TESTIMONY OF STUART E. EIZENSTAT
BEFORE
UNITED STATES SENATE COMMITTEE
ON INDIAN AFFAIRS
AND
UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE
ON RESOURCES

WASHINGTON, D.C.

MARCH 1, 2006

Chairman McCain, Ranking Member Senator Dorgan, Chairman Richard Pombo, Ranking Member Congressman Rahall, and members of the Senate Committee on Indian Affairs and the House Committee on Resources, thank you for inviting me to testify before your Committees today on S. 1439 and H.R. 4322, introduced by Chairman McCain, with Senator Dorgan as an original co-sponsor and Chairman Pombo and Congressman Rahall respectively, aimed, among other things at bringing belated, but welcome justice to American Indians whose trust accounts have been mismanaged in the past by the U.S. Department of the Interior, and to reform the administration of trust assets for Indian tribes and individual Indians.

I have been asked to testify because of my experience during the Clinton Administration, when in addition to holding a series of four senior international positions, I was simultaneously the leader of the Administration's efforts to bring belated justice to Holocaust survivors and other victims of Nazi atrocities and confiscation of property from World War II--initially as Special Envoy of the State Department on Property Restitution in Central and Eastern Europe and later as Special Representative of the President and Secretary of State on Holocaust-Era Issues. I wish to make it clear at the outset that in no way am I trying to compare the Nazi genocide of six million Jews and millions of others to the gross mistreatment of America's first residents, Native Americans. Each historical event stands on its own. But the way in which we sought to provide what I have called "imperfect justice" to victims of the Third Reich in a series of negotiations from 1995 to 2001 has some useful lessons in how the Congress might provide justice to American Indians in the mishandling of their trust funds assets by the U.S. Government.

Congress has repeatedly found, in the words of the United States Court of Appeals for the District of Columbia (December 10, 2004), that there was "hopelessly inept management of the IIM accounts" with "resulting chaos." In its November 15, 2005, decision the Court of Appeals stated that "it is not disputed that the government failed to be a diligent trustee," as "report after report excoriated the government's management of the IIM trust funds."

A 1992 Congressional report cited the Interior Department's "dismal history of inaction and incompetence." In 1994, Congress, embarrassed by this record, passed the Indian Trust Fund Management Reform Act imposing upon the Secretary of the Interior duties to manage the IIM accounts, and affirming the government's obligation to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or investment pursuant to the" 1938 Act.

Despite the very different historical origins of the Indian claims and the Holocaust claims, there are many lessons from our work that may be important for Congress to consider, some of which are already incorporated into S. 1439 and H.R. 4322. I am limiting my testimony to Title I.

The class action Holocaust cases were brought against Swiss and French banks for Holocaust-era bank accounts never returned to their rightful owners after the War, and, in some cases, drawn down by the banks with fees over decades. The Swiss banks were also accused of taking looted Jewish assets from the Germans for deposit; Class action suits were also brought against German and Austrian companies which employed slave and forced labor during World War II;

German and Austrian insurance companies; and against Germany and Austria for confiscated real and personal property never returned. In each instance, the class action suits were crucial in demonstrating the historical wrong, but are unable to resolve it in a judicial context. In each case, beneficiaries were dying--in the Holocaust cases at the rate of 10 percent per year--while the class action litigation droned on.

In our Holocaust actions, two slave labor cases were dismissed on the same day by Federal Judges Greenaway and Debovoise in New Jersey on a variety of grounds, including the statute of limitations and post-War treaties; Judge Edward Korman, the Federal judge in the Eastern District of New York, who presided over the Swiss bank cases, never ruled on the motions to dismiss, preferring to see our negotiations play out, but indicated suspicion about the legal basis of the claims, except as to actual bank accounts. The only case in which a motion to dismiss was denied was in the French bank case, and that on a dubious ground of a possible continuing conspiracy by the French banks.

In the Cobell case, while there appear to be strong legal arguments by the plaintiffs, the case has been batted around like a volley ball for almost a decade between the District Court and the Court of Appeals, with no benefit to the aggrieved Indians and at great cost to both sides. It is like the infamous case in a Dickens novel.

In fact, courts are not suitable instruments to resolve historical wrongs. Class action lawyers may be able to raise a historical wrong, but are incapable of solving the problem themselves. It was only the direct intervention of the Clinton Administration in mediating the Holocaust cases that led to our dramatic results--$8 billion in settlements for victims, Jewish and non-Jewish alike; payment by private companies to some one-and-half million surviving laborers (most non-Jewish); the identification of over 20,000 Holocaust-era Swiss bank accounts and the disgorgement of thousands of these to their owners or heirs; the payment of thousands of life insurance policies; the return of property and/or compensation for its confiscation; the return of hundreds of pieces of looted art work.

So, too, I applaud Senators McCain and Dorgan and Congressmen Pombo and Rahall for sponsoring legislation that intervenes to find a legislative solution that will never satisfy both sides, but will be infinitely preferable to the endless prospect of uncertain litigation.

Second, the way in which S. 1439 and H.R. 4322 would seek to settle the Cobell litigation and to bring a measure of justice to long suffering Indian country and Native Americans bears striking similarities to the approach we took in the Holocaust cases. Your legislation would create a Global Settlement Amount, in a so far unspecified amount, which would be allocated among the claimants. Your concept of allocating the capped amount partly by a per capita amount and partly by a formula amount, taking into consideration the flow of funds through the beneficiary's IIM account ("through-put") compared to the total through-put of all other beneficiaries seems eminently reasonable. Permit me to give you several examples from my experience.

In the Swiss bank case, a capped sum of $1.25 billion was agreed upon, to be divided up among an unknown number of claimants at the time of the settlement, with $800 million set aside for claims against actual Holocaust-era claims, and the balance for looted assets and other claims. If any sums were left over from the $800 million, as seems almost certain, that will be allocated by Judge Korman in a still unspecified way. There has been a major controversy in the Cobell case about the nature of the accounting required and the cost of performing it. The Committees may wish to know that the Committee of Eminent Persons, chaired by former Federal Reserve Board Chairman Paul Volcker, employed four major accounting firms, at a cost of over $200 million to the Swiss banks, and examined some one million accounts opened between 1938-1945. At the time of our negotiations, we did not know the results of that audit, although we had intimations that several hundred million dollars of accounts would have a possible or probable Holocaust relationship.

We took into account interest lost over the decades since the end of World War II by adding ten (10) times the amount in the account to the recovery. The eminent economist Henry Kaufman helped with the determination of the basis of the "plus-up".

In the German Holocaust labor cases, we employed a per capita concept in our capped 10 billion DM ($5 billion) settlement. We estimated from records available to us that there were around one million surviving laborers. We divided that number into the capped amount we negotiated. All slave laborers (defined as those who were being worked to death, as evidenced by being forced to live in a concentration camp or ghetto on the Red Cross list) were paid the same per capita amount ($7500 per person), regardless of the length of time, circumstances, or nature of their slave labor. Likewise, forced laborers, who worked under harsh but somewhat better conditions, all received $2500. It was impossible to have individual hearings for each of some one and a half million workers. Because there were more surviving laborers than we estimated, the per capita payments were less than we hoped.

Similarly, in the Austrian labor cases, we negotiated a $400 million capped fund, and allocated it per capita to Austrian slave and forced laborers on a per capita basis. With the German experience behind us, we over-funded the account to assure different categories of laborers received either $7500 or $2500, depending upon their circumstance. Indeed, there was an overage, as there were fewer laborers in this case than we estimated.

In the Austrian property settlement, we agreed upon a $210 million capped fund, called the General Settlement Fund (this has finally been funded only in the past several weeks, five years after our U.S.-Austrian agreement). Here, again, we had an unknown number of claimants and we agreed that each would get up to $2 million per person. There are now over 19,000 claimants, and, it appears, they will receive less than the maximum payment. The compensation is in lieu of the return of the actual confiscated property. The only *in rem* recovery comes for those whose property is held by the state. We had an earlier $150 million moveable property settlement, paid on a per capita basis to all Austrian Holocaust survivors, on the theory that they lived in leased apartments and/or owned leased businesses, which had been uncompensated after World War II.

For insurance payments, we also added a factor of ten (10) to the face value of the policies to take into account the passage of time.

Third, we employed the concept of "Rough Justice" in our determinations of the amount of the recovery. As you seek to fill-in the blank in your proposed Global Settlement Amount, you might consider doing the same.

Thus, we recognized that there was a certain arbitrariness in any figure. How do you place a value on the damage done 60 years after the War to a slave or forced laborer? How do you determine the capped amount for German slave and forced labor companies? How do you determine how much the Swiss banks should pay for their perfidy in hiding Holocaust-era bank accounts for decades from their owners and heirs, often taking them into the profits of the bank? This is where the concept of Rough Justice came into play, a concept actually proposed by attorneys for the Swiss banks, and employed in that and all subsequent agreements.

We did our best to try to come to some reasonable figure, but in the end, it was a case of getting the maximum for Holocaust victims that the offending foreign corporations were willing to pay. In the Swiss case, I employed a stratagem of asking each side for a range of their maximum and minimum and for what they believed the other side's maximum and minimum would be. I worked within those numbers and actually proposed a figure very close to the one Judge Korman later used to settle the cases. Again, while the Volcker audits were proceeding, we did not know their result at the time. With the German, Swiss, and French cases, it was simply finding the middle ground on which the parties could agree.

You have this unenviable task. There will be no figure that will satisfy both sides. You labor, as I did, with an imperfect set of historical records. Evidently, the state of the trust fund accounts is abysmal.

If there is to be an accounting, I believe that it must be one that can use statistical analysis and not cost out of proportion to what amounts it will uncover. But it is far better, as you have done in your legislation, to simply avoid further costly accounting on an incomplete and poorly managed set of records, some of which have been destroyed or otherwise are inaccessible.

In coming to a number, which almost certainly should be in the billions (reminding me of the demand by one of the leading class action lawyers, Mel Weiss, in the Swiss bank case that there could be no settlement without a "b" after the number!), the Committees should take into account the passage of time, the lost investment opportunities, the massive negligence--or worse--of the Interior Department, the fact that you are really returning their money, and similar factors. In coming to such a number you will have still done more justice for the IIM beneficiaries and for individual Indians than they could ever hope to obtain from the courts.

Also, your legislation will assure, as did our Holocaust negotiations (in which the class action lawyers got only about 1 percent of the total recovery), that the class action lawyers do not take a disproportionately large percentage of the ultimate recovery. You will also avoid the costs to the government of a massive audit. It is better, as we argued in the Swiss bank cases, to use that money for victims, than to pay it to auditors.

Fourth, you might consider the institutions we created to administer the Holocaust funds we obtained. In the Cobell case and in your legislation, there is a significant dispute over who should administer the settlement. The plaintiff-Indians, with their rightful suspicion of the Interior Department, and to a lesser degree, the Treasury Department, want the Federal District Court to administer the funds. The legislation proposes that the Treasury Department administer the funds.

There frankly is a problem with having either Interior or Treasury have such a fiduciary role, given that they are defendants in the cases, and in light of their failure to live up to their fiduciary responsibilities since 1887.

We created administrative mechanisms. In the Swiss bank case, a Claims Resolution Tribunal functions under Judge Korman, with a Special Master helping him. Average recoveries, after the plus-up for the decades of delay, is around $100,000. In the Austrian property claims, we created administrative tribunals with three persons, one appointed by the Austrian government, one by the U.S. government, and the third by the other two. In the case of the German slave and forced labor case, a German-controlled board makes policy decisions, but the U.S. government and the plaintiffs' have representatives. The insurance claims are processed by an organization headed by former Secretary of State Lawrence Eagleburger (ICHEIC), which has come in for substantial criticism for its pace of decisions and costs, although its performance has markedly improved. I have found that the purely administrative panels work most efficiently.

Congress might consider establishing an independent administrative tribunal in the Indian cases, independent of the Interior and Treasury Departments, perhaps reporting to the Attorney General of the United States in the Justice Department. Sending the administration of the payments back to the courts that have failed to resolve the matter for a decade is a prescription for future delay in doing justice to Indians.

The key is rapid decision-making in the lifetime of the majority of the claimants, a key consideration for aging Holocaust victims. I would think the same would apply to Indian claims. I believe you are on the right course to have these claims paid out of the Claims Judgment Fund.

It is important to realize that those regimes we created which are individual claims based, like the Swiss bank settlement's Claims Resolution Tribunal and the ICHEIC process, are slow and labored. For example, it has been more than seven years since the Swiss case was settled and more than three years after the Tribunal was created, yet the claims process has still not been concluded. The ICHEIC process is expensive and slow. Therefore, the more the Indian payments can be made on a per capita basis, without individual payments, the better.

Fifth is the issue of legal certainty and constitutionality. We were very concerned about how to constitutionally cut-off claims for those who did not wish to join in our government-to-government settlements. At the same time, the defendants in our cases rightly demanded "legal peace" before paying over billions of dollars. They did not wish to make such payments and then be sued yet again. While the vast majority of class action lawyers did support our settlement and voluntarily dismissed their claims, there were a few outliers. In the Swiss case, their appeals delayed a final settlement for several years, to the great detriment of aging Holocaust survivors. In the subsequent German, Austrian, and French cases we learned our lesson. We created a unique "Statement of Interest" in which the U.S. government pledged to support the defendants in dismissing all cases on any valid legal ground, and stating that there was a national security interest in having the cases dismissed and the negotiated settlement go forward. In every case, without exception, the federal courts have deferred to our Executive Branch Statement of Interest.

As I understand your proposed bill, you would extinguish claims for mismanagement of funds, but not for improper decisions on land management. Claims might still be made relating to the mismanagement of the underlying asset. I realize there may be objections to having the legislation cover both elements. I also recognize that you are limiting claims of land mismanagement to individual cases. But, I am sympathetic to the Interior Department's concern that any settlement would not cover all claims, and that there will still be elements of the Cobell litigation that will continue ad infinitem. It seems to me better to bite the bullet once and for all and pay a larger sum to settle all elements of the case. You have built in ample protections to challenge the distribution of the settlement funds to survive constitutional challenge.

I believe the Interior Department is correct in asserting in their December 8, 2005 statement by James Cason and Russ Swimmer that Congress shall provide "clear guidance as to the amounts to which individuals are entitled, rather than leaving the decision of what individuals receive to a formula developed by the Secretary. Congress shall craft a distribution method with as much clarity and direction as possible." The less discretion given to the Executive Branch the more efficient will be the payment program to long suffering Indians. Our Holocaust experience demonstrated that the more precise our negotiated agreements, the fairer and speedier were the administrative tribunal decisions for the benefit of victims.

In conclusion, you are to be congratulated for embarking on a politically courageous course to rectify over 100 years of wrongs committed by our government against individual Indians who ceded their accounts to the Interior Department in the expectation they would be properly managed. Your legislation broadly sets the right course.

I hope my suggestions will prove helpful as you work to perfect your bills.

* * * * *

Stuart E. Eizenstat was President Jimmy Carter's Executive Director of the White House Domestic Policy Staff and Chief Domestic Policy Adviser from 1977 - 1981. In the Clinton Administration from 1993 - 2001, he was US Ambassador to the European Union, Under Secretary of Commerce, Under Secretary of State, and Deputy Secretary of Treasury. During this time he was the Administration's leader in dealing with all Holocaust restitution issues.