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DEVON A. MIHESUAH

## **"Never Again"**

### **Kevin Gover's Apology for the Bureau of Indian Affairs**

*Christopher Buck*



On September 8, 2000, speaking on behalf of the Bureau of Indian Affairs (BIA), Assistant Secretary of the Interior Kevin Gover offered a historic apology for the agency's policies and actions throughout its 175-year history—particularly for its devastating impact on American Indian nations, whether federally recognized, unrecognized, or extinct.<sup>1</sup> Over much of its history,<sup>2</sup> the BIA wreaked havoc in Indian Country through policies that, in their most extreme forms, ranged from extermination (physical genocide) to assimilation (cultural genocide). Indeed, its legacy of anti-Indian abuses of power staggers the imagination and remains a source of profound shame for nearly every American of conscience who is aware of this relentless assault on all things Indian. In his capacity as assistant secretary for Indian affairs under the Clinton administration (November 1997 to January 2001), Gover took the occasion of the BIA's 175th anniversary as an opportunity *to make history by apologizing for it*.

Gover's apology was official as to the BIA itself, but did not presume to speak on behalf of the federal government. Nevertheless the event was as controversial as it was historic. Sadly, it was also as ephemeral as it was memorable. Although widely reported by the national and international press, Gover's apology has since suffered a death by silence. Recovery of the BIA's videotape of that event, however, and a formal reflection on its significance five years later, affords an ideal opportunity to reflect on the history that Gover made and its implications

for further remedial actions, particularly with regard to the issue of reparations. Educators, moreover, may take an interest in Gover's BIA apology as a resource for bringing university students (and the wider public) to a greater awareness of and sensitivity to unresolved issues of underrated magnitude that persist in Indian Country today. This paper revisits Gover's apology, and argues that this "Never Again" speech—as it has come to be known—should not languish in its current death by silence. To illumine public opinion and enlighten public policy, educators have a duty to carry forward the torch of Gover's message, in order to address past injustices and redress present inequities.

In 2000, the time had finally come for the BIA to speak to the Indian nations in a spirit of contrition. While a formal apology would have largely symbolic value only, the advent of the new millennium was an auspicious occasion for sending a signal federal message to Indian Country, an opportune time to make a formal apology that was long overdue. An apology that is too late can never be too soon. Acting entirely within his official prerogative, Gover was empowered to make this apology on behalf of the BIA. The White House had been duly informed when Gover sent President Clinton's chief adviser on Indian issues, Lynn Cutler, an advance copy of his speech. Although the White House did not object to it, the death by silence began even when Gover was speaking. During the speech, a representative of the White House was present—but chose neither to endorse nor comment on Gover's apology. Thus, although he was the top BIA official under Clinton's administration, Gover could not officially speak on behalf of that administration. The irony is this: while the administration did not oppose him, neither did it back him. The moment was golden, but the silence was deafening.

The time had come to look to the future by reflecting on the past. The BIA had operated continuously for 175 years. During most of that time, its policy was benighted, not enlightened. Established by Congress as part of the War Department in 1824, the BIA was transferred to the Department of the Interior in 1849. But the war metaphor persisted, and there were "Indian wars" to be fought. The BIA's enabling legislation couched malign policies in benign objectives. In theory, the BIA's mission was to assist Native Americans and Native Alaskans to manage their affairs under a trust relationship with the federal government. In practice, the BIA became an instrument of subjugation, land appropriation, forced assimilation, and in some cases, extermination—all of which Gover acknowledged in his apology. The BIA, now comprising some ten thousand federal employees, had operated as a "necessary evil" for American Indians during the post-Indian wars period, precisely because it served as the principal instrument for implementing federal trust obligations (even though the BIA has grossly mismanaged its fiduciary responsibilities). Acting as the executioner of shifting and often



pernicious congressional policies, however, the Bureau has profoundly harmed Indian peoples over its 175-year period of operation, through at least the termination era<sup>3</sup> of the 1960s and beyond. For most of its history, the BIA abused Indian treaty rights and human rights.

William Kevin Gover has been called a "briefcase warrior"<sup>4</sup> in fighting for American Indian rights. A citizen of the Pawnee Nation of Oklahoma, Gover earned his BA in Public and International Affairs from Princeton University's Woodrow Wilson School of Government in 1978. In 1981, Gover was awarded a Juris Doctor, with honors, from the University of New Mexico School of Law. After clerking for the late U.S. District Judge Juan G. Burciaga of Albuquerque, Gover practiced environmental and resource law and federal Indian law in a Washington, D.C., firm from 1983 to 1986, then returned to Albuquerque to form a small law firm with friends. From 1997 to 2001, Gover served as assistant secretary of the interior for Indian affairs, during which time he advised and reported directly to Secretary of the Interior Bruce Babbitt. This made Gover the highest-ranking Indian in the United States government during Clinton's second term in office. Throughout his career, Gover has testified extensively before Congress on issues of law and policy affecting Indian tribes. In recognition of his stellar service to Indian peoples, Princeton University conferred on Gover an Honorary Doctor of Laws in 2001.<sup>5</sup> This is not to say that everything Gover did was good (although all of his actions were well intentioned), but everything he did as a public advocate of American Indians was important. Gover is now professor of law and affiliate professor of the American Indian Studies Program at Arizona State University.

Although not openly endorsed by President Clinton at the time, Gover's apology was official as to the agency itself, but not as to the federal government at large. Institutional authority considerations aside, Gover's apology possessed its own moral force and was a poignant, defining moment in the BIA's relationship with its American Indian constituents as distinct political (tribal) entities. On its own merits, the apology had a depth of sincerity and commitment that made it all the more historic. Yet it was met with more cynicism than praise. Mere words would never be enough. The apology sought to repair tribal-BIA relations at an emotional level, with an agency commitment to work for the best interests of American Indians at the institutional level. The speech was not the harbinger of new policy. But it did renew federal commitment to Indian self-determination.

The irony is that it took an American Indian to officially apologize to American Indians. Critics have dismissed this as inconsequential, like a peace pipe without real peace. Critics argued that the sacred smoke masked the status quo. The most vocal critics were Indians. Yet Lloyd Tortolita, (former) governor of the New Mexico's Acoma Pueblo, welcomed Gover's speech but hastened to say, "If we could get an

apology from the whole government, that would be better."<sup>6</sup> Reactions were most often mixed. For instance, Gary Ridge, principal chief of the Southern Cherokee Indian Nation, stated, "Racism will always control while BIA still exists. . . . A million such statements as made so tearfully by Gover will do nothing whatever to solve the problem of white racism in the U.S. Government."<sup>7</sup> As Rose Weston has observed, "In the interval since the speech, the United States government has refused to issue an official apology to Native Americans and has taken no official responsibility for its role in past human rights abuses."<sup>8</sup> This is largely because, as the author later notes, the apology did not have the institutional force it should have had: "Yet, despite the candid comments and the sweeping promise, one public speech by a single, mid-level government official—especially one who is a member of the oppressed minority—is unlikely to have much lasting impact without actual changes in government policies and citizen attitudes in the United States."<sup>9</sup> Even more sobering is this: if, in 2000, the BIA had not been run predominantly by American Indians—with an American Indian in charge (Gover)—there might never have been an apology at all.

President Bill Clinton, who had apologized in 1993 to Native Hawaiians on behalf of the federal government, did send his greeting but not his apology to the gathering where Gover delivered this speech. Why Clinton never endorsed Gover's BIA apology remains a mystery. But far more disturbing than Clinton's silence was the controversy that surrounded the BIA at that time. The BIA—and Gover himself—was engaged in a legal battle that effectively nullified the apology and neutralized its impact. In 1996, a class action lawsuit, called the *Cobell* case, was filed on behalf of individual American Indians, alleging the government's wholesale mismanagement of the Individual Indian Money (IIM) trust accounts—totaling billions of dollars. Many of these funds simply vanished and remain unaccounted for. After the BIA had failed to comply with a series of discovery orders, a motion was entered to hold the heads of the Departments of the Treasury and the Interior in civil contempt of court. On February 22, 1999, in the U.S. District Court in Washington, D.C., Judge Royce C. Lamberth found Treasury Secretary Robert E. Rubin, Interior Secretary Bruce E. Babbitt, and Assistant Secretary Kevin E. Gover in contempt. The judge ordered the government to pay \$625,000 of the Indians' attorneys' fees as a penalty. It was discovered that BIA employees had deliberately destroyed IIM records, despite pending discovery demands.<sup>10</sup> Although Gover's apology did address past injustices, it fell short of accounting for present BIA mismanagement.

### THE 175TH ANNIVERSARY EVENT

The ceremony, coordinated by Nedra Darling, BIA public affairs director, took place in the Sidney Yates Auditorium of the Department of

the Interior, at 18th and C Streets, NW, in Washington, D.C. This spacious hall was fronted by a stage, backdropped with crimson curtains. The following description is based on the author's personal observations of the video of the 175th Anniversary of the BIA—footage that took the author more than two years of "white tape"<sup>11</sup> to obtain.<sup>12</sup> The speaker's podium was solemnized by a large emblem of the Bureau of Indian Affairs that faced the audience. The venue bore all the trappings of a typical government-sponsored event. But this meeting would be anything but typical. Acoma Pueblo Governor Lloyd Tortolita of New Mexico gave the opening invocation—a prayer in his native language.

Gover began his speech by acknowledging the historical origins of the BIA: "In March of 1824, President James Monroe established the Office of Indian Affairs in the Department of War. Its mission was to conduct the nation's business with regard to Indian affairs." Noting that the advent of the new millennium was a fitting time to take stock and reflect on the BIA's legacy, Gover cautioned that "this is no occasion for celebration; rather it is time for reflection and contemplation, a time for sorrowful truths to be spoken, a time for contrition." He then acknowledged "the fact that the works of this agency have at various times profoundly harmed the communities it was meant to serve." Reflecting on the painful truth and the bitter reality of this history, he stated that "from the very beginning, the Office of Indian Affairs was an instrument by which the United States enforced its ambition against the Indian nations." The BIA's use of force was worse than its ambition itself.

The phrase "enforced its ambition" says it all. The interests of the Indian peoples were not the agency's real goal. Its real mission was to carry out a federal policy that sought to deal with the Indian problem in the most expedient manner possible. The BIA's "first mission," Gover reminds us, "was to execute the removal of the southeastern tribal nations." This resulted in what history has come to know as the "Trail of Tears"—an American tragedy of epic proportions. "By threat, deceit, and force," Gover recounted, "these great tribal nations were made to march a thousand miles to the west, leaving thousands of their old, their young, and their infirm in hasty graves along the Trail of Tears." On this somber note, Gover then recited a catalog of evils for which the BIA was singularly, although not exclusively, responsible:

Yet in these more enlightened times, it must be acknowledged that the deliberate spread of disease, the decimation of the mighty bison herds, the use of the poison alcohol to destroy mind and body, and the cowardly killing of women and children made for tragedy on a scale so ghastly that it cannot be dismissed as merely the inevitable consequence of the clash of competing ways of life. This agency and the good people in it failed in the mission to prevent the

devastation. And so great nations of patriot warriors fell. We will never push aside the memory of unnecessary and violent death at places such as Sand Creek, the banks of the Washita River, and Wounded Knee.

Gover recalls the scenes of three bloody massacres that are forever etched in the collective memory of American Indians. The Sand Creek Massacre<sup>13</sup> is not only charged with emotion for virtually all American Indians, but it sparked a national controversy as well. On November 29, 1864 (five years after the Pike's Peak gold rush), Colonel John Chivington and seven hundred Colorado Volunteers (the regular Union army was busy fighting the Civil War) launched a surprise attack on Black Kettle's (Motavato) Cheyenne encampment along the Sand Creek. "In an orgy of violence," writes James Olson, "with Black Kettle and others waving white flags of surrender, Chivington's men slaughtered 450 Cheyenne men, women, and children. Only a few escaped."<sup>14</sup> Women were sexually mutilated in the most grotesque ways. One could scarcely imagine any greater depravity. (I'll not supply the sordid details, which cause deep revulsion in just about anyone who reads of it.)

The sick irony in all this was that Chivington was a Methodist lay preacher. He was known as the "Fighting Parson" whose mission in life was "to kill Indians."<sup>15</sup> Having honored Chivington as a hero in 1894, the United Methodist Church, on April 22, 1996, officially apologized to the Arapaho and Cheyenne for the Sand Creek Massacre and for having lionized Chivington for his role in it.<sup>16</sup> As for the national outrage that immediately followed the massacre, Olson states:

The Sand Creek Massacre precipitated an enormous political controversy in the United States. Large numbers of people sided with the Indians, and political pressure mounted for a more humane approach to Indian affairs. In 1865 Congress launched a special investigation of the Sand Creek Massacre, and what resulted was establishment of the Indian Peace Commission, a federal agency designed to engage in peaceful negotiations with the Indians.<sup>17</sup>

Remarkably, Black Kettle escaped the Sand Creek Massacre. But on November 27, 1868, Lieutenant Colonel George A. Custer led the Seventh Cavalry in a surprise, dawn attack on Black Kettle's Cheyenne sleeping encampment on the banks of the Washita River in Oklahoma. U.S. soldiers killed and scalped the Cheyenne leader. This episode exposed the very worst of the ambitions that Gover says were "enforced" against the Indian peoples. The government now has recognized this past injustice by memorializing it: on November 7, 2000, Congress authorized the establishment of the Sand Creek Massacre National

Historic Site (Public Law 106-465), to be administered by the National Park System.<sup>18</sup>

Gover also referenced the Wounded Knee massacre of 1890, which will be briefly related here. Wounded Knee is, by far, the most infamous massacre known to the American public. This blood-stained page of American history resulted from the BIA's attempt to suppress the popular "Ghost Dance" religion—a pan-Indian millenarian revitalization movement, so nicknamed as to describe what whites perceived as the Indians' ceremonial reunion with dead. After unsuccessful efforts to ban the religion, troops entered the Pine Ridge Reservation on December 29, 1890. A minor skirmish ensued that triggered the massacre, in which Chief Big Foot (Iniconjou) and 350 of his followers were killed. Wounded Knee marks the last major armed engagement between the U.S. military and the American Indians.<sup>19</sup>

Whether through war, disease, or displacement, the result of the Indians' encounter with the white man was devastating. "By the conclusion of the 'Indian Wars' in 1886," writes William C. Bradford, "the pre-Columbian Indian population had been reduced as much 98%, and an Indian-free U.S. was not beyond possibility."<sup>20</sup> In a sense, the worst was yet to come. After the Indian Wars came the BIA's policy of forced assimilation. Addressing this policy, Bradford writes,

Nor did the consequences of war have to include the futile and destructive efforts to annihilate Indian cultures. After the devastation of tribal economies and the deliberate creation of tribal dependence on the services provided by this agency, this agency set out to destroy all things Indian. This agency forbade the speaking of Indian languages, prohibited the conduct of traditional religious activities, outlawed traditional government, and made Indian people ashamed of who they were. Worst of all, the Bureau of Indian Affairs committed these acts against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually. Even in this era of self-determination, when the Bureau of Indian Affairs is at long last serving as an advocate for Indian people in an atmosphere of mutual respect, the legacy of these misdeeds haunts us.

The consequences of the Indian Wars are history, but the effects of the boarding schools persist to this day.<sup>21</sup> There are many Indians at present who still bear the scars of that experience. Litigation for damages resulting from widespread physical and sexual abuse is ongoing as well. In one of his *Indian Country Today* columns, published in 2002, Kevin Gover speaks of the consequent "deadly, toxic shame that was used in



the boarding schools, producing generations of Indians saddled with a crippling sense of shame." Gover elaborates on the present-day effects of that shame: "This toxic shame is what many of us have inherited from alcoholic adults in our families. If we don't deal with it, we will pass on this deadly shame to our own children."<sup>22</sup> What are the social consequences of that shame? Gover elaborates on this parade of horrible offenses in his speech:

The trauma of shame, fear and anger has passed from one generation to the next, and manifests itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian country. Many of our people live lives of unrelenting tragedy as Indian families suffer the ruin of lives by alcoholism, suicides made of shame and despair, and violent death at the hands of one another. So many of the maladies suffered today in Indian country result from the failures of this agency. Poverty, ignorance, and disease have been the product of this agency's work.

But the problem of poverty among reservations is not a hot topic of public debate. The BIA apology at least serves as a reminder for those who reflect on it. A full, written commentary on the history that Gover recounts in episodic paroxysms of unresolved historic grief would render the speech more meaningful to a wider public.

Then came the dramatic turning point in Gover's speech. After presenting an encapsulated overview of BIA history and of its impact on American Indian peoples today—and taking vicariously and symbolic responsibility for that legacy—Gover asserted his leadership as head of the BIA to register the fact that his apology was official as to the BIA itself. In other words, Gover's speech was the *official* BIA apology to all American Indians:

And so today I stand before you as the leader of an institution that in the past has committed acts so terrible that they infect, diminish, and destroy the lives of Indian people decades later, generations later. . . . I do not speak today for the United States. That is the province of the nation's elected leaders, and I would not presume to speak on their behalf. I am empowered, however, to speak on behalf of this agency, the Bureau of Indian Affairs, and I am quite certain that the words that follow reflect the hearts of its 10,000 employees.

In so doing, Gover expressed "our profound sorrow for what this agency has done in the past" and that "when we think of these misdeeds and

their tragic consequences, our hearts break and our grief is as pure and complete as yours." Noting that the BIA can do nothing to change this history, Gover said *what needed to be said but was so hard to say*: "On behalf of the Bureau of Indian Affairs, I extend this formal apology to Indian people for the historical conduct of this agency." This was a dramatic moment in the speech. Everything he already said culminated in this direct, unalloyed apology. Gover also accepted "the moral responsibility of putting things right." But an apology for past wrongs goes only half way. A complete apology seeks to make things right. It must reconcile, repair, and restore. After his retrospective of BIA history, Gover looked prospectively into the BIA's future mission and delivered what may be the most poignant and policy-laden section of his speech:

Never again will this agency stand silent when hate and violence are committed against Indians. Never again will we allow policy to proceed from the assumption that Indians possess less human genius than the other races. Never again will we be complicit in the theft of Indian property. Never again will we appoint false leaders who serve purposes other than those of the tribes. Never again will we allow unflattering and stereotypical images of Indian people to deface the halls of government or lead the American people to shallow and ignorant beliefs about Indians. Never again will we attack your religions, your languages, your rituals, or any of your tribal ways. Never again will we seize your children, nor teach them to be ashamed of who they are. Never again.

This recapitulates American Indian history in general—and past BIA policies in particular. As for "false leaders," the process remains unchanged. Each administration appoints its assistant secretary who is then confirmed by the Senate—yet with only marginal input from Indian leaders. This catalog of evils is also marked by its incompleteness. Gover made no claims that his apology would catalog all the wrongs. But it did represent them collectively and apologized for them as a whole. Whatever is missing in Gover's speech, however, ought to be noted in commentary. For instance, there is no mention of the forced sterilization of Indian women, which was a BIA-authorized policy—well known to historians.<sup>23</sup> As far as the American public is concerned, however, Indian history largely remains a "hidden history," as Bradford points out:

The brutal reality of invasion, slavery, forced relocation, genocide, land theft, ethnocide, and forcible denial of the right to self-determine has not percolated deeply into

contemporary understandings of U.S.–Indian history. The role of the U.S. in the deliberate destruction of Indian populations, property rights, and cultural patrimonies is for most Americans a hidden history that must be revealed and asserted as a factual predicate supporting redress before theories of justice can be evaluated.<sup>24</sup>

Unlike the government of Turkey, which persists in denying the Armenian genocide, the American government, as a whole and at its highest levels, should formally acknowledge its role in the decimation of Indian nations. Only then can the federal government take full responsibility for having perpetrated this American holocaust. American Indian history is the litmus test of American ideals. It is a historical record of which all Americans ought to be aware. Otherwise, as Bradford rightly observes, whatever wrongs the BIA committed will remain “for most Americans a hidden history.” But here’s the problem in particular: although Gover’s apology focuses on this “hidden history,” the American public remains largely oblivious. True, Gover’s speech did succeed in attracting the national press. It was widely reported nationally, even internationally. But the public has forgotten the apology entirely. The speech is history, and buried with it is the BIA’s “hidden history” of which Bradford speaks and which is the subject matter of Gover’s apology. The public can access the text of Gover’s speech easily enough. The problem is not access, but lack of awareness (and concern). To be fair, the public was not the primary audience. Gover’s message was directed to tribal leaders and to the Indian nations they represented. The problem is not episodic but systemic. The American educational system fails, in its entirety, to provide students a comprehensive history of Indian–white relations.

Gover goes on to say:

We cannot yet ask your forgiveness, not while the burdens of this agency’s history weigh so heavily on tribal communities. What we do ask is that, together, we allow the healing to begin: As you return to your homes, and as you talk with your people, please tell them that the time of dying is at its end. Tell your children that the time of shame and fear is over. Tell your young men and women to replace their anger with hope and love for their people. Together, we must wipe the tears of seven generations. Together, we must allow our broken hearts to mend. Together, we will face a challenging world with confidence and trust. Together, let us resolve that when our future leaders gather to discuss the history of this institution, it will be time to celebrate the rebirth of joy, freedom, and progress for the Indian Nations.

The Bureau of Indian Affairs was born in 1824 in a time of war on Indian people. May it live in the year 2000 and beyond as an instrument of their prosperity.

With keen sensitivity, Gover refrains from asking for forgiveness from American Indian peoples. There is wisdom in that. True forgiveness implies a substantial reconciliation. Here, the formal reconciliation process had just begun. This was the opportunity to begin the process of healing. That process has to be concomitant with federal support for the restoration of Indian self-determination and sovereignty. The apology does, however, end on a hopeful note, with a forward-looking commitment, not to righting the agency's historical wrongs (because that would necessarily involve reparations) but to rectifying the BIA's existing policies so that the devastations already visited upon the Indian nations would "never again" happen. The trail of broken treaties is a testament to one broken promise after another. Was Gover's promise yet another broken promise? Or did his speech signal a new era for the BIA and for Indian Country generally, coincident with the new millennium?

Some tribal leaders, as well as the majority present, openly wept during the speech. Clearly the apology succeeded on an emotional level. Immediate reaction to the speech in the auditorium was overwhelmingly positive. After his dramatic apology, Gover received a standing ovation. Of course, it was not the time or place to debate the merits of Gover's speech. The ceremony continued. Pawnee singers Steve and Tom Knifechief performed a special song "that only the Creator could give." Steve Knifechief explained that "we're not songmakers" but "this song came too easy to us" and therefore must be inspired. Called "The BIA Song," the words as translated, in part, were "God forgive us," followed by an assurance that the Creator would take care of the Indian peoples.

### LEGAL FORCE?

Apologies generally do not rise to the level of actionable government policy. Is Gover's speech any different? Does the BIA apology have any legal significance? When responding to this question, Gover reflected:

No, I don't believe it has any legal significance. I believe it was more of a marker that we had reached a new stage in the relationship between the BIA and the tribes. The BIA is an Indian-run organization now, and that was worth noting, and what better way to demonstrate that than to say what so many Indian people who work in the Bureau think? It was also meant to disavow certain policy ideas

that are no longer on the table. Whether that is a permanent state we cannot know, but perhaps the speech will make it a little harder to go back to some old, bad ideas. Finally, I hope that the speech will serve as a marker of the time when the tribes were/are moving beyond a survival mentality. While that mentality was in fact critical to the survival of the tribes, the fact is that they have survived, and those survival practices are no longer helpful to us. Historical grief must be overcome if true progress is to be made. Or as the Haudenosaunee say, "You cannot see the future with tears in your eyes."<sup>25</sup>

"Historical grief" is an important term in American Indian studies. It is unresolved bitterness, an open collective wound for each Indian nation, because the United States has, in effect, colonized the American Indians. With the shift (at least nominally) to self-determination at level of federal policy, it may now be said that United States (including the BIA) has entered what may be termed a neocolonial era.

In this neocolonial period, the deleterious effects of American colonialism persist. In a fully postcolonial era, most former colonies achieve their full independence. This is not the case with American Indian nations, however. Their inherent sovereignty has not been restored. Some will argue that this will never be the case. That notwithstanding, "self-determination" and "sovereignty" are policy markers that are here to stay. Or are they? In an *Indian Country Today* column, Gover comments, "Justice Antonin Scalia [of the U.S. Supreme Court] says point-blank on the lecture circuit that tribes simply are not sovereigns. Justice Stephen Breyer told an Indian audience earlier this year [2002] that it is unwise to bring tribal sovereignty cases to the court while its current members remain."<sup>26</sup> These off-the-record remarks betray a continuing anti-Indian bias in Supreme Court jurisprudence. Nevertheless, there can be no retreat from the rhetoric—if not the reality—of these destiny-laden concepts of American Indian sovereignty and self-determination.

For an outside opinion by a legal scholar who himself is an American Indian, I contacted William C. Bradford, Chiricahua Apache and professor of law. (Bradford's writings have already been referenced in this paper, but not Bradford personally.) I asked him whether Gover's BIA apology is of any legal consequence. In an e-mail, Professor Bradford replied:

My sense is that the Gover apology is little more than a recognition of moral responsibility that would not be cognizable in a legal forum. At best, an apology might support efforts to achieve a legislative remedy; in the judicial con-



text, even if one could credibly claim that Gover had the authority to transform the legal relationship of the U.S. to the tribes (a very dubious proposition), a host of doctrinal defenses would preclude legal remedies. As a matter of customary international law, provided an international forum would hear a claim, the Gover apology might be taken as formal recognition of a legal duty owed to tribes for the breach of which a remedy might be available. However, it is almost inconceivable that the U.S. would recognize the jurisdiction of any such international forum, and it would be impossible to satisfy any such judgment in courts of the U.S. So, I'm afraid, the Gover apology has moral, but not legal, consequences.<sup>27</sup>

Apologies can only go so far. They are typically more retrospective than prescriptive. Apparently, there are no legal ramifications of Gover's BIA apology. It succeeds in raising afresh moral issues that are implicated by Indian nations whose sovereignty is historical but not actual—or actual but still thwarted in the historical present by their current "ward" status in relation to the BIA. For those in the legal profession, Gover's speech invokes a legal history as well as the relevant legislative intent of Congress and the ensuing implementations of policy by the BIA under its current policies. Educators in general—and law professors in particular—should follow these developments with some interest. Since, of necessity, a formal apology implies a renunciation of past practices in favor of choices that will somehow bring about reconciliation on some level, what policy options might the BIA, Congress, and the president pursue to redress historical injustices and address current issues, the resolution of which would constitute the fullest implementation of Gover's BIA apology?

### **FEDERAL APOLOGY, REPARATIONS, RECOGNITION, AND BEYOND**

As previously stated, Gover's speech has suffered practically a silent death. It has also met with considerable skepticism from Indian leaders across the country and from the several American Indians with whom I have personally spoken. Nevertheless, history may look back on this event less harshly and perhaps with a much kinder eye. As for Gover himself, Associated Press journalist Matt Kelley reported in 2000, "Gover said the apology was important for two reasons: To help the B.I.A.'s majority-Indian work force deal with the paradox of working for an agency that has done harm to their people and to help Indians get beyond 'a culture of victimhood.'" Gover reportedly added, "It's too bad, in a way, that it could not be said to the Indians by the non-Indian

(federal) leadership, because there's a great deal of irony for an Indian apologizing to other Indians for what the non-Indians did to them."<sup>28</sup>

Here, Gover registers a telling point. Because the atrocities were committed against Indians by a national government that sought to take away Native lands and resources, it should have been non-Indians apologizing to American Indians. Now that the BIA is run primarily by American Indians (due to a affirmative action policy in place since the 1930s giving preferential BIA hiring to American Indians), developing the necessary infrastructures for effective self-determination is increasingly being done by Indians on both sides of the tribal-BIA divide. Is it too crude to say that Indians have just about taken over the BIA and are now directing federal Indian policy? The reality remains that the Bureau remains an instrument that executes the existing policies of the president, Congress, and the Supreme Court, and not the Indian nations per se.

No one disputes the authenticity and sincerity of Gover's message. His intentions were sincere and heartfelt. He was visibly emotional, even tearful, when delivering the last part of the apology. At that moment in time, he was empowered, if only as a reflex of pure prerogative by virtue of being the BIA's chief administrator, to say what he did. That Gover had at least the tacit backing of the administration might be inferred from the fact that President Clinton had personally written a welcoming letter to be read at the event. In the program leading up to Gover's keynote address, that letter was read aloud. President Bill Clinton had sent his greetings to participants and wishes for the success of the event (*but nothing more*). Clinton's letter was diplomatic, not substantive.

The lack of follow-up—whether in the form of a later presidential or congressional apology—indicates that, although Gover had official backing, his superiors were unwilling to accept responsibility for the historical crimes committed against Indian nations. Gover's apology provided the ideal segue into an apology that could truly have represented the United States of America as a whole. After all, an apology on behalf of the U.S. government is not without precedent. The federal government had already issued a formal apology to Japanese-Americans for incarcerating them in internment camps. The administration could have done the same in relation to Indian nations but chose not to.

Why is it that, on the 100th anniversary of the January 17, 1893, overthrow of the Kingdom of Hawaii, Congress offered an official apology to Native Hawaiians, but on the 175th anniversary of the BIA, Congress did not offer a similar apology? Gover's BIA speech was also on an anniversary of the founding of a government agency that, as in the case of the Native Hawaiians, was largely responsible for the "overthrow" of American Indians. To make it easy for Congress to write a sister joint resolution, a simple substitution of "Native Americans" in place

of "Native Hawaiians" would suffice, where Congress could simply say that it

- apologizes to Native Americans on behalf of the people of the United States for the overthrow of the Indian nations with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Americans to self-determination;
- expresses its commitment to acknowledge the ramifications of the overthrow of Indian nations, in order to provide a proper foundation for reconciliation between the United States and the Native American people; and
- urges the President of the United States to also acknowledge the ramifications of the overthrow of the Indian and to support reconciliation efforts between the United States and the Native American people.

Fortunately, a bill quite similar to the apology to Native Hawaiians has already been drafted. Introduced by Senator Sam Brownback, on his own behalf and for Senators Ben Nighthorse Campbell and Senator Daniel Inouye, S.J. Res. 37 was introduced on May 6, 2004. The names of additional cosponsors—Senators Daniel Akaka, Thad Cochran, Thomas Daschle, and Christopher Dodd—were added later. On June 23, 2004, the Committee on Indian Affairs recommended that the proposed resolution (a substitute amendment) be reported to the Senate "with favorable recommendation that it pass."<sup>29</sup> This proposed resolution reads, in part:

The United States, acting through Congress —

- (1) recognizes the special legal and political relationship the Indian tribes have with the United States and the solemn covenant with the land we share;
- (2) commends and honors the Native Peoples for the thousands of years that they have stewarded and protected this land;
- (3) recognizes that there have been years of official deprecations, ill-conceived policies, and the breaking of covenants by the United States Government regarding Indian tribes;
- (4) apologizes on behalf of the people of the United States to all Native Peoples for the many instances of violence, maltreatment, and neglect inflicted on Native Peoples by citizens of the United States;
- (5) expresses its regret for the ramifications of former wrongs and its commitment to build on the positive relationships of the past and present to move toward a brighter

future where all the people of this land live reconciled as brothers and sisters, and harmoniously steward and protect this land together;

(6) urges the President to acknowledge the wrongs of the United States against Indian tribes in the history of the United States in order to bring healing to this land by providing a proper foundation for reconciliation between the United States and Indian tribes; and

(7) commends the State governments that have begun reconciliation efforts with recognized Indian tribes located in their boundaries and encourages all State governments similarly to work toward reconciling relationships with Indian tribes within their boundaries.<sup>30</sup>

While there has been no reported progress on the bill since June 15, 2004,<sup>31</sup> were this resolution adopted, Kevin Gover's BIA apology would be fully vindicated and its purpose partly realized as an official act on behalf of the United States of America and not just on behalf of the Bureau of Indian Affairs.

Perhaps the ultimate advocacy for American Indians at this juncture today is support for reparations, however unlikely they may be. When I asked Professor Gover about his position on the reparations issue, he replied,

I support reparations only in this sense: Today's maladies in Indian Country are the direct result of the failed policies of the past. A rational and adequately funded effort to overcome poverty, illness, and ignorance is an appropriate form of reparations. I would not support payments to individual Indians. It would allow the US to wash its hands of the matter, and would accomplish very little, save to permit every Indian to get a new car.<sup>32</sup>

Just as a "mere apology" is insufficient redress for past injustices, Gover appears to be saying that, as a legal remedy, mere reparations will not place the American Indians back in their "rightful position." Reparations, if contemplated, must form part of a broader federal initiative. The most complete and compelling case for Indian reparations to date may well be William Bradford's 175-page manifesto, "'With a Very Great Blame on Our Hearts': Reparations, Reconciliation, and an American Indian Plea for Peace with Justice."<sup>33</sup> Yet "reparations" appears nowhere in the *Encyclopedia of American Indian Civil Rights*<sup>34</sup> (even the word *reparations* is missing in the index, as are corresponding entries for *plenary power*, *the discovery doctrine*, and other judicial inventions). The idea of reparations is simply not a constitutional concept. But it's a moral one. Professor

Bradford goes so far as to call for an "American Indian Declaration of Independence."<sup>35</sup>

Another way to advocate on behalf of Indian nations is to help them regain their respective and collective tribal standing as fully sovereign, political entities with international status—a rightful position they once had but lost through Supreme Court decisions and acts of Congress. In 2004, Gover told the Senate's Indian Affairs Committee, which was conducting hearings on the proposed Federal Acknowledgment Process Reform Act of 2003 (S. 297), that, for unrecognized tribes, the process of righting historical wrongs begins not with recognition of the wrongs themselves but of the unrecognized tribe's legal existence:

Those of us who are or have been in positions of authority in Indian affairs have few real opportunities to correct historic wrongs and make lasting improvements in the quality of life for tribal communities. The federal recognition program is one of the few undertakings in which the United States can definitively correct grievous historic wrongs and begin in an immediate way to undo the legacy of the genocidal policies of the past.<sup>36</sup>

This raises the issue of why so many tribes lack federal recognition. The BIA established the Federal Acknowledgment Project<sup>37</sup> in 1979. It put in place a formal procedure whereby Indian tribes could individually petition for federal recognition as legal tribal entities. The first requirement (of seven "factors") is that each unrecognized tribe provide historic evidence of its own existence: "The tribe must prove its existence as a functional entity from historical times to the present."<sup>38</sup> Under this requirement, the petitioning tribe has the burden to establish "ancestry as a tribe, not simply Indian ancestry."<sup>39</sup> But the process was generally so cumbersome and the documentation requirements so formidable that by 1994 only ten tribes had achieved formal recognition, out of 164 petitions.<sup>40</sup> There is cause to ask, should the law be the instrument of restorative justice or an impediment to it? Is nonrecognition of otherwise duly constituted, historically documented Indian tribes simply a form of ad hoc legal genocide?

In any event, the tribes that are federally recognized face their own struggles for cultural preservation—beyond their immediate economic exigencies. Unlike the Federal Acknowledgment Project, the purpose of Gover's speech was to provide an acknowledgment from the other side. In Gover's eyes, it was time (that is, long overdue) for the federal government to formally acknowledge what it had done historically, to confess what it cannot now undo, yet to redress by way of what it should and must do now and in the future. Reflecting on the purpose and significance of his speech, Professor Gover writes,



My purpose was not to lay the groundwork for reparations. It certainly was not to apologize for my own conduct. Indeed, when I say I attempted to lay down a policy marker of the things the Bureau would never do again, I really think the line had already been drawn. In the end, I apologized for the Bureau as a matter of unfinished business. The BIA had long since forsworn any return to the terminationist/assimilationist policies of the past. I am confident that the BIA will never support such policies, for the simple reason that the BIA is made up of Indians. I said what I wished somebody had said to me when I was a child: that there is nothing wrong in being Indian, that Indians did not deserve what happened to them, that it should not have happened, that the United States was wrong, that Indians deserved then, and they deserve now, to be treated as human beings.<sup>41</sup>

The healing can only begin if the "never again" promises truly mark the end of failed and tragic policies. Reparations alone, unless carefully conceived and implemented, may be nothing but a pay-off that has a symbolic significance at best. An apology alone is insufficient. Yet it is a place to start. But at no time did it ever rise to the status of an official federal apology, as Gover is careful to point out:

It was not meant to result in any tangible outcome, and certainly not to support reparations. I understand why many Indians seek reparations, but you know what? If the United States tomorrow decided to give us each a million dollars, that would be great, but it would still owe us an apology! At least it now can be said that the BIA has apologized. The BIA still owes much to Indian Country, but it no longer owes an apology, and a small but important bit of its historical debt to the tribes has been paid.<sup>42</sup>

It is painfully obvious that the federal government has not yet apologized to the Indian peoples, but a federal agency has. The need to do so had weighed heavily on Gover's heart. It was not so much that the right time had come but the right person. In Gover, the right man had the right idea. And that is what made the time right, the opportunity golden, and the moment historic.

Gover further reflected: "I felt as though the apology was a spiritual undertaking. Don't get me wrong, I am no holy man. But the agency I'd inherited owed Indians an apology as a matter of spirit as well as fact, and I was grateful to be the one to do that." So there was a "spiritual"

dimension to the apology, and that spirit touched and moved those who were receptive to it. The fact that the speech both succeeded and failed is not unlike a thing of beauty: its worth is in the eye of the beholder.

That many American Indians had a jaundiced view of the speech does not, in itself, detract from the need for the speech, nor its importance. Regardless of what its reception would be—and the reaction, as said before, was mixed—the apology still needed to be made. “It does not matter to me that the apology did not resonate throughout Indian Country,” Gover notes. “No apology could.” The reasons are all too clear: “So many Indians are lost to addiction, or anger, or fear, that any apology is inadequate to heal the soul wound of every Indian.” Gover further reflects: “It’s enough for me that the people who were there that day, most of them, were uplifted, even if only for a moment, and that perhaps some Indian child will read it someday and take it to heart.”<sup>43</sup> To that future child, Gover’s BIA apology may have its own special meaning. And this paper has argued that the significance of the speech extends far beyond Indian Country. But to what extent will the conditions of that future child differ from the present? If cycles of poverty, addiction, and despair are self-perpetuating, then major policy changes are needed. Gover’s apology hinted at these, but offered no substantive policy initiatives that the BIA might undertake to bring about reform.

What, then, is the wider significance of Gover’s apology? Although his apology did not—as Gover pointed out—and probably could not resonate throughout all Indian communities, it did, in fact, reach a much wider audience. In 2004, the Oxford University Press published a monograph, *On Apology*. In an excursus on the author’s “Personal Reflections,” Dr. Aaron Lazare (professor of psychiatry at the University of Massachusetts Medical School) discloses that, of all of the apologies that he has studied, Gover’s ranks alongside President Lincoln’s as the most poignant:

I find the apologies from Lincoln and Gover to be heart-wrenching, the most difficult of all those I describe in this book to read without tears. I suspect that the quality and specificity of the narratives contribute to that response, but I also experience a feeling of profound shame when I read them, because it is my country and my people who are the culprits. . . . Even though I have never personally harmed an African American or Native American, I feel shame for what happened to these populations, because they reflect (and should reflect) very badly on every citizen of the United States. . . . Accepting these responsibilities is part of what we mean when we speak of having a national identity.<sup>44</sup>

Gover spoke of a time in the future when the BIA would be seen as progressive rather than oppressive: "Together, let us resolve that when our future leaders gather to discuss the history of this institution, it will be time to celebrate the rebirth of joy, freedom, and progress for the Indian Nations." However, an apology that primarily expresses regret may be cathartic without being constructive. Much more than a "mere" apology is needed. As it stands, Gover's BIA apology, while long overdue, is not enough. No apology can be an end unto itself. For a government apology to be restorative, it must be reparative.

### **VISION AND REVISION: PROPOSALS FOR REFORM**

One colleague, in reviewing a prepublication draft of this article, pointed out:

Finally, and very importantly, the author offers no holistic theory of what appropriate redress for Indian nations might look like. Why educate children about the awful history of U.S.–Indian relations unless to some teleological purpose? What is the point? Ostensibly, we hope those children will grow up to become adults with an interest in reconciliation and redress, but the author does not state as much, nor does he suggest the microprocesses whereby this might happen.

The reviewer is right. To remedy the problem, I will summarize, to the best of my understanding, the latest and most comprehensive set of proposals for legal reform of federal Indian law.

In his recent article (I viewed a prepublished version) "Beyond Reparations: An American Indian Theory of Justice,"<sup>45</sup> William C. Bradford reviews three theories of justice: (1) Justice as Supersession (JAS); (2) Justice as Compensation (JAC); (3) Justice as Restoration (JAR)—to which he adds a fourth: (4) Justice as Indigenism (JAI). Professor Bradford writes, "As applied, JAI commits its practitioners to a sequential process consisting of seven distinct stages: acknowledgment, apology, peacemaking, commemoration, compensation, land restoration, legal reformation, and reconciliation" (72). On first blush, these appear to be eight stages. But legal reformation is "the capstone in a broader structure of remedies, including the restoration of Indian lands and the reconciliation between Indian and non-Indian peoples" (103). Thus, Bradford's seven stages culminate in final reconciliation.

Acknowledgment: Bradford urges Congress to establish and fund "The American Indian Reconciliation Commission" (AIRC)—a truth and reconciliation commission modeled on South Africa's. This pro-

posed body "would consist of equal numbers of Indians and non-Indians and include tribal chairpersons and national elected officials; jurists, lawyers, and scholars versant in federal Indian law, tribal legal systems, and indigenous rights regimes; and clergy" (43). The outcome of all these hearings would be a final report and recommendations: "Upon conclusion of its hearings, AIRC would send a Final Report to Congress and the President with nonbinding remedial recommendations, to include apologies, compensation, land restoration, and other measures to promote and protect self-determination" (43). In a message to the author, dated September 25, 2005, Professor Gover comments on the first of Professor Bradford's proposals:

I don't think this [is] necessary. We are wonderfully free to publish the truth about what happened. While for many years the media created the myth of dashing cavalryman and the brave cowboy, these stereotypes have been turned on their heads since the 1960s. Consider the difference in the way Custer was portrayed in "They Died with Their Boots On" and how he was portrayed in "Little Big Man." No reconciliation commission is necessary to dig out the truth. We know what it was, and we are free to say what it was.

Apology: Bradford then advocates a formal apology "on behalf of the U.S. and all its citizens past and present, as symbolic recognition of the role of public and private actors in past acts of genocide, land theft, and ethnocide" (43). Although Kevin Gover's 2000 apology was official in that it was formally made on behalf of the BIA, the apology, as already noted, lacked the backing of federal government as a whole. Gover was present, but President Clinton was conspicuously absent. Although Bradford does not directly mention Gover's apology, he alludes to it in his discussion of commemoration: "Thus, commemoration functions as a sort of moral commitment device that speaks the message, 'Never again,' in a language accessible to all" (48). (I would add that not only the language but the apology itself should be accessible to all people—first to the American Indians and then to the wider public.) Professor Gover wholeheartedly agrees: "I agree. The United States should apologize through the Congress and the President."

Peacemaking: This, in turn, leads to peacemaking. Bradford proposes a "U.S.–Indian TPM Conference (USITPMC)" composed of "the most respected elder Indian and non-Indian statesmen as peacemakers" whose task is to "collect and merge spiritual and secular values common to both Indian and non-Indian cultures and urge negotiators to envision a future when all U.S. citizens, Indian and non-Indian, are full and equal members of one great nation" (47). "Although the recommendations of USITPMC need not be binding," Bradford adds, "remedies

agreed upon could be committed to paper and transmitted to Congress as the basis for legislative action." Essentially, the USITPMC is a "think-tank" whose task is to propose incremental yet sweeping policy reforms. To be sustainable, public policy initiatives require popular support. Consensus on reparations can be built only on common values. Professor Gover is of a different opinion: "I see no value in this. The political leaders of the tribes have demanded, and broadly have received, the right to participate in Indian policy-making in both the executive and legislative branches."

**Commemoration:** When a past injustice is memorialized, it is, in a real sense, institutionalized. By establishing national and regional monuments to solemnize and memorialize the physical and cultural genocide suffered by the American Indian peoples, commemoration of past injustices would serve as a present commitment to reparative steps to redress past injustices and their current effects. While the order is not critical, reversing stages three (peacemaking) and four (commemoration) might enhance the continuity of the process and the progression Bradford envisions. In his response to this fourth proposal, Professor Gover remarks:

I agree. It is important for the United States to own its history. It does that through monuments and such. The changes at the Little Bighorn Battlefield and the soon-to-be-created Sand Creek monument are a good start. Tribes should also seek out all of those horrible state historical markers that provide a distorted version of the encounters between Indians and whites and insist that they be changed.

**Compensation:** Although money can never make the Indian nations whole, Bradford cautions that "any wealth transfer from the U.S." must act "as a symbolic act undertaken in further recognition of moral responsibility, rather than a settlement of claims" (48). This remedial restoration is a rightful position standard that is not an end in itself but a means to an end. To this proposal Professor Gover gives a laconic response: "No comment."

**Land restoration:** Of far greater moment is the restoration of rightful Indian territory wrongly taken. In a process that legal historians occasionally refer to as "land theft," treaties were negotiated to "treat away" Indian lands and extinguish their rightful claims to them. Treaties were expedients—licenses to steal—which were then to be broken. Yet inherent sovereignty is never extinguished. "Indians are entitled to the restoration of their ancestral lands to the furthest limits of reason and equity," Bradford urges, for this is a "necessary precondition for the exercise of the powers of self-government, the generation



of wealth, the propagation of culture, and the expression of religious belief" (49). Land restoration is an absolute prerequisite for Indian sovereignty and self-determination.

Bradford hastens to add, "the transfer of sovereignty over territory need not disturb private land titles" (50). Rather, he "envision[s] that the process of land restoration will be undertaken in the least disruptive fashion possible: non-Indians are encouraged to remain in possession of their real property entitlements on the sole condition that they agree to live in peace with their Indian neighbors under Indian sovereignty" (51). While the operational details Bradford proposes are beyond the scope of this paper, he notes that "hundreds of millions of acres exist in connection with which there are few conflicting claims" and that "a creative strategy for identifying suitable and appropriate lands wherein to transfer some quantum of sovereignty" is entirely possible (53). This land reform leads to legal reform.

Professor Gover agrees with this proposal in essence but says, "This is happening already, albeit very slowly. Tribes have learned how to go about reacquiring land, and the United States has been cooperative in many circumstances. On the other hand, the return of the Black Hills just isn't going to happen in our lifetimes." If this egregious "land theft" were to be officially acknowledged and apologized for, as Professor Bradford proposes, then perhaps the process of land restoration may be accelerated, once it is prioritized on the national agenda. Expediting this important legal remedy will go far in restoring, as much as possible, American Indian nations to their rightful position, even though they will never be made whole.

Legal reformation: Indian nations have a unique trajectory of legal history outside as well as within the Constitution. Indian history may be periodized as the Age of Sovereignty (1789–1870), the Age of Assimilation (1871–1934), The Indian New Deal (1934–1945), Assimilation Revisited (1945–1969), and The Age of Self-Determination (1969–present).<sup>46</sup> We are in the era of Indian self-determination. But is it the age of Indian sovereignty? Courts have long recognized that Indian nations are inherently "distinct, independent political communities, retaining their original natural rights"<sup>47</sup> as to their local autonomy and self-government. Indian tribes constitute a "separate people, with the power of regulating their internal and social relations."<sup>48</sup> The Indian peoples possess "the right . . . to make their own laws and be ruled by them."<sup>49</sup> How empowered, then, are tribes to exercise their self-determination?

Bradford advocates full Indian self-determination, with all of the rights to restored sovereignty that this implies. "Under this approach, which might well be implemented by the resumption of the treaty-making process, the presumption against autonomous tribal self-governance, gradually accreting since the early 19th century, would be

overturned," Bradford suggests, "and tribes would once more be presumed to possess near-absolute territorial autonomy complete with the powers to create and enforce laws over all persons within their jurisdiction in respect to all issue-areas, save for commerce and the dimensions of external sovereignty—i.e., foreign relations and defense" (55).

Even more concretely, Bradford advocates passage of an "Omnibus Indian Rights Act" buttressed by constitutional amendments that would fundamentally redefine federal Indian law vis-à-vis Indian self-determination. Under this plan, "four primary reform measures" would (1) strengthen protections of Indian religious and cultural rights; (2) establish "specific and enforceable trust-based remedial programs for Indian beneficiaries"; (3) establish "new judicial institutions committed to resolving ambiguities and construing treaty terms in favor of tribal reserved rights and to the enforcement of the trust doctrine"; and (4) incorporate "those principles of international law supportive of the rights of Indians as indigenous peoples" (56).

Judicially, Bradford proposes an independent, Article III "Court of Indian Affairs" on whose benches would sit "Indian judges schooled in the history of U.S.–Indian relations" and, having appellate jurisdiction, would be empowered "to hear cases sounding in federal Indian law and competence to award restitution of Indian lands and rights" (57). Bradford would also create Article I courts and such federal agencies as would, through their quasi-legislative rulemaking authority, effectively rework the trust doctrine within a separation of powers framework (57). The Article I courts, "when adjudicating cases affecting Indian rights," would "appoint a special master fluent in Indian legal issues to hear the merits" (57). Bradford further proposes an "Indian Assembly," but it is not quite clear whether this would be an independent agency within—or an advisory body outside—of the federal system.

There are three constitutional amendments that Bradford deems necessary to successfully effect this peaceful revolution. In reverse order: (1) one amendment is required to "restore or confirm the status of Indian tribes as entities superior to the States in the federalist hierarchy"; (2) another amendment would "recognize Indian property as within the full meaning of the protections of the Fifth Amendment Takings and Just Compensation clauses of the U.S. Constitution"; and (3) the third amendment would "renounce plenary power or permit devolutions of power that enhance tribal autonomy and sharply limit the subject matter and issue-areas in which Congress may treat Indian tribes as domestic dependencies" (58) and that might, in turn, effect "an eventual resumption of treaty-making with Indian nations" (58). This appears to be a comprehensive plan to transform the "ward" status of tribes, under the current trust doctrine, into domestically sovereign nations that yield only external sovereignty to the United States as a kind of concurrent sovereignty. This is Professor Gover's response:

I believe there is utterly no chance that the Constitution will be amended, so I'll not comment on the specifics. I agree that many reforms are needed. I also believe that the knowledgeable observer must acknowledge that the last forty years of Indian policy making have worked an extraordinary change in Indian affairs. We are no longer struggling to survive. That battle is over. Now we are trying to learn to flourish. That will take time, but current policy makes it possible. Never forget that fifty years ago, the United States was still trying to finish off tribal governments. We can never assume that this policy will not make a return, but it seems unlikely.

Reconciliation: What is effectively Bradford's eighth stage "imposes a duty not upon the U.S. but upon Indian people" (60):

If the U.S. restores a meaningful measure of land to Indian tribes and amends its legal and political order to ensure respect for and protection of fundamental Indian rights to self-determination, a new regime of peace and justice worthy of emulation and export must be rewarded with the most precious gift Indians can bestow: forgiveness. By forgiving the U.S. and all its people in a solemn ceremony broadcast globally to symbolize the dawn of the new relationship, Indians will finally be allowed to heal, and all Americans will be released from the chains of history and freed to forge a better tomorrow. The U.S. and Indian tribes are not only intertwined geographically and historically, they are interdependent. Indian autonomy and prosperity on the one hand, and U.S. legitimacy and global leadership on the other, are inseparable, with each a necessary condition for the full realization of the other. (60–61)

This statement is quoted at length to best capture and convey the good-faith spirit of these sweeping, yet conceivably pragmatic, proposals. On this eighth and final proposal, Professor Gover remarks: "This is a fine vision, and one that I endorse."

In a sentiment showing that a dual Indian-American patriotism is possible, Bradford states: "Despite its imperfections, the U.S. is an exceptional nation, and the greatest exponent of liberty the world has ever known" (61). He hastens to add, however, that America's world role can only be as effective as its moral authority allows, and that includes, first and foremost, structural justice for its indigenous and other oppressed minorities.

Although Bradford characterizes his proposals as "stages," their sequence need not be predetermined. A single constitutional amendment, for instance, might be a first rather than last resort, and both statutory and case law would flow from such a reconfiguration of constitutional powers. Essentially what Bradford does is to place a governmental apology within a broader perspective, whereby the apology becomes part and parcel of the reparations process. To effectively pursue a reparations agenda—even if motivated purely by enlightened self-interest—both federal and state governments—and American Indian tribes, both recognized and unrecognized—must begin with an official apology rather than end with it. Such an apology as Gover's opens old wounds but cannot heal them. At best, it is a balm, but not a cure. Whether future reparations take the shape of Bradford's proposals or other forms, Kevin Gover's speech is probably the best place to start in terms of enlisting public support for the public-policy initiatives that will be needed to begin the process of healing. "Reparations" is simply a synonym for "healing." Without reparations, there can be no healing. Reparations of some kind will determine the ultimate success or failure of Gover's apology. Both Indians and non-Indians will be crucial in the process.

In his historic September 8, 2000, BIA apology, Assistant Secretary Kevin Gover officially represented the BIA (as its head). He acted in advance of his own government. In a sense, Gover took the leadership role for the U.S. government with respect to Indian peoples. But President Clinton did not follow. Perhaps another president will.

The BIA apology essentially was a progressive contradiction in terms of existing federal policy. In a real sense, Gover also represented the sovereign Indian nations themselves (as their effective advocate in his capacity as the highest-ranking Indian official in the land). And so the "Briefcase Warrior" did the impossible: he semi-officially apologized for a government that has yet to officially do so. It was a singular achievement—a signal victory. But the victory was little more than symbolic—a signal, a gesture, a stated intention, semi-official rhetoric that could be the truth or a lie or somewhere in between in terms of its future implementation. One wonders whether the U.S. government will fully back and act on Gover's historic initiative, to transform the present effects of the BIA's past harms into future good.

While courts test cases and controversies, history and ultimately public opinion will test the courts. As Supreme Court Chief Justice William Rehnquist has noted in dissenting dicta: "That there was tragedy, deception, barbarity, and virtually every other vice known to man in the 300-year history of the expansion of the original 13 Colonies into a Nation which now embraces more than three million square miles and 50 States cannot be denied."<sup>50</sup>

Progress necessitates redress. Educators—Indian and non-Indian alike—can and should work together to effect a sea-change in pub-

lic opinion on Indian issues. Public opinion ripens into public policy. Gover's apology can be instrumental in this process. With considerable effort, the present writer has obtained the video of Gover's BIA apology. Legally, it is public domain. Yet it has not effectively entered the public domain, the civic sphere where the apology—and the issues it so dramatically addresses—can be seen for the first time by audiences who knew nothing of its existence and even less about its significance.

As an educator, I feel strongly that Professor Gover's speech should be brought back to intellectual and institutional life, to become the gold standard by which progress may be measured in Indian affairs. If nothing else, this singular speech should be integrated into the curriculum of every high school and university across the nation, so that the "Never Again!" speech elicits the assent of each new generation of Americans, that they may, one day, carry forward its mandate for the economic, social, and spiritual reconstruction of Indian nations. If the fact that "Federal Indian Law" is now required on the bar exams of New Mexico<sup>51</sup> and Washington<sup>52</sup> is any indication of a new legal trend, then more non-Indian lawyers may have the opportunity to become advocates for American Indian rights on the path back to self-determination for Indian nations—and legal recognition of their inherent sovereignty—leading to a symbolic redemption of America itself, by making things right. Kevin Gover could not and cannot fight the cause of redress for American Indian peoples alone. The BIA's spirit is willing, but the agency's ability to effect reparations is weak. Other "briefcase warriors" will have to fight to make peace. And it remains for the "private public"—those in the private sphere who may shape public policy—to really begin the healing. Kevin Gover's historic BIA apology added impetus to that process. As public domain legally, Gover's speech should become public domain educationally, if the tide of reparative intransigence is to be turned.

# NOTES

My thanks to Dr. Kevin Gover, professor of law and affiliate professor of the American Indian Studies Program of the College of Law at Arizona State University, for reading an earlier draft of this paper and for providing valuable comments. Thanks also to Dr. William C. Bradford, Chiricahua Apache and professor of law, and Philip Prygoski, professor of constitutional law at Thomas M. Cooley Law School for their suggestions. Any and all errors are my own, for which I take full responsibility.

University and college professors (as well as high school teachers) who wish to obtain a DVD of the 175th Anniversary of the Establishment of the Bureau of Indian Affairs for classroom use may e-mail their requests directly to the author at [dr.christopher.buck@gmail.com](mailto:dr.christopher.buck@gmail.com). On averaging duplicating, packaging, and shipping expenses, Dr. Buck will determine a nominal fee to cover costs.

- 1 Kevin Gover, "Special Feature: Remarks at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the

Bureau of Indian Affairs," *American Indian Law Review* 25:161–63.

- 2 For the early history of the BIA, see Felix S. Cohen, "Chapter 1: Historical Development and Background of Indian Policy," in *Cohen's Handbook of Federal Indian Law*, 2005 edition, ed. Nell Jessup Newton (Newark, N.J.: Lexis-Nexis Matthew Bender, 2005).
- 3 "Termination" refers to Congress's attempt, beginning in 1953, to end the Indian tribes' special trust relationship with the federal government and to "terminate" federal responsibility to American Indians by making them more self-reliant and less dependent on federal funds. As the new Commissioner of Indian Affairs, the man put in charge of executing this failed policy was Dillon Myer, who oversaw the internment of Japanese-Americans during World War II.
- 4 Steve Russell, "Kevin Gover: Briefcase Warrior," NativeWeb (2000), [http://www.nativeweb.org/nativelaw/nw\\_legal/russell\\_gover.html](http://www.nativeweb.org/nativelaw/nw_legal/russell_gover.html).
- 5 "Kevin Gover," American Bar Association, <http://www.abanet.org/publiced/rbgover.html>.
- 6 Brian Stockes, "Gover Apologizes for Atrocities of the Past," *Indian Country Today*, September 20, 2000, <http://www.indiancountry.com/content.dfm?id=631>.
- 7 "Responses to Kevin Gover Speech," September 14, 2000, [http://www.rosecity.net/cherokee\\_trails\\_newsletter/links/response.html](http://www.rosecity.net/cherokee_trails_newsletter/links/response.html).
- 8 Rose Weston, "Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States," *Arizona Journal of International and Comparative Law* 18, no. 3 (2001): 1017–59 at 1048.
- 9 Ibid., 1050.
- 10 See *Cobell v. Babbitt*, 37 F.Supp.2d 6 (1999) (finding defendants Secretary of the Interior, Assistant Secretary of the Interior for Indian Affairs, and Secretary of the Treasury in civil contempt of court for discovery abuse); 1999 U.S. Dist. LEXIS 20918 (D.D.C. 3 December 1999) (adopting special master's report as to unlawful destruction of records and further discovery abuses), affirmed, 240 F.3d 1081 (D.C. Cir. 2001); and 226 F.Supp.2d 1 (D.D.C. 17 September 2002) (holding additional contempt). See also documents archived online: Indian Trust—*Cobell v. Norton*, <http://www.indiantrust.com/>.
- 11 This term was used by Dr. Patrick LeBeau, former director of the American Indian Studies Program at Michigan State University, during his guest lecture in the present writer's class on "Religious Myths of America," where I first showed the Gover speech on video on February 9, 2004. Professor LeBeau was correcting me after I had referred to all the "red tape" I had encountered in my efforts to obtain a copy of this unedited, unreleased video. Professor LeBeau said something to this effect: "We [American Indians] don't see that as 'red tape.' We call it 'white tape.'"
- 12 Apparently, I am the first individual ever to request this video, according to Dr. Phil Bellfy, professor of American Indian Studies at Michigan State University and winner of the Best Indian Prose Award for 2003 from the University of Nebraska. I have had the tape digitized and plan to make it available for a wider audience. Fortunately, the video is public domain. Kevin Gover, personal communication, May 22, 2003: "As far as I'm concerned, you're free to make any use of it you



wish. Legally speaking, the text is the property of the government and therefore in the public domain. Hope you are able to locate a copy."

- 13 See Duane P. Schultz, *Month of the Freezing Moon: The Sand Creek Massacre* (New York: St. Martin's Press, 1990).
- 14 James S. Olson, "Sand Creek Massacre," in *Encyclopedia of American Indian Civil Rights*, ed. James S. Olson (Westport, Conn.: Greenwood Press, 1997), 318.
- 15 Brenda Smiley, "Sand Creek Massacre," *Archaeology* 52, no. 6 (November/December 1999), <http://www.archaeology.org/9911/newsbriefs/sand.html>.
- 16 General Conference of the United Methodist Church, "Support Restitution to the Cheyenne and Arapaho Tribes of Oklahoma for the Sand Creek Massacre," <http://www.umc-gbcs.org/issues/resolutions.php?resolutionid=175>.
- 17 Olson, "Sand Creek Massacre," 318.
- 18 Jerome A. Greene, *Washita: The U.S. Army and the Southern Cheyennes, 1867-1869* (Norman: University of Oklahoma Press, 2004).
- 19 Herman J. Viola, *Trail to Wounded Knee: The Last Stand of the Plains Indians 1860-1890* (Washington, D.C.: National Geographic Society, 2004).
- 20 William C. Bradford, "Beyond Reparations: An American Indian Theory of Justice," Working Paper Series, Social Science Research Network Electronic Library 6, (2004), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=515231](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=515231).
- 21 Brenda J. Child, *Boarding School Seasons: American Indian Families, 1900-1940* (Lincoln: University of Nebraska Press, 1998); David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928* (Lawrence: University Press of Kansas, 1995).
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- 23 See D. Marie Ralstin-Lewis, "The Continuing Struggle against Genocide: Indigenous Women's Reproductive Rights," *Wicazo Sa Review* 20, no. 1 (Spring 2005): 71-95, and the literature cited.
- 24 Bradford, "Beyond Reparations," 4.
- 25 Kevin Gover, personal e-mail communication, September 26, 2004.
- 26 Kevin Gover, "We Shouldn't Have (Indian) Trust in the Supreme Court," *Indian Country Today*, August 16, 2002, <http://www.indiancountry.com/content.cfm?id=1029505873>.
- 27 William Bradford, personal e-mail communication, October 17, 2004.
- 28 Matt Kelley, "Departing B.I.A. Head Says Work Isn't Done," *Albuquerque Journal*, December 26, 2000, 1, [http://www.abqjournal.com/archives/2000/arch\\_2000\\_501.html](http://www.abqjournal.com/archives/2000/arch_2000_501.html).
- 29 Senate Report 108-310 - "To Acknowledge a Long History of Official Depredations and Ill[-]conceived Policies by the United States Government Regarding Indian Tribes and Offer an Apology to all Native Peoples on Behalf of the United States," [http://thomas.loc.gov/cgi-bin/cpquery/R?cp108:FLD010:@1\(sr310\)](http://thomas.loc.gov/cgi-bin/cpquery/R?cp108:FLD010:@1(sr310)).
- 30 S. J. RES. 37 [Report No. 108-310] (May 6, 2004), <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SJRes00037:%7C>.

- 31 Evidently, the last congressional action occurred on June 15, 2004, when the bill was placed on Senate Legislative Calendar under General Orders. Calendar No. 638. See "Bill Summary & Status for the 108th Congress," <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SJ00037:@@X>.
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- 37 William W. Quinn Jr., "Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept," *American Journal of Legal History* 34 (October 1990): 331-64.
- 38 Quoted in Mark Baxter, "Federal Acknowledgement Project," *Encyclopedia of American Indian Civil Rights*, 123.
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- 42 Ibid.
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- 47 *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).
- 48 *U.S. v. Kagama*, 118 U.S. 375, 381-82 (1886).
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- 52 Sara Jean Green, "Indian Law Will Be Added to Bar Exam," *Seattle Times*, October 23, 2004, [http://seattletimes.nwsources.com/html/localnews/2002070849\\_indianlaw23m.html](http://seattletimes.nwsources.com/html/localnews/2002070849_indianlaw23m.html).

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