEAA. Strommer & Osborne, *supra* note 10, at 20. In contrast, Delaney suggests that tribal advocates initially suggested that the Kennedy Administration use the government contracting process as a mechanism for transferring control over federal funds and programs from agencies to tribes. Danielle A. Delaney, *The Master's Tools: Tribal Sovereignty and Tribal Self-Governance Contracting/Compacting*, 5 AM. INDIAN L.J. 309, 328 (2017). It is unclear whether Delaney is referring to tribal lobbying for Office of Economic Opportunity (OEO) funding to go directly to tribes (rather than the states) in 1964 or something else. WILKINSON, *supra* note 47, at 127–28. The channeling of federal funds directly to tribes through OEO programs empowered tribes and encouraged them to consider policy proposals similar to the OEO programs that could replace the termination policy. *Lobbying Against the Odds*, *supra* note 25, at 435. Tribes and tribal coalitions also testified at committee hearings held prior to the enactment of the ISDEAA. *Indian Self-Determination and Education Assistance Act Amendments of 1987: Hearing on S. 1703 Before the S. Select Comm. on Indian Affairs*, 100th Cong. 37 (1987) (statement of Joseph DeLaCruz, Quinault Nation) (explaining that he was “directly involved in the policy discussion leading to the original Self-Determination Act”); *Implementation of Public Law 93-638, The Indian Self-Determination and Education Assistance Act: Hearing Before the S. Comm. on Interior & Insular Affairs*, 94th Cong. (1975); *Indian Self-Determination and Education Program: Hearing on S. 1017 and Related Bills Before the S. Comm. on Interior & Insular Affairs*, 93d Cong. (1973); *Indian Self-Determination: Hearing on S. 3157, S. 1573, S. 1574, and S. 2238 Before the S. Comm. on Interior & Insular Affairs*, 92d Cong. (1972).

208. Many tribes were not happy with the regulations as finally promulgated in December 1975. They provided extensive comments to the Senate Select Committee on Indian Affairs. *Implementation of Public Law 93-638*, *supra* note 207. Tribal leaders raised inadequate funding as another problem in implementing ISDEAA. *Id.* at 244 (testimony of Alan Parker).

Affairs and a 1978 General Accountability Office Report.²⁰⁹ Senator Abourzek responded to tribal concerns by introducing legislation to amend the ISDEAA in 1978 to allow tribes to consolidate programs into a single grant for each fiscal year.²¹⁰ The Senate passed the bill, but it died in the House.²¹¹

Indian nations continued to raise concerns about the implementation of the ISDEAA.²¹² In 1982, the Senate Select Committee on Indian Affairs responded by holding an oversight hearing on indirect and other contract support costs, which include administrative costs associated with operating federal programs under the ISDEAA.²¹³ The Committee amassed almost 500 pages of testimony from tribes and tribal consortiums on the issues they faced in contracting under the ISDEAA.²¹⁴ Some tribes discussed their experiences with budget shortfalls due to inadequate funding of indirect costs associated with ISDEAA contracts.²¹⁵ They explained how those budget shortfalls undermined their

209. *Indian Self-Determination and Education Assistance Act Implementation: Hearing Before the S. Select Comm. on Indian Affairs*, 95th Cong. (1977); U.S. GEN. ACCOUNTING OFFICE, CONTROLS ARE NEEDED OVER INDIAN SELF-DETERMINATION CONTRACTS, GRANTS, AND TRAINING AND TECHNICAL ASSISTANCE ACTIVITIES TO INSURE REQUIRED SERVICES ARE PROVIDED TO INDIANS (1978).

210. *Amend the Indian Self-Determination and Education Assistance Act: Hearing on S. 2460 Before the S. Select Comm. on Indian Affairs*, 95th Cong. (1978). Senator Abourek introduced another, similar bill earlier in the same congressional session. A Bill to Amend the Indian Self-Determination and Education Assistance Act, S. 2372, 98th Cong. (1977).

211. This bill may have died because it was referred to the House late in the congressional session.

212. *Oversight of Indirect Costs and Contract Provisions of the Indian Self-Determination and Education Assistance Act: Hearing Before the S. Select Comm. on Indian Affairs*, 97th Cong. 1-2 (1982) (statement of Chairman William S. Cohen).

213. *Id.* Chairman Cohen mentioned the problems faced by the Lac Courte Oreilles Band of Chippewa, who had to request that Congress enact legislation to distribute some of their judgment funds to cover indirect costs stemming from the contracting process.

214. *Oversight of Indirect Costs and Contract Provisions of the Indian Self-Determination and Education Assistance Act*, *supra* note 212.

215. *See, e.g., id.* at 29-92 (testimony of Gordon Thayer, Lac Courte Oreilles Band of Chippewa) (recounting the difficulties the tribe faced in addressing shortfalls in indirect costs and how they nearly drove it into receivership); *id.* at 108-09 (testimony of Edward Little, All Indian Pueblo Council) (discussing the inadequate funding to administer federal programs and the resulting indirect cost shortfalls); *id.* at 120-22 (testimony of Tim Love, Penobscot Nation) (discussing the Nation's experience with budget shortfalls due to inadequate funding for indirect costs); *id.* at 126-27 (statement of Allan White Lightning, Standing Rock Sioux Tribe) (discussing the tribe's experience with budget shortfalls due to inadequate funding for indirect costs and recommending creation of a taskforce to address these issues).

ability to provide their tribal citizens with much-needed programs.²¹⁶ Others opposed the adoption of revisions to the regulations for various reasons, including BIA assertions that the Federal Grant and Cooperative Agreement Act should govern self-determination contracts.²¹⁷

Indian leaders persuaded Congress to enact technical amendments to the ISDEAA in 1984.²¹⁸ These amendments exempted tribal contracts from the Federal Grant and Cooperative Agreement Act as recommended by Indian nations in the 1982 Oversight hearing,²¹⁹ but fell short of fixing all the implementation problems identified by Indian nations, particularly those associated with the inadequate funding of indirect costs.²²⁰ The responsiveness of Congress to tribal concerns, however, encouraged tribal leaders to continue to keep problems in the contracting process on the congressional agenda and to advocate for their resolution.

In the mid-1980s, tribes employed lobbying to convince Congress to increase its oversight of tribal contracting and to amend the ISDEAA to ensure better implementation by the BIA

216. See, e.g., *id.* at 29–92 (testimony of Gordon Thayer, Lac Courte Oreilles Band of Chippewa); *id.* at 108–09 (testimony of Edward Little, All Indian Pueblo Council); *id.* at 120–22 (testimony of Tim Love, Penobscot Nation); *id.* at 126–27 (statement of Allan White Lightning, Standing Rock Sioux Tribe).

217. See, e.g., *id.* at 93–95 (testimony of Maxine Edmo, Fort Hall Business Council) (opposing adoption of draft revisions to the regulations implementing the ISDEAA because they would allow termination of contracting without tribal consent); *id.* at 108–09 (testimony of Edward Little, All Indian Pueblo Council) (opposing changes to the regulations); *id.* at 114 (testimony of Ronald P. Andrade, National Congress of American Indians) (opposing change from contracting to competitive grants and noting lack of consultation with tribes in proposing this change); *id.* at 125 (testimony of Virginia Thomas, Passamaquoddy Tribe) (opposing changes to the regulations implementing ISDEAA contracting).

218. A Bill to Make Technical Amendments to the Indian Self-Determination and Education Assistance Act and Other Acts, Pub. L. No. 98-250, 98 Stat. 118 (1984). President Reagan vetoed an earlier version of the same bill, S. 973, 98th Cong. (1983); see also Delaney, *supra* note 207, at 330 (describing the 1984 ISDEAA Amendments as the product of tribal advocacy).

219. See, e.g., *Oversight of Indirect Costs and Contract Provisions of the Indian Self-Determination and Education Assistance Act: Hearing Before the S. Select Comm. on Indian Affairs, 97th Cong. 118 (1982)* (statement of Ronald P. Andrade, National Congress of American Indians) (noting that Indian tribes were not mentioned in the Federal Grant and Cooperative Agreement Act and that the ISDEAA represented “clear congressional intent of establishing a tribal right to contract for BIA and IHS programs and services”).

220. An Act to Make Technical Amendments to the Indian Self-Determination and Education Assistance Act and Other Acts, 98 Stat. 118 (1984).

and IHS. After struggling with implementation issues for a decade, tribes had had enough and started raising concerns to members of Congress. Representative Morris Udall (D-AZ) responded to Indian frustrations by introducing the Indian Self-Determination Amendments of 1986, which sought to address issues with contract support costs.²²¹ Around the same time, a group of ten tribes formed the Alliance of American Indian Leaders to advocate for congressional recognition of the government-to-government relationship between tribes and the federal government.²²² They targeted the House Appropriations Subcommittee on Interior and Related Agencies.²²³

Aware of tribal concerns, Senator Daniel Inouye (D-HI), chairman of the Senate Committee on Indian Affairs, held an oversight hearing on the implementation of the ISDEAA in April 1987.²²⁴ He announced that the committee would be working on proposing amendments to the bill and invited tribal participation in the crafting of those amendments.²²⁵ Representing numerous tribal clients, Reid Chambers summarized many of the concerns raised by tribes in the 1987 hearing:

[T]ribes and tribal organizations have experienced tremendous frustrations with the 638 process. They receive insufficient funds to operate contracted programs. They are not permitted to contract for some programs at all. They are burdened with excessive paperwork and agency oversight. Minor contract modifications, virtually every purchase of equipment, and most

221. H.R. 4147, 99th Cong. (1986). For a description of the bill, see Dean & Webster, *supra* note 204, at 358.

222. Strommer & Osborne, *supra* note 10, at 31. Members of Congress acted in response to lobbying by a group of ten tribes, called the Alliance of American Indian Leaders, submitting a proposal to the United States House Interior and Related Agencies Subcommittee on Appropriations. *Id.* This alliance included the Quinault Indian Nation, the Lummi Tribe, the Jamestown S'kallam, the Rosebud Sioux, the Mille Lacs Band of Ojibwe, the Red Lake Chippewa, the Hoopa Tribe, the Central Council of the Tlingit-Haida, the Mescalero Apache, and the Crow Tribe. Johnson & Hamilton, *supra* note 204, at 1266-68. It worked closely with Senator Evans to devise the Tribal Self-Governance Demonstration Project incorporated into the ISDEAA Amendments of 1988. *Id.*

223. Strommer & Osborne, *supra* note 10, at 31.

224. *Indian Self-Determination and Education Assistance Act, Public Law 93-638: Hearing Before the S. Select Comm. on Indian Affairs*, 100th Cong. (1987).

225. *Recommendations for Strengthening the Indian Self-Determination Act: Hearing Before the S. Select Comm. on Indian Affairs*, 100th Cong. 1-2 (1987).

leases and subcontracts require agency approval. Federal procurement regulations designed for an entirely different sort of contract are indiscriminately applied to them. The process of self-determination has become a complex and often adversarial exercise in bureaucracy.²²⁶

Tribal leaders and advocates reiterated these concerns.²²⁷ A few months after the hearing, the *Arizona Republic* published a series of articles exposing corruption and misuse of funds by the BIA.²²⁸ The articles seemed to confirm and validate many of the problems tribes were raising about implementation of the ISDEAA.²²⁹

After the hearing, the Senate Select Committee on Indian Affairs collaborated with Indian nations to develop legislation to amend the ISDEAA and sent draft versions of proposed bills to Indian nations for review.²³⁰ Senator Daniel Evans (R-WA) and Representative Morris Udall (D-AZ) introduced identical bills, S. 1703 and H.R. 1223, to amend the ISDEAA in fall 1987.²³¹ As a

226. *Id.* at 140 (prepared statement of the Standing Rock Sioux Tribe, the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Seneca Nation, Yukon-Kuskokwim Health Corporation, Kodiak Area Native Association, Aleutian/Pribilof Island Association, Bristol Bay Native Association, and the Association of Regional Health Directors, Alaska).

227. *Id.* at 20 (testimony of Philip Martin, Chief, Mississippi Band of Choctaw Indians) (detailing the problems that the tribe has faced over the past six years in contracting with the BIA and IHS, especially in regard to the payment of contract support costs); *id.* at 26–28 (statement of Mr. Red Owl, Sisseton-Wahpeton Sioux Tribe) (stating that 85 cents on every dollar allocated to tribal contracting remains with the BIA and IHS); see also McClellan, *supra* note 198, at 45, 46–48 (explaining that bureaucrats interpreted the Act to stall its implementation and created veto points within the contract review process to frustrate tribal efforts to enter into self-determination contracts); Stuart, *supra* note 204, at 5–6 (describing the most common early criticisms as focused on how bureaucrats within the BIA and other agencies had thwarted implementation of the policy by manipulating the policy to increase their control over Indian nations and insisting that they review all tribal decisions). McClellan provides a detailed—and fascinating—account of the bureaucratic resistance to implementing the ISDEAA. McClellan, *supra* note 198, at 47.

228. Chuck Cook, Mike Masterson, & M.N. Trahant, *Fraud in Indian Country: A Billion-Dollar Betrayal*, ARIZ. REPUBLIC, Oct. 4–11, 1987 (series of thirty articles).

229. Ultimately, they led to oversight hearings on the BIA by other congressional committees. Johnson & Hamilton, *supra* note 204, at 1267 n.69.

230. *Indian Self-Determination and Education Assistance Act Amendments of 1987*, *supra* note 207, at 1 (Sen. Daniel K. Inouye, Chairman, S. Select Comm. on Indian Affairs); see also Johnson & Hamilton, *supra* note 204, at 1266–68.

231. *Indian Self-Determination and Education Assistance Act Amendments of 1988*, H.R. 1223, 100th Cong. (1988); *Indian Self-Determination and Education Assistance Act Amendments*, S. 1703, 100th Cong. (1987).

result of consultation with tribes at the proposal development stage, these bills responded to concerns raised by tribes and incorporated ideas presented by tribal advocates at the 1987 hearing.²³²

The two hearings held by the Senate Select Committee on Indian Affairs on the proposed legislation reveal the influence of tribes on the amendment process. At the outset of the first hearing, Senator Inouye identified tribes as the experts in the area and asked them to submit any recommendations for changes to the proposed legislation to the committee.²³³ Indian nations testified in support of the Senate bill at the two hearings.²³⁴ They reiterated many of their concerns about how failure to implement the ISDEAA threatened tribal sovereignty by undermining the ability of tribes to provide high-quality services to their citizens. They emphasized the need for Congress to ensure the full funding of contract support and indirect costs,²³⁵ provide liability

232. *Indian Self-Determination and Education Assistance Act Amendments of 1987*, *supra* note 207, at 1-2 (Sen. Daniel K. Inouye, Chairman, S. Select Comm. on Indian Affairs) (“This bill addresses many tribal concerns, and they include: the need for the Bureau of Indian Affairs and the Indian Health Service to fully fund tribal indirect costs for self-determination contracts; the need for year-to-year stability of contract funding levels in order to improve planning and management of programs; clarifying that Federal acquisition regulations do not apply to self-determination contracts; allowing tribes that have successfully operated programs for 3 or more years, and that have clean audits, to enter into 5-year mature contracts; reducing the paperwork and reporting requirements for mature contracts; alleviating problems associated with over-recovery and under-recovery of indirect costs from Federal agencies other than the BIA and IHS; and approving avenues for contract appeals and conflict resolution.”). Many tribal witnesses applauded the Committee for its consultation with tribes in crafting the bill. *See, e.g., id.* at 24 (statement of Suzan Shown Harjo, Executive Director, National Congress of American Indians); *id.* at 27 (statement of Hon. Billy Frank, Chairman, Northwest Indian Fishing Commission); *id.* at 37 (statement of Joseph Delacruz, President, Affiliated Tribes of Northwest Indians).

233. *Id.* at 2.

234. *Id.*; *see also Indian Self-Determination and Education Assistance Act Amendments of 1987 – Part II: Hearing on S. 1703 Before the S. Select Comm. on Indian Affairs*, 100th Cong. (1987).

235. *Indian Self-Determination and Education Assistance Act Amendments of 1987*, *supra* note 207, at 29 (statement of Stanley Paytiamo, All Indian Pueblos); *id.* at 41 (statement of Clarence Skye, United Sioux Tribes); *id.* at 43 (statement of Margaret Roberts, Alaska Indian Health Board); *id.* at 47 (statement of Anthony Drennan, Intertribal Council of Arizona).

insurance for contractors,²³⁶ and enable tribes to obtain technical assistance from outside of federal agencies.²³⁷

Assistant Secretary for Indian Affairs (ASIA) Ross Swimmer testified against the Senate bill, proposing that the BIA “step out of the picture and put the budget with the tribes and let them carry out the responsibility.”²³⁸ He expanded on this idea in testimony before the House Subcommittee on Interior Appropriations.²³⁹ He proposed a program of true self-determination, in which “tribes would have complete autonomy in determining what programs would be provided.”²⁴⁰ Rather than continue to allow tribes to contract for programs previously run by the BIA, ASIA Swimmer recommended that the federal government grant funds to the tribes to operate programs of their own choosing and that if the tribes did not want to run the programs, they could contract with the BIA to do it.²⁴¹

Members of the Alliance of American Indian Leaders, who had heard ASIA Swimmer’s proposal wanted to test out its core idea of giving tribes “the federal funds to manage their own affairs completely.”²⁴² These tribal leaders adapted ASIA Swimmer’s idea into their own proposal for a Tribal Self-Governance Demonstration Project that would allow tribes to compact for the operation of several government programs (rather than contract for each individually), minimize BIA oversight of tribal programs, and maximize tribal flexibility in designing

236. *Id.* at 29 (statement of Stanley Paytiamo, Governor, Acoma Pueblo Tribe); *id.* at 25 (statement of Lionel John, Executive Director, United South and Eastern Tribes); *id.* at 42 (statement of Margaret Roberts, Board Member, Alaska Native Health Board).

237. *Id.* at 25 (statement of Lionel John, Executive Director, United South and Eastern Tribes); *Indian Self-Determination and Education Assistance Act Amendments of 1987 – Part II*, *supra* note 234, at 56 (statement of Hon. William Ron Allen, Chairman, Jamestown Klallam Tribe).

238. *Indian Self-Determination and Education Assistance Act Amendments of 1987 – Part II*, *supra* note 234, at 28 (statement of Ross O. Swimmer, Assistant Secretary for Indian Affairs, United States Department of the Interior).

239. News Release, Dep’t of the Interior, Secretary Hodel Calls for Unified Effort to Improve Federal Programs Serving Indian Tribes (Oct. 27, 1987), https://www.bia.gov/sites/bia.gov/files/assets/public/press_release/pdf/idc-022499.pdf (quoting statement of Ross O. Swimmer, Assistant Secretary for Indian Affairs, before the House Subcommittee on Interior and Related Agencies Appropriations).

240. *Id.* at 4.

241. *Id.*

242. Johnson & Hamilton, *supra* note 204, at 1267.

programs and allocating resources. They initiated a multi-front strategy, targeting both the House Subcommittee on Interior Appropriations and the Senate Committee on Indian Affairs. The tribes entered into discussions with the Department of Interior, Chairman Sidney Yates (D-IL) of the House Subcommittee on Interior Appropriations, and Senators Inouye and Evans of the Senate Select Committee on Indian Affairs about the possibility of a demonstration project in mid-October 1987.²⁴³ They convinced the House Subcommittee on Interior Appropriations to increase the 1988 BIA budget by \$1 million to support a Tribal Self-Governance Demonstration Project.²⁴⁴

As members of the Alliance of American Indian Leaders negotiated with members of Congress to create a Tribal Self-Governance Demonstration Project, H.R. 1223 continued to progress through the House of Representatives. Tribal advocacy informed many of the amendments the House Committee on Interior and Insular Affairs made to H.R. 1223 before reporting it out on October 26, 1987.²⁴⁵ For example, sections three and eight responded to tribal concerns about contract support and indirect costs by defining terms and requiring that "the amount of funds provided under contracts shall be no less than the amount the appropriate Secretary would have otherwise provided for his administration of the program."²⁴⁶ The House passed H.R. 1223 on October 27, 1987.

Similarly, the Senate Committee on Indian Affairs amended the Senate version of the legislation, S. 1703, to incorporate many of the recommendations made by tribal leaders before reporting it out in December 1987. S. 1703 responded to tribal concerns by, *inter alia*, adding a new section to protect contract funding levels provided to tribes and prevent diversion of funds provided for contracts to pay for costs incurred by the federal government,²⁴⁷

243. *Indian Self-Determination and Education Assistance Act Amendments of 1987*, *supra* note 207, at 1-2 (statement of Sen. Daniel K. Inouye, Chairman, S. Select Comm. on Indian Affairs); Johnson & Hamilton, *supra* note 204, at 1267; Strommer & Osborne, *supra* note 10, at 31.

244. H.R. REP. NO. 100-498 (1987); Johnson & Hamilton, *supra* note 204, at 1267.

245. H.R. REP. NO. 100-393 (1987); S. REP. NO. 100-274, at 29 (1987).

246. H.R. REP. NO. 100-393, at 6.

247. S. REP. NO. 100-274, at 29.

clarifying that self-determination contracts are not governed by federal procurement laws,²⁴⁸ expanding the availability of technical assistance so that tribes could seek assistance outside the federal government,²⁴⁹ and obligating the BIA and IHS to obtain liability insurance for tribal contracts.²⁵⁰ The amended S. 1703 also acknowledged tribal interests in consolidating contracts into one block grant of BIA programs by authorizing a demonstration project to consolidate funding contracts for Indian tribes.²⁵¹

Tribes continued to work with Senator Evans as the Senate considered H.R. 1223, which had already passed in the House. In May 1988, the Senate incorporated the amended version of S. 1703 into H.R. 1223. Senator Evans then proposed an amendment that he had crafted with input from the tribes to the demonstration project provisions, and it passed.²⁵² The Senate then passed H.R. 1223, and the House concurred in the Senate amendments to the bill. President Reagan signed the bill into law.

Sustained tribal advocacy played an integral role in the crafting and enactment of the Indian Self-Determination Amendments of 1988. Congress repeatedly expressed its commitment to working with tribes to improve the implementation of self-determination contracts and its expectation that the BIA and IHS would do the same.²⁵³ Congress responded to tribal concerns

248. *Id.* at 29.

249. *Id.* at 28.

250. *Id.* at 27.

251. *Id.* at 39; *Indian Self-Determination and Education Assistance Act Amendments of 1987*, *supra* note 207, at 1-2 (statement of Sen. Daniel K. Inouye, Chairman, S. Select Comm. on Indian Affairs) (detailing tribal interest in consolidating grants). The self-governance demonstration project resembled a proposal for reworking the contracting process initially made during the 1987 hearing as well as responded to the requests made by the Alliance of American Indian Leaders. *Indian Self-Determination and Education Assistance Act, Public Law 93-638: Hearing Before the S. Select Comm. on Indian Affairs*, 100th Cong. 109 (1987) (testimony of Eric Eberhard). The Senate Committee on Indian Affairs acknowledged tribal interest in and concerns about the demonstration project. S. REP. NO. 100-274, at 64 (additional views of Senator Evans). The Committee then held a hearing on the demonstration project provisions in the proposed legislation to hear all relevant perspectives. *Indian Self-Determination and Education Assistance Act Amendments of 1987*, *supra* note 207, at 2.

252. 134 CONG. REC. S7112; *Indian Self-Determination and Education Assistance Act Amendments of 1987*, *supra* note 207, at 2 (statement of Sen. Daniel J. Evans, Vice Chairman, S. Select Comm. on Indian Affairs).

253. *Indian Self-Determination and Education Assistance Act Amendments of 1987*, *supra* note 207, at 1-2 (1987) (statement of Sen. Daniel K. Inouye, Chairman, S. Select Comm. on Indian Affairs) (expressing the intent of the committee to work with tribes in drafting

about the BIA and IHS acting without their consent by instructing the agencies "to work closely with tribes" in the promulgation of self-determination contract regulations.²⁵⁴

Congress also responded to substantive tribal concerns by amending the ISDEAA to improve the contracting process and creating the self-governance demonstration project.²⁵⁵ Congress strengthened the contracting process by listening to the tribes and amending the ISDEAA to clarify and protect contract funding levels,²⁵⁶ lessen the administrative burdens of contracting,²⁵⁷ expand the availability of technical assistance,²⁵⁸ and obligate the BIA and IHS to obtain liability insurance for tribal contracts.²⁵⁹ It also enacted a self-governance demonstration project, which expanded the types of programs and responsibilities that participating tribes could administer, minimized oversight of tribal programs by federal agencies, and maximized flexibility for tribes to redesign programs and reallocate resources in their agreements.²⁶⁰ The self-governance demonstration project allowed for tribes to bundle programs into one compact rather than contract separately for each of them.²⁶¹

Tribes forged a relationship with members of Congress in advocating for implementation of the ISDEAA in the late 1980s. This relationship produced the 1988 amendments, which largely reflected tribal input into how the agencies could improve their implementation of the ISDEAA to protect and further promote tribal sovereignty as Congress originally intended. Tribes learned

amendments and explaining how the committee consulted tribes in drafting amendments); S. REP. NO. 100-274, at 38, 40 (instructing the BIA and IHS to collaborate with tribes on self-determination contract regulations).

254. S. REP. NO. 100-274, at 38. Scholars have identified Congress's instructions to the IHS and the BIA to collaborate with tribes as a form of oversight. Beerman, *supra* note 186, at 125.

255. Strommer & Osborne, *supra* note 10, at 30-31.

256. S. REP. NO. 100-274, at 29.

257. *Id.* at 29.

258. *Id.* at 28.

259. *Id.* at 27.

260. *Id.*

261. For example, if a tribe administers BIA education and realty programs and wants to administer its own health clinic, it can compact for all these programs rather than contract for each one separately. Tribes, thus, had a choice either to contract or compact with the federal government.

from their success in amending the ISDEAA in 1988 and have managed to keep Congress engaged in oversight in this area.²⁶²

The Senate Committee on Indian Affairs acknowledged the working relationship that it had developed with tribes in the process of amending the ISDEAA by holding an oversight hearing in 1989 to hear testimony, *inter alia*, on regulations to implement the 1988 Amendments, the status of the demonstration project, and the federal government's provision of liability insurance to tribal contractors.²⁶³ At the hearing, tribal witnesses lamented the struggles they faced collaborating with the BIA and IHS in crafting regulations,²⁶⁴ but they overwhelmingly testified in favor of the demonstration project despite BIA reluctance in implementing it.²⁶⁵

As early as 1989, tribes identified the self-governance project as advancing tribal sovereignty and started advocating to have it extended and made permanent.²⁶⁶ Congress responded to the

262. See, e.g., *Indian Self-Determination Contract Reform Act of 1994: Hearing on S. 2036 Before the S. Comm. on Indian Affairs*, 103d Cong. 39 (1994) (statement of Lloyd Miller, Partner, Sonosky Chambers Law Firm) ("We have been working on this for the past 8 years. We worked 2 years with the committee to develop the 1988 amendments. We came back to this committee, regrettably, to work on the 1990 amendments, unfortunately distracting the committee's time due to the intransigence of the agencies. We came back to this committee in the last Congress to deal once again with a draft bill that did not pass the Senate. And now we are back again both with your bill and Senator Inouye's separate bill.").

263. *Implementation of Amendments to the Indian Self-Determination Act: Hearing Before the S. Select Comm. on Indian Affairs*, 101st Cong. 1-2 (statement of Sen. Daniel K. Inouye, Chairman, S. Select Comm. on Indian Affairs) (1989). Senator Inouye explained that Congress planned on monitoring implementation of the 1988 Amendments. *Id.* His statement suggests that the Senate Select Committee on Indian Affairs may have intentionally increased the attention paid to implementation of the ISDEAA after 1988.

264. *Id.* at 2-6, 19 (statement of Hon. William Ron Allen, Chairman, Jamestown Klallam Tribe) (describing the agencies' communications and interactions with the tribes as poor); *id.* at 7-10 (statement of Lionel John, Executive Director, United South and Eastern Tribes) (explaining that the agencies are not open to tribal suggestions); *id.* at 12-16 (statement of S. Bobo Dean, Hobbs, Strauss, Dean & Wilder) (expressing concerns that many positions taken by the IHS and BIA either contradict or are not supported by the ISDEAA and its amendments).

265. See, e.g., *id.* at 229 (prepared statement of Hon. Edward K. Thomas, President, Central Council of Tlingit and Haida Tribes) ("On balance, the Demonstration Project has been a very positive tool for my tribe. . .").

266. *Id.* at 229-30 (prepared statement of Hon. Edward K. Thomas, President, Central Council of Tlingit and Haida Tribes) (suggesting that the demonstration project will lead to permanent legislation changing the relationships between tribes and the federal government and advocating that more tribes be included in it); *Tribal Self-Governance Act of*

tribes by reauthorizing and expanding the self-governance project in 1991,²⁶⁷ extending it to Indian Health Service in 1992,²⁶⁸ and making it permanent in 1994.²⁶⁹ In addition to making the self-governance project permanent, Congress included several other provisions in the Indian Self-Determination Act Amendments of 1994 that addressed tribal concerns.²⁷⁰ For example, the 1994 Act responded to tribal complaints about the agencies' failure to engage tribes in the rulemaking process by including language mandating that the agencies enter into negotiated rulemaking with the tribes pursuant to the Negotiated Rulemaking Act of 1990.²⁷¹

1993: *Hearing on H.R. 3508 and S. 1618 Before the Subcomm. on Native Am. Affairs of the H. Comm. on Nat. Res.*, 103d Cong. 47 (1994) (prepared statement of Hon. Marge Anderson, Chief Executive, Mille Lacs Band of Ojibwe) (supporting bill to make the self-governance demonstration program permanent); *id.* at 86 (prepared statement of Hon. Edward K. Thomas, President, Central Council of Tlingit and Haida Indian Tribes); *id.* at 88 (statement of Hon. Christine Collison, President, Ketchikan Indian Corp.); *id.* at 93 (statement of Hon. Larry Nuckolls, Governor, Absentee Shawnee Tribe); *id.* at 117-18 (statement of Hon. George E. Bennett, Tribal Council Member, Grand Traverse Band of Ottawa and Chippewa Indians); *id.* at 126 (statement of Hon. Dale Risling, Chairman, Hoopa Valley Tribe).

Fourteen tribes testified for making the self-governance demonstration project permanent at a House Subcommittee on Native American Affairs hearing in 1994. *Tribal Self-Governance Act of 1993*, *supra* (statements of the Mille Lacs Band of Ojibwe, Tlingit and Haida Indian Tribes Central Council, Ketchikan Indian Community, Absentee Shawnee Tribe of Oklahoma, Grand Traverse Band of Ottawa-Chippewa, Hoopa Valley Tribe, Lummi Indian Nation, Quinault Indian Nation, Makah Indian Tribe, Chickasaw Nation, Confederated Salish & Kootenai Tribes, Navajo Nation, Lower Elwha S'Klallam Tribe, and Jamestown S'Klallam Tribe). One tribe testified against the 1994 Amendments. *Id.* at 104-05 (statement of Hon. Herbert M. Whitish, Chairman, Shoalwater Bay Tribe) (arguing that the legislation is premature and does not protect tribal rights). The House Committee took the comments of these tribal leaders very seriously. *Id.* at 123-25.

267. Tribal Self-Governance Demonstration Project of 1991, Pub. L. No. 102-184, 105 Stat. 1278 (repealed by 2001 Act).

268. Indian Health Amendments of 1992, Pub. L. No. 102-573, 106 Stat. 4526 (repealed 2000).

269. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413. For a discussion of the events leading up to the enactment of the Indian Self-Determination Act Amendments of 1994, see Johnson & Hamilton, *supra* note 204, at 1269-70; Strommer & Osborne, *supra* note 10, at 34-36.

270. A full analysis of the Indian Self-Determination Act Amendments of 1994 is beyond the scope of this Article. For analyses of the Act and how it changed the law, see Johnson & Hamilton, *supra* note 204, at 1269-77; Strommer & Osborne, *supra* note 10, at 35-39.

271. Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, § 105(d) (Oct. 25, 1994). Tribes had proposed amending the statutory language as early as 1989. *Implementation of Amendments to the Indian Self-Determination Act*, *supra* note 263, at 9 (statement of Lionel John, Executive Director, United South and Eastern Tribes) ("While it

Tribal advocacy led Congress to make the demonstration program, which allowed tribes to compact to operate IHS programs, permanent in 2000.²⁷² Tribes started lobbying for legislation to make the IHS self-governance program permanent in 1996.²⁷³ Tribes, the IHS, other executive branch agencies, and congressional staffers collaborated over the next several years to draft and enact a bill.²⁷⁴ In response to these efforts, Representatives George

was addressed in the report language, there was no specific language in the amendment that required the two agencies to come up with common regulations. We think that in order to make this happen, then the language must be inserted; otherwise, it will continue to wander around. We think that we need to see some language to kind of shepherd that along.”). Senator Inouye expressed hope in 1989 that Congress would not have to amend the statutory language because the agencies would comply with Congress’s previous instructions to collaborate with the tribes. *Id.* at 19 (“We can tighten up the language, but I would hope that that would not be necessary.”). Tribes had continually informed Congress about the agencies’ failures to engage them in the rulemaking process as required by Congress in the 1988 Amendments. *Id.* at 2–6, 19 (statement of Hon. William Ron Allen, Chairman, Jamestown Klallam Tribe); *id.* at 7–10 (statement of Lionel John, Executive Director, United South and Eastern Tribes); *id.* at 12–16 (statement of S. Bobo Dean, Hobbs, Strauss, Dean & Wilder); *Proposed Regulations to Implement the 1988 Amendments to the Indian Self-Determination and Education Assistance Act: Hearing Before the S. Comm. on Indian Affairs*, 103d Cong. 70–129 (1993); *see, e.g., Indian Self-Determination Contract Reform Act of 1994*, *supra* note 262, at 39 (statement of Lloyd Miller, Partner, Sonosky Chambers Law Firm) (“[T]he regulation process has been a disaster.”); *id.* at 31–33 (statement of Carol Evans, Chief Financial Officer, Spokane Tribe of Indians); *id.* at 27 (statement of Phillip Martin, Chief, Mississippi Band of Choctaw Indians); *id.* at 37 (Britt Clapham, Senior Assistant Att’y Gen., Navajo Nation Department of Justice); Delaney, *supra* note 207, at 333. Tribes also submitted comments in opposition to the proposed regulations. *Id.* By 1994, the agencies still had not promulgated regulations and the rulemaking process had completely deteriorated. *Indian Self-Determination Contract Reform Act of 1994*, *supra* note 262, at 1 (statement of Sen. John McCain, Vice Chairman, S. Comm. on Indian Affairs). Senators McCain and Inouye introduced S. 2036, which would have prohibited the agencies from enacting regulations at all. *Id.*

272. Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711.

273. Strommer & Osborne, *supra* note 10, at 41. Based on recommendations made by the self-governance tribes, the Director of the Indian Health Service created a taskforce, the Tribal Self-Governance Advisory Committee, to provide information, education, and policy guidance for implementation of self-governance within the IHS that same year. IHS TSGAC, TRIBALSELF.GOV.ORG, <https://www.tribalselfgov.org/advisory-committees/ihs-tsgac> (last visited Feb. 2, 2019). A similar DOI Tribal Self-Governance Advisory Committee was formally sanctioned by the ASIA in 1998. DOI SGAC, TRIBALSELF.GOV.ORG, <https://www.tribalselfgov.org/advisory-committees/doi-sgac> (last visited Feb. 2, 2019).

274. *Tribal Self-Governance Amendments of 1998: Hearing on H.R. 1833 Before the S. Comm. on Indian Affairs*, 105th Cong. 85–86 (1998) (testimony of Henry M. Cagey, Chairman, Lummi Indian Nation) (describing the federal-tribal consultative process in drafting and revising the bill over a two-year period); *Self-Governance: Hearing on S. 979 Before the S. Comm. on Indian Affairs*, 106th Cong. 63–64 (1999) (statement of Michael Lincoln, Deputy Director, Indian Health Service).

Miller (D-CA) and Don Young (R-AK) introduced several bills, which included provisions worked out among tribes, congressional staffers, and agency officials.²⁷⁵

Tribal leaders advocated for the legislation by overwhelmingly testifying in support of making the IHS self-governance program permanent during the Senate hearing.²⁷⁶ After the hearing, they worked closely with congressional staffers and agency officials to resolve differences between the House and Senate versions of the bill.²⁷⁷ A version of the Senate bill amended to incorporate the tribally supported provisions in the House bill became law on August 18, 2000.²⁷⁸

Tribes have consistently lobbied Congress for amendments to ensure the full funding of tribal contract support costs. By the late 1990s, the tribal under-recovery of contract support costs and congressional underfunding of these costs had grown exponentially.²⁷⁹ This lack of funding of these administrative costs forced

275. Representatives Miller and Young introduced House Bill 1833, which passed the House but was not scheduled for Senate action prior to the adjournment of Congress. Strommer & Osborne, *supra* note 10, at 40–42. Some attributed the failure of H.R. 1833 to issues dealing with contract support costs. *See, e.g., Self-Governance: Hearing on S. 979, supra* note 274, at 71 (statement of Henry Cagey, Chairman, Self-Governance Tribal Advisory Task Force). The Senate Committee on Indian Affairs hearing on H.R. 1833 confirms that Senator Slade Gorton (R-WA) raised serious concerns about contract support costs and opposed the bill. *Tribal Self-Governance Amendments of 1998, supra* note 274, at 47 (statement of Sen. Slade Gorton); *id.* at 86 (testimony of Henry M. Cagey, Chairman, Lummi Indian Nation) (noting that several senators opposed the bill because the contract support cost issue remained unresolved).

The failure of H.R. 1833 did not discourage tribes. Representatives Miller and Young introduced H.R. 1167 in the 106th Congress. H.R. 1167, 106th Cong. (1999). H.R. 1167 included all the revisions worked out among tribes, congressional staffers, and agency officials in the previous session. Strommer & Osborne, *supra* note 10, at 41. The bill quickly passed the House, and Senator Ben Nighthorse Campbell introduced a companion bill, S. 979, in the Senate. *Id.*

276. *Self-Governance: Hearing on S. 979, supra* note 274, at 63–64 (1999) (statement of Michael Lincoln, Deputy Director, Indian Health Service).

277. Strommer & Osborne, *supra* note 10, at 41–42.

278. Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711.

279. Dean & Webster, *supra* note 204, at 364–66. Unpaid contract support costs undermined the advances made to tribal sovereignty through the ISDEAA because tribes were forced to divert program funds to pay for them. *See id.* at 366 (describing the entire policy of tribal self-determination as at risk); *Contract Support Costs Within the Indian Health Service and the Bureau of Indian Affairs (Part II): Hearing Before the H. Comm. on Resources, 106th Cong. (1999)* [hereinafter *Contract Support Costs (Part II)*].

some tribes to limit their programs, leaving tribal needs unmet.²⁸⁰ Other tribes were deterred from contracting or compacting for federal programs and still others started threatening to retrocede programs back to the BIA and IHS.²⁸¹

Tribes responded to the crisis by increasing their advocacy for Congress to resolve the problem and fully fund contract support costs.²⁸² The NCAI mounted a two-pronged strategy, pushing for an increase in appropriations for contract support funding for fiscal year 1999²⁸³ and for legislation to provide a permanent indefinite appropriation to fund contract support costs.²⁸⁴

Congress responded by increasing appropriations for contract support costs in fiscal years 1999, 2000, and 2001.²⁸⁵ While increases in appropriations provided some temporary relief, they did not permanently fix contract support cost shortfalls. Thus, tribes continued to seek legislation to resolve the issue. Tribes helped to craft and supported proposed legislation in both 2000 and 2004.²⁸⁶

280. *Contract Support Costs (Part II)*, *supra* note 279.

281. *Id.*

282. Dean & Webster, *supra* note 204, at 366.

283. *Id.*

284. H.R. REP. NO. 106-837, at 5 (2000).

285. Congress appropriated substantially more in contract support funding for the IHS and slightly more for the BIA for fiscal year 1999. Dean & Webster, *supra* note 204, at 366-67. Unfortunately, these increases did not fully cover the contract support cost shortfalls. *Id.* Concerned over these costs and the lack of progress toward a resolution to the funding problem, Congress brought the contracting process to a halt for the first time in almost twenty-five years. INDIAN SELF-DETERMINATION CONTRACTING: SHORTFALLS IN CONTRACT SUPPORT COSTS AND ALTERNATIVES FOR FUNDING THEM 1 (Sept. 15, 1999) (U.S. Gen. Accounting Office Release GAO/T-RCED-99-287) (statement of Jim Wells, Director, Energy, Resources, and Science Issues, before the Senate Committee on Indian Affairs) <https://www.gao.gov/store1999/rc99287t.pdf>. It imposed a mandatory cap on the total amount of contract support cost funding for new and expanded programs and placed a one-year moratorium barring the Secretary from entering into new ISDEAA contracts in fiscal year 1999. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 314, 112 Stat. 2681-288 (1999).

NCAI applauded the increased appropriations while lobbying for more funding for fiscal year 2000 and an end to the moratorium. Dean & Webster, *supra* note 204, at 369. NCAI raised awareness about the problem by issuing a report detailing the historic and ongoing problems that the contract support cost shortfalls caused for tribes. *Id.* Congress lifted the moratorium and continued to increase contract support funding in 2000 and 2001. *Id.* at 370.

286. Members of Congress responded to tribal concerns by introducing legislation to clarify that the federal commitment to fund contract support costs is not subject to annual

In the early 2000s, tribes lobbied Congress while simultaneously litigating against the Departments of the Interior and Health and Human Services to recover contract support cost shortfalls.²⁸⁷ They increased their lobbying after the Supreme Court held—for the second time—that Congress had to fully pay tribal contract support costs.²⁸⁸ The tribes defeated the Obama

appropriations and to provide a permanent indefinite appropriation to pay the reasonable amount of negotiated contract support costs. H.R. 4148, 106th Cong. (2000). Members of Congress also held multiple hearings on contract support costs in 1999, *see, e.g., Self-Determination and Education Assistance Act and Contract Support Costs: Hearing Before the S. Comm. on Indian Affairs*, 106th Cong. (1999); *Contract Support Costs Within the Indian Health Service Annual Budget: Hearing Before the H. Comm. on Resources*, 106th Cong. (1999); *Contract Support Costs (Part II)*, *supra* note 279, and requested a GAO study on the problem. *See* Dean & Webster, *supra* note 204, at 369. Tribes actively helped to draft the Tribal Contract Support Cost Technical Amendments of 2000, H.R. REP. NO. 106-837, at 5 (2000), and they reiterated their support for the bill by uniformly testifying for it before the House Committee on Resources. *See* H.R. 946, 2671, and H.R. 4148 (Young, R-AK) – *To Make Technical Amendments to the Provisions of the Indian Self-Determination and Education Assistance Act Relating to Contract Support Costs, and for Other Purposes. "Tribal Contract Support Cost Technical Amendments of 2000": Hearing Before the H. Comm. on Res.*, 106th Cong. (2000) (testimony of the National Congress of American Indians, Yukon Kuskokwim Health Corporation, Cherokee Nation, Gila River Indian Community, Mississippi Band of Choctaw Indians, and several school boards within the Navajo Nation in favor of the bill) (no American Indians or tribes testified against the bill).

With tribal input and support, members of Congress again introduced legislation in 2004 that would have mandated a permanent appropriation for tribal contract support costs, but the bill failed to pass both houses. Tribal Contract Support Cost Technical Amendments, S. 2172, 108th Cong. (2004).

287. The Cherokee Nation and Shoshone-Paiute Tribes of the Duck Valley Reservation brought administrative claims under the Contract Disputes Act against the Secretary of Health and Human Services, alleging that the Secretary had failed to pay all of the contract support costs associated with their IHS compacts as required by ISDEAA. Cherokee Nation of Okla. v. Thompson, 311 F.3d 1054, 1059 (10th Cir. 2002). The administrative process failed to resolve the issue, and the tribes brought suit in federal court in March 1999. *Id.* at 1059–60. The Cherokee Nation pursued similar administrative claims against the Secretary of the Interior. Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 636 (2005). When the Board of Contract Appeals ordered that the Secretary pay the Cherokee Nation \$8.5 million in damages, the federal government sought review in the Court of Appeals for the Federal Circuit. *Id.* The Supreme Court consolidated these cases and affirmed the lower court finding that the ISDEAA required the federal government to pay tribal contract support costs subject to the availability of appropriations in 2005. *Id.* at 634. The Ramah Navajo Chapter and the Arctic Slope Native Association filed lawsuits to determine the meaning of the “subject to availability of appropriations” language when a spending cap is in place. James J. Linhardt, *The Ball Is in Congress’s Court: Contract Support Costs Following Ramah*, 37 AM. INDIAN L. REV. 203, 205 (2012). In 2012, the Supreme Court reiterated its earlier mandate that Congress pay tribal support costs in *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 185 (2012).

288. *Ramah*, 567 U.S. at 185.

Administration's fiscal year 2014 proposal that Congress eliminate the rights of tribes to full contract support funding.²⁸⁹ Tribal pressure finally led to full funding of contract support costs from both agencies as separate, indefinite appropriations starting in fiscal year 2016.²⁹⁰

Tribes have continued to keep issues related to the implementation of contracting and compacting on the congressional agenda even though Congress last enacted major amendments to the ISDEAA in 2000. In response to tribal advocacy, congressional committees have held numerous hearings related to contracting and compacting,²⁹¹ and members of Congress have introduced multiple bills to address various implementation issues.²⁹² Tribes

289. Mary Pavel, *Contract Support Costs Under the Indian Self-Determination Act: The Post-Cherokee-Ramah Full Funding Era*, Presentation to the Affiliated Tribes of Northwest Indians, http://atntribes.org/sites/default/files/MJP%20CSC%20powerpoint%20for%20ATNL_0.pdf (last visited Feb. 2, 2019). Tribes criticized the administration for proposing the policy without consulting tribes and urged the government to negotiate with tribes in good faith. *Contract Support Costs and Sequestration: Fiscal Crisis in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 113th Cong. (2013) (statement of Phylliss J. Anderson, Tribal Chief, Mississippi Band of Choctaw Indians); *id.* (statement of Brian Cladoosby, President, National Congress of American Indians).

290. See, e.g., Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2538 (BIA), 2566 (IHS).

291. See, e.g., *The 30th Anniversary of Tribal Self-Governance: Successes in Self-Governance and an Outlook for the Next 30 Years: Hearing Before the S. Comm. on Indian Affairs*, 115th Cong. (2018); S. 919, *the Department of Interior Tribal Self-Governance Act of 2013: Hearing Before the S. Comm. on Indian Affairs*, 113th Cong. (2014); H.R. 4347, *Department of the Interior Tribal Self-Governance Act of 2009: Hearing Before the H. Comm. on Nat. Res.*, 111th Cong. (2010); H.R. 4347, *To Amend the Indian Self-Determination and Education Assistance Act to Provide Further Self-Governance by Indian Tribes and for Other Purposes: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. (2010); *The Success and Shortfall of Self-Governance Under the Indian Self-Determination and Education Assistance Act After Twenty Years: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. (2008); H.R. 3994, *the Department of Interior Tribal Self-Governance Act of 2007: Hearing Before the H. Comm. on Nat. Res.*, 110th Cong. (2007); *Tribal Self-Governance: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. (2006) [hereinafter *Tribal Self-Governance* (2006)]; *Department of the Interior and the Department of Health and Human Services Tribal Self-Governance Act: Hearing on S. 1715 and S. 1696 Before the S. Comm. on Indian Affairs*, 108th Cong. (2004); *Tribal Contract Support Cost Technical Amendments: Hearing Before the S. Comm. on Indian Affairs on S. 2172*, 108th Cong. (2004); *Tribal Self-Governance: Oversight Hearing Before the H. Comm. on Res.*, 108th Cong. (2003).

292. PROGRESS for Indian Tribes Act, S. 2515, 115th Cong. (2018); Department of the Interior Tribal Self-Governance Act of 2014, H.R. 4546, 113th Cong. (2014); Department of Interior Tribal Self-Governance Act of 2013, S. 919, 113th Cong. (2014); Department of the Interior Tribal Self-Governance Act of 2012, S. 3685, 112th Cong. (2012); Department of the Interior Tribal Self-Governance Act of 2011, H.R. 2444, 112th Cong. (2011); Department of the Interior Tribal Self-Governance Act of 2010, H.R. 4347, 111th Cong. (2010); Department

have continuously advocated for a solution to the ongoing shortfalls in contract support costs,²⁹³ an expansion of self-governance programs beyond the BIA and the IHS,²⁹⁴ and an amendment to the ISDEAA that would streamline the Department of the Interior's process for approving self-governance compacts by aligning it with the process used by the IHS.²⁹⁵ Members of Congress have responded to these requests by introducing bills proposing to amend Title IV to make it consistent with the process used by the IHS²⁹⁶ and to expand self-governance programs

of Interior Tribal Self-Governance Act of 2007, H.R. 3994, 110th Cong. (2007); Tribal Contract Support Cost Technical Amendments of 2004, S. 2172, 108th Cong. (2004); Department of the Interior Tribal Self-Governance Act of 2004, S. 1715, 108th Cong. (2004).

293. See, e.g., *The 30th Anniversary of Tribal Self-Governance: Successes in Self-Governance and an Outlook for the Next 30 Years*, supra note 291 (statement of Melanie Benjamin, Mille Lacs Band of Ojibwe) (noting the need to resolve funding issues, expand tribal self-governance programs, and enact amendments to Title IV); *Contract Support Costs and Sequestration: Fiscal Crisis in Indian Country*, supra note 289 (statement of Phylliss J. Anderson, Tribal Chief, Mississippi Band of Choctaw Indians); *id.* (statement of Brian Cladoosby, President, National Congress of American Indians); *Tribal Self-Governance* (2006), supra note 291, at 11–13 (statement of Floyd Jourdain, Jr., Chairman, Red Lake Band of Chippewa Indians of Minnesota) (raising issues related to contract support costs and advocating for their resolution).

294. See, e.g., *Department of the Interior and the Department of Health and Human Services Tribal Self-Governance Act*, supra note 291; *The 30th Anniversary of Tribal Self-Governance: Successes in Self-Governance and an Outlook for the Next 30 Years*, supra note 291 (statement of Melanie Benjamin, Chief Executive, Mille Lacs Band of Ojibwe) (noting the need to resolve funding issues, expand tribal self-governance programs, and enact amendments to Title IV); *id.* (statement of Arthur "Butch" Blazer, President, Mescalero Apache Tribe) (urging Congress to extend self-governance programs to the USDA).

295. See, e.g., *The 30th Anniversary of Tribal Self-Governance: Successes in Self-Governance and an Outlook for the Next 30 Years*, supra note 291 (statement of Melanie Benjamin, Chief Executive, Mille Lacs Band of Ojibwe) (noting the need to resolve funding issues, expand tribal self-governance programs, and enact amendments to Title IV); *Tribal Self-Governance* (2006), supra note 291 at 3–4 (George Skibine, Department of Interior) (mentioning that the BIA and tribes were working together on an amendment to Title IV); *id.* at 14 (statement of Melanie Benjamin, Chairwoman, Mille Lac Band Assembly) (urging amendments to Title IV); *id.* at 11–12 (statement of Floyd Jourdain, Jr., Chairman, Red Lake Band of Chippewa Indians of Minnesota) (supporting amendments to Title IV).

296. See, e.g., Department of the Interior Tribal Self-Governance Act of 2004, S. 1715, 108th Cong. (2004); Department of Interior Self-Governance Act of 2010, H.R. 4347, 111th Cong. (2010); Department of Interior Self-Governance Act of 2011, H.R. 2444, 112th Cong. (2011); Department of Interior Self-Governance Act of 2012, S. 3685, 112th Cong. (2012); Department of Interior Self-Governance Act of 2013, S. 919, 113th Cong. (2014); Department of Interior Self-Governance Act of 2014, H.R. 4546, 113th Cong. (2014); Department of Interior Self-Governance Act of 2015, S. 286, 114th Cong. (2015); PROGRESS for Indian Tribes Act, S. 2515, 115th Cong. (2018).

beyond the BIA.²⁹⁷ Most recently, Senators John Hoeven (R-ND) and Tom Udall (D-NM) introduced the bipartisan Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination (PROGRESS) for Indian Tribes Act in March 2018.²⁹⁸ The product of several years of negotiations among tribes, congressional staffers, and the BIA, the PROGRESS for Indian Tribes Act would streamline the Department of the Interior's self-governance process and provide tribes with greater flexibility in administering federal programs. The Senate passed the bill in September 2018.²⁹⁹

The case of the ISDEAA illustrates how Indian nations have used advocacy to encourage legislative oversight. The multiple oversight hearings that Congress has held on Indian affairs suggest that many more examples of this may exist and merit investigation. Tribes have and continue to actively employ lobbying to facilitate Congress's oversight of self-determination contracting and self-governance compacting.³⁰⁰ In the 1980s, tribes used lobbying to notify Congress of problems with the implementation of the ISDEAA.³⁰¹ They pushed Congress to reaffirm its commitment to tribal sovereignty by overseeing agency implementation of the ISDEAA. Congress responded to

Tribes have continuously worked with congressional staffers and the BIA to craft legislation acceptable to all parties involved. Strommer & Osborne, *supra* note 10, at 61–62 (documenting tribal efforts and bills introduced to amend Title IV through 2014); S. REP. NO. 114-060, at 2–4 (2015) (detailing the history of legislative proposals to amend Title IV).

297. Department of Health and Human Services Tribal Self-Governance Amendments Act of 2004, S. 1696, 108th Cong. (2004); *see also* Strommer & Osborne, *supra* note 10, at 47 (discussing S. 1696 and its demise). Strommer and Osborne suggest that expansion, especially outside of BIA programs, is a contentious issue. *Id.* at 62. Recent bills have not included provisions either expanding or limiting the scope of federal programs eligible for inclusion in self-governance agreements. S. REP. NO. 114-060, at 4 (2015). The Senate Committee on Indian Affairs, however, has noted that current law gives the Secretary of the Interior wide discretion over what programs to include and has commended the Secretary on the few occasions that it has expanded self-governance agreements to include more programs. *Id.*

298. PROGRESS for Indian Tribes Act, S. 2515, 115th Cong. (2018).

299. Hoeven, Udall Announce Committee Passage of Progress for Indian Tribes Act, NATV NEWS (Apr. 11, 2018), <http://www.natvnews.com/hoevenudallannouncemmitteeassageofprogressforindiantribesact.html>.

300. Delaney argues that tribes also used the 1995–96 negotiated rulemaking process to improve implementation of the ISDEAA and its amendments. *See* Delaney, *supra* note 207, at 334.

301. *See supra* Section II.C.2.

these concerns by holding multiple hearings, in which Senator Inouye recognized tribes as experts in the implementation of the ISDEAA.³⁰²

The tribal role in oversight of the ISDEAA, however, has shifted over time. Tribes no longer serve only to sound the fire alarm about problems in the implementation process.³⁰³ Rather, through their continued advocacy, tribes have come to be an integral voice in congressional oversight of self-determination policy. Senator Inouye's recognition of tribes as experts facilitated this shift by suggesting that members of Congress should consult tribes on how to improve implementation of the ISDEAA to fulfill the statute's goal of promoting tribal sovereignty.³⁰⁴ Members of Congress have continued to invite tribal participation and have developed a more collaborative approach to ISDEAA oversight that includes extensive consultation with tribes. Moreover, members of Congress have followed up with tribes on the implementation of amendments.³⁰⁵ Members of Congress use these hearings to press agencies to respond to tribal concerns. These ongoing interactions among tribes and members of Congress produce a reinforcing cycle of oversight over time.

Tribal lobbying has had concrete impacts on the ISDEAA policy and its implementation.³⁰⁶ At least three times (1988, 1994,

302. *Indian Self-Determination and Education Assistance Act Amendments of 1987*, *supra* note 207, at 1.

303. The fire alarm theory of oversight suggests that interest groups serve to ring the alarm when agencies fail to follow legislative mandates. McCubbins & Schwartz, *supra* note 185, at 166.

304. *Indian Self-Determination and Education Assistance Act Amendments of 1987*, *supra* note 207.

305. For example, the Senate Committee on Indian Affairs held an oversight hearing in 1989 with the express purpose of monitoring implementation of the 1988 amendments. *See Implementation of Amendments to the Self-Determination Act: Hearing Before the S. Select Comm. on Indian Affairs*, 101st Cong. (1989) (explaining that Congress had planned on monitoring implementation of the 1988 Amendments).

306. Tribes have actively engaged in tribal contracting and self-governance compacts. Today, "more than 350 federally recognized tribes and consortia operate self-governance programs." FAQs, TRIBALSELF.GOV.ORG, <https://www.tribalselfgov.org/self-governance/faqs> (last visited Feb. 2, 2019). Similarly, "[a]s of July 2016, the IHS and Tribes have negotiated 90 self-governance compacts that are funded through 115 funding agreements with over 350 (or 60 percent) of the 567 federally recognized Tribes. This program constitutes approximately \$1.8 billion (or nearly 40 percent) of the IHS budget." *Tribal Self-Governance Fact Sheets*, INDIAN HEALTH SERV., <https://www.ihs.gov/newsroom/index.cfm/factsheets/tribalselfgovernance> (last visited Feb. 2, 2019).

and 2000), tribal lobbying on oversight has led to significant legislative reforms intended to improve implementation of tribal self-governance programs and curbed agency departures from the stated legislative goal of promoting tribal sovereignty. Tribal lobbying has provided members of Congress with invaluable, independent information about the implementation of self-governance programs.³⁰⁷ This information, in turn, has facilitated better congressional oversight by undercutting the informational advantages that agencies generally have in relation to Congress. But tribes did not stop there. They engaged in the bill drafting and amending process to produce policy changes meant to improve self-governance programs and their implementation. Oversight did not end with these legislative reforms but continued as tribes and members of Congress continued to work together to ensure successful implementation of the self-governance policy.

Even when tribal advocacy did not lead to legislative reforms, lobbying affected the dynamics among the agencies and Congress. Tribes significantly reduced the agencies' informational advantages relative to Congress by presenting concrete evidence about agency resistance to implementing the ISDEAA.³⁰⁸ On more than one occasion, members of Congress used information supplied by tribes to reprimand agencies for failures in the implementation process.³⁰⁹ Moreover, they have often commended tribes for their implementation of self-governance programs while chastising the agencies for their failures.

In addition to highlighting how tribes have used lobbying to increase congressional oversight, the case of the ISDEAA

307. See Richard L. Hall & Kristina C. Miler, *What Happens After the Alarm? Interest Group Subsidies to Legislative Overseers*, 70 J. POL. 990, 999–1002 (2008) (explaining that interest groups subsidize oversight by providing legislators with information). For a theoretical discussion of how groups use lobbying to help Congress control the bureaucracy, see David Epstein and Sharyn O'Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J.L. ECON. & ORG. 227 (1995).

308. Epstein & O'Halloran, *supra* note 307, at 236 (explaining how information provided to legislators by interest groups counters the informational advantage of agencies).

309. For example, Congress instructed the agencies to consult with tribes in crafting regulations in the report to the 1988 Amendments. When the agencies failed to do this, Congress mandated negotiated rulemaking in the 1994 Amendments. For a fuller discussion of these events, see *supra* note 272.

demonstrates the sophistication of tribal lobbying strategies. In the 1980s, tribes developed and utilized a multi-pronged strategy for enhancing implementation of the ISDEAA. Tribes adapted their strategy from one that focused on the committees with jurisdiction over Indian affairs to targeting appropriations committees as well. Tribes built alliances with members of Congress on both committees to achieve their goal of creating a self-governance demonstration project. They used the appropriations process to direct agency action even if the ISDEAA was not amended to include the self-governance demonstration project.³¹⁰ The 1988 amendments reinforced this action and ensured the creation of the demonstration project. Indian nations have continued to target both committees in advancing further refinements to the implementation of the ISDEAA and especially in their efforts to obtain full funding for contract support costs.³¹¹ In the late 1990s, tribes again altered their strategy by expanding their efforts to resolve contract support cost shortfalls. They turned to the federal courts and leveraged judicial power to encourage Congress to address shortfalls in contract support costs.

III. UNDERSTANDING TRIBAL LOBBYING AS A STRATEGY FOR TRIBAL RESILIENCE

Indian nations are fighting to survive as distinct peoples with their own governments in a rapidly changing world. Lobbying is part of this larger survival strategy. To the extent that tribes can and do use lobbying to improve federal Indian policy, it is a strategy for resilience.³¹²

Lobbying serves as a strategy for tribal resilience by giving voice to Indian nations. The case studies highlight the voices of Indian nations as active participants in the political process. Tribal actions have ensured tribal survival. Federal Indian law is not something done to Indians, but emerges out of a complicated, interactive process of encounters between Indians and non-

310. Beerman, *supra* note 186, at 84–90 (noting how interest groups obtain earmarks to direct agency action).

311. *See, e.g.,* Pavel, *supra* note 289.

312. COBB, *supra* note 30, at 59–69 (explaining that tribal activism has always been about tribal self-determination and survival).

Indians.³¹³ Through lobbying, American Indians engage and challenge the political system in a sustained effort to maintain their sovereignty, culture, and identity. Congress is not merely a foreign governmental institution but a site of contestation.³¹⁴

The three case studies presented here illuminate some of the various ways in which Indian nations have used lobbying as a strategy for tribal resilience. Each case serves as an illustration of a broader range of lobbying activities that Indian nations have engaged in over time to protect their tribal sovereignty. The cases demonstrate how tribes have harnessed strategies used by interest groups within the American political system to advocate for federal Indian laws and policies beneficial to them. Like interest groups, Indian nations have used legislative advocacy to achieve different goals.³¹⁵ As the case studies show, Indian nations have pushed back against potential encroachments on their sovereignty by initiating new policies to ensure their continued survival, seeking to reverse court decisions adverse to their interests, and advocating for implementation of programs that foster their development as tribal governments.³¹⁶ Occasionally, they even transform laws and policies to better reflect their interests.

The case studies provide some initial insights into how Indian nations have used lobbying to foster tribal sovereignty in multiple contexts.³¹⁷ The cases when read together suggest that lobbying strategies that encourage tribal resilience share common aspects. These common aspects include, but may not be limited to, an emphasis on protecting tribal sovereignty, persistence in pursuing tribal goals, the development of sophisticated and adaptable

313. *Id.* at 60–61 (discussing how previous encounters between Indians and the BIA can be described as mutual and reciprocal).

314. Neta Ziv, *Cause Lawyers, Clients, and the State: Congress as a Forum for Cause Lawyering During the Enactment of the Americans with Disabilities Act*, in *CAUSE LAWYERING AND THE STATE IN THE GLOBAL ERA* 212 (Austin Sarat & Stuart Scheingold eds., 2001); Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 *AM. POL. SCI. REV.* 690 (1983).

315. *LOBBYING AND POLICY CHANGE*, *supra* note 60, at 78, 110–11; *Making Strategic Choices*, *supra* note 36, at 948–58.

316. *See supra* Part II.

317. The presentation of multiple cases allows for comparative analysis across the cases. Three cases do not provide definitive information, but they impart initial insights into possible trends or patterns in tribal lobbying.

strategies, and a commitment to building long-term, sustainable relationships. First, tribal sovereignty claims are central to these lobbying efforts. In each of the case studies, tribes made arguments about how the existing policy undermined their status as separate sovereign governments and they sought legislation that reaffirmed that status. Tribes lobbied to protect and promote their government-to-government relationship with the federal government.

Second, tribes exhibited tremendous persistence in their lobbying efforts. Consistent with earlier studies on tribal advocacy, the case studies demonstrate the incredible tenacity of tribes in advancing their interests over time.³¹⁸ Tribes lobbied for the Indian Tribal Tax Governmental Status Act for almost a decade in the face of opposition from the Department of the Treasury.³¹⁹ But their persistence paid off. Congress enacted the partial *Oliphant* fix in the VAWA Reauthorization of 2013 much more quickly (in less than four years), but Native advocates had spent decades laying the groundwork for a successful legislative campaign and expanded their mobilization efforts when the House refused to pass an acceptable bill.³²⁰ Thus, the case studies confirm earlier research findings that Indian tribes are in it for the long term and willing to continue advocating even in the face of opposition and defeat.³²¹

Third, tribes develop sophisticated, long-term strategies to pursue their goals and demonstrate a willingness to adapt their strategies over time. Tribal advocates crafted a multilevel strategy for educating the public and legislators about the importance of a limited *Oliphant* fix that targeted policymakers at the federal and international level.³²² When the House of Representatives removed the jurisdictional provisions from the bill it passed, the NCAI Taskforce on Violence Against Women responded by increasing its efforts to mobilize supporters. Similarly, tribes lobbied across

318. EVANS, *supra* note 32, at 74.

319. See *supra* Part II. Tribes do not always face as much opposition or delay as they did in the cases presented here. Most bills initiated by tribes that are enacted are enacted in one to two congressional sessions.

320. See *supra* Part II.

321. EVANS, *supra* note 32, at 74 (noting how tribes built relationships with federal bureaucrats and used a slow, long-term approach to making policies more beneficial to them).

322. See *supra* Part II.

committees to convince Congress to enact a self-governance demonstration project as part of the 1988 ISDEAA amendments.³²³ When they failed to persuade Congress to mandate permanent appropriations for contract support costs, they turned to the courts, demonstrating their ability to shift strategies as necessary.³²⁴ The case studies suggest that the adaptability of tribal advocates enables them to foster tribal resilience through lobbying.

Fourth, tribes engage in relationship and coalition building within and outside of Indian country as part of their lobbying strategies. The case studies confirm previous studies finding that tribes build relationships with congressional staffers by continually interacting with them to revise and improve policies.³²⁵ The clearest example of this emerges in the case study of the ISDEAA, in which tribes collaborated closely with congressional staffers over several decades to ensure legislative oversight and reform of the self-determination contracting and self-governance compacting processes.³²⁶ Moreover, the case studies expand on these findings by indicating that tribes also develop alliances with other groups as a way of promoting tribal sovereignty. For example, the NCAI Taskforce cultivated relationships with a broad spectrum of women's rights and human rights groups as part of their efforts to protect Native women by restoring tribal criminal jurisdiction. This intentional fostering of alliances among tribes, with other interest groups and with government officials, has helped tribes to protect their sovereignty over time.

IV. LESSONS FROM INDIAN COUNTRY: IMPLICATIONS FOR FEDERAL INDIAN LAW AND ADVOCACY STUDIES

This Part explores some of the broader implications of this exploratory research for federal Indian law and interest group and advocacy studies. Section IV.A highlights the new and important questions that the case studies raise for the study of federal Indian law. Section IV.B looks beyond federal Indian law to consider the

323. *See supra* Part II.

324. *See supra* Part II.

325. EVANS, *supra* note 32, at 74-75.

326. *See supra* Part II.

implications of this research on interest group and advocacy studies more generally.

A. Tribal Advocacy and Federal Indian law

The implications of this research for federal Indian law are significant. In a world in which tribes continue to face threats to their survival and sovereignty,³²⁷ scholars need to develop more detailed and comprehensive understandings of the various, sophisticated ways in which tribes influence the creation, enactment, and implementation of federal Indian law and policy. The case studies contribute to this larger project by furnishing some basic information about the myriad ways in which tribes engage in lobbying strategies and how those ways compare to interest groups more generally. They also indicate some important directions for future research in this area.

The case studies enhance existing knowledge about tribal legislative advocacy by presenting a broader view of how American Indians and tribes engage in lobbying. Indian nations have long advocated for their own survival and used multiple strategies in doing so. The case studies here simply attempt to describe some of tribes' more recent efforts. They confirm that American Indians often act like interest groups.³²⁸ Previous studies have demonstrated how American Indians contribute to electoral campaigns³²⁹ and build relationships with legislators³³⁰ similar to interest groups. Like interest groups, Indian tribes craft sophisticated strategies in response to various opportunities and constraints.³³¹ Tribes displayed a willingness to shift strategies over time in response to changes in the political environment. For example, tribal advocates changed their strategy by more aggressively advocating for a limited *Oliphant* fix in the VAWA reauthorization after they learned that the Department of Justice

327. See, e.g., FORCED FEDERALISM, *supra* note 16, at 3–8; see also A Bill to Abrogate the Sovereign Immunity of Indian Tribes as a Defense in *Inter Partes* Review of Patents, S. 1948, 115th Cong. (2017).

328. *State Lobbying Registrations*, *supra* note 32, at 5; *Post-Indian Gaming Regulatory Act Era*, *supra* note 26, at 129.

329. *Post-Indian Gaming Regulatory Act Era*, *supra* note 26, at 129.

330. EVANS, *supra* note 32, at 74; GROSS, *supra* note 46, at 82–84.

331. LOBBYING AND POLICY CHANGE, *supra* note 60, at 110–11.

supported restoring tribal criminal jurisdiction over non-Indians committing intimate partner violence to tribal governments.³³² Similar to interest groups, Indian nations use lobbying for various purposes, including to leverage institutional relationships, build support for an issue, educate the public, develop credibility with government officials, and encourage legislative oversight.³³³ They have engaged in a variety of influencing behaviors, including but not limited to, disseminating research, building coalitions, working with allies, mobilizing at the grass roots level, and testifying before congressional hearings.³³⁴

By emphasizing how tribes act like interest groups, the case studies show that Indian nations view Congress as an arena of contestation and lobby legislators to influence the creation and implementation of federal Indian law.³³⁵ They reveal that Congress, not just the courts, is an important venue for the crafting of federal Indian law and policy. These findings run contrary to the bulk of federal Indian law scholarship, which has traditionally focused on court decisions and taken a top-down approach to studying federal Indian law.³³⁶ The case studies suggest that Indian nations are active participants in the creation and implementation of federal Indian law across a range of institutions. Future studies should investigate the various roles that Indian nations play across institutions in the initiation, development, and implementation of federal Indian law.

The case studies leave several important questions unanswered. The case studies suggest that tribes exercise some influence in initiating and implementing federal Indian policy. But the extent of this influence remains largely unknown. The case studies are not representative, so research is needed to determine whether these case studies are indicative of more general patterns

332. See *supra* Section II.C.2.

333. LOBBYING AND POLICY CHANGE, *supra* note 60, at 78, 110-11; *Making Strategic Choices*, *supra* note 36, at 948-58.

334. LOBBYING AND POLICY CHANGE, *supra* note 60, at 150-51 (noting the various tactics used by lobbyists). Previous studies have also documented American Indians using some of these tactics. See, e.g., Berger, *supra* note 38; *Making Strategic Choices*, *supra* note 36, at 948-58.

335. HANSEN & SKOPEK, *supra* note 32, at 212.

336. Notable exceptions to this trend include, but are not limited to, Berger, *supra* note 38, and INDIAN LAW STORIES (Carole Goldberg et al. eds., 2011).

and trends in tribal influence. Several questions still need to be answered: How successful are American Indians in influencing the enactment of federal and state laws and policies beneficial to them? Are some tribes more successful than others? What conditions improve their chances of success? These questions merit systematic investigation and will provide important insights into how and when Indian nations can craft successful advocacy strategies.

Moreover, this research has only investigated a few cases of tribes using advocacy to argue for legislation beneficial to them. Most likely, Indian nations are using lobbying in other ways as well. For example, this research has not considered what happens when tribes lobby against a policy change. To develop a complete picture of Indian legislative advocacy, future studies should examine how, when, and why tribes use advocacy to oppose or defeat legislation. These future investigations should also explore the efficacy of tribal opposition. For example, how successful are Indian nations at preventing the enactment of laws and policies detrimental to them? Under what conditions are tribes able to defeat laws and policies detrimental to them? This preliminary, descriptive study indicates the need for more research in this understudied area.

B. Interest Group and Advocacy Studies

The research provides insights beyond federal Indian law to interest group and advocacy studies more generally. First, the case studies indicate that Indian nations behave similarly to interest groups with some notable and important exceptions. As noted previously, Indian nations frequently engage in many of the same behaviors as interest groups, including initiating legislation, campaigning at the grassroots level, testifying before congressional committees, building relationships with other interest groups and government officials, and drafting legislative language.³³⁷

Indian nations, however, do not always act like interest groups, and their divergent behaviors may provide insights into important differences among interest groups and how they lobby.

337. LOBBYING AND POLICY CHANGE, *supra* note 60, at 155.

In contrast to recent lobbying studies that report that interest groups challenging the status quo emphasize the positive aspects of the proposed policy,³³⁸ my case studies suggest that Indian tribes also regularly highlighted the negative, harmful consequences of existing policies in arguing for policy change. Indian nations repeatedly testified about the detrimental effects of not extending the same tax rules to tribal governments as other governments, failing to recognize the criminal jurisdiction of Indian tribes, and the shortfalls in contract support costs.³³⁹ My findings, thus, suggest the need to pay closer attention to the arguments being made by interest groups. Moreover, my findings may indicate that the arguments made by groups challenging the status quo may depend on their relationship to the policies being challenged. In my case studies, the group challenging the policy was the group harmed by it. Thus, they were uniquely positioned to make cogent arguments about the negative impacts of existing policies. Different interest groups may make different arguments based on their relationship to the policy.

Second, my research expands existing understandings of how groups influence the political process.³⁴⁰ Similar to previous studies, it highlights interactions among interest groups and legislators.³⁴¹ Unlike most previous studies, my research closely follows targeted advocacy on a specific policy proposal and thus allows for the tracking of influence over time.³⁴² It documents the arguments and proposals Indian nations advanced to exercise influence on a specific policy proposal at different stages of the

338. *Id.* at 140.

339. *See supra* Part II.

340. Scholars disagree on the ability of interest groups to influence the political process. For a discussion of this debate, see BURSTEIN, *supra* note 60, at 6–16. They have struggled to show empirically how groups influence legislators through lobbying. *See, e.g.*, BAUMGARTNER & LEECH, *supra* note 60, at 36 (“Scholars have long attempted to observe and document the exercise of influence in politics. They have yet to succeed.”).

341. BURSTEIN, *supra* note 60, at 100–06; JOHN R. WRIGHT, *INTEREST GROUPS & CONGRESS: LOBBYING, CONTRIBUTIONS, AND INFLUENCE* 75–97 (1996); Holly J. McCammon, et al., *How Movements Win: Gendered Opportunity Structures and U.S. Women’s Suffrage Movements, 1866 to 1919*, 66 AM. SOC. REV. 49 (2001) [hereinafter *How Movements Win*]; Holly J. McCammon, et al., *Movement Framing and Discursive Opportunity Structures: The Political Successes of the U.S. Women’s Jury Movements*, 72 AM. SOCIOLOGICAL REV. 725 (2007) [hereinafter *Movement Framing and Discursive Opportunity Structures*].

342. BURSTEIN, *supra* note 60, at 102–03.

legislative process. For example, tribal advocates played key roles in the initial development and drafting of legislative proposals in all three cases and influenced the amending processes in the VAWA and ISDEAA cases. This close tracking of the legislative proposal as it developed allowed me to trace how legislators responded to these proposals and arguments. The data, thus, shows how members of Congress responded to tribal arguments and the interactive dialogue among tribes, legislators, and agencies in the legislative process. My research builds on the insight made by earlier scholars that influence emerges through interactions among interest groups, legislators, and bureaucrats by suggesting that influence may be revealed through close documentation of these interactions and linking them to policy outcomes.³⁴³ For example, Indian nations appear to have influenced the 1988 ISDEAA Amendments, which incorporated many of their suggested revisions. Future studies should investigate similar interactions in other cases to improve current understandings of how influence works.

Third, this research contributes to a growing literature on the role and influence of marginalized groups in the political process. It expands knowledge about how marginalized groups may engage in the political process by exploring the experiences of one group. Contrary to popular narratives about the political powerlessness of marginalized groups, the data suggests that even groups thought to be powerless may occasionally exercise influence in the political process. This finding complicates contemporary debates over how to understand and measure power and powerlessness for doctrinal purposes.³⁴⁴ It suggests that the dichotomy between powerful and powerless used to identify suspect classes in the existing equal protection doctrine may oversimplify reality. Groups may exercise power in some contexts but not others. Thus, my research challenges scholars and

343. *Id.* at 100–06; WRIGHT, *supra* note 341, at 75–97; *How Movements Win*, *supra* note 341, at 49; *Movement Framing and Discursive Opportunity Structures*, *supra* note 341, at 725.

344. Bertrall L. Ross, II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CAL. L. REV. 323 (2016) (arguing for a holistic definition of a group's power in applications of equal protection doctrine); Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527 (2015) (trying to theorize and operationalize political powerlessness to identify suspect classes for equal protection purposes).

judges to think more carefully about what power is as well as how, when, and why groups use it. It suggests that more contextual approaches to understanding political power may be more accurate. My research indicates a need for future studies investigating how, when, and why other marginalized groups exercise power in the political process and identifying the different conditions leading to power and powerlessness.

Finally, my research expands on existing understandings of the “important and incompletely understood role” of interest groups in congressional oversight.³⁴⁵ The case study on the ISDEAA in particular builds on earlier studies investigating the role and influence of interest groups in congressional oversight of agency action. Like previous studies, my research confirms that interest group lobbying may influence legislative control of the bureaucracy.³⁴⁶ Indian nations, like interest groups, have sounded the fire alarm to encourage members of Congress to rein in agencies straying from legislative mandates.³⁴⁷ My research expands on earlier studies by suggesting a dialectic relationship between interest groups and legislators in oversight processes. It demonstrates how members of Congress may actively rely on and collaborate with an interest group in overseeing policy implementation.³⁴⁸ It shows that this relationship may not be unidirectional with interest groups always sounding the alarm. At least in the case of monitoring implementation of the ISDEAA, members of Congress actively turned to Indian nations for guidance on how to curb agency discretion. This finding suggests a more cyclical relationship between members of Congress and interest groups and that interest groups may exercise more influence in the oversight process than previously thought. Future research is needed to test this finding across a wider range of cases.

Moreover, unlike earlier oversight studies, which suggest that legislative reform is an uncommon result of lobbying,³⁴⁹ my

345. Hall & Miler, *supra* note 307, at 1002.

346. *Id.* at 1003; Epstein & O'Halloran, *supra* note 307, at 228.

347. *See supra* Part II.

348. Hall & Miler, *supra* note 307, at 1003.

349. Epstein & O'Halloran, *supra* note 307, at 228 (“These groups can influence policy by their threat to sound a fire alarm, but in general they cannot achieve their most preferred policy outcome.”).

research indicates that lobbying may inform policy formation and lead to the crafting of better policies. As exploratory research, this finding is less important than the direction in which it points. Future work should investigate a wider range of cases to determine when and how interest group influence extends beyond sounding fire alarms and providing information to engaging actively in revising policies.

CONCLUSION

Indian peoples have demonstrated remarkable resilience since Europeans arrived in the New World over five hundred years ago. This Article has explored how Indian tribes have used lobbying to protect their tribal sovereignty, build their institutions, and maintain control over their lands and natural resources during the Tribal Self-Determination Era. Through case studies, it has demonstrated how tribes have harnessed strategies used by interest groups within the American political system to advocate for federal Indian laws and policies beneficial to them. Tribes have pushed back against potential encroachments on their sovereignty, initiated new policies to ensure their continued survival, and advocated for implementation of programs that foster their development as tribal governments.