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A MATTER OF TRUST: THE ELIMINATION OF FEDERALLY FUNDED LEGAL SERVICES ON THE NAVAJO NATION

Katherine J. Wise*

This is the radical question of justice, . . . not, "How much do I get?" but "Who are we to each other?" What place is there for me in your universe, or for you in mine? Upon what understandings, giving rise to what expectations, do we talk? What world, what relations do we make together?¹

I. Your Universe

You were born and raised on the Navajo Nation. You spend a good deal of time on the road — the nearest grocery store is 100 miles away — but you have never been farther off of the reservation than Flagstaff, Arizona, or Gallup, New Mexico. You live in a one room hogan with a packed dirt floor, four children, and two dogs. You make a living cleaning rooms at the Thunderbird Lodge, where Anglo and European tourists stay when they come to see the canyons and mesas and buy silver and turquoise jewelry.

Your ex-husband is liable for child support under the divorce agreement, but you have never received a check. You think he has a good job at the mines, but he works over the border in Utah and the State of Arizona will not garnish his wages. He comes by occasionally to see the kids. Once he was drunk and hit you. You tried to file a victim's protection order, but the police say they have been unable to serve him on the reservation and you cannot afford a private process server, so you let it expire.

At the end of the month, when most of your bills are due, your mother has you over for dinner. After being on the waiting list for close to five years, she got into the Indian Health Service housing near the hospital because of her heart trouble. She has electricity and running water. The kids like to visit her because she has a television set. She can get only two stations, both of which are showing the evening news.

Your mother speaks only Navajo, so you try to translate for her. The reporter is saying something about the congressional budget negotiations and how the federal government has been shut down. There is always an unexpected expense, like the hurricanes or the Oklahoma bombing or

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1. JAMES BOYD WHITE, JUSTICE AS TRANSLATION 233 (1990).

sending troops to Bosnia. You understand what it means to live close to the edge, to have more debts than you can pay. You understand carefully planning your daily expenses only to have some new emergency arise like a child growing a shoe size, or not being able to sell any banana bread on the weekend because it is raining outside and the tourists are not at the flea market, or needing gas money to take a child to the hospital in Albuquerque to have his tonsils removed.

The news reporter is replaced by two Anglo men who are arguing. One says we need to cut taxes and minimize federal control. You agree with that. You could use more money and you believe in tribal self-government. But then the other man says that what we need is fewer tax cuts with more money going to social programs. You have heard rumors that government benefits and legal services might be eliminated. You depend on both. You don't know what you will do if that happens. You are not sure which man is right, which view will get you more. Your mother laughs. She tells you it does not matter how much you get — it is never enough. It matters what you spend it on. Like last month, when you had to miss a car payment to pay for your father's burial. It is a question of priorities — to whom our debt is greater. That question is easier to answer.

II. The Greater Debt

The congressional budget hearings of 1995-96 dominated the news and shut down the federal government. Both the demand for lower taxes and minimized federal control, and the opposing request for less significant tax cuts and more money for social programs, focused on the question, "How much do I get?" The "I" is alternately the individual taxpayer and the federal government. The Legal Services Corporation (LSC), like many other federally funded organizations, found itself in the middle of the struggle. The LSC was designed to grant funds to private legal services programs that provide free legal services to people whose income falls below a designated level. Those arguing to reduce government spending for social programs advocated the elimination of the LSC, claiming that it promoted welfare dependency, divorce, abortion, legal reform, and the homosexual political agenda.² Supporters of the LSC pointed to the increasing numbers of people living in poverty, the general need for legal advice in this era of sophisticated regulation, the lack of feasible alternatives, and the basic right of all people to equal access to justice.³

2. For one example of this view from the former domestic policy adviser to President Reagan, see Gary L. Bauer, *Should Congress Pull the Plug on the Legal Services Corp.?*; **Yes: Its Anti-Family Litigation Has Helped Expand Welfare, Divorce, Abortion and the Homosexual Agenda*, L.A. TIMES, Nov. 29, 1995, at B9.

3. Roberta Ramo, President of the American Bar Association, is one such supporter of federal funding for the LSC. Linda Feldmann, *Liberal Policy Tool or Key to Equal Justice for*

This comment will not rehash the various arguments about how much aid the LSC should be providing, or to whom, or for what purposes. Instead it will ask the question, "Who are we to each other?" This question was lost in the budget debates. It will look at the basic issue of defining the federal government's role in providing legal services to those living in poverty. In particular, it will look at the federal government's responsibility to provide legal services to Native American communities. This comment will argue that the elimination or drastic reduction of the LSC cuts off people whom the federal government has forcibly relocated — often in remote areas with extremely limited resources — and subjected to extensive federal regulation from *all* access to legal services. This comment will also argue that this exclusion of people from the legal system violates the federal government's trust responsibility toward Native American tribes.

This comment will focus on the Navajo Nation because it is the largest Native American tribe and has the most developed tribal court and legal services program. Part III of this comment provides a general description of the Navajo Nation. Part IV describes how the tribal, federal, and state courts operate on and around the Navajo Nation. Part V gives an overview of the history of the LSC, its presence on the Navajo Nation, and the effect of current Congressional budget cuts. Part VI looks at the responsibility of the federal government to provide legal services to Native American tribes based on the trust relationship.

III. The Navajo Nation⁴

Most people in the legal profession practice in or near urban areas. Their contact with poverty law is usually through pro bono work or local urban Legal Aid offices. There is a general perception that when the LSC is eliminated, there will be private attorneys and alternative funding sources to fill the gap. People needing free legal advice will simply have to go to a different office, a different organization, in another part of town. Those whose need is less pressing or less valid will simply be weeded out by the more limited resources and the extra exertion required. This stereotype of Anglo justice, based on the experience of people with private urban legal organizations and made popular in the media by observers of the urban

Poor?, CHRISTIAN SCI. MONITOR, Sept. 15, 1995, at 1.

4. Many of the descriptions of the Navajo Nation included in this comment are based on my experiences living and working close to the center of the Navajo Nation in Chinle, Arizona, during the summer of 1995. Although most of the descriptions of the Navajo Nation portray a harsh life, the situation of the Navajo tribe is far from hopeless. No comment can address every related issue, and this one does not address arguments in favor of tribal termination and cultural assimilation — the understanding being that annihilation of a cultural community is never a solution.

scene, has little applicability to rural justice operations,⁵ and no applicability to Native American justice on the Navajo Nation.

In rural areas, and especially on the Navajo Nation, location becomes everything. The Navajo Nation is the size of West Virginia, covering 25,351 square miles in the states of Arizona, New Mexico, and Utah.⁶ There are approximately 260,000 members of the Navajo Nation throughout the country, making it the largest Native American tribe in the United States.⁷ But within the Navajo Nation, its communities are extremely rural and isolated, with an average of only 6.37 people per square mile.⁸ Extended family groups usually live in isolated clusters of a few hogans⁹ and mobile homes, with small communities occasionally growing around schools, hospitals, or other government facilities.

There is no public transportation, and most roads are unpaved and deeply rutted from spring rains. Most Navajo families live over 100 miles from basic shopping services and even farther from medical and other services, making a reliable vehicle vital to existence. Yet 27% of Navajo families do not have a motor vehicle.¹⁰ The fact that the land is beautiful, full of open canyons and mesas and green riverbeds, does not make the need any less real.

Approximately 70% of Navajos live in poverty.¹¹ According to the 1990 Census, 57% of Navajo homes use wood as their main home heating source, 46% of households must use outhouses, chemical toilets, or facilities in another structure, and 82% of homes do not have a phone.¹² Other than oil, gas and mineral extraction, there is virtually no industry. Families survive on public benefits supplemented by the sale of artwork and farm products. Due to the aridity and remoteness of the region, neither farming nor tourism are sufficient to support a livelihood alone. Almost 60% of the adults on the Navajo Nation have not graduated from high school, and of those most have less than a ninth grade education.¹³ Navajo is the primary language of 82% of Navajo Nation residents.¹⁴

5. SAMUEL J. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS* 92 (1978).

6. Memorandum from Dolph Barnhouse, Executive Director of DNA People's Legal Services, Window Rock, Ariz., at 2 (1995) [hereinafter *Barnhouse Memorandum*] (on file with author).

7. The population of the Navajo Nation is close to half of the total U.S. Native American reservation population. BRAKEL, *supra* note 5, at 79.

8. Barnhouse Memorandum, *supra* note 6, at 2.

9. A hogan is a traditional family dwelling that usually consists of one room with a dirt floor.

10. Barnhouse Memorandum, *supra* note 6, at 2.

11. The BIA estimates that only 30% of the labor force earns more than \$7000 per year. *Id.* at 3.

12. *Id.* at 2.

13. *Id.* at 3.

14. *Id.*

The provision of legal services on the Navajo Nation is complicated by all of these factors. Offices must be widely separated and located many miles from courts and law libraries. Travel, telephone, and library expenses are all much higher than for urban law firms. Clients have a very limited understanding of the legal system and Anglo-American law, so communication with clients is extremely difficult and time-consuming. Due to the fact that much of the older population speaks little or no English, translators are required. Physical isolation, limited facilities (many areas have no running water or electricity), and virtually nonexistent available housing¹⁵ make recruitment and retention of legal staff extremely difficult.

IV. The Legal System on and Around the Navajo Nation

A. The Tribal Courts

Depending on the definition of "court" and "reservation," tribal courts exist today on sixty to 120 Native American reservations.¹⁶ The tribal power of self-government and the existence of tribal courts are based on the notion of tribal sovereignty. According to the Supreme Court,

the settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self-government — by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.¹⁷

Because of their power of self-government, tribal courts have jurisdiction over all civil and criminal matters that occur within reservation boundaries, with the exception of the thirteen major crimes reserved to federal court jurisdiction by the Major Crimes Act.¹⁸

15. Most homes are passed down within families, it takes years for eligible applicants to receive government housing, and there is little new construction. *Id.*

16. BRAKEL, *supra* note 5, at 5 (footnote omitted).

17. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832). In this case the State of Georgia imprisoned a white man who was living with the Cherokee tribe in an attempt to undermine the tribal government. *Id.* at 535. The Supreme Court held that the imprisonment violated the Constitution which granted the power to regulate intercourse with Native Americans to the federal government. *Id.* at 593. Consequently, Native American tribes were found to be subjects of federal law to the exclusion of state law, and entitled to exercise their own inherent rights of sovereignty as long as they were consistent with federal law. *Id.*

18. The Major Crimes Act, 18 U.S.C. § 1153 (1994), covers 13 crimes which, if committed by Indians in Indian country, fall within the jurisdiction of the federal courts: murder; manslaughter; rape; carnal knowledge of any female, not his wife, who has not attained the age of 16 years; assault with intent to commit rape; incest; assault with intent to commit murder; assault with a dangerous weapon; assault resulting in serious bodily injury; arson; burglary;

Despite their power of self-government, many tribal courts have refused to exercise jurisdiction over areas such as probate, juvenile problems, domestic relations, housing issues, and others which require special laws, expertise, or facilities that the tribes do not have available.¹⁹ Most tribal courts have also refused to exercise jurisdiction over non-Native Americans who commit crimes or civil offenses on reservation property.²⁰

Tribal courts are recent Anglo-American creations.²¹ Justice in Native American communities was traditionally dispensed in varying ways, according to the needs of the specific community.²² The common factor was that there were no courts, judges, public jails, police, or written codes as we know them.²³ Much of the traditional justice systems were destroyed in the process of physical displacement and cultural assimilation.²⁴ Then, in the late 1800s, the Bureau of Indian Affairs created the Courts of Indian Offenses.²⁵ The judges were Native Americans appointed by and responsible to the BIA, and were assisted by a Native American police force.

In the 1930s the Courts of Indian Offenses were replaced by the current tribal court system. Under this system, tribal judges are appointed by, paid by, and responsible to the tribe rather than the BIA.²⁶ The applicable law is the tribal code of the reservation, which is not indigenous, but rather based on state, federal, and BIA law with some indigenous elements mixed in.²⁷ Substantial gaps are usually filled by state law. The Navajo Nation Tribal Code is bound in four hardcover volumes, and the Navajo Nation has adopted its own slightly modified version of the Uniform Commercial Code. But the Navajo Nation is unusual in this regard — many tribes have little or no statutory or case law, and consequently rely much more heavily on state and federal law for persuasive authority.²⁸

Most tribes lack trained legal personnel in all levels of the tribal legal system. Judges are usually Native Americans from the local community who rarely have received any formal education beyond high school, the

robbery and larceny. 18 U.S.C. § 1153 (1994). The Indian Country Crimes Act, 18 U.S.C. § 1152 (1994), states that federal jurisdiction also extends to interracial crimes occurring in Native American country. The Assimilative Crimes Act, 18 U.S.C. § 13 (1994), permits the use of state criminal law as a gap-filling device when there is no applicable federal substantive criminal law.

19. BRAKEL, *supra* note 5, at 8-9.

20. Non-Native Americans, however, sometimes sue Native Americans in the tribal courts. *Id.*

21. *Id.* at 9.

22. *Id.*

23. *Id.*

24. *Id.* at 10.

25. *Id.* (footnote omitted).

26. *Id.* at 10-11.

27. *Id.* at 17.

28. *Id.* at 18.

average level of reservation residents.²⁹ The National American Indian Court Judges Association has attempted to train tribal judges once they are appointed, but the program has not been effective due to frequent turnover.³⁰ Some tribes use a visiting-judge system either for all cases or for only the legally complex or politically sensitive cases in an attempt to remedy the lack of training. But this method also has its drawbacks. The visiting judges are usually Anglo judges from surrounding areas who are not familiar with the tribal language, law, or culture, and their availability is limited. In contrast to many tribes, the Navajo Nation tribal council appoints Navajo judges for life³¹ and employs Anglo legal advisors, but these advisors are often recent law school graduates who have little experience and stay for a short period of time.³²

Oftentimes there is no tribal prosecutor. The role is then played by a judge or police officer, neither with legal training.³³ Tribal attorneys are usually Anglo and represent the interest of the tribe only, not individuals. On a few reservations, such as the Navajo Nation, federally funded lawyers have been available to individuals. On others, local private attorneys may handle individual casework in the tribal courts. But the appearance of professional attorneys in the tribal courts has been minimal.

One reason for the lack of private attorneys in the tribal courts is the fact that few Native Americans become licensed attorneys, and even fewer return to the reservation to work.³⁴ Some tribes have set up tribal bar examinations in an attempt to deal with the shortage of attorneys, but this has not had a significant impact on the presence of Native American representatives in the courts. The Navajo Nation has a tribal bar and offers a course taught by tribal judges to train tribal advocates.³⁵ But the system, although it produces very capable and much needed advocates, does not eliminate the need for attorneys trained and qualified to practice in state and federal courts. The practical result is that the advocates do not operate as independent representatives, but must work in conjunction with state-licensed (usually Anglo) attorneys, once again necessitating federal or private assistance.

29. *Id.*

30. Most judges are appointed for short terms of two to four years. *Id.*

31. The life appointment of judges on the Navajo Nation has helped to ameliorate the common problem of frequent turnover due to tribal politics and the popular election of tribal judges for short terms. But turnover is still a problem due to the low salaries and lack of status. *Id.* at 23-25.

32. *Id.* at 19.

33. *Id.*

34. As of 1976, the total number of state-licensed Native American attorneys was 85. *Id.* at 20.

35. Tribal advocates are licensed to practice in tribal court, but not state or federal court. *Id.*

Private practitioners are also dissuaded by the small income generating matters that prevail in tribal courts. Because of the extensive unemployment and poverty on most reservations, litigation tends to involve disputes about government benefits, grazing rights, consumer fraud, divorce, or other matters that are often of crucial importance to the client, but generate negligible profits.

There is also distrust on both sides. In the Anglo community there is widespread prejudice against Native American clients. Some attorneys flatly refuse to take Native American clients, claiming that they will not pay attorneys' fees and will show up drunk or not at all for client meetings, while others will take such "risky" clients only when they are convinced that there is a good chance for substantial remuneration. Native Americans tend to be wary of Anglo attorneys who often speak a foreign language, charge high fees, and are part of the same nonreservation community that is often responsible for their claims of consumer fraud or employment discrimination.

But probably the greatest barrier to private representation on many reservations, and on the Navajo Nation in particular, is geographical distance. There are only about half a dozen lawyers in private practice on the Navajo Nation, and most of them work for large institutional clients.³⁶ Other private attorneys can be found only in cities surrounding the reservation. Common travelling distances to Gallup, New Mexico, Flagstaff, Arizona, or Tucson are between 250 and 400 miles — the distance from Columbus, Ohio, to Louisville, Kentucky, or Nashville, Tennessee. For people with children to care for, no car, and few resources, such a journey quickly becomes an impossibility.

Due to the lack of attorneys, lack of clerical and technical support, lack of legal training for tribal advocates and judges, and general lack of respect for tribal judges, the orders of tribal courts are often simply ignored.³⁷ On the Navajo Nation, where the tribal court system is the most sophisticated and judges command respect, enforcement is still an issue.³⁸

36. Bamhouse Memorandum, *supra* note 6, at 7.

37. *Id.* at 21-22.

38. In the ten-week period I spent working on the Navajo Nation in the summer of 1995, my office helped approximately ten women clients file Protection Orders against abusive ex-husbands or boyfriends. Of those ten Protection Orders, only two were activated by service of process by the police department. One client was attacked by her boyfriend two more times after filing the Protection Order with the court. Both times the police had to come to her home to ask the boyfriend to leave; both times the police were informed that the woman had filed a Protection Order against the man. Yet the police failed to serve the man on either occasion while they had him in custody. Another client finally stopped renewing her application for a Protection Order after the police failed to serve her ex-husband for weeks. At the time he was employed as a construction worker and was repairing the road directly in front of the police station.

Another difficulty with the tribal courts is a virtually nonexistent appeals procedure. A report for 1961 showed a total of twenty-eight appeals for *all* tribal courts for the year.³⁹ The Navajo Nation, which has a *de novo* standard of review on appeal, was the only court system with a "significant" number of appeals.⁴⁰

Despite the underutilized nature of the tribal court system as a whole, the need for a tribal court system is great. It seems incredible to recognize Native American tribes as "distinct, independent, political communities,"⁴¹ to treat them as sovereign nations with the right to exercise the powers of self-government, yet at the same time to deny them the resources necessary to maintain a workable legal system. It also seems incredible to impose extensive and complicated federal legislation that affects every aspect of the lives of Native Americans without providing the training and facilities necessary to interpret and enforce it.⁴² On a more basic level, a workable tribal court system is needed because criminal and civil disputes exist on reservations in significant numbers, and state and federal courts are practically inaccessible and incapable of meeting the demand.⁴³

Crime on reservations is a serious problem. There are few reliable or recent statistics, but crime rates on reservations tend to be anywhere from five to fifteen times higher than the crime rates for society at large.⁴⁴ Reservation crime has traditionally been primarily personal, with few crimes against property and rare cases of forgery, fraud, embezzlement, commercial vice, or prostitution.⁴⁵ In interviews conducted with the Navajo chief justice, the tribal chief of police, and a federal prosecutor located in Albuquerque, New Mexico, it was estimated that about 700 major crimes were committed annually on the Navajo Reservation.⁴⁶ Less than 10% of these, however, resulted in prosecution.⁴⁷ The remainder were simply sent back for tribal handling or dropped altogether.⁴⁸ "Lack of interest and cooperation on the part of both federal and tribal officials as well as of witnesses and juries — caused by geographical and cultural distance — and lack of manpower (again both tribal and federal) were cited as being

39. BRAKEL, *supra* note 5, at 22 (footnote omitted).

40. In 1974 the Navajo court system had 76 appeals out of a total caseload of 30,000. *Id.* at 22 (footnote omitted).

41. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

42. *See infra* note 70-71 and accompanying text.

43. Off-reservation attorneys cost more, state and federal courts are often extremely distant, and neither the attorneys nor the courts are equipped to handle the cultural and language barriers.

44. On the Navajo Nation in 1974, the total number of arrests per 100,000 people was 24,075. For the United States as a whole during the same year, the total number of arrests per 100,000 people was 4584. Brakel, *supra* note 5, at 28-34.

45. *Id.* at 37.

46. *Id.* at 39-40.

47. *Id.*

48. *Id.*

responsible for this pattern of little or no enforcement."⁴⁹ Law enforcement with respect to major crimes on other reservations has been found to be equally inadequate.⁵⁰

The largest part of the civil caseload on the Navajo Nation is made up of domestic relations problems, including divorce, separation, adoption, custody, and guardianship.⁵¹ Another major category of civil cases is contract/commercial problems. Because many Navajos cannot read or speak English well and many have trouble getting credit due to their low incomes, they often turn to car dealers and storefront lenders who charge high interest, misrepresent or falsify prices or interest payments, sell goods that fail the warranty of merchantability, and misrepresent primary signatories as cosignatories or simply forge signatures.⁵² The rest of the civil actions tend to involve probate/trust, landlord/tenant, and land/grazing/fencing cases.⁵³

The fact that only 5% of the total Navajo tribal caseload involves civil cases indicates that there is an underuse of the tribal court for civil matters.⁵⁴ Obviously the civil caseload should not be anywhere near the enormous criminal caseload, nor should the Navajo Nation be encouraged to approach the excessive litigiousness of society as a whole. But it is clear that civil complaints are not lacking on the Navajo Nation. It has also been a concern that although a large number of Native Americans qualify for government poverty and disability benefits, they do not receive them because of lack of knowledge about such programs. At this point there is no government program to educate Native Americans about their rights to benefits or about the application procedure. And such a program would still require legal involvement, because at this point a majority of benefit applicants are denied outright and must go through an appeal process with an administrative judge.

49. *Id.*

50. *Id.*

51. *Id.*

52. My office had one client who was being sued on a car contract she never signed. Her daughter had bought a car from a dealer who had the daughter sign the contract as a cosignatory and then the car dealer forged the mother's signature as the primary signatory. Another common practice of border-town car dealerships is to mail Navajos "checks" for \$2000. The dealership then counts the "check" as a down payment in order to secure financing from a bank when in fact no payment was made. In this way, individuals are enabled to purchase vehicles that they otherwise could not afford and to incur contractual obligations that they cannot meet. Used car contracts usually contain an "as is" clause while the dealer reassures the client that all necessary repairs will be made at no additional cost. Many people may believe that the client is at fault for such gullibility, but for someone who cannot read the contract and comes from a culture that is based on close family ties and trust and has little knowledge of the law, belief in the assertions of dealers is a matter of necessity, as well as of custom.

53. BRAKEL, *supra* note 5, at 40.

54. *Id.*

The slack in the civil caseload is not taken up by state or federal courts or alternative methods of dispute resolution. The Navajo Tribe does have some organizations designed to deal with certain grazing or other minor issues, but their scope of capabilities is extremely limited.⁵⁵ "The tribal courts are *the* judicial forum on the reservations. For the vast majority of people, tribal justice is all they know."⁵⁶ But tribal justice is clearly inadequate in training and size to meet the demand.⁵⁷ The tribal courts are also inadequate in procedure. Most tribal justice is summary with standard sentencing regardless of the complexity of the cases or the predispositions of the litigants.⁵⁸ "A satisfactory system cannot afford to dispose of this caseload with treatment that uniformly ranges from summary to nul, doled out by untrained 'magistrates.' No one would stand for this in the larger society. Why should it be good enough for the reservations?"⁵⁹ Criminal cases usually result in a fine or jail, with the poorer criminals ending up in jail because they cannot afford the fine or bail.⁶⁰ In civil cases, usually only one party is represented and the outcome favors that party.⁶¹

B. The State Courts

The domain of power of state governments is limited to two situations. The first situation occurs when Congress has expressly delegated to, or recognized in, the state some power of government respecting Native Americans. The second situation occurs when a question involving Native Americans also involves non-Native Americans to a degree which calls into play the jurisdiction of a state government.⁶² It is a general rule that Native

55. The Navajo Nation does have a mediation system known as the Peacemaker Courts. This system was recently studied by lawyers from across the country in Sedona, Arizona, at a conference sponsored by the American Bar Association, the Native American Bar Association, and the Navajo Nation. The Peacemaker Courts take mediation one step further. Each party in the dispute is given all the time he or she needs to lay the issue on the table. There are no restrictions and no rules of evidence. The parties are then encouraged to work on a solution together. The Navajo "mediator" only intervenes when the parties reach a roadblock or the discussion gets too far off track. The point is that the *parties* create the solution, so that they are more likely to be satisfied by the outcome. John W. Clark, Jr., *The Peacemaker System of Justice: A Lesson for America*, GEN. PRACTITIONER, Jan. 1996, at 13 (publication of the State Bar of Michigan). The use of the Peacemaker Courts is limited, however, by the parties and the nature of the dispute. It works best when the dispute is minor and the parties are both Native American.

56. BRAKEL, *supra* note 5, at 47.

57. See *supra* notes 19-40 and accompanying text for a lengthy discussion of the tribal court system.

58. BRAKEL, *supra* note 5, at 47-49.

59. *Id.* at 49.

60. *Id.* at 53.

61. *Id.* at 55.

62. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 117 (Five Rings 1986) (reprint of Univ. of N.M. photo. reprint 1971) (1942) [hereinafter COHEN].

Americans outside of Native American lands are subject to the laws of the state in which they find themselves to the same extent that an alien would be subject to those laws.⁶³

State laws have had no force within the territory of a Native American tribe in matters affecting Native Americans since 1832.⁶⁴ One of the most famous statements explaining the limitation of state power in this area is found in *United States v. Kagama*,⁶⁵ a case which upheld the constitutionality of congressional legislation on offenses between Native Americans committed on a Native American reservation:

It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.⁶⁶

Despite the Court's patronizing language, it clearly distinguishes federal responsibility from state responsibility — not only for the controlling law over Native American tribes, but also for the well being of Native American tribes — based on the history of federal intervention in Native American affairs and local state prejudice against Native Americans. It follows that the federal government, not the states, should be responsible for providing funds and resources for tribal court systems — not because Native Americans should be "dependent" on the federal government or are somehow incapable of taking care of themselves, but because the federal government created an imbalance in rights and resources which it now must rectify.

C. The Federal Courts

No other ethnic or cultural group is as heavily regulated as Native Americans:

63. *Id.* at 119.

64. *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 593 (1832).

65. *United States v. Kagama*, 118 U.S. 375 (1886).

66. *Id.* at 383-84.

Although some federal laws were intended to benefit Indians, as a whole they have placed Indians in a political and economic straightjacket. Indians and Indian tribes are in such a precarious position today that economic survival would be difficult without major support from the federal government. This sad state of affairs is the result of two hundred years of federal government regulation. . . . [I]t must be recognized that there has never been a consistent federal Indian policy. On the contrary, federal policy with respect to Indians have shifted during the past two hundred years from regarding tribes as sovereign equals, to relocating tribes, to attempts to exterminate or assimilate them, and currently, to encouraging tribal self-determination. These policy changes have been rapid and are usually highly disruptive. Until recently, the most striking feature of federal Indian policy was the total lack of Indian involvement or consent in its formulation.⁶⁷

Federal control of Native American affairs has traditionally fallen into four major areas: (1) the regulation of Native American traders, (2) controlling the disposition of Native American land, (3) the protection of that land against trespass, and (4) the control of liquor traffic.⁶⁸ Federal control over these four types of transactions forms the basis of the entire body of federal legislation on Native American affairs, comprising more than 4,300 distinct enactments.⁶⁹

All of the mass of federal Indian law is based on the abstract principle of protection of the Native American. This principle on its face is consistent with the principles of racial equality and of tribal self-government in internal matters. In practice, however, this principle has been consistently used to justify federal interference for federal purposes, not for the benefit or "protection" of Native Americans. The more effective way to protect the existence and self-sufficiency of Native American tribes would be through a program of federal economic and educational support. The goal should be to enable tribes to rectify their loss of land and livelihood, manage their own affairs efficiently and effectively, and develop a means of income that would eventually make federal assistance unnecessary and allow the tribes to regain their full independence without requiring tribal termination and assimilation. Such a program of economic and educational support would necessarily entail the provision of federal funds for legal services for Native Americans.

67. STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE BASIC ACLU GUIDE TO THE INDIAN AND TRIBAL RIGHTS* 2 (1992).

68. COHEN, *supra* note 62, at xxv.

69. *Id.* at xxvii.

V. *The Role of Legal Services on the Navajo Nation*

A. *The History of the Legal Services Corporation*

No cohesive body of poverty law existed in the United States until the 1960s, almost one hundred years after the first poverty law office was established.⁷⁰ It is surprising that poverty law has grown so slowly and received so little support from within the legal community for so long. The issues and the focus of poverty law have, for the most part, stayed the same. People living in poverty have always needed basic advice regarding contracts, real estate transactions, landlord-tenant disputes, child abuse, domestic violence, divorce, guardianships, benefits, and employment issues. The focus has consistently been on settlement, because it involves less time and money than extended litigation — two things of great importance to a client living in poverty.

Despite the continued focus of Legal Aid lawyers on individual representation instead of law reform,⁷¹ the increasing numbers of people living in poverty, and the fact that poverty lawyers provide no competition to private attorneys,⁷² the ABA and the legal world in general have consistently

70. The New York Legal Aid Society was created in 1876 to render free legal aid to people of German birth who could not afford legal services. In 1889 the charter was amended to give free legal service to all. The office served mostly immigrants, was staffed by volunteers, and was funded almost exclusively by contributions from German immigrants. MARTHA DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973*, at 11-12 (1993). Like the German immigrants, Native Americans have the added difficulties of a language barrier, an alien value and legal system, limited education, skills that are often of little use in the larger American market, and poor employment options. But unlike the German immigrants, the Native Americans do not have an established source of funds from those who came before and made their way in American society. Unlike the German immigrants, the Native Americans are an ethnic minority who have consistently had their established livelihoods and carefully maintained resources taken away — from eastern forests to midwestern farmland to western copper, silver, gold, and uranium mines. They have been threatened with tribal termination and cultural assimilation. It makes sense, then, that as the successful German immigrants looked out for their own, the federal government, which has legally claimed the Native Americans as its own, should help to fund the basic needs of Native Americans.

71. Legal Aid lawyers stayed out of the law reform work going on at the turn of the century partly to maintain an "image of professional objectivity," partly because most of the Legal Aid lawyers were women and Jews who had been excluded from most of the other law firms and had little political clout, and partly to protect the funding that was being received from the legal profession. *Id.* at 14-15. Legal Aid lawyers continue to stay out of law reform work because LSC funding recipients are forbidden from participating in lobbying and legislative activities. Legal Service Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified at 42 U.S.C. §§ 2996-29,961).

72. From the beginning the New York Legal Aid Society purposely refused to take cases that, due to potential damage awards, private attorneys would be willing to take. DAVIS, *supra* note 70, at 15. Current Legal Aid attorneys cannot take cases that provide for attorneys fees, and most Legal Aid organizations require attorneys to first try to refer out cases that have potential awards of more than \$1000.

resisted the expansion of poverty law. The only support has been for the "Americanization" of immigrants and Native Americans, not for broad legal reform and the elimination of class injustice.⁷³ Largely due to this lack of support, a comprehensive assault on poverty was not attempted until 1963,⁷⁴ and it took another year for the federal government to begin to get involved. In 1964 Lyndon Johnson began his War on Poverty, and one year later the Office of Economic Opportunity incorporated federally funded legal services into its Community Action Program.⁷⁵ The ABA turned around and supported Johnson's plan for federally funded legal aid, but still with a greater focus on individual clients, not impact litigation.⁷⁶

In 1966, the first year the federal program was in operation, 300 legal services organizations received \$42 million.⁷⁷ Once these "block grants" were distributed, they were beyond government control. By 1967, however, it was clear that it was going to take more than these grants to eliminate poverty. The Vietnam war diverted funds from domestic spending, and there continued to be little public support for legal services funding. Then, in 1974, Richard Nixon created the Legal Services Corporation.⁷⁸

73. DAVIS, *supra* note 70, at 16. The National Lawyers Guild, created in 1938, was the first organization to focus on legal reform. *Id.* at 18. Their goals were supported by law professors and theorists such as Jacobus tenBroek, who put forth the argument that the Equal Protection Clause protects poor people, as well as racial groups, from state laws that result in unequal treatment. *Id.* at 20. This theory was upheld by the Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that states must provide trial counsel for indigents in criminal proceedings. But such theories continued to be resisted by the ABA, the Legal Aid Society and the general population who viewed comprehensive legal services as being un-American. DAVIS, *supra* note 70, at 19.

74. DAVIS, *supra* note 70, at 26-31. The Mobilization for Youth Legal Unit (MYLU) was founded in 1963. Designed by social workers, the original plan was to provide legal advice while leaving litigation to the Legal Aid Society. But Edward Sparer, hired as the Legal Unit's director, had a vision instead of direct legal services in the Legal Aid tradition with a focus on impact litigation designed to change the institutional structure that had created and was sustaining poverty.

Sparer viewed the law as an instrument of social change and believed in the empowerment of the poor, not Americanization. Simply diluting the poor and immigrants among the larger population would not eliminate the problem, but Sparer believed that comprehensive litigation and education could. Sparer advocated the special training of attorneys for the poverty issues that faced their clients, and the training of clients to resolve their own basic legal issues and to be their own advocates in administrative hearings.

The MYLU was funded in part by the city, which caused some controversy when it sued the city's welfare department on behalf of clients. The city cut back funding, but just at that time the federal government stepped in.

75. *Id.* at 32.

76. *Id.* at 33.

77. *Id.* at 34.

78. Legal Service Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified at 42 U.S.C. §§ 2996-2996f (1994 & Supp. I 1995)).

Like the block grant program, the LSC was a corporation designed to distribute grants to various legal services programs that provided legal aid to the indigent. Four purposes for the LSC are included in the statute:⁷⁹ (1) to provide equal access to the system of justice, (2) to provide high quality legal assistance to those who would otherwise be unable to afford adequate legal counsel, (3) to best serve the ends of justice and assist in improving opportunities for low-income persons, and (4) to reaffirm faith in our government of laws by making legal services available to all.⁸⁰

To achieve these goals, the LSC has placed priority on resolving cases through advice, brief service,⁸¹ administrative proceedings, or negotiated settlements in order to help the most people get the most benefit with the least expense.⁸² Fewer than 10% of all cases result in litigation that ends in a court decision, and most of these cases involve family law issues that by law must be decided by a court.⁸³ Welfare litigation, which has been the subject of so much controversy and caused many to advocate the elimination of the LSC, represents less than 0.2% of all Legal Services cases.⁸⁴ Most of the cases handled by local legal services programs are noncontroversial, involving the individual everyday problems of the poor.⁸⁵ Although such cases are sometimes called "routine," they often represent matters of crisis for individual clients and their families.

According to Census Bureau estimates, more than 39 million Americans live in households whose income is below the poverty level.⁸⁶ More than 11 million additional individuals with incomes between 100% and 125% of the

79. *Id.* § 2296

80. Ironically, the statute also contains a provision that "to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures." *Id.* The drafters clearly recognized the fact that the provision of legal services to the poor was essential to preserving law and government and the notion of justice for all. No government can be truly democratic if justice can be bought, and no government can remain stable and protect its citizens when certain classes of people are denied access to the system of justice and must, as a consequence, resort to other means. But despite the drafters' consciousness of the necessity of protecting the legal services program from the instability of the political process, it is precisely that instability which is currently putting the program at risk as conservatives ignore the real issues at stake and reduce the LSC to something which can be destroyed at will.

81. Advice is the process of providing the client information at the client meeting. Brief service, on the other hand, entails writing letters, making phone calls, or doing more extensive research on behalf of the client.

82. Testimony of Alexander D. Forger, President, and Douglas S. Eakeley, Chairman of the Board of Directors of the Legal Services Corporation, Before the Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies of the Committee on Appropriations of the United States House of Representatives (May 24, 1995), available in LEXIS, Legis Directory, Cngtst File [hereinafter Testimony].

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

poverty level are potentially eligible for legal services.⁸⁷ Programs funded by the LSC closed approximately 1.7 million cases in 1995, directly benefitting 5 million people.⁸⁸ Despite all of this work done by LSC grantees, nearly half of all people who actually apply for assistance from local programs are turned away due to the lack of program resources — not due to the client's ineligibility for aid.⁸⁹ The need for legal services continues to rise as the number of people living in poverty increases, and the number of people living in poverty is destined to significantly increase as long as those living in poverty are denied the tools, like access to legal services, that are necessary to break the cycle.

It is possible to argue about the exact dollar amount required to meet the need, and the amount the federal government can afford to spend, but as former Rep. Guy Molinari (R-N.Y.) stated, "I don't think there is any dispute about the fact that there is a very substantial amount of people out there who are, in fact, in need of civil legal services."⁹⁰

B. The Presence of Legal Service on the Navajo Nation

The Navajo Legal Services Program, known as DNA,⁹¹ was established in 1967 and first received funds through the Office of Economic Opportunity.⁹² In 1974, DNA became an LSC recipient and has relied almost exclusively on LSC funds since that time.⁹³ The DNA program is more Native American-oriented than most programs,⁹⁴ so it provides one of the best illustrations of where Native American Legal Services should be headed.

DNA serves both the Navajo Nation and the Hopi Reservation.⁹⁵ It employs thirty-three attorneys, fourteen advocates, and four advocate trainees,

87. *Id.*

88. It is estimated that 80% of all Legal Services cases benefit children living in poverty.

Id.

89. *Id.*

90. *Id.*

91. DNA stands for Dinebeini a Nahiilna be Agaditahe, which translated means, "Attorneys that Contribute to the Economic Revitalization of the Navajo People."

92. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS*, AMERICAN JUSTICE 152 (1983) (citation omitted).

93. Despite attempts to diversify funding sources, 93% of DNA's total funding comes from the LSC. Dolph Barnhouse, *The Legal Services Corporation: The Cornerstone of DNA's Resources*, DNA UPDATE, Fall 1995, at 2.

94. Priority is given in all positions to Native American applicants. Out of all of DNA's employees, 75% are Native American, 70% of those working on the Navajo Nation are Navajo, and 66% of those working on the Hopi Reservation are Hopi. DNA UPDATE, Fall 1994, at 9.

95. The Hopi Reservation is located in the middle of the Navajo Nation. It consists of twelve autonomous villages covering 1.5 million acres. The Hopi Reservation is estimated to have a population of 10,000, with more than 8500 being client eligible. The poverty rate is worse than that of the Navajo Nation, with 44% unemployment and 90.8% earning less than \$7000 per year. Hopi is the primary language of 68% of the population, and 38% have not graduated from high school. *Id.*

as well as secretaries/receptionists/interpreters in nine offices spread across five different geographical locations.⁹⁶ The priorities adopted by DNA⁹⁷ are reflected in the actual caseload handled by all of the offices.⁹⁸ In 1993, 49% of the cases dealt with family issues (20% of the total number of cases dealt specifically with domestic violence),⁹⁹ 16% involved consumer issues, and 9% related to government benefits.¹⁰⁰ Other cases challenged unlawful employment and rental practices, enforced child support orders, and protected the safety of abused children and women. Contrary to accusations of the excessive litigiousness of Legal Services organizations, 85% of these cases were resolved before reaching court.¹⁰¹

In addition to inappropriate criticisms of the "anti-family" nature of Legal Services and excessive litigation expenses, conservatives often accuse Legal Services of being "political." This accusation is misplaced for a number of reasons. First of all, being "political" is not a crime — in the case of the LSC, an organization created by the government to serve the governments' purposes, it is an inevitability. The LSC is, by its nature, political — just like every other government organization. Secondly, if one wants to distinguish "political" from "partisan" or "legislative," that has already been done by the statute itself. Organizations funded by the LSC are forbidden from attempting "to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress

96. *Id.*

97. DNA's Board of Directors adopted the following priorities in 1995: (1) prevention of domestic violence; (2) promotion of quality health care; (3) creation of employment opportunities; (4) protection of land and the environment; (5) protection of consumers' rights; (6) protection of criminal defendants' rights; (7) protection of the rights of children; (8) protection of the elderly; (9) expansion and protection of adequate housing; (10) protection of government benefits; (11) protection and expansion of educational rights and opportunities; (12) protection of the rights of disabled persons; and (13) protection of civil rights and tribal identity. Barnhouse Memorandum, *supra* note 6, at 5-6.

98. DNA closed over 8000 cases in 1994 (up from 3000 in 1990). Dolph Barnhouse, *Will DNA Be Here Next Year?*, DNA UPDATE, Spring 1995, at 2.

99. These cases were far from being "anti-family." I observed one case that obtained guardianship of an elderly father for a married couple, preventing the need for institutionalization. One married couple wanted to adopt the child of an alcoholic sibling. I was involved in a case where a woman was seeking a divorce — she had finally come into the office, after being severely abused for years, because her husband was incarcerated and she felt that she would be safe. When I asked her what her husband had been incarcerated for, she showed me the record of his indictment for the kidnapping and attempted murder of their three-year-old daughter. However, members of Congress are currently attempting to prohibit the use of LSC funds available under the Act to provide legal assistance in certain proceedings relating to divorces and legal separations. H.R. 270, 105th Cong. (1997).

100. Barnhouse, *supra* note 98, at 9.

101. *Id.* at 2.

or a State or local legislative body."¹⁰² If an LSC grantee is truly "political" in this sense, its funding is subject to revocation.

But the limitation on the "political" nature of LSC grantees, as well as the current prohibition on class action suits,¹⁰³ causes particular difficulties for Native American legal services. In terms of legislative activity, most tribes have little or no statutory law. Oftentimes the Legal Services attorneys are the only ones with experience drafting more sophisticated legislation. On the Navajo Nation, domestic violence had reached endemic proportions, but there were no remedies other than criminal charges for rape, sexual assault, and battery. DNA was instrumental in working with the Tribal Council to draft the Domestic Abuse Protection Act, which was passed in 1993 and allows people who are being abused in a domestic setting to obtain protection orders — a form of relief that was not previously available.¹⁰⁴ To prohibit legislative activity, therefore, effectively means to prohibit the growth of the law and the protection of the people.

The prohibition of class action suits is equally problematic for all Legal Services grantees. Individual litigation is expensive, and money is one thing LSC grantees and clients are greatly lacking. Oftentimes individual claims, although extremely important to the client, are too costly to bring. But one way to achieve the client's goals, save money, and have a greater impact on the problem itself is to bring class action suits. Class action suits have been brought on the Navajo Nation in the past to improve the condition of the jails and to stop fraudulent car dealership, insurance, and credit union practices. There seems to be no practical purpose in prohibiting the use of class action suits other than to prevent LSC grantees from having a greater impact in protecting people who are living in poverty.¹⁰⁵

At this point, other LSC grantees are paid to provide basic field services for the residents of the Navajo Nation and Hopi Reservation, but DNA is the only program providing substantial civil legal services anywhere in the service

102. H.R. 3019, 104th Cong. § 504(a)(4) (1996) (as enacted in the Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (not yet codified)).

103. *Id.* § 504(a)(7).

104. After the implementation of DAPA, from July 1993 to July 1994, 1164 domestic protection orders were filed in Navajo Nation courts. Susan Warren, *Are You Safe In Your Home?*, DNA UPDATE, Fall 1994, at 2.

105. Justice Beverly Cohen of the New York Supreme Court recently ruled that the ban on filing class action lawsuits was unconstitutional because Congress has no right to tell the LSC how to spend the money it receives from other sources, such as private donations and state treasuries. Legal Services attorneys are also preparing to file constitutional challenges to the ban in Hawaii and California. For the most part, Legal Services attorneys have withdrawn or settled nearly all of the 630 class action suits that were pending at the time of the ban. See Don Van Natta, Jr., *Lawyers for Poor Applaud Lifting of Class-Action Ban*, AUSTIN AMERICAN-STATESMAN, Jan. 1, 1997, at A27.

area — all of the other services are located hundreds of miles away off of the reservations.¹⁰⁶ The Navajo Nation itself funds two projects — the Navajo Public Defender, which provides criminal representation to Navajos in the Navajo Nation courts, and the Navajo/Hopi Legal Services Office in Tuba City, Arizona, which provides representation only in connection with the relocation of Navajos from lands partitioned to the Hopi Tribe following years of litigation between the Navajo and Hopi Tribes.¹⁰⁷ The Navajo Nation engages in litigation for the Nation that benefits low-income Navajo citizens, but it provides no individual representation.¹⁰⁸ DNA has also been under contract since 1993 to provide public defender services in the Hopi tribal courts.¹⁰⁹

Three of the five categories specifically identified in the Legal Services Corporation Act of 1974 as generating special needs that create particular difficulties in obtaining legal services apply to the population served by DNA: (1) Native Americans, (2) persons with limited English speaking abilities, and (3) persons living in sparsely populated areas.¹¹⁰ There are also the additional access barriers of physical isolation, cultural barriers (the tendency to avoid conflict and distrust of the Anglo legal system), and special legal problems arising from complex federal Indian law. Despite these barriers, DNA's budget planning and oversight have been found to be so effective that the most recent LSC monitors to review the program stated that DNA has one of the top three financial management systems of all programs reviewed by the team nationwide.¹¹¹

The reduction or elimination of LSC funding will severely restrict, if not eradicate, the provision of legal services on the Navajo Nation. It will prevent an entire geographical area and cultural community from effectively accessing the legal system. DNA, as it is, does not have the resources to even come

106. Earnhouse Memorandum, *supra* note 6, at 6-7.

107. *Id.* at 7-8.

108. *Id.* at 8. In addition to individual representation, DNA has established special projects which include the Community Education Project, Youth Law Project, Landowner's Rights Project, Home Ownership Project, and Native American Protection and Advocacy Project. DNA has also developed a scholarship fund for DNA employees who attend law school, recruits only at regional law schools with large Native American enrollment, and actively seeks fellowships from private foundations in order to encourage the involvement of support staff, advocates and attorneys from the communities served.

DNA also allocates significant resources to provide clients with the tools needed to solve their own problems through community education programs which include: pro se workshops and clinics, workshops with local police and community-based organizations like battered women's shelters, radio programs (the "Legal Minute" is broadcast daily throughout the service area in Navajo and English), videos (in Navajo, Hopi, and English on consumer law issues and domestic violence issues), and training programs for judges and court personnel. *Id.* 12-15, 32.

109. *The Hopi Public Defender Office*, DNA UPDATE, Fall 1995, at 8-9.

110. Barnhouse Memorandum, *supra* note 6, at 8.

111. *Id.* at 35.

close to meeting the needs of the Navajo Nation. But it is providing some effective access to justice to those living in poverty. Current congressional plans will take away even that.

C. The Effect of Current Congressional Budget Cuts on the Provision of Legal Services

Congress has decided to cut the LSC budget as a whole by 31% for fiscal year 1996.¹¹² Although it sounds better than the proposed bill to abolish the LSC, which came close to passing, it actually is not much different.¹¹³ Both plans call for funds to be reduced from \$400 million to \$278 million for 1996. Under the current plan the money goes to the LSC; under the proposed plan the money would go to the states. The current plan makes no provision for future years. The proposed plan would cut the funds to \$250 million in 1997, \$175 million in 1998, \$100 million in 1999, until the federal funding of legal services is completely eliminated in the year 2000.¹¹⁴

Under the current plan the money is to be allocated by the LSC to organizations in equal amounts based on the number of people living in poverty in all geographical areas.¹¹⁵ The current plan creates two major problems — it eliminates the Native American line item which guaranteed funding specifically for Native American legal services, and it relies on census statistics which are known to inaccurately represent Native American populations. The proposed plan would allocate money directly to the states in a proportion equal to the number of residents in each state who live at or under the poverty line.¹¹⁶ This plan creates even more problems with its greater vagueness. States would simply get a lump sum, with no incentive to allocate funds to rural areas and Native American lands where there are few votes. There is even less of an incentive for states to allocate funds to Native American lands since Native Americans living and working on Native American lands are not subject to state tax. The states are much more likely to concentrate the allocation of their legal services funds in urban areas where there are more votes, more tax dollars, and more people to be concerned about the issues of poverty and crime.

In either case, the current reduction or proposed elimination of LSC funding will bar most low income Americans from access to the legal system. The experience of current LSC programs, already underfunded and understaffed, has made it clear that state and local governments and the

112. Congress cut the Legal Services Corporation budget from \$400 million for fiscal year 1995 to \$278 million for fiscal year 1996. H.R. 3019, 104th Cong. (1996) (as enrolled). Funds for fiscal year 1997 have not yet been appropriated.

113. H.R. 2277, 104th Cong. (1995) (version 2).

114. *Id.* § 3(I).

115. H.R. 3019 § 501.

116. H.R. 2277 § 3(b).

private bar will not take responsibility for legal services for the poor and will not pick up the case load when federal funding is eliminated.¹¹⁷

A recent survey of all fifty states indicates that local support overall will decline markedly in this current calendar year. Delaware, which has imposed a new filing fee surcharge, is the only state which expects an increase in support.¹¹⁸ The problem is compounded by the fact that at the same time Congress is cutting LSC funding, it is cutting a wide range of social programs, shifting the financial responsibility to the states for everything at once. In many regions of the country, especially in rural areas and on Native American lands where there is a high concentration of poor people, it is likely that there will be little or no publicly funded legal services available to the poor.

It is also not realistic to expect the pro bono services of private attorneys to fill the gap when federal legal services are cut. Pro bono services are already at an all-time high due to the efforts of the organized bar, the LSC and other local programs designed to involve private attorneys in the provision of legal services to those who need such services.¹¹⁹ It is estimated that one sixth of all Legal Services cases were handled by private attorneys in 1994.¹²⁰ Even if the present level of pro bono services were doubled or tripled, they would replace only a fraction of the services now being provided by Legal Services attorneys, which as a whole meet only a small percentage of the need of the increasing population of eligible clients.

Moreover, pro bono programs have typically depended on Legal Services attorneys for training and funding for basic intake and referral.¹²¹ By eliminating the LSC, the essential structure through which most pro bono services are provided will be destroyed.

VI. The Trust Relationship

Between 1787 and 1871, hundreds of treaties were signed between the United States government and Native American tribes. In these treaties Native Americans gave up their land in return for promises which included a guarantee that the United States would create a permanent reservation for the tribe and protect the safety and well being of tribal members.¹²² According to the Supreme Court, these promises established a trust relationship between the federal government and Native American tribes.¹²³ Also, inherent in the trust relationship is the trust responsibility which flows from it. Trust

117. Testimony, *supra* note 82.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. PEVAR, *supra* note 67, at 26.

123. *Id.*

responsibility is the obligation of the federal government to honor the trust relationship and to fulfill trust commitments — the tribes gave up the land, now in return the U.S. government must continue to fulfill its obligations.¹²⁴

The trust relationship was originally created to enforce treaty commitments, but courts have extended its application: (1) to federal statutes, agreements and executive orders (which create trust relationships the same way as treaties), (2) to include implied commitments such as hunting and fishing rights, and (3) to impose an independent obligation upon the federal government to remain loyal to Native Americans and to advance their interests including interest in self-government.¹²⁵ According to the United States Senate:

The purpose behind the trust doctrine is and always has been to ensure the survival and welfare on Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.¹²⁶

The federal government's *independent* obligation to protect and advance the interest of Native Americans in self-government and to raise their standard of living and social well being must include funding to establish and maintain a workable justice system.

Courts have held that the federal government's assumption of elaborate control over the property of Native Americans has created a common-law trust by providing all of the necessary elements: a trustee (the United States), a beneficiary (the Native American allottees), and a trust corpus (Native American resources, lands, and funds).¹²⁷ The trust relationship is based on the history of the relationship between Native American tribes and the federal government — not on express statutes.¹²⁸ The federal government, therefore, becomes "more than a mere contracting party" in carrying out treaty obligations.¹²⁹ "Under a human and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust."¹³⁰

124. *Id.*

125. *Id.* at 26-27.

126. *Id.* at 27 (quoting AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT 130 (1977)).

127. *United States v. Mitchell*, 463 U.S. 206 (1983).

128. *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (1980).

129. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

130. *Id.*

President Nixon, in speaking out against the policy of forced termination, made it clear that the trust relationship is not something which can be revoked at will.

Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.¹³¹

Instead, the trust relationship is something that must *always* be taken into account in determining national policy regarding Native Americans. When federal responsibility for the provision of Native American legal services is viewed in light of this trust relationship, it is clear that the federal government does not have a choice as to *whether* or not to help fund Native American legal services, but only as to *how* that responsibility can best be fulfilled.

VII. Your Place

I live in your universe. My employer on the reservation is Anglo. I take home fried chicken to my family from your fast food restaurants on Friday nights. My children learn from your Anglo teachers. Your Anglo doctors treat my family. I listen to your radio stations in my car and watch your television shows in the laundromat. I deposit my paychecks in your bank. I buy my clothes and food in your stores off the reservation. I make my car payments to your dealership. On Sundays I attend services in your church. I speak your language.

You entered my universe with force and changed it. You moved it farther west as the eastern towns grew, away from the San Francisco Peaks — the

131. FRANCIS P. PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 257-58 (1990) (quoting President Nixon, Special Message on Indian Affairs, PUB. PAPERS 575-76 (July 8, 1970)).

home of the Hopi kachinas — where there is lumber and tourism. You moved it away from the Black Hills, rich in gold and minerals and spirits. You moved it away from water, away from the animals which you then decimated. Then you gave us a new language, but not enough teachers. You gave us new diseases, but not enough doctors. You gave us a new law, but not enough lawyers.

You determined our place in your universe. Now let us determine your place in ours. We have given you much — our land, our resources, our skills, our art, our labor, our stories, our medicines, our music, our architecture. We protected you in wartime. We carried your weapons and your messages, coded in our own language. Now it is time for you to protect our Nation, our people, our families. You owe us this.

