

## INDIGENOUS LANGUAGES UNDER SIEGE: THE NATIVE AMERICAN EXPERIENCE

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*It's soul-satisfying to be able to read and speak your own language.*

— Richard Littlebear, Northern Cheyenne<sup>1</sup>

*[L]anguage is so important, because it is one thing that we can keep alive, that can never change. If we're able to keep our language going, we'll be able to pass on knowledge, from generation to generation. Without it, we're going to lose so much. We're going to be just like everybody else. We can tell them . . . this is how it was . . . . We used to dance, but we don't know our songs. We used to have these traditional activities, but we can't do them no more, because we can't talk. We would lose so much without our language.*

— Dorothy Rock, Santa Clara<sup>2</sup>

*Language is at the heart of our sociocultural systems of kinship and identity.*

— Professor Christine Sims, Acoma<sup>3</sup>

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<sup>•</sup> Professor of Law, New England School of Law; J.D., University of Michigan, 1987; A.B., Georgetown University, 1984.

<sup>1</sup> James Hagengruber, *Cheyenne Language Surviving*, Canku Ota, Nov. 3, 2001, [http://www.turtletrack.org/Issues01/Co11032001/CO\\_11032001\\_Cheyenne\\_Language.htm](http://www.turtletrack.org/Issues01/Co11032001/CO_11032001_Cheyenne_Language.htm). Dr. Littlebear is the President of Chief Dull Knife College in Lama Deer, Montana. *Id.*

<sup>2</sup> Jodi Shultz, *Language and Identity Among New Mexico Pueblos*, 2000, <http://si.unm.edu/Web%20Journals/Articles/Jodi%20Shultz.html> (last visited Feb. 26, 2008) (quoting HOLGER S. SCHULTZ, PUEBLO VOICES: DEFINING THE ROLE OF PUEBLO EDUCATION 172-73 (1998)).

<sup>3</sup> *Recovery and Preservation of Native American Languages: Field Hearing before the House Comm. on Education and the Workforce*, 109th Cong. 29 (2006) [hereinafter *2006 NALA Amendments Hearing*] (statement of Ryan Wilson,

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The title of this year's Tribal Sovereignty Symposium, "Indigenous and Minority Languages under Siege," conjures up images of these languages being set upon by enemies and perhaps fighting for their very survival. This is an accurate picture, news reports and scholarly studies tell us, where the languages of many Native American tribes are concerned. With each passing year, it seems, there are several more reports of the last fluent speaker of a Native American language passing away. In 1996, for example, Red Thunder Cloud, the last speaker of Catawba, died, and, in the words of one journalist, took "to the grave the last human link to the ancient language of his people."<sup>4</sup> In January of this year, Marie Smith Jones, a Native Alaskan who was the last fluent speaker of Eyak and worked with linguist Michael Krauss on an Eyak dictionary and grammar, passed away.<sup>5</sup> The loss of indigenous languages is certainly not confined to North America. A linguistic race against time is currently underway, for example, to gather information from an 82-year-old woman who is the last known speaker of Dura, the language of the Dura ethnic group of Nepal; the other remaining speaker died last year.<sup>6</sup>

In a congressional hearing on language recovery and preservation, held in the summer of 2006, one witness noted that linguists believe that there were approximately 300 languages spoken in North America prior to 1492.<sup>7</sup> Of the languages that are still in use in Native American communities, it is estimated that only twenty will remain viable by 2050.<sup>8</sup> In a Senate hearing held in 2000, linguist Michael Krauss offered estimates of the number of Native

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President of the National Indian Education Association).

<sup>4</sup> David Stout, *Red Thunder Cloud, 76, Dies, and Catawba Tongue with Him*, N.Y. TIMES, Jan. 14, 1996, at 33; see also Pamela M. Walsh, *Red Thunder Cloud, Efforts Helped Preserve Catawba Language: at 76*, BOSTON GLOBE, Jan. 14, 1996, at 44 (noting that the Catawba Nation credited Red Thunder Cloud with "single-handedly keeping its language and much of its culture alive for the past 40 years").

<sup>5</sup> Mary Pemberton, *Obituary, Marie Smith Jones, 89, Last Full-blooded Alaskan Eyak*, BOSTON GLOBE, Jan. 25, 2008, at B6. Ms. Jones was 89. See *id.*

<sup>6</sup> Andrew Buncombe, *Battle to Save the Last of Nepal's Dura Speakers*, INDEP., Jan. 17, 2008, at 28.

<sup>7</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 17.

<sup>8</sup> *Id.*

American languages that fall into several categories of endangerment, based on the age of those who speak them. Of the approximately 175 living languages, spread over 29 states, about 20 (11%) are still spoken by children as well as adults; about 30 (17%) are spoken by parental generations and up; about 70 (40%) are spoken by the grandparental generation and up; and about 55 (30%) “are very nearly extinct, and will be gone in the next 10 years, unless something radical is done.”<sup>9</sup> Even those languages that are still spoken by children cannot be considered safe. Krauss noted, for example, that 20-30 years ago, Navajo was spoken by 90% of 6 year olds; today it is spoken by only about 50% of them.<sup>10</sup>

How have Native American languages, like the languages of other indigenous peoples around the world, arrived at this crisis stage? Is this simply the result of the passage of time, in an environment in which non-Native American society’s sheer numbers, and its ever-present English-language media, including the “cultural nerve gas of television,”<sup>11</sup> inevitably swamp Native American languages and lead to their replacement by English? Or has this situation resulted from more deliberate action on the part of the dominant society, acting through its laws and other mechanisms of government power?

We should also ask, given that so many Native American languages are threatened with extinction today, what can and should be done about this situation? In particular, what role can and should the government of the United States play in stabilizing, preserving, and even revitalizing Native American languages?

In this article, I would like to share some thoughts on the answers to these questions. First, in Part I, I discuss the history of

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<sup>9</sup> *Native American Languages Act Amendments: Hearing on S. 2688 Before the Senate Comm. on Indian Affairs*, 106<sup>th</sup> Cong. 30-31 (2000) (statement of Michael Krauss, Director of the Alaska Native Language Center, University of Alaska -- Fairbanks).

<sup>10</sup> *Id.* at 31.

<sup>11</sup> James Brooke, *Indians Striving to Save Their Languages*, N.Y. TIMES, Apr. 9, 1998, available at <http://query.nytimes.com/gst/fullpage.html?res=9A02E7D8173DF93AA35757C0A96E958260&sec=spon=&pagewanted=2> (quoting Michael Krauss).

the U.S. government's policy toward Native American languages, to see how the laws of the past contributed to the threats posed to Native American languages in the present. Situating the current issue of language preservation in this historical context promotes not only an understanding of how the present situation arose, but also suggests a responsibility on the part of the U.S. government to make a meaningful effort to remedy the devastating contemporary effects of its past policy toward Native American languages – a policy that the government itself has disavowed. After this examination of the law of the past, Part II moves on to consider the law of the present, to see how current U.S. law addresses Native American languages, most notably through the Native American Languages Acts of 1990, 1992, and 2006. Finally, Part III discusses the responsibility of the U.S. government to take on a greater role in fostering the preservation, stabilization, and revitalization of Native American languages.

*I. The Law of the Past – The Historical Treatment of Native American Languages*

To take away a people's language is to begin to conquer them.<sup>12</sup>

If the people lose their language, they will lose their identity. They will be in the mainstream, falling through the rocks.<sup>13</sup>

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<sup>12</sup> 152 Cong. Rec. E1894-02 (Sept. 28, 2006) (statement of Rep. Rick Renzi, who attributed the statement to “a wise friend”).

<sup>13</sup> Brenda Norrell, *Cyber O'odham: An Ancient Language Goes on the Internet*, INDIAN COUNTRY TODAY, May 4-11, 1998, at A1 (quoting Rosita Whitehorse, an O'odham language teacher).

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*A. The Initial Onslaught: European Languages  
Arrive in North America*

Generations before the U.S. government became involved in teaching English to Native Americans, Europeans arrived in North America and began to teach their languages to the tribes that they encountered. At the time that Native Americans first found some rather confused Europeans wandering on their land, they were part of a North American population that spoke hundreds of different languages.<sup>14</sup> In short, linguistic diversity has a very long heritage in the United States.

French- and Spanish-speaking missionaries, following in the footsteps of the explorers of the sixteenth century, were the first to teach their languages to Native Americans.<sup>15</sup> Thus, Spanish and French, rather than English, were North America's original European languages.

English began to establish a foothold after 1617, when King James I called for the education of Native Americans, which would include the teaching of English. Protestant ministers then began to establish institutions for the education of Native American youths, including Harvard College.<sup>16</sup> English missionaries put a heavy

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<sup>14</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 17.

<sup>15</sup> See ESTELLE FUCHS & ROBERT J. HAVIGHURST, *TO LIVE ON THIS EARTH: AMERICAN INDIAN EDUCATION 2* (1972) (Franciscan missionaries arrived in the southwestern part of the future United States with the Spanish explorer Francisco Vasquez de Coronado in the first half of the sixteenth century. They taught Spanish to Native Americans in Arizona, California, New Mexico, and Texas); see also Jon Reyhner & Jeanne Eder, *A History of Indian Education*, in *TEACHING AMERICAN INDIAN STUDENTS* 33, 35 (Jon Reyhner ed., 1992) (stating that French Jesuit missionaries served in the area along the St. Lawrence River, in the Great Lakes area, and in the area along the Mississippi River beginning in 1611); see also FUCHS & HAVIGHURST, *supra*, at 2; see generally Allison M. Dussias, *Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901 (1999) [hereinafter Dussias, *Waging War with Words*].

<sup>16</sup> See FUCHS & HAVIGHURST, *supra* note 15, at 2; see also Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819, 822-64 (2001) [hereinafter Dussias, *Let No Native American Child Be Left Behind*] (For a

emphasis on being able to read the Bible and religious works, so many of them promoted Native American literacy as part of their conversion efforts.<sup>17</sup> Some translated the Bible and other works into Native American languages,<sup>18</sup> so that their converts could read the Bible in their native language. These translations have today come to play a role that was unforeseen by those who composed them. Members of the Mashpee Wampanoag Tribe of Massachusetts are turning to the so-called Eliot Bible, the Bible translation prepared by English missionary John Eliot in the seventeenth century, as a key resource in their efforts to reconstruct and revitalize the Wampanoag language.<sup>19</sup>

Translating religious books into native languages was, however, seen as a temporary measure. Eventually, it was presumed, the Native Americans being educated by the English-speaking missionaries would speak English. Native Americans were thus expected to give up their languages along with the other “uncivilized” aspects of their cultures. This expectation was shared and acted upon by the government of the United States following independence.

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more extensive analysis of the history of European and U.S. government educational programs for Native Americans).

<sup>17</sup> See ROBERT F. BERKHOFFER, JR., *SALVATION AND THE SAVAGE: AN ANALYSIS OF PROTESTANT MISSIONS AND AMERICAN INDIAN RESPONSE, 1787-1862*, 2-6 (1965) (discussing organizations that focused on the spreading of the Gospel among the Indians and the importance attached to reading the Bible).

<sup>18</sup> See, e.g., JAMES AXTELL, *THE INVASION WITHIN: THE CONTEST OF CULTURES IN COLONIAL NORTH AMERICA* 184 (1985) (describing John Eliot’s translation of fourteen works into the Natick dialect).

<sup>19</sup> Anna Ash, Jessie Little Doe Fermino, & Ken Hale, *Diversity in Local Language Maintenance and Restoration: A Reason for Optimism*, in *THE GREEN BOOK OF LANGUAGE REVITALIZATION IN PRACTICE* 19, 28-29 (Leanne Hinton & Ken Hale eds., 2001) [hereinafter *THE GREEN BOOK*] (providing an excellent resource for materials on language revitalization challenges, methodologies, and programs).

*B. Establishing the Hegemony of English in Indian Schools*

Over time, and particularly after the establishment of the so-called “Peace Policy” in 1869,<sup>20</sup> the U.S. government became increasingly involved in Native American education and, consequently, in teaching English to Native American children. The government ran its own schools for Native American children, including both on-reservation schools and off-reservation boarding schools. The government also provided funding for so-called “contract schools,” schools operated by religious groups under contracts with the government.<sup>21</sup>

In 1885, the Bureau of Indian Affairs formalized an existing policy of ensuring the hegemony of English. An 1885 regulation for the so-called “Indian schools” provided as follows:

All instruction must be in English, except in so far as the native language of the pupils shall be a necessary medium for conveying the knowledge of English, and the conversation of and communications between the pupils and with the teacher must be, as far as practicable, in English.<sup>22</sup>

The policy applied both to government-run schools and to contract schools. The “Course of Study” developed for use in Indian schools designated learning English as the main focus of first-year students’ education.<sup>23</sup> After four years of instruction, students were expected to be able to speak English “fluently and correctly.”<sup>24</sup>

Why was replacing the students’ languages with English deemed so important? A couple of relatively benign reasons may come to mind. The English-only policy could have been developed by educators as just a matter of convenience. The policy could

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<sup>20</sup> See Dussias, *Waging War with Words*, *supra* note 15, at 909-11.

<sup>21</sup> See 1887 Comm’r Indian Aff. Ann. Rep. xxii [hereinafter 1887 Comm’r Indian Aff. Rep.].

<sup>22</sup> *Id.* at xx.

<sup>23</sup> See 1890 Comm’r Indian Aff. Ann. Rep., at clvi [hereinafter 1890 Comm’r Indian Aff. Ann. Rep.].

<sup>24</sup> *Id.* at clviii.

simply have been instituted as a means of creating a common language in schools that drew students from tribes that spoke a variety of languages. Alternatively, or additionally, the policy could have been developed to address the concern that in order to succeed, indeed, to even survive, in an economy and society dominated by speakers of English, Native Americans would need to speak English. Some government officials did in fact argue that replacing Native American languages with English was in the Native Americans' best interests, as they otherwise would be cheated in their business dealings with whites.<sup>25</sup> Contemporary writings of government policy makers, however, make it clear that for most of them, there were other motivations for imposing the English-only policy.

First of all, English was seen as a tool of assimilation and of promoting national unity. A passage in an 1868 report summed up this view: "Through sameness of language is produced sameness of sentiment, and thought; customs and habits are molded and assimilated in the same way . . . ."<sup>26</sup> Thus, English was expected to have a profound transformative and homogenizing effect on the Native Americans who managed to learn it.

Government officials were also convinced that language was inextricably tied to national character and thus to national unity. The Commissioner of Indian Affairs noted in 1887, for example, that unless different peoples spoke the same language, there could be "[n]o unity or community of feeling among them."<sup>27</sup> English, in other words, would help to dissolve Native Americans into the great American "melting pot."

Secondly, officials believed that speaking English would make Native Americans good citizens, as citizenship became available to them. Knowing English would enable the Native Americans "to become acquainted with the laws, customs, and institutions of our country"<sup>28</sup> and was essential to their

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<sup>25</sup> See, e.g., 1887 Comm'r Indian Aff. Ann. Rep., *supra* note 21, at xxiv (citing an unnamed former missionary to the Sioux).

<sup>26</sup> *Id.* at xx (quoting the 1868 Report of the Indian Peace Commission).

<sup>27</sup> *Id.* at xxii.

<sup>28</sup> *Id.* at xx (quoting 1885 Comm'r Indian Aff. Ann. Rep.).

“comprehension of the duties and obligations of citizenship.”<sup>29</sup>

Thirdly, English was seen as a premier language, which would advance Native Americans on the road to being civilized. Officials spoke of English as “the language of the greatest, most powerful, and enterprising nationalities beneath the sun,”<sup>30</sup> — certainly a fitting replacement for Native American languages. Learning English was expected to “work a revolution in the Indian character and to lift them on to a higher plane of civilization.”<sup>31</sup> This sentiment is summed up well in an 1887 government report:

This language [English], which is good enough for a white man and a black man, ought to be good enough for the red man . . . . The first step to be taken toward civilization, toward teaching the Indians the mischief and folly of continuing in their barbarous practices, is to teach them the English language. The impracticability, if not impossibility, of civilizing the Indians of this country in any other tongue than our own would seem to be obvious . . . . [W]e must remove the stumbling-blocks of hereditary customs and manners, and of these language is one of the most important elements.<sup>32</sup>

The passage above also alludes to a fourth rationale for the English-only policy: Native American languages were seen as inferior and barbarous,<sup>33</sup> and thus crying out for eradication. The languages were believed to have “limited resources” and to be “wholly unadapted to the newer life for which [the Indians] are being prepared.”<sup>34</sup> Native Americans who continued to speak their mother tongues would, it was believed, cling to their tribes’ customs and

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<sup>29</sup> *Id.* (quoting 1885 Comm’r Indian Aff. Ann. Rep.). Citizenship was not extended to all Indians until the enactment of the Citizenship Act of 1924. *See* Act of June 2, 1924, ch. 233, 43 Stat. 253, codified as amended at 8 U.S.C. § 1401(b).

<sup>30</sup> 1887 Comm’r Indian Aff. Ann. Rep., *supra* note 21, at xxi (quoting 1886 Comm’r of Indian Affairs Ann. Rep.).

<sup>31</sup> 1891 Comm’r Indian Aff. Ann. Rep. 53.

<sup>32</sup> 1887 Comm’r Indian Aff. Ann. Rep., *supra* note 21, at xxiii.

<sup>33</sup> *See, e.g., id.* at xx (quoting the Report of the Indian Peace Commission).

<sup>34</sup> *Id.* at xxv (quoting an unnamed religious weekly).

“inherent superstitions,”<sup>35</sup> which the government also sought to stamp out as part of the civilization process.

For the foregoing reasons, government officials believed, Native American languages had to be eradicated. They had to be replaced with English, and the schools, which were educating the next generation of tribal members, were the front line in this battle.

It is interesting to note that there was one goal that was allowed to trump, at least temporarily, the goal of eradicating Native American languages and replacing them with English, conversion of Native American children and adults to Christianity. Officials referred to this policy, which was seen as an essential element of the comprehensive program to assimilate Native Americans, as “Christianization.”<sup>36</sup> The Commissioner of Indian Affairs made it clear in his 1887 annual report that the English-only policy “did not touch the question of the preaching of the Gospel in the churches nor in any wise [sic] hamper or hinder the efforts of missionaries to bring the various tribes to a knowledge of the Christian religion.”<sup>37</sup> The 1888 Commissioner’s report reiterated that “it is not the intention of the Indian Bureau to prohibit the reading of the Bible by any Indian in any language, or by anybody to any Indian in any language or in any Indian vernacular, anywhere, at any time.”<sup>38</sup> Thus, Native Americans could be addressed in their own languages for the purpose of religious conversion, but the expectation was that this was a temporary measure, to be abandoned once they spoke adequate English.

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<sup>35</sup> See 1887 Comm’r Indian Aff. Ann. Rep., *supra* note 21, at xxiv (quoting an unnamed Indian Service agent).

<sup>36</sup> See generally Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773 (1997) (analyzing the efforts of the U.S. government to eradicate tribal religions and to replace them with Christianity).

<sup>37</sup> 1887 Comm’r Indian Aff. Ann. Rep., *supra* note 21, at xxiii; see also *id.* at xxiv (quoting an unnamed Indian Service agent and stating that “missionaries are at liberty to use the vernacular in religious instructions. This is essential in explaining the precepts of the Christian religion to adult Indians who do not understand English.”).

<sup>38</sup> 1888 Comm’r Indian Aff. Ann. Rep. 57, at xvii.

*C. The Implementation of the English-Only Policy*

The English-only policy was taken very seriously, with no discretion allowed for educators to use their informed judgment as to when it was advisable to immerse Native American students in English. Reservation agents and school authorities who were suspected of being slow to comply with the English-only policy were reprimanded. Contract schools that were suspected of non-compliance were threatened with loss of funding.<sup>39</sup>

English's hegemony in the schools extended beyond classroom instruction, as the Bureau of Indian Affairs required not only that all instruction be in English, but also that all student conversations be in English.<sup>40</sup> Thus students in off-reservation boarding schools, who had been torn away from their families and communities, were to be denied the comfort that could have been obtained from speaking to other members of their tribe in a familiar language.

Native American children suffered from the harsh enforcement of the English-only policy. The Rules for Indian Schools provided that students were to be rebuked or punished for persistent violations of the policy.<sup>41</sup> Published recollections of both teachers and students indicate the enthusiasm with which school personnel implemented the latter instruction.<sup>42</sup> Punishments included spanking and whipping of students, washing students'

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<sup>39</sup> See 1887 Comm'r Indian Aff. Ann. Rep., *supra* note 21, at xxi. For example, when it was reported in 1884 that students in one school were being instructed in the Dakota language as well as in English, school authorities were informed that only English could be taught, and if any other language was taught to the children, they would be removed from the school and government support would be withdrawn. *Id.*

<sup>40</sup> 1890 Comm'r Indian Aff. Ann. Rep., *supra* note 23, at cli (stating, "Pupils must be compelled to converse with each other in English . . .").

<sup>41</sup> See *id.* (stating that pupils, "should be properly rebuked or punished for persistent violation of this rule").

<sup>42</sup> See DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928, 140-41 (1995); see also Reyhner & Eder, *supra* note 15, at 43 (describing the recollection of a Blackfoot student that students were given a stroke of a leather strap with holes in it each time they spoke their language).

mouths out with soap, and forcing students to stand still in a schoolroom or march around while other students played.<sup>43</sup> Other school officials preferred the carrot to the stick, and rewarded students for going a long period of time without speaking their native language.<sup>44</sup>

The English-only policy meant that students were submerged in a language that was wholly new to many of them and was quite different, not just in vocabulary but also in sound and structure, from the languages of their families and communities. Linguists tell us that there is a considerable gap between Native American languages and European languages in terms of phonology (speech sounds), morphology (structure of words), and syntax (ways of piecing words together).<sup>45</sup> Historian David Wallace Adams has explained that “many Indian languages place little emphasis on time or verb tense; others make little differentiation between nouns and verbs or separate linguistic units; still others build into a single word thoughts that in English can only be expressed in an entire sentence.”<sup>46</sup> A renowned Tewa-speaking storyteller and educator, the late Esther Martinez, described another difference between English and some Native American languages, the role of tonality. In Tewa, words may be spelled essentially the same, but differences in meaning are indicated by tones. The words for “water,” “moon,” and “road,” for example, would sound the same to a listener who did not hear the tonal differences in the way that they were pronounced.<sup>47</sup> Speakers of Tewa and similar languages who were learning English would have been unfamiliar with the concept of a language lacking such distinctions.

At the same time, the students were thrown into a new culture and worldview that was connected to the experience of learning English. As linguist Edward Sapir explained, languages are not

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<sup>43</sup> See ADAMS, *supra* note 42, at 141; see also MICHAEL C. COLEMAN, *AMERICAN INDIAN CHILDREN AT SCHOOL, 1850-1930*, 151-52 (1993).

<sup>44</sup> See ADAMS, *supra* note 42, at 140-41.

<sup>45</sup> See *id.* at 139.

<sup>46</sup> *Id.*

<sup>47</sup> MY LIFE IN SAN JUAN PUEBLO: STORIES OF ESTHER MARTINEZ 86 (Sue-Ellen Jacobs & Josephine Binford eds., 2004).

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simply systematic inventories of experiences that are relevant to individuals, but are “self-contained, creative symbolic organization[s], which . . . actually define[ ] experience for us . . . because of our unconscious projection of [their] implicit expectations into the field of experience.”<sup>48</sup> Native American children who were forced, under the very real threat of punishment, to leap across both a linguistic and a cultural divide were indeed faced with a daunting and deeply unsettling task. The writings of students who survived the schools and the English-only policy bear witness to the effects of the policy on those on whom it was imposed.<sup>49</sup>

Some students did resist the effort to strip them of their mother tongue by continuing to use it for private conversations, out of the earshot of their teachers and other school employees.<sup>50</sup> With the threat of punishment looming, however, most students were eventually worn down. Students, particularly those in off-reservation boarding schools, became estranged from their tribe’s languages, with some even feeling shame when they accidentally lapsed and spoke their language.<sup>51</sup>

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<sup>48</sup> CLYDE KLUCKHOHN & DOROTHEA LEIGHTON, *THE NAVAJO* 282 (Doubleday & Co., Inc., rev. ed. 1962) (1946) (quoting Edward Sapir, *Conceptual Categories in Primitive Languages*, LXXIV SCIENCE 578 (1931)). “From a psychological point of view, there are as many different worlds upon the earth as there are languages. Each language is an instrument which guides people in observing, in reacting, in expressing themselves in a special way.” *Id.* at 254; see also MY LIFE IN SAN JUAN PUEBLO, *supra* note 47 (describing the school experiences of Esther Martinez).

<sup>49</sup> See, e.g., CHARLES A. EASTMAN (OHIYESA), *FROM THE DEEP WOODS TO CIVILIZATION* 46 (Univ. of Neb. Press 1977) (1916) (Eastman attended the Santee Indian School); ADAMS, *supra* note 42, at 138 (recounting the experiences of Luther Standing Bear, who attended Carlisle Indian School).

<sup>50</sup> See, e.g., COLEMAN, *supra* note 43, at 152 (noting how Navajo students stayed some distance from school authorities, or whispered and covered their mouths, when they wanted to speak Navajo).

<sup>51</sup> A Sioux student at Carlisle Indian School, for example, admitted to the school superintendent in 1881 “with much sorrow” that she had spoken one Sioux word without thinking in response to another student’s addressing her in Sioux, and that she had been so upset that she could not eat her dinner and wept at the dining table. See ADAMS, *supra* note 42, at 141 (quoting Letter from Nellie Robertson to Capt. Richard Henry Pratt, *reprinted in* EADLE KEATAH TOH [the Carlisle Indian School newspaper], Jan. 1881, at 4).

Some students who spent years in off-reservation boarding schools returned to their communities unable to speak, or no longer completely comfortable in speaking, their native languages. As returned students grew to adulthood and had children of their own, many of those who had managed to remain fluent in their tribe's language chose not to pass the language on to their children. They did not want their children to undergo the kind of suffering that they had experienced in school, as the following words of one boarding school graduate explain:

I was eleven years old [when I went to Covelo], and every night I cried and then I'd lay awake and think and think and think I'd think to myself, "If I ever get married and have children I'll *never* teach my children the language or all the Indian things that I know. I'll *never* teach them that. I don't want my children to be treated like they treated me." That's the way I raised my children.<sup>52</sup>

As generations of Native American students spent years in schools subject to the English-only policy, the policy took its toll, making a substantial contribution to the process of endangerment and extinction of many Native American languages. The English-only policy, while seemingly part of the law of the past, is not, then, really past, in the sense of being over and done with. It continues to have recognizable effects today, for Native American communities throughout the United States.

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<sup>52</sup> Leanne Hinton, *Federal Language Policy and Indigenous Languages in the United States*, in *THE GREEN BOOK*, *supra* note 19, at 39, 41.

*II. The Law of the Present – Current U.S. Law Focused on Native American Languages*

It is the policy of the United States . . . to preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages.<sup>53</sup>

*A. The Native American Languages Act of 1990*

In 1990, Congress enacted a statute that seemed to make an important break with the policies of the past: the Native American Languages Act of 1990 (“NALA”).<sup>54</sup> The statute identified several important congressional findings that served as motivations for its enactment, including the following:

- (1) the status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages;
- (2) special status is accorded Native Americans in the United States, a status that recognizes distinct cultural and political rights, including the right to continue separate identities;
- (3) the traditional languages of Native Americans are an integral part of their cultures and identities and form the

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<sup>53</sup> 25 U.S.C. § 2903(1) (2006).

<sup>54</sup> Native American Languages Act of 1990, Pub. L. No. 101-477, 104 Stat. 1152, 1153 (1990) (codified as amended at 25 U.S.C. §§ 2901-06) (NALA was part of a statute that reauthorized the Tribally Controlled Community College Assistance Act of 1978 and the Navajo Community College Act); *see id.* (Technical amendments to NALA in 1996 changed two cross-references in the definition section); *see* Act of Feb. 12, 1996, Pub. L. No. 104-109, § 11, 110 Stat. 763, 765 (1996) (codified at 25 U.S.C. § 2902); *see* Dussias, *Waging War with Words*, *supra* note 15, at 939-950 (providing a more detailed discussion and assessment of NALA and the 1992 amendment to it); *see also* Robert D. Arnold, “. . . To Help Assure the Survival and Continuing Vitality of Native American Languages,” in *THE GREEN BOOK*, *supra* note 19, at 45, 45-48 (providing a discussion of the political wrangling that ultimately resulted in the enactment of NALA and the 1992 amendment to NALA).

basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values; . . .

(8) acts of suppression and extermination directed against Native American languages and cultures are in conflict with the United States policy of self-determination for Native Americans; [and]

(9) languages are the means of communication for the full range of human experiences and are critical to the survival of cultural and political integrity of any people. . . <sup>55</sup>

The Senate Report on NALA expanded on the importance of language in the survival of culture, stating, “[l]anguage is the basis of culture. History, religion, values, feelings, ideas and the way of seeing and interpreting events are expressed and understood through language.”<sup>56</sup>

The statements above undoubtedly made uplifting reading in 1990 for anyone concerned about the survival of Native American languages. They indicated a newfound understanding of the importance of Native American languages and a recognition of the way in which they are related to tribal cultural and political rights. They repudiated the policies of the past. But what did NALA offer in terms of substantive government support and legal protection?

NALA went on to set out a number of policies of the United States with respect to Native American languages, including policies to:

(1) preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages; . . .

(3) encourage and support the use of Native American

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<sup>55</sup> 25 U.S.C. § 2901 (2006) (defining “Native American” as Indians, Native Hawaiians, Native Alaskans, and Native American Pacific Islanders); *see* 25 U.S.C. § 2902(2) (2006).

<sup>56</sup> S. REP. NO. 101-250, at 1 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 1840, 1841.

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languages as a medium of instruction . . . in order to encourage and support—

- (A) Native American language survival,
  - (B) educational opportunity,
  - (C) increased student success and performance,
  - (D) increased student awareness and knowledge of their culture and history, and
  - (E) increased student and community pride;
- (4) encourage State and local education programs to work with Native American parents, educators, and . . . tribes . . . in the implementation of programs to put this policy into effect;
- (5) recognize the right of Indian tribes and other Native American governing bodies to use the Native American languages as a medium of instruction in all schools funded by the Secretary of the Interior; [and]
- (6) fully recognize the inherent right of Indian tribes and other Native American governing bodies . . . to take action on, and give official status to, their Native American languages for the purpose of conducting their own business. . .<sup>57</sup>

A separate section of NALA provided that “[t]he right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs.”<sup>58</sup>

These provisions, like the congressional findings, indicated a changed government attitude toward Native American languages and expressed support for language preservation and utilization. But the question remains, what did NALA really accomplish? Or maybe better put, what did NALA not accomplish?

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<sup>57</sup> 25 U.S.C. § 2903 (2000).

<sup>58</sup> *Id.* § 2904.

NALA did not create any specific programs aimed at trying to undo the damage done by past government policy toward Native American languages, or to foster the preservation and development of still existing languages. NALA did not mandate that any specific actions be taken in support of its broad policy statements. Finally, NALA did not designate any funding to implement its stated policies.

*B. The Native American Languages Act of 1992*

In 1992, Congress enacted another language-related statute, the Native American Languages Act of 1992 (“NALA of 1992”).<sup>59</sup> The Act addressed one of the shortcomings of NALA, namely, the lack of any specific programs to implement its policies, by establishing a grant program, to be administered by the Administration for Native Americans (the “ANA”) of the U.S. Department of Health and Human Services.<sup>60</sup>

NALA of 1992 provided authority for the awarding of one- to three-year grants<sup>61</sup> to tribal governments and Native American organizations to further “the survival and continuing vitality of Native American languages.”<sup>62</sup> Grants can be used for such purposes as the following:

- establishment and support of community language projects to facilitate the transfer of Native American language skills from older to younger Native Americans;
- establishment of projects to train Native Americans as language teachers, interpreters, or translators;
- development and dissemination of teaching materials;
- establishment and support of projects to train Native Americans for participation in television or radio programs

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<sup>59</sup> Native American Languages Act of 1992, Pub. L. No. 102-524, 106 Stat. 3434 (1992) (codified as amended at 42 U.S.C. §§ 2991b-3, 2992d(e) (2006).

<sup>60</sup> See 42 U.S.C. § 2991b-3(f) (2006).

<sup>61</sup> See *id.* § 2991b-3(e)(2).

<sup>62</sup> *Id.* § 2991b-3(a).

broadcast in a Native American language;

— compilation and analysis of oral testimony to record and preserve a Native American language; and

— purchase of equipment needed to carry out a Native American language project.<sup>63</sup>

NALA of 1992 did little, however, to address another shortcoming of NALA, namely, lack of adequate and reliable funding. The statute provided for only a small amount of funding (\$2 million), and only for fiscal year 1993.<sup>64</sup> The determination of funding amounts for subsequent years was left to the whims of the federal budgetary process.<sup>65</sup> The lack of adequate funding for NALA grants has been put into perspective by linguist Michael Krauss, who noted that the government has been willing to spend one million dollars per year per Florida panther to save the species from extinction, while spending only two million dollars per year (and less in some years) to save all of the Native American languages that are threatened with extinction.<sup>66</sup> NALA of 1992 also imposed a

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<sup>63</sup> *See id.* §§ 2991b-3(b)(1)-(6). The list of purposes for which grants may be used is non-exclusive. *See id.* § 2991b-3(b). According to the website of the Administration for Native Americans, grants available under NALA as amended are categorized as follows: 1. Assessment Grants, which are available for the purpose of conducting an assessment of the current status of a language and establishing long-range language goals; 2. Project Planning Grants, which are available for the purpose of planning a language project; and 3. Design and/or Implementation Grants, which are available for implementing a preservation language project that will contribute to the achievement of the community's long-range language goal(s). Administration for Native Americans, Program Information, [http://www.acf.hhs.gov/programs/ana/programs/program\\_information.html](http://www.acf.hhs.gov/programs/ana/programs/program_information.html) (last visited Feb. 6, 2008).

The most recent grant announcement mentions another purpose for which grants can be awarded, namely, Native Language Immersion Projects, which were added to the program by the 2006 amendment to NALA, discussed *infra* at note 84 and accompanying text. *See* Administration for Native Americans, Grant Opportunities, <http://www.acf.hhs.gov/grants/open/HHS-2008-ACF-ANA-NL-0016.html> (last visited Feb. 6, 2008).

<sup>64</sup> Pub. L. No. 102-524, § 3 (providing for the authorization of appropriations).

<sup>65</sup> NALA of 1992 authorized the appropriation of "such sums as are necessary" in fiscal years 1994-1997. *See id.*

<sup>66</sup> *See* James Brooke, *Indians Striving to Save Their Languages*, N.Y. TIMES,

requirement that language program grantees contribute 20% matching funds to the grant project.<sup>67</sup>

NALA's limited substantive effect, even as amended, was further highlighted in a 1996 Hawaii federal district court case addressing the question of whether NALA could be the basis for a lawsuit alleging noncompliance with the statute's provisions. In other words, could NALA be used as a legal tool by those whose rights it was supposed to protect? In *Office of Hawaiian Affairs v. Department of Education*, the district court answered this question in the negative.<sup>68</sup>

The litigation began in 1995, when the Office of Hawaiian Affairs (the "OHA")<sup>69</sup> sued the Hawaii Department of Education ("DOE") and its officials on the grounds that the DOE had failed to provide sufficient instruction in the Hawaiian language to public schools students.<sup>70</sup> The OHA argued that the defendants had restricted Native Hawaiian students' right to express themselves in the Hawaiian language by failing to provide sufficient Hawaiian

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Apr. 9, 1998, at A1. Administration for Native Americans notices released since the enactment of NALA of 1992 have indicated the approximate amounts of financial assistance available for Native American language projects in fiscal years subsequent to fiscal year 1993. *See, e.g.*, 70 Fed. Reg. 5864, 5867 & 5877 (2005) (\$1,000,000 for each of two program areas for fiscal year 2005); 69 Fed. Reg. 8288, 8292 & 8301 (2004) (\$1,000,000 for each of two program areas for fiscal year 2004); 68 Fed. Reg. 2057, 2057 (2003) (\$2,000,000 for fiscal year 2003); 66 Fed. Reg. 51794, 51794 (2001) (\$2,000,000 for fiscal year 2002); 65 Fed. Reg. 64705, 64706 (2000) (\$2,000,000 for fiscal year 2001); 65 Fed. Reg. 5978, 5979 (2000) (\$2,000,000 for fiscal year 2000); 63 Fed. Reg. 69974, 69974 (1998) (\$2,000,000 for fiscal year 1999); 63 Fed. Reg. 1475, 1475 (1998) (\$2,000,000 for fiscal year 1998); 61 Fed. Reg. 44122, 44131 (1996) (\$1,000,000 for fiscal year 1997); 60 Fed. Reg. 46598, 46608 (1995) (\$1,000,000 for fiscal year 1996); 59 Fed. Reg. 37342, 37350 (1994) (\$1,000,000 for fiscal year 1995); 59 Fed. Reg. 14167, 14169 (1993) (\$1,000,000 for fiscal year 1994).

<sup>67</sup> 42 U.S.C. § 2991b-3(e)(1)(a) (2008).

<sup>68</sup> *Office of Hawaiian Affairs v. Dep't of Educ.*, 951 F. Supp. 1484 (D. Haw. 1996).

<sup>69</sup> The OHA was created in 1978 to serve Native Hawaiians and to hold title to property set aside or conveyed to it in trust for Native Hawaiians. Elizabeth Pa Martin, *Hawaiian Natives Claims of Sovereignty and Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 273, 280 (1991).

<sup>70</sup> *Office of Hawaiian Affairs*, 951 F. Supp. at 1487.

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language immersion programs. This failure amounted to a restriction on students' right to express themselves in violation of NALA Section 2904's prohibition on the restricting of Native Americans' right "to express themselves through the use of Native American languages . . . in any public proceeding, including publicly supported education programs."<sup>71</sup> The Hawaiian language is recognized as an official language of the state,<sup>72</sup> and the language nests (Punana Leo) and other immersion programs that have been established to foster the learning of the language have been held up as examples of successful language restoration initiatives.<sup>73</sup>

An expert consulted by the OHA in connection with the litigation explained that the defendants had restricted the use of the Hawaiian language by the following actions:

- (1) failing to open up sufficient slots for more students to participate in the [existing state] immersion program[ ],
- (2) placing immersion schools in inconvenient and out-of-the-way locations without providing transportation to those schools,
- (3) valuing teachers with DOE certification over those with Hawaiian language skills, and
- (4) failing to promise a continued State commitment to

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<sup>71</sup> 25 U.S.C.A. § 2904 (West 2008).

<sup>72</sup> Hawaiian was designated as one of the two official languages of the state in the 1978 state constitutional convention. See Sam No'Eau Warner, *The Movement to Revitalize Hawaiian Language and Culture*, in THE GREEN BOOK, *supra* note 19, at 133, 135. See also HAW. CONST. art. XV, § 4. "English and Hawaiian shall be the official languages of Hawaii, except that Hawaiian shall be required for public acts and transactions only as provided by law." HAW. CONST. art. XV, § 4.

<sup>73</sup> For an extensive analysis of the history and status of the Hawaiian language and of the efforts to revitalize Hawaiian language and culture through pre-school level language nests (Punana Leo) and immersion schools (Kula Kaiapuni). See generally THE GREEN BOOK, *supra* note 19, at 129, 129-176. See Summer Kapau, *Judicial Enforcement of "Official" Indigenous Languages: A Comparative Analysis of the Māori and Hawaiian Struggles for Cultural Language Rights*, 26 HAW. L. REV. 495 (2004) (comparing indigenous language preservation issues and approaches in Hawaii and New Zealand).

immersion programs so that parents will be encouraged to place their children in these programs.<sup>74</sup>

The court rejected the suit, without considering the actual NALA-based claim that the OHA made. The court held that NALA did not, either expressly or by implication, create the right for a private citizen or entity to go to court on the basis of a claim that the defendant had violated NALA.<sup>75</sup> The court treated NALA as merely a statement of general policy goals<sup>76</sup> rather than as a statute that imposed a set of affirmative duties on the states. In the court's view, the only section of NALA that might require the states to take affirmative steps to carry out the policy of protecting Native American languages was Section 2904, but even that section's requirements, the court believed, might be limited to federally funded education programs.<sup>77</sup> Further, even if the provision covered state programs, it did not place any affirmative duty on Hawaii to promote the Hawaiian language by funding immersion programs. Rather, it "at most . . . prevent[ed] the state from barring the use of Hawaiian languages in school."<sup>78</sup> In other words, as the court read NALA, it might have purported to recognize rights, but it had not created effective rights for individuals.

The court's decision underscored the limitations of NALA and NALA of 1992 as tools to fight for the preservation of Native American languages and to try to undo at least some of the damage resulting from past government policy. The court's approach seemingly dismissed NALA as merely an inspiring statement offering no concrete relief for individuals who were still experiencing the adverse effects of generations of language discrimination and eradication efforts.

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<sup>74</sup> Office of Hawaiian Affairs, 951 F. Supp. at 1494 (summarizing the views of the OHA's expert, identified as Dr. Wilson).

<sup>75</sup> *See id.* The court also held that the suit as against state agencies was barred by the Eleventh Amendment, although this constitutional barrier did not affect the suit as against state officials who were named as defendants. *See id.* at 1490-93.

<sup>76</sup> *See id.* at 1494.

<sup>77</sup> *See id.* at 1495.

<sup>78</sup> *Id.*

*C. The Esther Martinez Native American Languages  
Preservation Act of 2006*

Congress's latest efforts to support the preservation of Native American languages are embodied in the Esther Martinez Native American Languages Preservation Act of 2006 (the "Martinez Act"), which expanded granting authority for support of preservation projects to include grants focused on language immersion programs, including Native American language nests for young children and their parents and Native American language survival schools for school-age children.<sup>79</sup> The statute represented another advance in federal support for language preservation and restoration, but like NALA of 1992, the 2006 statute failed to address some of the continuing shortcomings of the federal efforts.

*1. The Introduction of H.R. 4766 and the  
Albuquerque Field Hearing*

The bill that ultimately became the Martinez Act was introduced as H.R. 4766 in February, 2006 by Representative Heather Wilson of New Mexico.<sup>80</sup> Members of Congress also proposed two additional bills related to language preservation that were pending during the time that H.R. 4766 was under consideration: the Native American Languages Act Amendments Act of 2006 (S. 2674) and the Native American Languages Amendments Act of 2006 (H.R. 5222), both introduced by members of Congress from Hawaii. The Senate bill, S. 2674, was introduced by Senator Akaka in April, 2006, and authorized grants and contracts for establishing and operating language nests, survival schools, and at least four demonstration programs to provide assistance to survival schools and language nests.<sup>81</sup> The additional House Bill, H.R. 5222, was introduced by Representative Case in April, 2006 as well, and

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<sup>79</sup> Esther Martinez Native American Languages Preservation Act of 2006, Pub. L. No. 109-394, 120 Stat. 2705 (2006).

<sup>80</sup> 152 Cong. Rec. H332-01 (daily ed. Feb. 15, 2006) (statement of Rep. Wilson); H.R. 4766, 109th Cong. § 2 (as passed by House, Feb. 15, 2006).

<sup>81</sup> S. 2674, 109th Cong. § 5 (2006).

also authorized support for language nests and survival schools, along with support for the establishment of demonstration programs through grants to four specified entities.<sup>82</sup> It was Representative Wilson's bill, however, that ultimately was enacted to bolster the provisions of NALA and NALA of 1992.<sup>83</sup>

Representative Wilson was inspired to work for language preservation by her contacts with members of the Jicarilla Apache Tribe and of the Sandia Pueblo. At Sandia Pueblo's early childhood education center, which is funded with tribal and Head Start monies, Representative Wilson saw

that the grandmas come, and they come to sing and speak to the babies and children so that they will have a language that their parents do not have; . . . [the language is] skipping a generation, and that's how they are trying to restore their own use of their own native language.<sup>84</sup>

She became aware of the endangered status of native languages on the Mescalero Apache, Sandia Pueblo, Navajo, and other reservations. Representative Wilson introduced H.R. 4766 to try to preserve Native American languages, "because language is connected to culture, and culture is what we celebrate here in New Mexico."<sup>85</sup> In remarks before the House of Representatives, she described Native American languages as "national treasures" that are "part of a unique heritage"<sup>86</sup> and noted that the "languages will not

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<sup>82</sup> H.R. 5222, 109<sup>th</sup> Cong. § 4 (2006). Both H.R. 5222 and S. 2674 included provisions directing the Secretary of Education to provide language nests and survival schools with alternative methods for meeting national education standards with respect to Native American languages education. H.R. 5222 § 5, S. 2674 § 5.

<sup>83</sup> H.R. 4766 was originally structured as an amendment to NALA but was ultimately enacted as an amendment to the section of the Native American Programs Act of 1974 that contains the provisions of NALA of 1992. *See* H.R. 4766 § 2 (Feb. 15, 2006) (indicating that the Act would amend Section 103 of the Native American Languages Act, 25 U.S.C. § 2902); H.R. 4766 § 2, 152 Cong. Rec. H-7609-01 (Sept. 27, 2006) (indicating that the Act would amend Section 803C of the Native American Programs Act of 1974, 42 U.S.C. § 2991b-3).

<sup>84</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 4-5.

<sup>85</sup> *Id.* at 5.

<sup>86</sup> National Indian Education Association, Legislative Tracking, Congresswoman Wilson introduces a bill to amend the Native American

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be preserved without attention and effort, and once lost, may never be recovered.”<sup>87</sup>

A field hearing on H.R. 4766 was held by the House of Representatives Education and Workforce Committee on August 31, 2006 at the Indian Pueblo Cultural Center in Albuquerque, New Mexico,<sup>88</sup> in Representative Wilson’s home district. After the proceedings were opened with an invocation by Santo Domingo Pueblo Governor Julian Coriz in “his native language” (in the words of the printed hearings),<sup>89</sup> Native American language experts and members of Congress shared their views on the status of Native American languages and of the actions that needed to be taken to protect these languages.

At the hearing, Representative Tom Udall, a cosponsor of H.R. 4766, lamented the fact that “[f]or too long . . . we did not appreciate the importance of language and its ability to enhance the rich dynamics of our history. From learning the ancestry of those who came before us to passing stories down through generations, to maintaining religious, cultural and social ties, language is fundamental.”<sup>90</sup> Given the rapid pace at which native languages are being lost, efforts to promote language preservation must be strengthened, in his view, “starting today.”<sup>91</sup> He emphasized that immersion programs “offer the best opportunity for languages to be passed on” and therefore new immersion programs are “urgently needed.”<sup>92</sup> Congressman Udall tied the preservation of languages to the preservation of the earth itself. He noted that he was co-

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Languages Act, Feb. 15, 2006, [http://www.niea.org/issues/tracking\\_detail.php?id+13](http://www.niea.org/issues/tracking_detail.php?id+13) (last visited Jan. 18, 2008).

<sup>87</sup> *Id.*

<sup>88</sup> 2006 NALA Amendments Hearing, *supra* note 3.

<sup>89</sup> Presumably Governor Coriz spoke the Santo Domingo Pueblo’s Keres dialect. *See id.* at 1; *see also* Keres Pueblo Language, <http://www.native-languages.org/keres.htm> (last visited Feb. 26, 2008). *See generally* THE GREEN BOOK, *supra* note 19, at 61, 61-82 (providing further information about Pueblo languages and of language preservation efforts in a number of Pueblos).

<sup>90</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 6 (statement of U.S. Representative Tom Udall).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

sponsoring bipartisan legislation on global warming and explained the link between this proposed legislation and H.R. 4766:

[F]or me native languages are about the traditions with the earth, the fact that we come from Mother Earth, that we are part of Mother Earth, and I believe that the traditions that are represented in those languages have much to teach us. If we had adopted the ways that you had and the views that native people had of the earth, we would be a lot further along in terms of protecting our planet.<sup>93</sup>

Six witnesses spoke at the hearing. Considering their testimony at length gives a good sense of the views of today's tribal leaders, Native American organizations, and Native American academics and students on the current status and the significance of Native American languages and their perspective on the bill that became the Martinez Act.

The first witness at the hearing was Amadeo Shije, a former Governor of the Pueblo of Zia and the Chairman of the All Indian Pueblo Council. Chairman Shije noted the links between language and Pueblo ceremonies, government, and longevity:

[T]he Pueblo communities still practice their daily ceremonial lifestyles. There are no rights or duties more precious to us than those regarding religion and ceremonies, and in every aspect of our daily lives and fulfilling our daily existence the use of our language is there. Language has been and continues to be our last stronghold of the traditional form of government which existed long before Columbus and long before the formation of the United States.<sup>94</sup>

Protecting Pueblo languages and religious freedom are

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<sup>93</sup> *Id.* at 7.

<sup>94</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 9 (statement of Amadeo Shije, Chairman, All Indian Pueblo Council). The All Indian Pueblo Council is a consortium of New Mexico's 19 Pueblo tribal governments. *See id.* at 7. *See also* All Indian Pueblo Council, <http://www.19pueblos.org> (last visited May 12, 2008).

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critical to Pueblo existence and survival, he explained. Chairman Shije also made the point that while the Pueblo people “give value to those things that make us Indian people,” they must also “give equal value to educating and developing those skills necessary to deal with the external communities, to protect our communities internally. . . .”<sup>95</sup>

Chairman Shije described some of the efforts being made, through community gatherings, storytelling, and Head Start program activities, to preserve the Pueblo people’s unwritten language. Although some elders had noted that some language losses, or at least changes, had already had occurred, he was optimistic that the Pueblo people would not lose their language, which would mean “the loss of everything that we Pueblo people stand for.”<sup>96</sup> He praised H.R. 4766 for the “much needed support” that it would provide to immersion schools and expressed the All Indian Pueblo Council’s support for the bill.<sup>97</sup>

The National Indian Education Association (“NIEA”) was represented at the hearing by its President, Ryan Wilson, who described the introduction of H.R. 4766 as ushering in “a joyous daybreak to a long, long night of apathy when it came to our native languages.”<sup>98</sup> Wilson identified the adoption of the assimilationist policy by the United States as “one of its darker moments in history,” and explained that the language eradication aspect of the policy was based on the knowledge that “people disconnected from their languages were more apt to lose their cultural identities and that a

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<sup>95</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 9 (statement of Amadeo Shije, Chairman, All Indian Pueblo Council).

<sup>96</sup> *Id.* at 10.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 12 (statement of Ryan Wilson, President of the National Indian Education Association). Founded in 1969, the National Indian Education Association is the oldest and largest Indian education organization in the United States and is “committed to increasing educational opportunities and resources for American Indian, Alaska Native, and Native Hawaiian students while protecting our cultural and linguistic traditions.” *E.g.*, <http://www.niea.org/profile/> (last visited April. 6, 2008).

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society's culture more quickly dies if the language dies. . . ."<sup>99</sup> Contemporary Native Americans shared this understanding of the importance of native languages with respect to cultural preservation:

[O]ur cultural beliefs, traditions, social structures, heritage, and governance systems depend on our Native languages. We conduct our ceremonies, prayers, stories, songs, and dances in our Native languages just as we have done since the beginning of time. Our languages connect us to our ancestors, our traditional ways of life, and our histories. . . . If our languages die, then it is inevitable that our cultures will die next.<sup>100</sup>

Wilson situated the struggle for native language protection and support within the broader national and international struggle for human rights: "The United States of America and other countries around the world are supporting human rights, including the rights of indigenous minorities . . . . The time has come now for equal recognition of the basic human rights of America's native peoples and the control of our education . . . ."<sup>101</sup>

Wilson described a common non-Indian reaction to the struggle to achieve recognition of the proper role of native languages in formal educational programs:

[T]here's a common theme that we hear . . . when we approach our non Indian brothers —that this should be taught in the home. This way of life belongs in your tribal community, in your village . . . but in actuality, when you understand fully [the] history of what has happened, the trauma that has happened to these tribal communities, and that these languages, sacred languages, were put on trial, they were judged, they were convicted and they were jailed, and we were told . . . to never stress our First Amendment rights, to never use our languages . . . . [H]ere

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<sup>99</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 16 (statement of Ryan Wilson).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 12.

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we are in 2006 . . . [and] we are told that . . . they don't belong in the schools.<sup>102</sup>

Wilson rejected the view that only the home is the proper province of native languages, explaining that:

We are in a crisis and what we are really saying is that [teaching of native languages] belongs in our schools. Maybe not every school, but we have to create venues in our tribal communities where [native languages] can be taught, and we have to codify forever a place in the Department of Education to fund these schools.<sup>103</sup>

Wilson emphasized the pan-tribal support for H.R. 4766 and the need to act quickly: "We can no longer, as we sit by and watch these languages erode at lightning speed[,] move at horse and buggy pace. . . ."<sup>104</sup>

In addition to highlighting the human rights and First Amendment underpinnings of language preservation efforts and responsibilities, Wilson also tied language preservation and Indian education more generally to treaty rights and the federal government's trust responsibility:

When we talk about Indian education, we gave up millions of acres of the richest land in the world in exchange for this continued inherent sovereignty . . . , and education was a piece of that. . . . [I]t's a trust responsibility. It's a treaty right. . . . [W]e want to express that right through these immersion schools. . . .<sup>105</sup>

Having seen the successes of students at existing schools with language immersion programs, most of which receive private funding, educators can not stand silent while other students continue to receive an education that does not meet their needs: "[W]hat are we doing to our own children when we are not advancing these

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 12-13.

<sup>104</sup> *Id.* at 13.

<sup>105</sup> *Id.* at 14.

practices? When we know something works but we systematically prevent them from having access we are cheating generation after generation of young people. We can't do that anymore."<sup>106</sup>

Wilson countered any potential objections that supporting native languages through immersion schools was aimed at isolating tribal members, explaining that "this isn't an isolation movement, this is actually a movement to elevate the acquisition of English, to elevate our standards in academic progress and to really enjoy the full fruits of [the] American dream . . . and equality of opportunity."<sup>107</sup> The goal for Indian students was not simply to "close the achievement gap" in schools, but rather to become the "most educated people in America, and that will never come through the exclusive dominance of the English language. It will come through biculturally competent people. We need to create native thinkers and learners who have conquered the language, not Indian children who have been conquered by the English language."<sup>108</sup>

In closing, Wilson noted how the hopes of tribal elders were tied to the proposed legislation:

[W]e have elders all over the country that are watching this bill. They are living and hanging on to life because they want to see this get passed. They want to have a tool, a conduit, so to speak, to pass on our engendered way of life and languages on to our young people. . . .<sup>109</sup>

H.R. 4766, Wilson explained, "creates a commitment to excellent, because that's what our way of life is. It's an excellent way of life. It creates healthy minds. It creates young people that have assets, that are resilient and that are achieving because they are biculturally competent."<sup>110</sup> In short, much was at stake for all generations in the effort to enact H.R. 4766.

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<sup>106</sup> *Id.* at 15; *see also id.* at 18-20 (describing and listing schools with language immersion programs).

<sup>107</sup> *Id.* at 13.

<sup>108</sup> *Id.* at 15.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

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Ryan Wilson was followed by Christine Sims, an assistant professor at the University of New Mexico and a member of the Pueblo of Acoma.<sup>111</sup> Professor Sims situated her testimony historically, noting the deep roots of the Pueblo villages and of their languages, which “have been here hundreds and perhaps thousands of years.”<sup>112</sup> At the same time, she noted that the hearing came at an especially significant time in history: this was the first time that Congress was considering “bills that would provide the resources most needed for Native American language survival” and because at no other time in history had “the possibility existed . . . for Congress to support a conscious movement among Native American people to define for themselves a vision of education for their children, reflecting what is of most concern to them.”<sup>113</sup> This Native American vision of education includes “language as an integral part of daily education,”<sup>114</sup> in order to foster the development of Native American students academically and as community leaders, who “appreciate and understand the value and the application of their ancestral languages to their daily lives as well as the life of the communities from which they come.”<sup>115</sup>

Given that federal legislation “has often tended to drive practice and policy away from the concerns of native people regarding the maintenance of language and culture,” tribes that were concerned about language survival among their children have developed community-based language programs.<sup>116</sup> Many of these

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<sup>111</sup> *Id.* at 27 (statement of Professor Christine Sims) (noting her academic and tribal affiliations). Professor Sims noted her involvement in The Institute for American Indian Education, which is based in the University of New Mexico’s College of Education, and further noted that the organization, “seeks to increase the capacity of American Indian tribes in developing, expanding, and improving the delivery of instructional services that address the educational and linguistic needs of American Indian students.” *Id.*

<sup>112</sup> *Id.* at 24.

<sup>113</sup> *Id.* Professor Sims also noted that H.R. 4766 and the other bills were regarded with some skepticism, because of past federal efforts to undermine the tribes’ “indigenous form of education.” *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 25.

<sup>116</sup> *Id.* (noting that such programs had been established by the Pueblos of

tribes have concluded, however, that these efforts had to be taken into the setting of their children's schools, and it was in this setting that support was needed from Congress. New Mexico (a state that has enacted an Indian Education Act<sup>117</sup>) has already taken steps to support the learning of native languages in schools by enacting legislation that supports the establishment of heritage language programs as a new category of state-funded bilingual programs and that ceded to tribes the development of certification processes for tribal members to serve as public school language instructors.<sup>118</sup> Professor Sims pointed out that there should be "a similar movement within Federal education policy that fully supports the intent of the original native languages act by making available the funding necessary for such initiatives."<sup>119</sup>

Professor Sims concluded her remarks with reflections on the importance of language to tribes and the academic benefits derived

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Tesuque, Santa Clara, San Juan, San Antonio, Acoma, Cochiti, and Zuni).

<sup>117</sup> Indian Education Act, N.M. STAT. ANN. §§ 22-23A-1-8. Among the enumerated purposes of the Indian Education Act is ensuring "maintenance of native languages." N.M. STAT. ANN. § 22-23A-2 (B). The Act established an Indian Education Division and an Indian education advisory council and requires the preparation of an annual statewide tribal education status report. N.M. STAT. ANN. §§ 22-23A-5-7.

<sup>118</sup> See 2006 NALA Amendments Hearing, *supra* note 3, at 25 (statement of Professor Christine Sims); see generally New Mexico Public Education Department, Bilingual and Multicultural Education, <http://sde.state.nm.us/BilingualMulticultural/index.html> (last visited Mar. 4, 2008) (providing information on bilingual education in New Mexico); see also New Mexico Public Education Department, Indian Education, <http://sde.state.nm.us/indian.ed/index.html> (last visited Mar. 4, 2008) (providing information on Indian-specific education); see also New Mexico Public Education Department, Indian Education, Indian Education Reports and Resources, <http://sde.state.nm.us/indian.ed/Resources.html> (last visited Mar. 4, 2008) (providing information and materials related to the endeavors of the Indian Education Division, including relevant statutes and annual Indian Education Status Reports); see also N.M. STAT. ANN. §§ 22-23-1.1-22-23-6 (codifying New Mexico's Bilingual Multicultural Education Act); see also N.M. STAT. ANN. § 22-10-3 (allowing for limited licenses for teachers of Native American language and culture).

<sup>119</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 25 (statement of Professor Christine Sims).

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from learning native languages. She noted that for tribal communities across the country:

[L]anguage is at the heart of our survival. It's the heart of our sociocultural systems. It's the heart of our own systems of jurisprudence in governments that we had from time immemorial. Language is the means by which we pass on to our children the things that are essential for their socialization into the lives of our communities. It's the link by which we pass on values and beliefs.

For many communities . . . these languages are the primary and sole means for transmitting traditional knowledge, religious beliefs and practices. These aspects of language use all combine to form the essence of what has been for us the foundation of educating native children.<sup>120</sup>

She pointed out the students who were attending the hearing and noted what was at stake for them and for all students. Research on bilingual language programs has shown that the “benefits children derive from being . . . schooled in their heritage language . . . go beyond just the fact of learning the language itself” and include additional benefits derived “from having lessons taught that reflect where they come from.”<sup>121</sup> The experience of learning their heritage language, with people from their own community teaching them, gives them the opportunity to build a solid foundation for learning. Professor Sims explained that, “some of all these kinds of ills we see in terms of academics grow from . . . not having that opportunity.”<sup>122</sup> She asked the Committee members to not forget the significance of the matter at hand both for the children who were in attendance and those who were back in their classrooms.<sup>123</sup>

Kimberly Tabaha, a student at Window Rock High School

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<sup>120</sup> *Id.* at 26.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* Professor Sims's prepared statement elaborated on successful models of native language instruction, such as language learning initiatives of the Pueblo of Cochiti and the Pueblo of Acoma. *See id.* at 29-30.

<sup>123</sup> *Id.* at 26.

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who had attended a Navajo immersion program since kindergarten, emphasized the importance of keeping attention focused on the significance of the legislation for Native American students.<sup>124</sup> She spoke of how her knowledge of her language and traditions had given her “a strong self-esteem to succeed in school” and to continue on to college.<sup>125</sup> She described her intentions to “maintain and balance my tradition, including my language, along with the Western way of life.”<sup>126</sup> Ms. Tabaha lamented the lack of Navajo language classes in some of the schools, but expressed confidence that if further funding were provided for Navajo immersion programs, her generation could fulfill its responsibility to save the language from extinction.<sup>127</sup>

The perspective of a tribe in another part of the United States was offered by Carol Cornelius from the Oneida Cultural Heritage Department of the Oneida Tribe of Wisconsin.<sup>128</sup> Ms. Cornelius noted that in her tribe, which was removed from New York to Wisconsin in the 1820’s, every family

has a story about why we don’t speak the language. When I was a child, I asked my grandmother to teach me and she said, ‘The only way you make it in the white man’s world is to speak English,’ and she refused to teach me. . . . [S]he was doing that to protect us from all of the hurt that she had been through. . . .<sup>129</sup>

Because the Tribe’s language was not passed on by elders, who were scarred by their educational experiences, there were only five remaining tribal members (out of a membership of 16,000) who had learned Oneida as their first language, two of whom were over 95 years old and the youngest of whom was 86. The Tribe’s Oneida

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<sup>124</sup> *Id.* at 39-40 (statement of Kimberly J. Tabaha, Senior, Window Rock High School).

<sup>125</sup> *Id.* at 40.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 30-1 (statement of Carol Cornelius, Area Manager, Oneida Cultural Heritage Department, Oneida Tribe of Indians of Wisconsin).

<sup>129</sup> *Id.* at 31.

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Language Revitalization Program was working with these elders, to the extent that their health permitted, on the development of speakers and teachers of the Oneida language.<sup>130</sup>

Ms. Cornelius described the challenges faced by the program in its efforts to produce fluent speakers but also noted that at least some Oneida children were receiving opportunities that were unavailable to her generation: “our youngest children attending Oneida child care, the Head Start program, Oneida Nation School System, are exposed to the language everyday as part of their daily life.”<sup>131</sup> The Tribe benefited from an ANA language grant from 2000 to 2003, which funded two trainees in multi-media capabilities, but had not received a subsequent grant, due to the ANA’s lack of adequate funding.<sup>132</sup>

Ms. Cornelius expressed praise for H.R. 4766 and its approach:

As our language was taken away by forbidding our children to speak, the revitalization of our languages needs to begin with teaching our children again to speak our languages. I applaud the authors of this legislation for recognizing that we must begin with the children and the families. I notice the strong component in there for families’ involvement, and that’s just absolutely critical to . . . [language] survival.”<sup>133</sup>

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<sup>130</sup> *See id.* at 31, 33. The program began in 1996, at which point the Tribe had only 25-30 elders who had learned to speak Oneida as their first language. A language/culture trainee program was begun, with ten elders and five trainees. At present there are three elders and eight trainees, who have completed a two-year basic vocabulary program and are now moving into a two-year training phase focused on conversational functionality. In the next, advanced phase, the trainees will achieve greater fluidity in the language and begin teaching the Tribe. *See id.* at 33.

<sup>131</sup> *Id.* at 32. Six tribal members at the beginner stage were teaching basic vocabulary in the child care program (100 children), Head Start (108 children), and the school system (350 elementary and 125 high school students). *See id.* at 33.

<sup>132</sup> *See id.* at 32.

<sup>133</sup> *Id.* Ms. Cornelius also offered a few specific suggestions about the bill. *See id.*

She noted in closing that earlier in the month she had visited a language nest in Cherokee, North Carolina and been struck by the Cherokee language comprehension of the children, who had been in the program since they were 7 weeks old. Watching the children respond to Cherokee was an uplifting experience: “That just made my heart soar, and passing this legislation will also do that for all of us.”<sup>134</sup>

Finally, Sam Montoya, Language and Cultural Resources Administrator of the Pueblo of Sandia, described the status of native language at Sandia.<sup>135</sup> Mr. Montoya grew up speaking Southern Tiwa with his parents and grandparents, but many of his contemporaries attended Indian schools in Santa Fe and Albuquerque, where they were punished for speaking native languages and taught that English was the proper language for school and work.<sup>136</sup> When they returned home and eventually had children, they “wanted to make things easier for their children” and spoke English more in their homes. Because of this process, at age 60, Mr. Montoya was one of the youngest speakers of Sandia Tiwa.<sup>137</sup> The language, Mr. Montoya explained, “is one of the important connections we have to history, our culture, our land, and our future as Pueblo people,” and “the missing generational link . . . has meant that fewer and fewer people are able to speak our language.”<sup>138</sup>

In trying to promote language learning, the Tribe has developed a variety of learning tools, such as an alphabet to allow for writing their language; a first draft of a Tiwa/English dictionary; a dialog-based adult language curriculum; materials for use in Head Start classrooms; and a Master-Apprentice program, which pairs a Tiwa speaker with a language learner for informal language immersion sessions.<sup>139</sup> Mr. Montoya noted that in Pueblo communities, writing is controversial, but the Tribe is “committed to

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<sup>134</sup> *Id.* at 33.

<sup>135</sup> *Id.* at 33 (statement of Sam Montoya, Language and Cultural Resources Administrator, Pueblo of Sandia).

<sup>136</sup> *Id.* at 35.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *See id.*

implementing the change while preserving our right to control the written materials created for language instruction.”<sup>140</sup> He emphasized the “absolute necessity” of recognizing that tribes should decide “who has access to language materials, and how to approach language revitalization in the individual communities.”<sup>141</sup> Concerns about recording an orally transmitted language in written form have been voiced in other Pueblo communities as well, along with concerns over whether it is appropriate for Pueblo language and culture to be used as part of the curriculum in a non-native school.<sup>142</sup>

Montoya highlighted some of the benefits of encouraging the use of Tiwa in the community. First, language use reinforced the traditional family structure and other aspects of Pueblo culture. The children were learning traditional greetings for adults, which include titles that “indicate respect in the presence of family structure that extends beyond the nuclear model with all adults responsible for guiding children in the Pueblo and all children recognizing older people as respected elders.”<sup>143</sup> Tribal members are also using the Tiwa names for medicinal plants, an additional example of how, as Montoya explained, “not everything about our culture that our language captures can be simply translated into English.”<sup>144</sup> Secondly, the expansion of the language program has led to language being something that people discuss in the community, rather than being something that brought to mind painful experiences. Instead of avoiding talking about “forced assimilation in boarding

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<sup>140</sup> *Id.* at 36.

<sup>141</sup> *Id.* at 37.

<sup>142</sup> See Rebecca Blum Martinez, *Languages and Tribal Sovereignty: Whose Language Is It Anyway?*, 39 THEORY INTO PRACTICE 211, 214 (2000) (noting opposition in some Pueblo communities to writing their language on the grounds that it is sacrilegious and may allow indiscriminate access); see also *id.* at 215 (noting opposition in conservative Pueblos to teaching language and culture in schools, which should teach only “White man’s” knowledge and language).

<sup>143</sup> 2006 NALA Amendments Hearing, *supra* note 3 at 36 (statement of Sam Montoya, Language and Cultural Resources Administrator, Pueblo of Sandia); see also MY LIFE IN SAN PUEBLO, *supra* note 47 at 86, 143 (describing how the elders are addressed).

<sup>144</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 36 (statement of Sam Montoya, Language and Cultural Resources Administrator, Pueblo of Sandia).

schools . . . because of feelings of shame and regret associated with the experience there and the resulting language loss,” people were talking about what should be done about language loss and were more willing to participate in language programs.<sup>145</sup> Finally, growing up in a bilingual community is an asset, rather than a liability, because “children who are able to communicate in two or more languages have an easier time learning additional languages and new skills.”<sup>146</sup>

Montoya offered a number of suggestions as to how the federal government could support the efforts of Sandia Pueblo and other tribes. He recommended increased funding for the National Science Foundation/National Endowment for the Humanities Documenting Endangered Languages Fellowship program, which had provided funding for a linguist who worked with the Tribe on the language program.<sup>147</sup> He also recommended increased instructional support, to help train fluent speakers who do not have classroom experience or teaching materials in curricular design and second language learning and teaching.<sup>148</sup> Finally, Montoya asked Committee members to support bilingual education and to withhold support for legislation that aims to establish English as the official language of the United States. Montoya explained the deleterious impact of English-only legislation:

Trying to establish English as the only official language in this country erases our hard-earned claims to sovereignty and sends a message to our children that our languages are not as valued or as important as English. This runs counter to all of our efforts as indigenous people to reverse language loss and take control of the language policy in

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *See id.* at 36.

<sup>148</sup> *Id.* at 37 (statement of Sam Montoya, Language and Cultural Resources Administrator, Pueblo of Sandia). Montoya noted that Sandia Pueblo had recently learned that there is an opportunity for the Tribe to choose someone to teach Tiwa in the Bernalillo County Schools, and instructional support for such programs would be helpful. *See id.*

our communities.<sup>149</sup>

After giving their individual testimony, the witnesses were asked by Representative Wilson to identify the characteristics of language programs or language recovery programs that make them successful.<sup>150</sup> Their responses identified the following factors, which must be addressed to make a program successful:

- the opportunity for complete immersion;
- teacher training, so that those who can speak a language can learn how to best teach it;
- a long-term commitment, so that children can continue their studies over the course of their school years;
- a curriculum that is based in the community, to make language teaching relevant and tied to the context in which the language is used;
- a commitment by whole families to language learning;
- a commitment by the community to language learning; and
- patience and persistence, particularly given the fact that a language may have sounds that do not exist in English and therefore takes time to learn.<sup>151</sup>

The hearing ended as it had begun, with a prayer by Governor Coriz, given in the language that his tribe was endeavoring to preserve.<sup>152</sup>

## 2. *The Renaming and Enactment of H.R. 4766*

Although House Education and the Workforce Committee Chairman Howard McKeon warned the attendees of the August 2006

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<sup>149</sup> *Id.*; see also Dussias, *Waging War with Words*, *supra* note 15, at 951-63 (discussing the English-only movement and proposed legislation).

<sup>150</sup> See 2006 NALA Amendments Hearing, *supra* note 3, at 43.

<sup>151</sup> See 2006 NALA Amendments Hearings, *supra* note 3, at 43-45; see also MY LIFE IN SAN PUEBLO, *supra* note 47, at 78, 86 (describing Tewa sounds that do not exist in the English language).

<sup>152</sup> See 2006 NALA Amendments Hearings, *supra* note 3, at 51.

Albuquerque field hearing that H.R. 4766 might well not be passed by Congress before the conclusion of the then waning current session,<sup>153</sup> H.R. 4766 was in fact enacted sooner than he had anticipated. The passage of the bill might well have been accelerated by the tragic death of Esther Martinez of Ohkay Owingeh, a woman who had worked long and hard to preserve her tribe's language.<sup>154</sup> Renamed San Juan Pueblo by the Spanish, Ohkay Owingeh, as it is once again known, means "place of strong people."<sup>155</sup> Esther Martinez surely lived up to the name of her community.

The bill was brought to the floor of the House of Representatives on September 27, 2006 by Committee Chairman McKeon. McKeon spoke of being proud that Congress was responding to the message conveyed by the witnesses at the field hearing, of the need to preserve Native American languages in the face of their dramatic decline.<sup>156</sup> He noted that there was a "great feeling" in the room during the hearing, and that some attendees had expressed the worry that "they would never see us again and never hear from us[,]” but instead “[w]e are back, and we are passing the bill.”<sup>157</sup>

McKeon spoke of what was at stake in the struggle to preserve Native American languages and of the need for the enactment of H.R. 4766 as a language preservation tool:

The link between education, language, and culture is considered by many as paramount to preserving the very identity of Native Americans. By encouraging a greater focus on Native language programs, we are not only striving to preserve that identity, but we are encouraging

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<sup>153</sup> *See id.*

<sup>154</sup> *See* Jerry Reynolds, *Legislative Review: Miracles in the 109<sup>th</sup> Congress*, INDIAN COUNTRY TODAY, Dec. 22, 2006 (noting that Rep. McKeon had indicated that he would not move the bill out of the Committee until 2007, but the tragedy of Mrs. Martinez's death "altered the emotional dynamics behind the bill").

<sup>155</sup> *See* Ohkay Owingeh Community School, [http://www.sanjuaned.org/ohkay\\_owingeh.html](http://www.sanjuaned.org/ohkay_owingeh.html) (last visited April 1, 2008).

<sup>156</sup> 152 CONG. REC. H7609-01, H7610 (daily ed. Sept. 27, 2006) (statement of Rep. McKeon).

<sup>157</sup> *Id.*

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greater academic performance among Native American students as well.

... Native American language preservation... represents the preservation of an important part of our Nation's history, culture, and legacy.

By providing grants to Native American language programs consisting of language nests, survival schools and restoration programs, we are bolstering that preservation effort. This measure will empower Native Americans to take the steps they deem necessary to preserve their indigenous languages and thus their cultures.<sup>158</sup>

The last sentence quoted above indicates a recognition that it is Native Americans themselves who must decide what steps are appropriate, in their communities, for addressing language preservation. The federal role should be to provide resources to support their efforts.

Representative Dale Kildee of Michigan also spoke in support of H.R. 4766, calling Native American languages "one of the treasures of this country's heritage, history, and diversity."<sup>159</sup> Many geographical names in the United States are derived from Native American languages, and it "would be a dishonor to continue to lose the languages to which we owe their origin."<sup>160</sup> Kildee also recalled the contributions made by the "code talkers" in the first and second world wars.<sup>161</sup> At the time that Kildee made these remarks, the Senate had just passed the Code Talkers Recognition Act a few days before.<sup>162</sup>

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<sup>158</sup> *Id.*

<sup>159</sup> 152 Cong. Rec. H7609-01, H7611 (Sept. 27, 2006) (statement of Rep. Kildee).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> 152 Cong. Rec. S9893-02, (Sept. 21, 2006) (remarks of Sen. Harkin, noting that the Senate had passed S. 1035, the Code Talkers Recognition Act, on the previous evening); *see also* Dussias, *Waging War with Words*, *supra* note 15, at 929-38 (providing an analysis of the Code Talkers and their treatment by the

The loss of languages could be stemmed, Kildee explained, by significantly increasing support for Native American language immersion programs, which decrease Native American dropout rates and increase their educational attainment while also developing fluent speakers.<sup>163</sup> He viewed H.R. 4766 as taking “an important step forward in recognizing [the] vital importance of the Federal Government proactively working to save an important part of our heritage.” He also warned, however, that as set out in H.R. 4766, the grant program was “just a promise,” which could not be fulfilled without a significant increase in funding.<sup>164</sup> He pledged to send a letter to the Appropriations Committee in support of increased funding for the grant program, and invited all of his colleagues to join him in that effort.<sup>165</sup>

Representative Heather Wilson, speaking as the author of H.R. 4766, announced her desire to rename the bill as the Esther Martinez Native American Languages Preservation Act of 2006, in honor of the gifted Pueblo teacher, linguist, and storyteller from New Mexico. Representative Wilson explained her request that the bill be renamed as follows:

At a government-run boarding school for American Indians[, the Santa Fe Indian School,] in the 1920s, Esther Martinez was not allowed to speak Tewa, her native language. Nor could she listen to the kinds of stories that her grandfather would tell her at her native San Juan Pueblo, now known as [Ohkay] Owingeh. The goal of the school was to assimilate American Indians, and that meant leaving the past, the stories, and the language behind. But Mrs. Martinez never did. After graduating from high school, Mrs. Martinez raised 10 children on an income earned from working as a janitor and in other service industry jobs, and she taught her children Tewa. Esther

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United States).

<sup>163</sup> 152 Cong. Rec. H7609-01, H7611 (Sept. 27, 2006) (statement of Rep. Kildee).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

took linguistics classes, and in her 50s she became a teacher. She taught Tewa in the local public schools. In 1983, her dictionary of San Juan Tewa was published . . . .<sup>166</sup>

On September 14, 2006, Mrs. Martinez was honored as a National Heritage Fellow by the National Endowment for the Arts (“NEA”), described by the NEA as the “highest form of federal recognition of folk and traditional artists.”<sup>167</sup> Two days later, while on her way back home, Mrs. Martinez was killed in a car accident. She was 94 years old. Representative Wilson sought to honor Mrs. Martinez’s efforts to preserve native languages by naming the 2006 Act for her.<sup>168</sup>

Representative Tom Udall, whose district encompasses Ohkay Owingeh, noted that the House was passing H.R. 4766 “with . . . great hope for the future, but with great sorrow for the recent past.”<sup>169</sup> He highlighted some of the other accomplishments of “Aunt Esther,” as many knew Mrs. Martinez, such as serving as director of bilingual education at the San Juan Day School, publishing a book of her stories, and translating the New Testament into Tewa.<sup>170</sup> He also noted that “it is a fitting tribute that this legislation be named after her” and that passing the legislation indicated that “the importance of cultivating and passing languages down to younger generations is now being recognized.”<sup>171</sup>

Esther Martinez’s Pueblo name was P’oe Tsawa, meaning “Blue Water.”<sup>172</sup> As an elder in her community, she was most

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<sup>166</sup> 152 Cong. Rec. H7609-01, H7611 (Sept. 27, 2006) (statement of Rep. Wilson).

<sup>167</sup> National Endowment for the Arts, About Us, NEA ARTS Honoring Our Nation’s Cultural Heritage: NEA National Heritage Fellowship Program, <http://www.nea.gov/about/Nearts/15-2007vol1/15p2honor.html> (last visited April 1, 2008).

<sup>168</sup> 152 Cong. Rec. H7609-01 (Sept. 27, 2006).

<sup>169</sup> 152 Cong. Rec. H7609-01, H7611 (Sept. 27, 2006) (statement of Rep. Udall).

<sup>170</sup> *Id.* at H7611-H7612.

<sup>171</sup> *Id.* at H7612.

<sup>172</sup> MY LIFE IN SAN PUEBLO, *supra* note 47 at 86. The proper Tewa spelling

commonly referred to as Kooe P'oe Tsawa, "Aunt Blue Water."<sup>173</sup> Babies are customarily given names by midwives, in connection with a ceremony in which the newborn is "offered to Mother Nature" by being held out to all six of the directions – north, south, east, west, above, and below.<sup>174</sup> Mrs. Martinez, though, was given her name by her father, who thought of the name while gazing into the water of his favorite fishing hole.<sup>175</sup>

In her final remarks, Representative Wilson focused her colleagues' attention on the role that the Act could play in the preservation of Native American cultures as more than relics of the past:

[N]ot too far from this House, . . . we have the newest building in the Smithsonian Institution. . . . It is the Museum of the American Indian, and inside it we are preserving Navajo rugs and bead work and beautiful pieces of art and kachinas and fetishes. We spend millions of dollars to preserve objects from the past. This bill . . . preserves a living culture through the preservation of language.<sup>176</sup>

Following supportive remarks by several other House members,<sup>177</sup> the Esther Martinez Native American Languages Preservation Act of 2006 was passed by the House.<sup>178</sup> The bill as passed by the House was referred to the Senate's Committee on

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includes additional marks, similar to accent marks, to indicate the Tewa letters, sounds, and tones that do not exist in English. *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 83, 85.

<sup>175</sup> *Id.* at 85. Esther Martinez was baptized with the name Estefanita as her Christian name, but was referred to as Esther. *Id.* at n.1.

<sup>176</sup> 152 Cong. Rec. H7609-01, H7611 (Sept. 27, 2006) (statement of Rep. Wilson).

<sup>177</sup> 152 Cong. Rec. H7609-01, H7612-H7613 (Sept. 27, 2006) (statements of Reps. Pomeroy, Bordallo, Baca, Pearce, and Petri). Representatives Rick Renzi of Arizona and Betty McCollum of Minnesota also submitted remarks in support of the bill. 152 Cong. Rec. E1894-02 (Sept. 28, 2006); 152 Cong. Rec. E1896-03 (Sept. 27, 2006).

<sup>178</sup> 152 Cong. Rec. H7609-01, H7613 (Sept. 27, 2006).

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Indian Affairs,<sup>179</sup> and passed by the Senate on December 6, 2006.<sup>180</sup> Among the Senators speaking in support of the bill was John McCain of Arizona, who urged the Senate to pass the bill as passed by the House of Representatives.<sup>181</sup> The Act was signed by President Bush on December 14, 2006 as Public Law No. 108-394.<sup>182</sup>

Under the provisions of the Martinez Act, the additional kinds of programs that are now eligible for funding through grants administered by the ANA are the following:

(A) Native American language nests, which are site-based educational programs that—

(i) provide instruction and child care through the use of a Native American language for at least 10 children under the age of 7 for an average of at least 500 hours per year per student;

(ii) provide classes in a Native American language for parents (or legal guardians) of students enrolled in a Native American language nest . . . ; and

(iii) ensure that a Native American language is the dominant medium of instruction in the Native American language nest;

(B) Native American language survival schools, which are site-based educational programs for school-age students that—

(i) provide an average of at least 500 hours of instruction through the use of 1 or more Native American languages for at least 15 students . . . ;

(ii) develop instructional courses and materials for learning Native American languages and for instruction through the use of Native American

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<sup>179</sup> 152 Cong. Rec. S10874-03 (Nov. 13, 2006).

<sup>180</sup> 152 Cong. Rec. S11387-01 (Dec. 6, 2006).

<sup>181</sup> 152 Cong. Rec. S11314-01 (Dec. 6, 2006).

<sup>182</sup> See Micheal Coleman, *Bush Acts to Preserve Native Languages*, ALBUQUERQUE J., Dec. 17, 2006, at B5.

languages;

(iii) provide for teacher training;

(iv) work toward a goal of all students achieving—

(I) fluency in a Native American language;  
and

(II) academic proficiency in mathematics,  
reading (or language arts), and science; and

(v) are located in areas that have high numbers or  
percentages of Native American students; and

(C) Native American language restoration programs, which  
are educational programs that—

(i) operate at least 1 Native American language  
program for the community in which it serves;

(ii) provide training programs for teachers of  
Native American languages;

(iii) develop instructional materials for the  
programs;

(iv) work toward a goal of increasing proficiency  
and fluency in at least 1 Native American  
language;

(v) provide instruction in at least 1 Native  
American language; and

(vi) may use funds received under this section  
for—

(I) Native American language programs, such  
as Native American language immersion  
programs, Native American language and  
culture camps, . . . [and] Native American  
language programs that use a master-  
apprentice model of learning languages . . . ;

(II) Native American language teacher  
training programs, such as training programs

in Native American language translation for fluent speakers, training programs for Native American language teachers, training programs for teachers in schools to utilize Native American language materials, tools, and interactive media to teach Native American language; and

(III) the development of Native American language materials, such as books, audio and visual tools, and interactive media programs.<sup>183</sup>

### 3. *Assessing the Martinez Act*

Was the 2006 Native American language preservation legislation a fitting tribute to Esther Martinez? On the bright side, the Martinez Act does expand the kinds of programs that are eligible for grants, giving greater flexibility for those who are working on language preservation projects. In addition, the Act emphasized immersion programs, such as language nests and survival schools, which numerous Native American tribes and educators have identified as a particularly promising and effective tool for language preservation.

However, the Act did not expressly mandate any actions to support language preservation. Nor did it designate any particular dollar amounts for funding grants for language programs. This leaves Native American language programs and other initiatives still subject to the vagaries, and competing funding claims, of the federal budgetary process.<sup>184</sup>

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<sup>183</sup> Esther Martinez Native American Languages Preservation Act of 2006, Pub. L. No. 109-394, § 2, 120 Stat. 2705, 2705-2706 (2006) (to be codified at 42 U.S.C. § 2991b-3).

<sup>184</sup> See, e.g., Chee Brossy, *New Media for Dine*, NAVAJO TIMES, Dec. 6, 2007, at A9 (noting that, “Money for such projects is supposed to be available under the Federal Esther Martinez Native American Languages Preservation Act of 2006, but Congress has not appropriated any because of disagreement between the

Representative Dale Kildee of Michigan had pointed out this shortcoming in his remarks in support of H.R. 4766. He noted that while the statute would allow for “grants to support and strengthen Native American language immersion programs” and would thus take “an important step forward in recognizing that vital importance of the Federal Government proactively working to save an important part of our heritage,” “the allowance for this grant program is just a promise, and this promise cannot be realized without a real increase in funding from the Administration for Native Americans which has been level funded at \$44 million for the last 3 years.”<sup>185</sup> The 2006 Senate bill to amend NALA, S. 2674, also stated that “previous Federal laws have resulted in inadequate funding for the enormous task of preserving and supporting Native languages.”<sup>186</sup> NIEA President Ryan Wilson also spoke in his 2006 hearing testimony of the need “to codify forever a place . . . to fund these schools.”<sup>187</sup>

A \$555 billion omnibus bill for the fiscal year 2008 budget that was passed by Congress and signed by President Bush on December 26, 2007 provided for \$6 million in funding for Native American language programs.<sup>188</sup> While this is a more generous funding amount than has been provided in the past, there is no reason to believe that a similar amount will be provided for in the future.

Another criticism of the Martinez Act is that the language preservation grant program is administered by the Administration for Native Americans (“ANA”) rather than by the Department of Education. H.R. 4766, as introduced by Representative Wilson and the co-sponsors, provided for amendment of the Native American Languages Act and the establishment of the grant program in the Department of Education.<sup>189</sup> The bill as enacted, however, amended

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House and Senate over the amount.”).

<sup>185</sup> 152 Cong. Rec. H7609-01 (Sept. 27, 2006).

<sup>186</sup> S. 2674, 109<sup>th</sup> Cong., 2<sup>nd</sup> Sess., § 2.

<sup>187</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 12.

<sup>188</sup> See Jerry Reynolds, *Budget Compromise Brings Relief, for Now*, INDIAN COUNTRY TODAY, Dec. 26, 2007.

<sup>189</sup> H.R. 4766, 109<sup>th</sup> Cong., §§ 2-3 (defining the term “Secretary” as meaning the Secretary of Education and authorizing grants and contracts to be made by the Secretary).

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the Native American Programs Act of 1974 and expanded the authority granted to the Department of Health and Human Services (“HHS”) under NALA of 2002.<sup>190</sup> As a result, the new grants and contracts authorized by the Martinez Act are to be administered by HHS, through the ANA. Ryan Wilson described the shortcoming of this approach in his 2006 hearing testimony. NALA of 2002, he noted, “provides for a very broad grant program for Native language projects that span the spectrum from recording and compiling information on extinct Native languages to teaching Native languages” and “provides minimal support for language immersion programs.”<sup>191</sup> Over the preceding few years, “ANA’s funding has been flatlined at \$44 million with less than 10% of this funding going toward language immersion programs.”<sup>192</sup>

Moreover, Wilson pointed out, the language grant program is just one of the grant programs that ANA administers and thus “language grant applications must compete against ANA’s other grant programs.”<sup>193</sup> Thus, with very limited funding available, language grant applications have to compete with applications for grants under programs focused on “social and economic development, environmental regulatory enhancement, healthy marriages, and environmental mitigation.”<sup>194</sup> It should be noted that

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<sup>190</sup> See Esther Martinez Native American Languages Preservation Act § 2 (amending the Native American Programs Act to expand the program to ensure the vitality of Native American languages).

<sup>191</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 20 (statement of Ryan Wilson, President of the National Indian Education Association).

<sup>192</sup> *Id.*; see also Department of Health and Human Services, Administration for Native Americans, ANA Fast Facts, [http://www.acf.hhs.gov/programs/ana/about/fast\\_facts.html](http://www.acf.hhs.gov/programs/ana/about/fast_facts.html) (last visited Mar. 3, 2008) (noting that in Fiscal Year 2001, ANA received a \$10 million increase in its appropriation, from \$35.4M to \$45M, but since Fiscal Year 2004, the appropriation has been “straight-lined,” and that in Fiscal Year 2006, ANA had a demand for project funding in excess of \$85 million and provided funding for 23% of the applications that it received).

<sup>193</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 20 (statement of Ryan Wilson, President of the National Indian Education Association).

<sup>194</sup> *Id.*; see also Department of Health and Human Services, Administration for Native Americans, Program Information, [http://www.acf.hhs.gov/programs/ana/programs/program\\_information.html](http://www.acf.hhs.gov/programs/ana/programs/program_information.html) (last visited Mar. 3, 2008) (listing the Administration for Native Americans’ programs).

language grant applications have not been very successful in this competition – language grants make up a fairly small percentage of the grants awarded by ANA. The breakdown of fiscal year 2006 new grants, for example, was as follows: fifty-seven Social and Economic Development Strategies (SEDS) grants; ten Healthy Marriage Initiative grants; three SEDS Alaska grants; thirteen Native American Language Preservation and Maintenance grants; one Environmental Mitigation grant; and five Environmental Regulatory Enhancement grants.<sup>195</sup>

Ryan Wilson expressed the NIEA’s position that the language immersion grant program included in H.R. 4766 should be administered by the Office of Indian Education of the Department of Education (“DOE”) because of the DOE’s role as the federal agency that administers Native American education and that “can provide stability for an immersion nest or school through its grant funding stream and other resources.”<sup>196</sup> In addition, language nests and survival schools fit within the purpose of Title VII of No Child Left Behind (which is administered by the DOE) to “provide for the ‘unique and culturally related academic needs of Indian students.’”<sup>197</sup>

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<sup>195</sup> Department of Health and Human Services, Administration for Native Americans, ANA Fast Facts, [http://www.acf.hhs.gov/programs/ana/about/fast\\_facts.html](http://www.acf.hhs.gov/programs/ana/about/fast_facts.html) (last visited Mar. 3, 2008).

<sup>196</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 21 (statement of Ryan Wilson, President of the National Indian Education Association).

<sup>197</sup> *Id.* (quoting Title VII of No Child Left Behind).

*III. The Responsibility of the United States toward  
Native American Languages*

It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children. The Federal Government will continue to work . . . toward the goal of ensuring that programs that serve Indian children are of the highest quality and provide for . . . the unique educational and culturally related academic needs of these children.

— No Child Left Behind Act of 2001<sup>198</sup>

With the enactment of the Esther Martinez Native American Languages Preservation Act of 2006, has the U.S. government finally invested an adequate amount of resources and demonstrated a true commitment to the preservation of Native American languages? After all, the grant program established pursuant to NALA of 1992, and expanded by the Martinez Act, while receiving a relatively small amount of funding each fiscal year, has nonetheless provided grants for dozens of tribes and organizations to undertake important work.<sup>199</sup> Still, given the past efforts of the government to stamp out Native American languages as part of what can be termed a “cultural genocide” program, the continuing effects of which tribes still experience today, coupled with the congressional findings and policy statements in the Native American language preservation statutes, I can only conclude that the United States simply should do more than it has done to date. A number of factors, explored below, support the conclusion that the United States has a responsibility to better protect, and foster the preservation of, Native American languages.

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<sup>198</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, sec. 7101, 20 Stat. 7401 (2002).

<sup>199</sup> The ANA website includes extensive information about language preservation and maintenance grants that have been awarded. *See, e.g.*, Department of Health and Human Services, Administration for Native Americans, *2007 Current ANA Native Language Preservation and Maintenance Grants (By Category and By State)*, <http://www.acf.hhs.gov/programs/ana//grants/currentndetails.html> (last visited Jan. 24, 2008).

In order to adequately determine what kind of assistance the United States should provide to meet this responsibility, there is a need for the kind of input from tribal leaders, tribal members, and Native American educators and organizations that was provided in the August 2006 hearing and in previous hearings related to NALA and other proposed amending legislation. And of course tribes may have different views, based on their own experiences, beliefs, and concerns, on this issue. I therefore only offer some preliminary thoughts on appropriate government actions, drawing upon views and concerns that were expressed in the 2006 hearing.

First and foremost, it seems essential to make a long-term commitment to dedicated language preservation grant funding and to raise the funding level beyond what it has been in past fiscal years. These actions are justified by the number of tribes that are in need of support, the number of languages that are at risk of disappearance, and the enormity of what is at stake for the tribes that are seeking to preserve their languages. In his testimony in the 2006 hearing, Ryan Wilson noted that the National Indian Education Association supported a figure “in the range of \$8 million” for the new grant program to be established by H.R. 4766, an amount of funding that “would allow for firmer financial footing for existing language immersion programs and would provide encouragement for others to begin.”<sup>200</sup> In addition, it seems important to determine to what extent a requirement imposed in NALA of 1992, that language program grantees contribute 20% matching funds, stands as an insurmountable barrier to tribes and organizations that would like to apply for grants.<sup>201</sup>

Some tribal members and leaders have expressed the view that it must be up to the tribes to determine whether and how their languages will be saved, because only the tribes truly care about this issue. Ivan Star Comes Out, a Lakota, for example, has stated that “the dominant society has absolutely no interest in . . . native language and culture. People of European origin have no stake in

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<sup>200</sup> NALA 2006 Hearings, *supra* note 3, at 20 (statement of Ryan Wilson, President of the National Indian Education Association).

<sup>201</sup> 42 U.S.C. § 2991b-3(e)(1).

this. In fact, the only stake they had was in destroying indigenous languages and cultures.”<sup>202</sup> Certainly no one has more at stake where a language is concerned than the people to whom it belongs, and no one can be expected to have more of a commitment to a language than those people. I do not believe, however, that it is legitimate for the United States to use this viewpoint as an excuse for shirking its responsibility to provide whatever assistance is sought by tribal leaders and others to try to make up for the damage done by the United States.

While the nature and extent of the assistance that needs to be provided must be determined with tribal input, I do wish to offer a number of reasons why the United States has a responsibility, both legal and, I believe, moral, to do more to promote and support programs for language preservation and restoration. The remarks below identify some of the factors that support increased government efforts toward language preservation and restoration.

In my view, then, the United States must increase its efforts to preserve protect, and revitalize Native American languages in recognition of the following:

*1. In Recognition of What the U.S. Government Itself*

*Says Its Policy Is*

A number of statutes and presidential statements claim that federal policy is to protect Native American languages and to recognize the role of Native American language and culture in education programs for Native American students. First and foremost, NALA repudiated past government policy and stated that “the status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages.”<sup>203</sup> Members of Congress have recognized

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<sup>202</sup> Ivan Star Comes Out, *Close to Extinction: What Can Be Done?*, INDIAN COUNTRY TODAY, Oct. 5-Oct. 12, 1998, at A5.

<sup>203</sup> 25 U.S.C. § 2901(1).

the responsibility of the United States toward Native American languages in their public statements. Senator Akaka, for example, in voicing support for amending NALA, stated that “[a]s Americans, it is our responsibility to perpetuate Native languages that have shaped our collective identity and contributed to our history.”<sup>204</sup> NALA of 1992 and the Martinez Act were enacted as a result of the recognition that the government needed to do more to actually implement the policies set out in NALA. NALA, NALA of 1992, and the Martinez Act became law by being passed (after careful study) by Congress and signed by the President, indicating the support of both the legislative and executive branches of the U.S. government, and of members of both major political parties, for Native American language preservation.

Government support for Native American language preservation is not limited to these language-focused statutes. Title VII of the No Child Left Behind Act, for example, recognizes the federal “responsibility to the Indian people for the education of Indian children” and commits the government to working to ensure that programs that serve Indian children provide for “the unique educational and culturally related academic needs of these children.”<sup>205</sup> Title VII thus recognizes the inadequacy of a “one size fits all” approach toward education where Native American children are concerned and instead commits the government to working toward the creation of educational programs that embrace tribal culture, of which language is considered a necessary component by many tribes.

Executive orders have also expressed support for language revitalization. President Clinton’s 1998 executive order “American Indian and Alaska Native Education” established an interagency task force charged with developing a comprehensive Indian education policy designed to “assist tribal governments in meeting the unique educational needs of their children, including the need to preserve,

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<sup>204</sup> Cong. Rec., S3716, Apr. 27, 2006 (statement of Senator Akaka in introducing S. 2674).

<sup>205</sup> 20 U.S.C. § 7101.

revitalize, and use native languages and cultural traditions.”<sup>206</sup> President Bush’s 2004 executive order, also entitled “American Indian and Alaska Native Education,” expressed a commitment to assisting “American Indian and Alaska Native students in meeting the challenging academic standard of the No Child Left Behind Act . . . in a manner that is consistent with tribal traditions, languages, and cultures.”<sup>207</sup> The 2004 order mandated the preparation of a study of American Indian and Alaska Native education that would include “assessment of the impact and role of native language and culture on the development of educational strategies to improve academic achievement.”<sup>208</sup>

Thus, both the legislative and the executive branches of the federal government claim that they support the policy of preserving and revitalizing Native American languages and have recognized the need to consider tribal languages in developing adequate educational programs for Native American children. Laws have been enacted and executive orders have been given accordingly. It seems, then, that Congress and the President should act in a way that is consistent with this policy and establish and adequately fund programs to carry out the policy and thus make language preservation and restoration a reality. As Professor Christine Sims pointed out in her 2006 hearing testimony, if the intent of NALA is to be carried out, then the necessary funding must be made available, to make its promises a reality.<sup>209</sup>

*2. In Recognition of Federal Responsibilities to All Young  
Americans Where Education is Concerned, and, in particular,  
Federal Responsibilities to Students Who Are at Risk*

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<sup>206</sup> Exec. Order No. 13,096, 63 Fed. Reg. 42,683 (1998), *reprinted in* 20 U.S.C.A. § 7401 (2003).

<sup>207</sup> Exec. Order No. 13,336, 69 Fed. Reg. 25,295 (Apr. 30, 2004), *reprinted as amended in* 20 U.S.C. § 7401 (2008).

<sup>208</sup> The 2004 executive order revoked the 1998 executive order. *Id.* §3(a)(iii); *See id.* § 9

<sup>209</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 25 (statement of Professor Christine Sims).

Many Native American students are considered “at risk,” a situation that has been recognized by educators and federal officials for many years and has been attributed to the inadequacy of the educational services and opportunities that have been provided to Native American students.<sup>210</sup> A 1969 Senate report, “Indian Education: A National Tragedy – A National Challenge,” stated that “our national policies for educating American Indians are a failure of major proportions. They have not offered Indian children – either in years past or today – an educational opportunity anywhere near equal to that offered the great bulk of American children.”<sup>211</sup> Almost thirty years later, remarks by President Clinton highlighted the continuing legacy of inadequate educational services for Native American students, stating that “[i]f the drop out rate continues, then the future for Native American children will become even bleaker . . . . The opportunity gap between them and their peers will widen to a dangerous chasm.”<sup>212</sup>

There is considerable and growing evidence that learning Native American languages, particularly in immersion-focused programs like language nests and language survival schools, improves Native American students’ overall academic performance.<sup>213</sup> This finding, and its significance for policy making, was included in the congressional findings that supported the enactment of NALA, which included the following:

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<sup>210</sup> See Dussias, *Let No Native American Child Be Left Behind*, *supra* note 16, at 833-41, 844-60, 864-73 (discussing government and government-sponsored reports on the status of Indian education, beginning with the so-called “Meriam Report” of 1928).

<sup>211</sup> Senate Special Subcomm. on Indian Educ., Comm. on Labor & Public Welfare, *Indian Education: A National Tragedy – A National Challenge*, S. Rep. No. 91-501, at xi (1969), *quoted in* Dussias, *Let No Native American Child Be Left Behind*, *supra* note 16, at 819.

<sup>212</sup> Brenda Norrell, *National Press Favors Scandal; Indian Education Found Not Worthy*, INDIAN COUNTRY TODAY, Sept. 28-Oct. 5, 1998, at C1 (quoting President Clinton’s remarks on the signing of his 1998 executive order on Indian education).

<sup>213</sup> See, e.g., Teresa L. McCarty, *Revitalising Indigenous Languages in Homogenising Times*, 39 COMP EDUC. 147, 152-57 (2003) (discussing the academic successes of students in Hawaiian and Navajo immersion schools).

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(6) there is convincing evidence that student achievement and performance, community and school pride, and educational opportunity is clearly and directly tied to respect for, and support of, the first language of the child or student; [and]

(7) it is clearly in the interests of the United States, individual States, and territories to encourage the full academic and human potential achievements of all students and citizens and to take steps to realize these ends. . . .<sup>214</sup>

Several of the witnesses and members of Congress at the 2006 field hearing held prior to the enactment of the Martinez Act also noted the evidence indicating the benefits of immersion programs in particular.<sup>215</sup>

Congress and the President have also purported to commit the government to ensuring that no child is “left behind” by the educational system through the No Child Left Behind Act. If academic success for many Native American students is best fostered by a grounding in their tribe’s language, then native language-based education should be recognized as part of the equation for academic success. Otherwise, Native American students will be denied equal educational opportunity. Congress recognized this reality in Title VII of the No Child Left Behind Act, with its commitment to working to ensure that educational programs that service Native American children provide for their “unique educational and culturally related academic needs.”<sup>216</sup>

A one-page Department of Education publication, “*How No Child Left Behind Benefits American Indians*,” notes that, “[i]n 2004, President Bush signed an Executive Order . . . pledging “to meet *No Child Left Behind*’s high standards ‘in a manner that is consistent with tribal traditions, languages and cultures.’”<sup>217</sup> The

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<sup>214</sup> 25 U.S.C. § 2901(6)-(7).

<sup>215</sup> See, e.g., 2006 NALA Amendments Hearing, *supra* note 3 (statements of Rep. Udall, Ryan Wilson, and Professor Christine Sims).

<sup>216</sup> 20 U.S.C. § 7101.

<sup>217</sup> U.S. Department of Education, *How No Child Left Behind Benefits American Indians*, <http://www.ed.gov/nclb/accountability/achieve/nclb-amind.pdf>

brochure states that, “President Bush and Secretary Spellings are working to ensure that *No Child Left Behind* meets the needs of American Indian and Alaska Native citizens.”<sup>218</sup> Representative Betty McCollum, however, has argued that the implementation of Title VII has departed from what Congress intended with respect to support for Native American languages in Native American programs. According to McCollum:

Title VII – which exists to ensure Native children receive Native language and culture instruction – has been reduced or reallocated to other functions of the No Child Left Behind law . . . . Schools have felt pressure from the Bush administration to instead spend resources for Native language and culture on the goals of Bush’s No Child Left Behind law. Title VII resources must be focused on Title VII goals – not siphoned off to support other goals of the Bush administration . . . . Native children have the right to the education they are promised – that means the highest quality education – including instruction in their language.<sup>219</sup>

In summary, the U.S. government has recognized the at risk status of Native American students and its resulting special responsibility toward them, and the role of Native American language learning in improving educational opportunities and outcomes. The carrying out of this responsibility is not, however, without flaws, which must be addressed in order for the responsibility to be more fully met.

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(providing one of several Department of Education publications that focus on the impact of the No Child Left Behind Act on various groups and claim that the impact has been positive; *see also* U.S. Department of Education, *Fact Sheets, Op-Eds* <http://www.ed.gov/news/opeds/factsheets/index.html?src=ln> (listing other publications addressing the Act’s impact on other groups, namely, African Americans and Hispanics).

<sup>218</sup> U.S. Department of Education, *How No Child Left Behind Benefits American Indians*, <http://www.ed.gov/nclb/accountability/achieve/nclb-amind.pdf>.

<sup>219</sup> 152 Cong. Rec. E1896-03 (Sept. 27, 2006) (statement of Rep. Betty McCollum).

3. *In Recognition of a Responsibility to Try to Repair Some of the Damage Done by Past Policies*

In her statement in the 2006 hearing, Professor Christine Sims described the impact of past federal policies on Native American education and languages and how the deleterious effects of these policies were combined with the ravages of federal policy toward Indian lands: “The legacy of federal education systems and policies . . . were especially detrimental to Native tribes, often exacerbating the already painful experiences of forced removal from traditional lands in many cases.”<sup>220</sup> It can be added that along with the policy of forced removal from tribal lands that was imposed on some tribes, the government also imposed the allotment policy, under which tribal lands were divided up and allotted to tribal members, on many tribes.<sup>221</sup> The policy reduced the tribal land base, as “surplus” reservation land was sold to white settlers. In addition to having adverse effects on tribal economies, the implementation of the allotment policy also reduced the geographic area in which Native American languages had a kind of linguistic refuge. Loss of tribal property rights thus contributed to language loss. In addition, funds that were received from the sale of surplus lands to settlers were made available to Congress for appropriations to pay for schools for tribes whose land was sold – schools in which tribal children were taught English and punished for speaking their languages.<sup>222</sup> One “civilizing” policy thus fed into another, as stripping tribes of their land supported stripping tribes of their languages.

Representative Betty McCollum of Minnesota, in remarks in support of H.R. 4766, attributed the endangered status of Native American languages to both the action and the inaction of the

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<sup>220</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 29 (statement of Professor Christine Sims).

<sup>221</sup> See, e.g., Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637, 672-88 (1999) (providing an analysis of the allotment policy and process).

<sup>222</sup> See Dussias, *Let No Native American Child Be Left Behind*, *supra* note 16, at 845.

government, noting that “decades of federal restrictions on the instruction and use of Native languages led to their deliberate decline.”<sup>223</sup> Representative McCollum also noted that damage continues to be done by current federal actions, such as flawed implementation of Title VII of the No Child Left Behind Act.<sup>224</sup>

Another aspect of past government conduct toward Native Americans, the widespread removal of Native American children from their homes for adoption, foster care, or other placements in non-Native homes or institutions that occurred prior to the enactment of the Indian Child Welfare Act in 1978,<sup>225</sup> also contributed to the endangered status of many languages today. This separation of Native American children from their communities was, like the English-only policy for schools, based at least in part on negative attitudes toward Native American culture.<sup>226</sup> It necessarily reduced the number of Native American children to whom Native American languages could be passed, along with its other devastating effects on Native American families and communities. In short, a number of U.S. government policies, not just the English-only policy of the Indian schools, have contributed to the endangered status of Native American languages.

Professor Sims pointed out in her testimony that the results of past federal policies continue to be very real in the daily lives of tribal members: “The continuing legacy of such circumstances continue[s] to haunt us today, when we view the problems and issues that are often associated with the low academic performance of Native children, including high drop out rates, high rates of youth

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<sup>223</sup> 152 Cong. Rec. E1896-03 (Sept. 27, 2006) (statement of Rep. Betty McCollum).

<sup>224</sup> *See id.*

<sup>225</sup> *See* Lorie A. Graham, “*The Past Never Vanishes*”: *A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 23-34 (discussing the practices that led to the removal of Native American children from their homes and the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901-63 (1998)).

<sup>226</sup> *Id.* at 25-28 (describing the prejudices that affected many child placement decisions).

suicides, and low academic test scores.”<sup>227</sup> Government officials, at both the state and federal level, have time and again pointed to these problems, and vowed to do more to improve the educational experiences and outcomes of Native American students.

The term “reparations” has been used in general to describe the idea that groups, such as African Americans, who suffered from violations of their rights in the past are entitled to compensation, of one form or another, in the present. The reparation concept recognizes that those individuals and entities that profited from mistreatment and exploitation of others in the past, or their successors, continue to benefit from the fruits of this past misconduct, while the descendants of those who were mistreated and exploited continue to be adversely affected by the socioeconomic and other impacts of centuries of racism, disenfranchisement, lack of equal educational opportunity, and unpaid or underpaid labor. Reparations theory and practice continue to evolve, as outlined by Professors Yamamoto, Kim, and Holden in their 2007 article, *American Reparations Theory and Practice at the Crossroads*.<sup>228</sup>

Professor William Bradford, in his 2005 article, *Beyond Reparations: An American Indian Theory of Justice*, explained the inadequacy of the reparations concept for achieving justice for Native Americans, who have suffered and continue to suffer injustices that cannot be understood in material terms.<sup>229</sup> Language loss indeed seems to be one such injustice. He speaks instead of a theory of justice as indigenism, which encompasses seven stages in the movement toward justice for Native Americans: acknowledgment, apology, peacemaking, commemoration, compensation, land restoration, legal reformation, and reconciliation.<sup>230</sup> His point about the limitations of reparations

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<sup>227</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 29 (statement of Professor Christine Sims).

<sup>228</sup> Eric K. Yamamoto, Sandra Hye Yun Kim, & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W.L. REV. 1, 15-39 (discussing four generations of reparations theory).

<sup>229</sup> William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1 (2005).

<sup>230</sup> *See id.* at 72.

theories for justice for Native Americans is well taken, but I also find that some approaches that have emerged from more recent reparations theory are helpful in thinking about the United States' responsibilities toward Native American languages, such as the "four R's approach" discussed by Professor Yamamoto and his co-authors. This approach to group healing requires: (1) *recognition* of group harms and the historical roots of grievances; (2) acceptance of *responsibility* for healing wounds, whether based on culpability or receipt of privileges and benefits; (3) acts of *reconstruction* to build a new relationship, including apologies, other acts of atonement, and efforts to restructure institutions; and (4) *reparations*, such as education, symbolic displays, and financial support.<sup>231</sup> The "four R's" seem to me to be helpful guideposts for assessing whether the United States has made sufficient efforts to treat Native Americans with justice and promote healing where their languages are concerned. The United States has made some progress with respect to each of these dimensions of healing and justice. Most in need of further progress seem to be acts of reconstruction, which should include changes in educational institutions to accommodate language learning, and acts of reparations, which seemingly should include a more generous and sustained financial commitment to language restoration.

Finally, it seems only appropriate that, given that Native American languages were taken away by *forbidding* Native American children to speak them, the U.S. government should help to repair the damage done by its repudiated English-only policy by supporting *teaching* these languages to Native American children today. After all, why shouldn't the United States put as much energy and resources into preserving and restoring Native American languages as it, in the past, put into trying to eradicate them? Justice seems to require no less.

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<sup>231</sup> Yamamoto et al., *supra* note 228, at 48.

4. *In Recognition of the Continued Existence of Treaties between the United States and Sovereign Tribes, the Trust Relationship between Tribes and the United States, and the United States' Commitment to Respect Tribal Sovereignty and Rights to Self-Determination*

Under treaties and other agreements between tribes and the United States, dating to as early as the birth of the United States, tribes granted rights to land and other resources to the United States. Tribes ceded many things of value under these treaties, but they did not cede their right to preserve their languages and cultures. Instead, in many of the treaties they were promised educational services. Education guarantees in treaties typically addressed matters such as teachers' salaries, construction of school buildings, and school supplies.<sup>232</sup> By these treaty provisions, bolstered by the trust relationship and legislation, the U.S. government bound itself to provide educational services to Native Americans. While these treaties generally did not protect language rights per se,<sup>233</sup> they in effect guaranteed that tribes would receive educational services that were appropriate for the needs of the tribes and tribal children. The parties to the treaties, both tribes and the federal government, today recognize that appropriate educational services include provision for the teaching of Native American languages. Treaty rights are thus not truly honored, and legal obligations are not truly fulfilled, unless this understanding is acted upon.

The treaties and agreements that the federal government made with tribes over the course of many years, along with judicial decisions and other aspects of the dealings between the tribes and the government, gave rise to the trust relationship, encompassing a

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<sup>232</sup> See Dussias, *Let No Native American Child Be Left Behind*, *supra* note 16, at 826. Of the almost 400 treaties entered into with tribes between 1778 and 1871, 120 included educational provisions. *See id.*

<sup>233</sup> See James Fife, *The Legal Framework for the Protection of Indigenous Language Rights in the United States*, 41 WILLAMETTE L. REV. 325, 364-66 (2005). While treaties were generally silent as to Native American languages, an 1828 treaty with the Western Cherokee provided for a sum of \$1,000 to be used to purchase a printing press to print documents in English and Cherokee. An 1866 Treaty with the Creeks provided that federal legislation would not interfere with tribal "customs," which could be interpreted to protect traditional language practices. *Id.*

responsibility to respect and protect tribes, tribal resources, and tribes' right to separate identities. NALA recognized the special relationship between tribes and the United States, in which the United States recognizes tribes' "distinct cultural and political rights, including the right to continue separate identities."<sup>234</sup> In his testimony in the 2006 hearing, Ryan Wilson of the National Indian Education Association emphasized this point, noting that "Indian country is not a special interest group," like the various interest groups that want to weigh in on proposed legislation relating to education. Rather, Indian education is a matter of special federal responsibility, "because we have a unique relationship with the Federal Government, and it's based on those treaties, based on the trust responsibility."<sup>235</sup>

Ryan Wilson also explained how tribal sovereignty fits into the picture, noting that tribes "gave up millions of acres of the richest land in the world" in exchange for continued recognition of tribes' inherent sovereignty, "and education was a piece of that."<sup>236</sup> The inherent sovereignty of tribes was recognized by the very fact of treaty-making. Sovereignty carries with it the right and power to make the choice to preserve tribal culture, which includes a tribe's own language.

The tribal right to self-determination, recognized by current federal policy, also supports the right to preservation of tribal languages. The right to self-determination was affirmed in the Indian Self-Determination and Education Assistance Act, which declared Congress's "commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy . . . ."<sup>237</sup> NALA recognized the self-determination right, stating that "acts of suppression and

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<sup>234</sup> 25 U.S.C. § 2901(2).

<sup>235</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 14 (statement of Ryan Wilson, President of the National Indian Education Association).

<sup>236</sup> *Id.*

<sup>237</sup> 25 U.S.C. § 450a.

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extermination directed against Native American languages and cultures are in conflict with the United States policy of self-determination for Native Americans.”<sup>238</sup>

Title VII of the No Child Left Behind Act employed similar language, with an emphasis on the trust relationship, stating that it is “the policy of the United States to fulfill the Federal Government’s unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.”<sup>239</sup>

Representative Betty McCollum of Minnesota touched on these concepts as well in her remarks in support of H.R. 4766. She stated that Native American languages and cultures are being eroded “[d]espite treaties and laws and executive orders that call for the preservation and incorporation of Native language and culture in education.”<sup>240</sup> Representative McCollum called for a reaffirmation of “our commitment to preserve, to honor, and to teach the living traditions, cultures, and languages of the First Americans who have and continue to contribute to the strength of our Nation as teachers, community leaders, business owners, artists, elected officials, and neighbors—and the brave men and women who have fought in our armed services. Native Americans have identified the recovery and preservation of their languages as one of their highest priorities. As a country, we have a moral obligation to live up to our commitments to the First Americans.”<sup>241</sup>

In summary, a number of foundational legal principles related to the status and legal rights of tribes – treaty rights, the trust relationship, tribal sovereignty, the government-to-government relationship between tribes and the United States, and the right to self-determination – establish the federal responsibility for supporting the preservation and restoration of Native American languages, and the obligation to take this responsibility seriously.

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<sup>238</sup> 25 U.S.C. § 2901(8).

<sup>239</sup> 20 U.S.C. § 7401.

<sup>240</sup> 152 Cong. Rec. E1896-03 (Sept. 27, 2006).

<sup>241</sup> *Id.*

5. *In Recognition of the Need to Support the Meaningful Exercise of the Constitutional Rights of Native Americans*

Rights to freedom of expression and to free exercise of religion have often fallen short where Native Americans are concerned. Native American free exercise rights in particular, both historically and in the present, have suffered from both explicit and implicit acts of repression and suppression.<sup>242</sup> These rights are intertwined with language rights, because Native American may prefer to express themselves in native languages, particularly in the context of traditional religious practices.

Native Americans from a variety of tribes who practice traditional religions have explained that they feel that they cannot pray in the way that has been passed down from their ancestors in English. Navajo Sam Billison has explained that, "Navajo culture and philosophy dictates that our language is an integral part of our religion. All of our ceremonial songs and prayers are in our language . . . ."<sup>243</sup> In a similar vein, commenting on the loss of knowledge that would accompany the loss of Navajo, Clay Slate, the manager of the Navajo Language Program stated, "There are a lot of things that if they aren't done in Navajo, they can't be done at all."<sup>244</sup> For Pueblo peoples as well, native languages are essential to spirituality.<sup>245</sup>

Tribes and organizations that have worked on language programs have noted that "[a] number of people have learned how to pray in their language . . . . They are starting to reinvent their languages so they can pray at ceremonies and funerals."<sup>246</sup> Mashpee

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<sup>242</sup> See generally Dussias, *supra* note 36 (analyzing other constitutional rights that are intertwined with language rights); see also Fife, *supra* note 233, at 331-43.

<sup>243</sup> Ted Rushton, "English Only" Meets Opposition, INDIAN COUNTRY TODAY, Feb. 16-23, 1998, at C2 (quoting Sam Billison).

<sup>244</sup> Sascha Brodsky, *Saving Languages: Students Learn to Speak Navajo*, DENVER POST, Oct. 16, 1994, at C02 (quoting Clay Slate).

<sup>245</sup> See, e.g., Regis Pecos & Rebecca Blum-Martinez, *The Key to Cultural Survival: Language Planning and Revitalization in the Pueblo de Cochiti*, in THE GREEN BOOK, *supra* note 19, at 75-6, 79.

<sup>246</sup> James Brooke, *Indians Striving to Save Their Languages*, N.Y. TIMES, Apr. 9, 1998, at A1 (quoting Leanne Hinton).

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Wampanoag tribal member Jessie Little Doe Fermino, director of the Wampanoag Language Reclamation Project, has found that having language students compose prayers in Wampanoag has had a profound effect not only on the individuals who create the prayers but also on their communities.<sup>247</sup> Use of the language in this manner accords with their belief that “it is the language that the creator would prefer them to use in prayer and ceremony.”<sup>248</sup> For Native Americans with this perspective, suppression of languages resulted in suppression of the right to the free exercise of religion, and promotion of language restoration protects and promotes free exercise rights.

NALA recognized the link between Native American languages and both the right to freedom of religion and the right to freedom of expression. NALA’s congressional findings included the recognition that “the traditional languages of Native Americans . . . form the basic medium for the transmission, and thus survival, of Native American . . . religions.”<sup>249</sup> NALA also sought to protect freedom of expression rights by prohibiting restrictions in any public proceedings, including publicly supported educational programs, on “[t]he right of Native Americans to express themselves through the use of Native American languages.”<sup>250</sup>

Several of the witnesses who provided testimony at the 2006 hearing touched upon constitutional rights concerns. Amadeo Shije, for example, spoke of the continued practice of Pueblo daily ceremonies, in which Pueblo languages are used, and of the need to protect Pueblo language and religious freedom.<sup>251</sup> Ryan Wilson explained that Native Americans conduct “ceremonies, prayers, stories, songs, and dances” in their native languages, as has been

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<sup>247</sup> See Anna Ash, Jessie Little Doe Fermino & Ken Hale, *Diversity in Local Language Maintenance and Restoration: A Reason for Optimism*, in THE GREEN BOOK, *supra* note 19, at 19, 31.

<sup>248</sup> *Id.*

<sup>249</sup> 25 U.S.C. § 2901(3).

<sup>250</sup> *Id.* § 2904.

<sup>251</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 9 (statement of Amadeo Shije, Chairman of the All Indian Pueblo Council).

done “since the beginning of time,”<sup>252</sup> and referred to the languages as “sacred languages.”<sup>253</sup> He noted the history of government conduct toward Native American languages, and how Native Americans “were told . . . to never stress our First Amendment rights, to never use our languages . . . .”<sup>254</sup>

Thus, the need to ensure to Native Americans meaningful rights to freedom of expression and free exercise of religion points to the need for greater dedication by the U.S. government to the protection and revitalization of Native American language rights.

6. *In Recognition of the Human Rights and other International Law-Based Rights of Tribes and Individual Native Americans*

There appear to be a growing international consensus that the language rights of linguistic minorities, including the rights of indigenous peoples that speak minority languages, are entitled to respect and protection, or at least to protection against discrimination. While the United States has not become a party to some of the instruments that reflect this understanding, it is worth noting that by taking this stance the United States is bucking the international trend toward the recognition of the language rights of indigenous groups and minority groups. Moreover, at least where indigenous language rights are concerned, this stance is at odds with federal legislation and executive branch policy. Native Americans, like other indigenous peoples, are entitled to the protection of international human rights conventions ratified by the nation state in which they reside and also the protection of customary international human rights norms.<sup>255</sup>

While a discussion of international law instruments and their potential role in protecting minority and indigenous rights is beyond

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<sup>252</sup> *Id.* at 16 (statement of Ryan Wilson, President of the National Indian Education Association).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> Paul A. Magnarella, *The Evolving Right of Self-Determination of Indigenous Peoples*, 14 ST. THOMAS L. REV. 425, 429 (2001).

the scope of this article,<sup>256</sup> several of the provisions that are relevant to protection of language rights are as follows:

— *the Universal Declaration of Human Rights, Article 2*, provides that language cannot be a basis for discrimination with respect to the rights and freedoms set forth in the Declaration,<sup>257</sup> and other guarantees in the Declaration related to cultural, education, and other rights can be read to provide implicit protection for speakers of minority languages;<sup>258</sup>

— *the International Covenant on Civil and Political Rights, Article 27*, provides that persons belonging to ethnic, religious, and linguistic minorities “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language,”<sup>259</sup> and Article 26 guarantees protection against discrimination on the basis of language; and

— *the U.N. Convention on the Rights of the Child, Article 30*, provides that a child who belongs to a linguistic minority and/or is indigenous “shall not be denied the right, in community with other members of his or her group, . . . to use his or her own language”;<sup>260</sup> other articles deal with linguistic needs with respect to mass media

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<sup>256</sup> See Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 93-126 (1999) (providing an analysis of indigenous peoples’ rights under international law).

<sup>257</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1<sup>st</sup> plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948).

<sup>258</sup> See, e.g., *id.* art. 7 (regarding equal protection); see also art. 19 (regarding freedom of expression); see also art. 22 (regarding cultural rights); see also art. 26 (regarding education); see also art. 27 (regarding participation in cultural life).

<sup>259</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

<sup>260</sup> Convention on the Rights of the Child, GA. Res. 44/25. annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990.

(Article 17) and education (Article 29).<sup>261</sup>

Provisions protecting the language rights of *minority* groups may prove helpful in protect indigenous peoples who are minority language speakers within the boundaries of an internationally recognized nation state that has ratified the relevant convention, but in addition other documents embrace the concept of rights based on *indigenous* status, such as the following:

— *International Labor Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, Article 28*, provides that indigenous children “shall, wherever practicable, be taught to read and write their own indigenous language” and that “[m]easures shall be taken to preserve and promote the development and practice” of indigenous languages;<sup>262</sup> and

— *the U.N. Declaration on the Rights of Indigenous Peoples, Article 13*, which provides:

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.<sup>263</sup>

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<sup>261</sup> *See id.*

<sup>262</sup> International Labor Organization Convention [ILO], *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, art. 28, adopted June 27, 1989, reprinted in 28 I.L.M. 1382 (1989).

<sup>263</sup> United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, UN Doc. A/RES/61/295 (Oct. 2, 2007); *see generally* International Work Group for Indigenous Affairs, Declaration on the Rights of Indigenous Peoples, <http://www.iwgia.org/sw248.asp> (updated Sept. 14, 2007) (providing information on the adoption process).

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In the regional context, the American Convention on Human Rights, Article 1, also embraces opposition to discrimination on the basis of language. It provides that the states parties to the Convention undertake to ensure to all persons the free and full exercise of the rights and freedoms recognized in the Convention, without any discrimination for reasons of language. The American Declaration of the Rights and Duties of Man, Article 2, similarly provides that all persons have the rights established in the Declaration “without distinction as to . . . language.” The Proposed American Declaration on the Rights of Indigenous Peoples also protects indigenous language rights. For example, it recognizes in Article XIII indigenous peoples’ right “to use, develop, revitalize, and transmit to future generations their own histories, languages, oral traditions, philosophies, systems of writing, and literature” and provides that the state will take measures to protect the exercise of this right and “shall make the necessary efforts for the indigenous languages to be established as official languages in the areas where indigenous languages predominate.”<sup>264</sup> Under Article XIV, states are “to include in their national educational systems content that reflects the intercultural, multiethnic, and multilingual nature of their societies” and indigenous peoples are recognized as having “the right to bilingual intercultural education that incorporates their own world view, history, knowledge, values, spiritual practices, and ways of life.”<sup>265</sup>

Thus, actions by the U.S. government that support Native American language preservation are in accord with, and implicitly, if not explicitly, recognize the growing international support for the language rights of indigenous peoples and minority language groups. Ryan Wilson acknowledged this idea in his comment that the United States “and other countries around the world are supporting human rights. . . . The time has come for equal recognition of the basic

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<sup>264</sup> Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs, *Consolidated Text of the Draft American Declaration on the Rights of Indigenous Peoples*, art. XIII, oea/ser.k/xvigt/dadin/doc.139/0317, June 17, 2003.

<sup>265</sup> *Id.* art. XIV.

human rights of America's native peoples . . . ."<sup>266</sup>

7. *In Recognition of How Much is at Stake in the Struggle to Preserve and Restore Native American Languages*

NALA recognized that languages are critical to the survival of Native American cultures. This sentiment was voiced by tribal leaders and members who took part in the process leading up to the enactment of NALA, NALA of 1992, and the Martinez Act. Clearly, no one has more at stake in the survival of a language than those to whom it belongs, and when a language no longer exists no one suffers a greater loss than they do.

Nonetheless, I believe – and I am not alone in this belief – that when we think about endangered languages, we should be concerned not only about how much is at stake for tribes whose languages are under siege, but how much is at stake for all of us. Senator Akaka, in voicing support for amending NALA in 2006, reflected this view. He stated that the proposed legislation offered an “opportunity for our country to acknowledge and ensure that our future will be enhanced by the contributions of Native language and culture.”<sup>267</sup>

Although the death of a language imposes the greatest loss on the people to whom it belonged, when a language dies, we all suffer a loss. As David Crystal has noted, because of the uniqueness of the world view that is tied to each language, the extinction of a language means that the whole world has suffered this loss:

To lose a language is to lose a unique insight into the human condition. Each language presents a view of the world that is shared by no other. Each has its own figures of speech, its own narrative style, its own proverbs, its own oral or written literatures. Preserving a language may also

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<sup>266</sup> 2006 NALA Amendments Hearing, *supra* note 3, at 12 (statement of Ryan Wilson); *see also* Fife, *supra* note 233, at 348-52 (discussing the potential impact of international human rights standards on Native American language rights).

<sup>267</sup> Cong. Rec., S3716, Apr. 27, 2006 (statement of Senator Akaka in introducing S. 2674).

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be instructive; we can learn from the way in which different languages structure reality.<sup>268</sup>

In this same vein, Daniel Ammon, a Hupa high school teacher, has explained that the Hupa language “is part of our culture . . . . It contains how a Hupa person views the world.”<sup>269</sup> If Hupa were lost, then this unique world view would go with it, a loss that the whole world would bear.

When a language disappears, the knowledge developed by its speakers throughout history can be lost, particularly if the language is unwritten: “[T]he loss of a language means a loss of inherited knowledge that extends over hundreds or thousands of years . . . . [W]hen a language without a writing system disappears, its speakers’ experience is lost forever. . . . Language loss is knowledge loss, and it is irretrievable.”<sup>270</sup>

Part of the knowledge that potentially is lost when a language is lost is knowledge of the environment. Representative Tom Udall alluded to this in his comments in supports of H.R. 4766, in which he noted that he was also co-sponsoring legislation on global warming. He saw a link between this proposed legislation and H.R. 4766:

[F]or me native languages are about the traditions with the earth, the fact that we come from Mother Earth, that we are part of Mother Earth, and I believe that the traditions that are represented in those languages have much to teach us. If we had adopted the ways that you had and the views that native people had of the earth, we would be a lot further along in terms of protecting our planet.<sup>271</sup>

It seems that at a time in which we are dealing with human-induced environmental degradation, of many kinds and in many

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<sup>268</sup> David Crystal, *Languages: When the Last Speakers Go, They Take with Them Their History and Culture*, CIVILIZATION, Feb.-Mar. 1997, at 44.

<sup>269</sup> Brooke, *supra* note 246, at A22 (quoting Daniel Ammon).

<sup>270</sup> Crystal, *supra* note 268, at 44; *see, generally*, Paul Salopek, *Knowledge, Culture Dying Along with Tribal Tongues; Languages Becoming Extinct at Unprecedented Rate*, DALLAS MORNING NEWS, Mar. 3, 1996, at 6A.

<sup>271</sup> Salopek, *supra* note 270, at 7.

places, and where we are already seeing the effects of global warming, we can ill afford to lose any knowledge that might provide guidance for dealing with these challenges.

More generally, to the extent that the world views reflected in indigenous languages provide tools for fostering the survival of individuals and communities, despite great odds against that survival, then this knowledge, too, could prove of inestimable value for all of us. Given the fact, however, that the threatened status of indigenous peoples' cultures, languages, lands, and very lives is attributable to actions by those of us who are members of the dominant society, can we expect that this knowledge will be shared with us? To paraphrase the words of a song, it's too much to expect, but – I hope, given the dire straits in which the world finds itself today – it's not too much to ask.<sup>272</sup>

I will leave the last words – words of warning, but also words of hope – to two Native American women:

*We exist in uncertain times, times of change, times of danger. . . . Maybe our Native American culture will be needed again to help lost Americans survive when the television lights dim and the oil runs out. That is the Indian strength – we know how to survive.*

— Randy'L He-dow Teton, Shoshone Bannock<sup>273</sup>

*Ours is not a lost culture. The children, the young adults are taking a lot of interest. . . . Many of our young folks are interested in picking up the language, so I think it might encourage the others.*

— P'oe Tsawa, Ohkay Owingeh<sup>274</sup>

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<sup>272</sup> MARY CHAPIN CARPENTER, *Not Too Much to Ask, on COME ON COME ON* (Sony BMG Music Entertainment 1992).

<sup>273</sup> Colin Nickerson, *Disquiet on an American Trail: Along Lewis and Clark's Route, Pride in Nation Mixed with Anxiety*, BOSTON GLOBE, July 4, 2004, at A1 (quoting Randy'L He-dow Teton).

<sup>274</sup> MY LIFE IN SAN PUEBLO, *supra* note 47 at 28.