THE CONTINUED SOCIAL INJUSTICE OF NATIVE AMERICAN EXPLOITATION*

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ABSTRACT

Native Americans have long lived in dire poverty, way below any other ethnic group in the United States, despite treaty-obligated federal services in Indian Country. An analysis of distributive justice under the policy of federal paternalism provides disturbing results - the most marked being the 10 billion-dollar mismanagement of the *Individual Indian Money* (IIM) trust fund. This paper explores the historical, cultural and legal ramifications of this on-going controversy.

INTRODUCTION

Native aboriginals of North America have long suffered from both physical and cultural genocide at the hands of the European colonists. This situation was especially true in the United States where federal policy originally sanctioned ethnic cleansing in the form of genocide and forced removal. These policies decimated the Native American population from tens of millions to less than a million by the time of President Grant's *Peace Policy* of 1870. This was the beginning of a more sublte form of discrimination under the pretense of *distributive justice*. And with the pretense of distributive justice came the justification for the abolition of treaty making with Native American tribes. The problem with distrubitive and procedural justice in the United States at that time was that Native Americans were still disenfranchised and did not have the weight of a non-Indian before the courts, federal or state. Hence, the practice of *federal paternalism* stemming from President Grant's Peace Policy served to obviate critical elements of decision and process control. Clearly there was no fairness in this pseudo-model of distributive justice. The *interactive justice* process was one-sided with Indian tribes having no real power or authority to accept, reject, or otherwise influence decisions about their fate (Beugre & Baron 2001; Morris & Leung 2000; Sweeney & McFarlin 1993; Taylor 1994; Tyler, Boeckmann, Smith & Huo 1997; Walzer 1983; and Young 1990).

Grant's main architect for the peace plan was his choice to head the Bureau of Indian Affairs, Commissioner of Indian Affairs Ely Parker. Parker was of mixed Indian (Seneca) and white blood and served as a brigadier general in the Union Army. A trusted protege of President Grant and strong supporter of this new dimension of ethnic cleansing, he supported these efforts to not only uproot tribes but force them to abandon their traditional ways in lieu of the Western-Christian perspective. Removal continued to be the primary vehicle of ridding lands of unwanted Indians desired by white settlers and the railroads. Congress aided the Executive Branch in this process by refusing to ratify any more Indian treaties. In 1854, the U.S. Senate, in executive session, read each unratified U.S./Indian treaty three times, as required by law, and then denied ratification for all. The tribes involved were not notified of this clandestine move and had little recourse after-the-fact (French 1994).

After most of the remaining tribes were removed to *Indian Territory* (Oklahoma) efforts were underway to take this land away from them, including the *Five Civilized Tribes*. They were termed such due to their adoption of the Euro-American legal and economic model during the early years of the Republic and they brought their U.S.-styled laws, courts, police and corrections with them to Indian Territory (Oklahoma) during Removal. Given that they had already accommodated the western-model of justice, they were generally exempt from the dictates of the Courts of Indian Offenses and other federally-imposed judicial authority except for that which dealt with non-Indian offenders within Indian country. However, the civilized tribes fell out of favor with the federal government for their support of the Confederacy during the Civil War and suffered severe sanctions during Reconstruction. This set in motion plans to include them in the allotment plan -- the foundation for cultural genocide at this time -- which was already being imposed on other tribes (*Curtis Act* 1898; Meriam 1928).

Allotment represented the imposition of the Western Protestant Ethic model of economic competition and individual responsibility that was diametrically opposite the ab-

original communal, collective responsibility model. Moreover, the aboriginal traditional Indian cultural model reflected *social communism*. The 160-acre family allotments were comparable to the land alloted to *homesteaders* who staked claims on federal public lands opened to settlers. This plan would free up so-called *surplus lands* held in common by the tribe through treaties. Some of this land was used to relocate other removed tribes in the past but the plan now was to make this land available to non-Indian homesteaders. Initially, the alloted Indian land was to be held in trust by the U.S. government in order to prevent the land from being taxed or being taken illegally by non-Indians. Nonetheless, many Indians lost their allotment when challenged in court. Lastly, the Allotment Act was intended to have universal application within Indian country and was imposed without any requirement of consent of the tribes or Indians affected. The program was quite effective in that the total amount of treaty-granted, Indian-held land fell from 138 million acres in 1887 to 48 million acres in 1934, with much of this being desert or poor agricultural land. Besides, many Indian landowners eventually lost their allotments to the states for failure to pay property taxes (Canby Jr. 1988; French 1987).

All told, allotment was a great success for proponents of manifest destiny and another dire failure for American Indians. It was during this time and under these circumstances that the current federal fraud was initiated cheating the Indians of ten billion dollars via the treaty-bound trust relationship with the U.S. Departments of Interior and Treasury. In summary, the *General Allotment Act* (Dawes Act) of 1887 the U.S. Congress took back 90 million acres from Indian tribes and gave them to white homesteaders. The remaining 54 million acres of Indian lands were determined by allotments ranging from 40 acres to 30 acres with those lands not individually allotted held in trust by the U.S. Government. Today the allotted trust lands belong to some 300,000 American Indians. Herein lies the current problem. These lands were then unilaterally leased out to non-Indian enterprises (grazing, timber, oil and gas activities) with the money going to the U.S. Treasury supposedly held in trust for distribution to individual Indians under a program known as the Individual Indian Money (IIM) trust. The mismanagement of these monies was first noticed by the General Accounting Office, the independent investigative arm of Congress in 1928. This was part of the reform movement leading to the Meriam Report. The mismanagement continued and was not addressed until 1994 with passage of the Indian Trust Reform Act (Collier 1934; Dawes Act 1887; Title 25 2002).

There is also suspicion that this effort to defraud Native Americans paved the way for the rationale for both Termination and Relocation during the Eisenhower administration during the 1950s. These federal policies were renewed efforts to again attempt to destroy the American Indian traditional communal lifestyle. A curt introduction to this section is provided by the 1999 *Memorandum Opinion: Findings of Fact and Conclusions of Law* document resulting out of the *Eloise Pepion Cobell et al., v. Bruce Babbitt, Lawrence Summers, and Kevin Gover (Civil No. 96-1285)*:

> Less than two decades after the Reorganization Act was passed, in the early 1950s, congressional policy swung in a new direction. According to Assistant Secretary Gover, "This time the policy was called the 'termination policy.' Termination basically meant the severing of the relationship between the tribe and the United States, and, specifically, the severing of the trust relationship." Congress directed BIA to identify tribes that were said to be "ready for termination, ready to be released from federal supervision because by this point the conclusion had been reached that the real problem with Indian affairs, and the real reason the Indians are poor is that they're under the thumb of the federal government." Following that direction, the United States withdrew recognition of the existence of certain tribes and forswore any responsibility to those tribes or their people as Indians. The tribal assets were gathered up and either administered by a corporate entity or distributed among the tribal members. Much like the allotment policy, this policy devastated the tribal communities. The termination policy ended quickly. After the 1960s, no further tribes were terminated. (Lamberth 1999)

Interestingly, President Eisenhower appointed Dillon Myer, a former head of the Japanese-American Relocation Centers, to the position of Commissioner of the Bureau of Indian Affairs during his administration. His dictatorial style set the stage for a combined

Executive and Congressional endeavor to reverse the progress gained under the Wheeler-Howard and Johnson-O'Malley acts. The first act in this series was *House Concurrent Resolution 108*. On August 1, 1953, the Eighty-third Congress enacted a fundamental change in Indian policy which again reinforced the concepts of cultural genocide and ethnic cleansing by attempting to abolish federal obligations to Indian groups. By passing an "act of Congress," they attempted to deny American Indians any special recognition and thereby relegate them common members of the states where their reservation existed (Canby Jr. 1988; IRA 1934; Philip 1977).

Two weeks later Public Law 280 went into effect. It extended state criminal jurisdiction over offenses committed by or against Indians in Indian country by taking this authority from the tribal courts. A major problem with this legislation was that it exacerbated the often hostile relationship that existed between non-Indians and Indians in states where reservations exist. This provided the non-Indians their chance to further exploit their American Indian neighbors now that they no longer had federal protection. Less that a year later, in June 1954, the Menominee Indians of Wisconsin were added to the list by Congress. They soon became the example of how devastating the policy of Termination was in Indian country. Termination and Public Law 280 were unilateral policy decisions made by the U.S. Congress and forced upon Indian tribes. No tribe has ever accepted the terms of Public Law 280. Despite this fact, it continues in those so-designated States (*House Concurrent Resolution 108* 1953; Morgan 1892; *Public Law 280* 1953; *Termination of Menominee Indians* 1954).

Another component of this plan to Terminate federal Indian obligations included the transfer of Indian health from the Bureau of Indian Affairs (BIA) to the Public Health Service of the then U.S. Department of Health, Education, and Welfare. This new service under the Public Health Service became known as Indian Health Service (IHS). However, one of the most devastating aspects of Termination was the twentieth century method of Indian Removal, the BIA's Relocation program where young Indians were enticed out of Indian country, away from their culture and language, to targeted urban settings. Relocation was operated by the Bureau of Indian Affairs' Branch of Relocation (BIA) with grants paid to Indians willing to leave Indian country for urban areas (Emmons 1954; *Transfer of Indian Health Services from BIA to Public Health Service* 1954).

If anything, the combination of Termination and Relocation contributed to a new social problem -- that of psychocultural marginality -- whereby American Indians were caught between two worlds without being allowed to fully belong to either. This represented the ultimate form of cultural genocide. With their culture and language again being attacked by the combined effects of Termination and Relocation, a new generation of American Indians living off reservations and in urban Indian ghettos were socialized in a world of both psychological and cultural ambiguity -- the foundation of marginality. With this process came increased social, health and legal problems. Costo and Henry noted this process in their book, *Indian Treaties: Two Centuries of Dishonor*:

> Religious groups and white-controlled humanitarians organizations generally embodied the worst of the growing paternalism toward the Natives. Finally, the federal government, jockeying precariously between policies of assimilation and the growing recognition that the tribes simply would not disappear together with their unique cultures, originated what has become known as the "Relocation Program." Indians were induced to go to the cities for training in the arts of the technological world. There they were dumped into housing that in most cases was ghetto-based, into jobs that were dead end, and training that failed to lead to professions and occupations. The litany of that period provides the crassest example of government ignorance of the Indian situation. The "Indian problem" did not go away. It worsened. The policies of the Eisenhower administration, which espoused the termination of federal-Indian relationships, was shown to be a failure, a gross injustice added to a history of injustice. (Costo & Henry 1977)

Termination ended with the failed Menominee experience but did nothing to reverse the damage done by either Relocation or Public Law 280. Wisconsin exemplified state hostility toward Indians within their boundaries. Indeed, the state went too far in its interpretation of the combined authority of Termination and Public Law 280. Wisconsin felt that the

law made all state statutes applicable to the dissolved reservation including specified exemptions such as hunting and fishing rights. In 1964, the U.S. Supreme Court held that the Termination Act did not abrogate Indian treaty rights since these rights were reserved by Public Law 280 which was passed by the same Congress. Continued poverty and exploitation eventually led to the *Menominee Restoration Act* in December 1973 which repealed the Termination Act of June 17, 1954 restoring tribal status and federal supervision (*Menominee Restoration Act* 1973).

COBELL V. NORTON

This suit was filed with the aid of the Native American Rights Fund (NARF) on June 10, 1996 when Babbitt was in office. In the original suit, the Assistant Interior Secretary (BIA Director) was Ada Deer and Robert Rubin was the Secretary of the Treasury. The suit was filed by Elouise Cobell, a Blackfoot Indian and Montana banker, who, along with the NARF lawyers, accuse the U.S. government of violating their trust responsibility for the collection of monies from the leasing of Indian lands to non-Indian businesses for grazing, logging, mining and oil drilling. The plaintiffs note a 10 billion dollar shortfall due to either theft, corrupt deals or shoddy bookkeeping practices.

In describing the suit, John Echohawk, Executive Director of the Native American Rights Fund noted that:

> The Bureau of Indian Affairs has spent more than 100 years mismanaging, diverting and losing money that belongs to Indians. They have no idea how much has been collected from the companies that use our land and are unable to provide even a basic, regular statement to Indian account holders. Every day the system remains broken, hundreds of thousands of Indians are losing more and more money. (Echohawk 2001)

The catch-22 is that the Department of Interior approves all leases of resources in Indian country. Moreover, the law requires Indians to use the federal government as their bank so these transactions occur without Indian input or accountability.

DECLARATIVE JUDGMENT OF INDIAN SUIT AGAINST THE U.S. GOVERNMENT

A comprehensive text describes *Eloise Pepion Cobell, et al., v. Bruce Babbitt, Secretary of the Interior, Lawrence Summers, Secretary of the Treasury, and Kevin Gover, Assistant Secretary of the Interior* (U.S. District Court, District of Columbia, Civil No. 96-1285 (RLC)). In the text the Plaintiffs, representing federally-recognized Indian tribes whose monies are administered by the BIA and U.S. Department of the Interior, claim that the Defendants, the BIA and U.S. Department of the Interior, have mismanaged the federal program known as the *Individual Indian Money* (IIM). In the Introduction to the Memorandum Opinion it was noted:

> It would be difficult to fina a more historically mismanaged federal program than the Individual Indian Money (IIM) trust. The United States, the trustee of the IIM trust, cannot say how much money is or should be in the trust. As the trustee admitted on the eve of the trial, it cannot render an accurate accounting to the beneficiaries, contrary to a specific statutory mandate and the century-old obligation to do so. More specifically, as Secretary Babbitt testified, an accounting cannot be rendered for most of the 300,000-plus beneficiaries, who are now plaintiffs in this lawsuit. Generations of IIM trust beneficiaries have been born and raised with the assurance that their trustee, the United States, was acting properly with their money. Just as many generations have been denied any such proof, however. "If courts were permitted to indulge their sympathies, a case better calculated to excite them could scarcely be imagined." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831) (Marshall 1831).

The Court ordered the following action:

> **Declaratory Judgment**
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> Pursuant to the Declaratory Judgment Act, 28 U.S.C. Section 2201, and the Administrative Procedure Act, 5 U.S.C. sections 702 & 76, the court HEREBY DECLARES that:
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> 1. The Indian Trust Fund Management Reform Act, 25 U.S.C. Sections 162a *et seq.* & 4011 *et seq.*, requires defendants to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were depos-

ited.

2. The Indian Trust Fund Management Reform Act, 25 U.S.C. Sections 162a *et seq.* & 4011 *et seq.*, requires defendants to retrieve and retain all information concerning the IIM trust that is necessary to render an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs.
3. To the extent that prospective relief is warranted in this case and to the extent that the issues are in controversy, it has been shown that defendant Bruce Babbitt, Secretary of the Interior, and defendant Kevin Gover, Assistant Secretary of the Interior, owe plaintiffs, pursuant to the statutes and regulations governing the management of the IIM trust, the statutory trust duty to:
   (a) establish written policies and procedures for collecting from outside sources missing information necessary to render an accurate accounting of the IIM trust;
   (b) establish written policies and procedures for the retention of IIM-related trust documents necessary to render an accurate accounting of the IIM trust;
   (c) establish written policies and procedures for computer and business systems architecture necessary to render an accurate accounting of the IIM trust; and
   (d) establish written policies and procedures for the staffing of trust management functions necessary to render an accurate accounting of the IIM trust.
4. To the extent that prospective relief is warranted in this case and to the extent that the issues are in controversy, it has been shown that defendant Lawrence Summers, Secretary of the Treasury, owes plaintiffs, pursuant to the statutes and regulations governing the management of the IIM trust, the statutory trust duty to retain IIM trust documents that are necessary to render an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs.
5. Defendants are currently in breach of the statutory trust duties declared in subparagraphs II(2)-(4).
6. Defendants have no written plans to bring themselves into compliance with the duties declared in subparagraphs II(2)-(4).
7. Defendants must promptly come into compliance by establishing written policies and procedures not inconsistent with the court's Memorandum Opinion that rectify the breaches to trust declared in subparagraphs II(2)-(4).
8. To allow defendants the opportunity to promptly come into compliance through the establishment of the appropriate written policies and procedures, the court HEREBY REMANDS the required actions to defendants for further proceedings not inconsistent with the court's Memorandum Opinion issued this date.

III. Continuing Jurisdiction and Further Proceedings

To ensure that defendants are diligently taking steps to rectify the continuing breaches of trust declared today and to ensure that defendants take the other actions represented to the court upon which the court bases its decision today, the court will retain continuing jurisdiction over this matter for a period of five years, subject to any motion for an enlargement of time that may be made. Accordingly, the court ORDERS that:

1. Beginning March 1, 2000, defendants shall file with the court and serve upon plaintiffs quarterly status reports setting forth and explaining the steps that defendants have taken to rectify the breaches of trust declared today and to bring themselves into compliance with their statutory trust duties embodied in the Indian Trust Fund Management Reform Act of 1994 and other applicable statutes and regulations governing the IIM trust.
2. Each quarterly report shall be limited, to the extent practical, to actions taken since the issuance of the preceding quarterly report. Defendants' first quarterly report, due March 1, 2000, shall encompass actions taken since June 10, 1999.
3. Defendants Secreatry of the Interior and Assistant Secretary of the Interior - Indian Affairs shall file with the court and serve upon plaintiffs the revised or amended High Level Implementation Plan. The revised or amended HLIP shall be filed and served upon completion but no later than March 1, 2000.
4. Defendants shall provide any additional

information requested by the court to explain or supplement defendants' submissions. Plaintiffs may petition the court to order defendants to provide further information as needed if such information cannot be obtained through informal requests directly to defendants.

5. The court DENIES plaintiffs' request for prospective relief that have not already been granted by this order. The court based much of its decision today - especially the denial of more extensive prospective relief - on defendants' plans (in both substance and timing) to bring themselves into compliance with their trust duties declared today and provided for explicitly by statute. These plans have been represented to the court primarily through the High Level Implementation Plan, but also through the representations made by government witnesses and government counsel. Given the court's reliance on these representations, the court ORDERS defendants, as part of their quarterly status reports, to explain any changes made to the HLIP. Should plaintiffs believe that they are entitled to further prospective relief based upon information contained in these reports or otherwise learned, they may so move at the appropriate juncture. Such a motion will then trigger this court's power of judicial review.

IV. Certification of Order for Interlocutory Appeal

For the reasons stated in the court's accompanying Memorandum Opinion, and pursuant to 28 U.S.C. Section 1292(a)(4), the court HEREBY FINDS that it is of the opinion that this order involves controlling questions of law as to which there is substantial grounds for difference of opinion. An immediate appeal of the court's order may materially advance the ultimate termination of the litegation. Accordingly, the court HEREBY CERTIFIES this order for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b). Further proceedings in this case shall not be stayed during the pendency of any interlocutory appeal that may be taken. So Ordered. Royce C. Lamberth, United States District Judge.

Not only did the defendants not comply, they were charged by the plaintiffs with engaging in an Oliver North procedure - the deliberate destruction of records. Judge Lamberth subsequently held the defendants in contempt of court in February 2000 for admitting to the improper destruction of thousands of records and for not filing the required quarterly reports. The American Indian plaintiffs are requesting appointment of a "Special Master" to enforce Judge Lamberth's Court Order. And this action comes from one of the most Indian-friendly administrations in U.S. history! Clearly, contravening U.S. policy and procedures toward American Indians continues unabated into the 21st Century.

CONTINUED STONEWALLING BY THE BUSH ADMINISTRATION

The court-appointed federal monitor reported to the court that Secretary of the Interior, Gale Norton, presented compulsory reports that were untruthful hence leading to a contempt charge leveled against her. That placed her in the same status as her predecessor, Bruce Babbitt. Moreover, the Native American Rights Fund notified Judge Lambert that sixteen Federal Reserve Banks, including the New York Fed, have been on an Anderson/Enron-like binge of destroying Indian trust account documents clearly in violation of the federal judge's order. The federal judge has now held Secretary Norton in contempt of court - a distinction that has not been assigned a high-ranking member of the U.S. administration since the 1800s.

During the six years of the suit other tribes have looked at their trust funds for evidence of corruption and deals between U.S. corporations and the U.S. Government. The Navajo, the largest Indian tribe in the United States with the largest reservation discovered secret deals between the U.S. Department of the Interior and Peabody Coal greatly restricting fair market royalties for coal taken from their land. The Navajo suit is for 600 million dollars. Distrust in Indian country over these blatant abuses which have contributed to much of the social and health problems long plaguing Indian country due to a severe shortfall of monies due them is mounting dramatically. Indeed, the National Congress of American Indians (NCAI), the most senior and respected voice in Indian country, has voiced its distrust of the U.S. Federal Government in general and the Bush administration in particular:

The trust is a shambles and in need of top-

to-bottom reconstruction. We hope, and expect, that the Court will not delay justice for another six months or a year while the Secretary (Norton) rearranges the chairs at her Department - stripping the Native American employees of the BIA, in the meantime, of their trust responsibilities, as if this mess is their fault. (Martin 2001)

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