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LONE WOLF V. HITCHCOCK

In the Supreme Court of the American Indian Nations

Editor's note: This opinion was written following the re-argument of the original Lone Wolf Opinion. This re-argument occurred at the first Tribal Law and Governance Conference on September 26-27, 1998, in Lawrence, Kansas. The original Lone Wolf opinion can be found at 187 U.S. 553 (1903).

PER CURIAM OPINION.

I. Facts

In 1867, a treaty was concluded with the Kiowa and Comanche tribes of Indians, and such other friendly tribes as might be united with them, setting apart a reservation for the use of such Indians. See 15 Stat. 581. By a separate treaty the Apache tribe of Indians was incorporated with the two former-named, and became entitled to share in the benefits of the reservation. See 15 Stat. 589.

The first named treaty is usually called the Medicine Lodge Treaty. By the sixth article thereof it was provided that heads of families might select a tract of land within the reservation, not exceeding 320 acres in extent, which should thereafter cease to be held in common, and should be for the exclusive possession of the Indian making the selection, so long as he or his family might continue to cultivate the land. The twelfth article of the treaty was as follows:

Article 12. No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article III (VI) of this treaty.

The three tribes settled under the treaties upon the described land. On October 6, 1892, 456 male adult members of the confederated tribes signed, with three commissioners representing the United States, an agreement concerning the reservation. The Indian agent, in a certificate appended to the agreement, represented that there were then 562 male adults in the three tribes. See Senate Ex. Doc. No. 27, 52d Cong., 2d. Sess., at 17. Four hundred and fifty-six male adults therefore constituted more than three fourths of the certified number of total male adults in the three tribes. In form, the agreement was a proposed treaty, the terms of which, in substance, provided for a surrender to the United States of the rights of the tribes in the reservation, for allotments out of such lands to the Indians in severalty, the fee simple title to be conveyed to the allottees or their heirs after the expiration of twenty- five years; and the payment or setting apart for the benefit of the tribes of two million dollars as the consideration for the surplus of land over and above the allotments which might be made to the Indians. It was provided that sundry named friends of the Indians (among such persons being the Indian agent and an army officer) "should each be entitled to all the benefits, in land only, conferred under this agreement, the same as if members of said tribes." Eliminating 350,000 acres of mountainous land, the quantity of surplus lands, suitable for farming and grazing purposes was estimated at 2,150,000 acres.

Concerning the payment to be made for these surplus lands, the commission, in their report to the President

announcing the termination of the negotiations, said:

In this connection it is proper to add that the commission agreed with the Indians to incorporate the following in their report, which is now done:

The Indians upon this reservation seem to believe (but whether from an exercise of their own judgment or from the advice of others the commission cannot determine) that their surplus land is worth two and one half million dollars, and Congress may be induced to give them that much for it. Therefore, in compliance with their request, we report that they desire to be heard through an attorney and a delegation to Washington upon that question, the agreement signed, however, to be effective upon ratification, no matter what Congress may do with their appeal for the extra half million dollars.

Senate Ex. Doc. No. 17, 52d Cong., 2d. Sess.

In transmitting the agreement to the Secretary of the Interior, the Commissioner of Indian Affairs said:

The price paid, while considerably in excess of that paid to the Cheyennes and Arapahoes, seems to be fair and reasonable, both to the government and the Indians, the land being doubtless of better quality than that in the Cheyenne and Arapahoe reservation.

Attention was directed to the provision in the agreement in favor of the Indian agent and an army officer, and it was suggested that to permit them to avail thereof would establish a bad precedent.

Soon after the signing of the foregoing agreement it was claimed by the Indians that their assent had been obtained by fraudulent misrepresentations of its terms by the interpreters, and it was asserted that the agreement should not be held binding upon the tribes because three fourths of the adult male members had not assented thereto, as was required by the twelfth article of the Medicine Lodge treaty.

Obviously, in consequence of the policy embodied in section 2079 of the Revised Statutes, departing from the former custom of dealing with Indian affairs by treaty and providing for legislative action on such subjects, various bills were introduced in both Houses of Congress designed to give legal effect to the agreement made by the Indians in 1892. These bills were referred to the proper committees, and before such committees the Indians presented their objections to the propriety of giving effect to the agreement. See H. R. Doc. No. 431, 55th Cong., 2d. Sess. In 1898, the Committee on Indian Affairs of the House of Representatives unanimously reported a bill for the execution of the agreement made with the Indians. The report of the committee recited that a favorable conclusion had been reached by the committee "after the fullest hearings from delegations of the Indian tribes and all parties at interest." H. R. Doc. No. 419, 56th Cong., 1st. Sess., at 5.

The bill thus reported did not exactly conform to the agreement as signed by the Indians. It modified the agreement by changing the time for making the allotments, and it also provided that the proceeds of the surplus lands remaining after allotments to the Indians should be held to await the judicial decision of a claim asserted by the Choctaw and Chickasaw tribes of Indians to the surplus lands. This claim was based upon a treaty made in 1866, by which the two tribes ceded the reservation in question, it being contended that the lands were impressed with a trust in favor of the ceding tribes, and that whenever the reservation was abandoned, so much of it as was not allotted to the confederated Indians of the Comanche, Kiowa and Apache tribes reverted to the Choctaws and Chickasaws.

The bill just referred to passed the House of Representatives on May 16, 1898. See 31st Cong. Rec. 4947. When the bill reached the Senate that body, on January 25, 1899, adopted a resolution calling upon the Secretary of the Interior for information as to whether the signatures attached to the agreement comprised three fourths of the male adults of the tribes. In response the Secretary of the Interior informed the Senate, under date of January 28, 1899, that the records of the department "failed to show a census of these Indians for the year 1892," but that "from a roll used in making a payment to them in January and February, 1893, it appeared that there were 725 males over eighteen years of age, of whom 639 were twenty-one years and over." The Secretary further called attention to the fact that by the agreement of 1892 a right of selection was conferred upon each member of the tribes over eighteen years of age, and observed:

If 18 years and over be held to be the legal age of those who were authorized to sign the agreement, the number of persons who actually signed was 87 less than three fourths of the adult male membership of the tribes; and if 21 years be held to be the minimum age, then 23 less than three fourths signed the agreement. In either event, less than

three fourths of the male adults appear to have so signed.

With this information before it, the bill was favorably reported by the Committee on Indian Affairs of the Senate, but did not pass that body.

At the first session of the following Congress (the Fifty-sixth) bills were introduced in both the Senate and House of Representatives substantially like that which has just been noticed. See Senate 1352; H.R. 905.

In the meanwhile, about October, 1899, the Indians had, at a general council at which 571 male adults of the tribes purported to be present, protested against the execution of the provisions of the agreement of 1892, and adopted a memorial to Congress, praying that that body should not give effect to the agreement. This memorial was forwarded to the Secretary of the Interior by the Commissioner of Indian Affairs with lengthy comments, pointing out the fact that the Indians claimed that their signatures to the agreement had been procured by fraud and that the legal number of Indians had not signed the agreement, and that the previous bills and bills then pending contemplated modification of the agreement in important particulars without the consent of the Indians.

This communication from the Commissioner of Indian Affairs, together with the memorial of the Indians, were transmitted by the Secretary of the Interior to Congress. See Senate Doc. No. 76; H. R. Doc. No. 333; 56th Cong., 1st Sess. Attention was called to the fact that although by the agreement of October 6, 1892, one half of each allotment was contemplated to be agricultural land, there was only sufficient agricultural land in the entire reservation to average thirty acres per Indian. After setting out the charges of fraud and complaints respecting the proposed amendments designed to be made to the agreement, as above stated, particular complaint was made of the provision in the agreement of 1892 as to allotments in severalty among the Indians of lands for agricultural purposes. After reciting that the tribal lands were not adapted to such purposes, but were suitable for grazing, the memorial proceeded as follows:

> We submit that the provision for lands to be allotted to us under this treaty are insufficient, because it is evident we cannot, on account of the climate of our section, which renders the maturity of crops uncertain, become a successful farming community; that we, or whoever else occupies these lands, will have to depend upon the cattle industry for revenue and support. And we therefore pray, if we cannot be granted the privilege of keeping our reservation under the treaty made with us in 1868, and known as the Medicine Lodge treaty, that authority be granted for the consideration of a new treaty that will make the allowance of land to be allotted to us sufficient for us to graze upon it enough stock cattle, the increase from which we can market for support of ourselves and families.

With the papers just referred to before it, the House Committee on Indian Affairs, in February, 1900, favorably reported a bill to give effect to the agreement of 1892.

On January 19, 1900, an act was passed by the Senate, entitled "An act to ratify an agreement made with the Indians of the Fort Hall Indian reservation in Idaho, and making an appropriation to carry the same into effect." In February, 1900, the House Committee on Indian Affairs, having before it the memorial of the Indians transmitted by the Secretary of the Interior, and also having for consideration the Senate bill just alluded to, reported that bill back to the House favorably, with certain amendments. See H. R. Doc. No. 419, 56th Cong., 1st Sess.

One of such amendments consisted in adding to the bill in question, as section 6, a provision to execute the agreement made with the Kiowa, Comanche and Apache Indians in 1892. Although the bill thus reported embodied the execution of the agreement last referred it, the title of the bill was not changed, and consequently referred only to the execution of the agreement made with the Indians of the Fort Hall reservation in Idaho. The provisions thus embodied in section 6 of the bill in question substantially conformed to those contained in the bill which had previously passed the House, except that the previous enactment on this subject was changed so as to do away with the necessity for making to each Indian one half of his allotment in agricultural land and the other half in grazing land. In addition, a clause was inserted in the bill providing for the setting apart of a large amount of grazing land to be used in common by the Indians. The provision in question was as follows:

> That in addition to the allotment of lands to said Indians as provided for in this agreement, the Secretary of the Interior shall set aside for the use in common for said Indian tribes four hundred and eighty thousand acres of grazing lands, to be selected by the Secretary of the Interior, either in one or more tracts as will best subserve the interest of said Indians.

The provision of the agreement in favor of the Indian agent and army officer was also eliminated.

The bill, moreover, exempted the money consideration for the surplus lands from all claims for Indian depredations, and expressly provided that in the event the claim of the Choctaws and Chickasaws was ultimately sustained, the consideration referred to should be subject to the further action of Congress. In this bill as in previous ones provision was made for allotments to the Indians, the opening of the surplus land for settlement, etc. The bill became a law by concurrence of the Senate in the amendments adopted by the House as just stated. See Act of June 6, 1900, 31 Stat. 672.

Thereafter, by acts approved on January 4, 1901, 31 Stat. 727, c. 8; March 3, 1901, 31 Stat. 1078, c. 832, and March 3, 1901, 31 Stat. 1093, c. 846, authority was given to extend the time for making allotments and opening of the surplus land for settlement for a period not exceeding eight months from December 6, 1900; appropriations were made for surveys in connection with allotments and setting apart of grazing lands; and authority was conferred to establish counties and county seats, townsites, etc., and proclaim the surplus lands open for settlement by white people.

On June 6, 1901, a bill was filed on the equity side of the Supreme Court of the District of Columbia, wherein Lone Wolf (one of the appellants herein) was named as complainant, suing for himself as well as for all other members of the confederated tribes of the Kiowa, Comanche and Apache Indians, residing in the Territory of Oklahoma. The present appellees (the Secretary of the Interior, the Commissioner of Indian Affairs and the Commissioner of the General Land Office) were made respondents tothe bill. Subsequently, by an amendment to the bill, members of the Kiowa, Comanche and Apache tribes were joined with Lone Wolf as parties complainant.

The bill recited the establishing and occupancy of the reservation in Oklahoma by the confederated tribes of Kiowas, Comanches and Apaches, the signing of the agreement of October 6, 1892, and the subsequent proceedings which have been detailed, culminating in the passage of the act of June 6, 1900, and the acts of Congress supplementary to said act. In substance it was further charged in the bill that the agreement had not been signed as required by the Medicine Lodge treaty, that is, by three fourths of the male adult members of the tribe, and that the signatures thereto had been obtained by fraudulent misrepresentations and concealment, similar to those recited in the memorial signed at the 1899 council. In addition to the grievance previously stated in the memorial, the charge was made that the interpreters falsely represented, when the said treaty was being considered by the Indians, that the treaty provided "for the sale of their surplus lands at some time in the future at the price of $2.50 per acre;" whereas, in truth and in fact, "by the terms of said treaty, only $1.00 an acre is allowed for said surplus lands," which sum, it was charged, was an amount far below the real value of said lands. It was also averred that portions of the signed agreement had been changed by Congress without submitting such changes to the Indians for their consideration.

Based upon the foregoing allegations, it was alleged that so much of said act of Congress of June 6, 1900, and so much of said acts supplementary thereto and amendatory thereof as provided for the taking effect of said agreement, the allotment of certain lands mentioned therein to members of said Indian tribes, the surveying, laying out, and platting townsites and location county seats on said lands, and the ceding to the United States and the opening to settlement by white men of two million acres of said lands, were enacted in violation of the property rights of the said Kiowa, Comanche and Apache Indians, and if carried into effect would deprive said Indians of their lands without due process of law, and that said parts of said acts were contrary to the Constitution of the United States, and were void, and conferred no right, power or duty upon the respondents to do or perform any of the acts or things enjoined or required by the acts of Congress in question.

Alleging the intention of the respondents to carry into effect the aforesaid claimed unconstitutional and void acts, and asking discovery by answers to interrogatories propounded to the respondents, the allowance of a temporary restraining order, and a final decree awarding a perpetual injunction was prayed, to restrain the commission by the respondents of the alleged unlawful acts by them threatened to be done. General relief was also prayed.

On January 6, 1901, a rule to show cause why a temporary injunction should not be granted was issued. In response to this rule an affidavit of the Secretary of the Interior was filed, in which in substance it was averred that the complainant (Lone Wolf) and his wife and daughter had selected allotments under the act of June 6, 1900, and the

same had been approved by the Secretary of the Interior and that all other members of the tribes, excepting twelve, had also accepted and retained allotments in severalty, and that the greater part thereof had been approved before the bringing of this suit.

It was also averred that the 480,000 acres of grazing land provided to be set apart, in the act of June 6, 1900, for the use by the Indians in common, had been so set apart prior to the institution of the suit, "with the approval of a council composed of chiefs and headmen of said Indians." Thereupon an affidavit verified by Lone Wolf was filed, in which in effect he denied that he had accepted an allotment of lands under the act of June 6, 1900, and the acts supplementary to and amendatory thereof.

Thereafter, on June 17, 1901, leave was given to amend the bill and the same was amended, as heretofore stated, by adding additional parties complainant and by providing a substituted first paragraph of the bill, in which was set forth, among other things, that the three tribes, at a general council held on June 7, 1901, had voted to institute all legal and other proceedings necessary to be taken, to prevent the carrying into effect of the legislation complained of.

The Supreme Court of the District on June 21, 1901, denied the application for a temporary injunction. The cause was thereafter submitted to the court on a demurrer to the bill as amended. The demurrer was sustained, and the complainants electing not to plead further, on June 26, 1901, a decree was entered in favor of the respondents. An appeal was thereupon taken to the Court of Appeals of the District.

While this appeal was pending, the President issued a proclamation, dated July 4, 1901, see 32 Stat. Appx. Proclamations, at 11, in which it was ordered that the surplus lands ceded by the Comanche, Kiowa and Apache and other tribes of Indians should be opened to entry and settlement on August 6, 1901. Among other things, it was recited in the proclamation that all the conditions required by law to be performed prior to the opening of the lands to settlement and entry had been performed. It was also therein recited that, in pursuance of the act of Congress ratifying the agreement, allotments of land in severalty had been regularly made to each member of the Comanche, Kiowa and Apache tribes or Indians; the lands occupied by religious societies or other organizations for religious or educational work among the Indians had been regularly allotted and confirmed to such societies and organizations, respectively; and the Secretary of the Interior, out of the lands ceded by the agreement, had regularly selected and set aside for the use in common for said Comanche, Kiowa and Apache tribes of Indians, four hundred and eighty thousand acres of grazing lands.

The Court of Appeals (without passing on a motion which had been made to dismiss the appeal) affirmed the decree of the court below, and overruled a motion for reargument. 19 App.D.C. 315. An appeal to the Supreme Court of the United States affirmed the decision of the court of Appeals. See 187 U.S. 553 (1903). A request for reconsideration of this decision was made to this Court. Having granted the request in the interests of justice, the case is now here for review.

The Court granted review on two basic issues. First, should this Court continue to recognize Congressional plenary power over Indian affairs under which the United States government claims a right for its Congress to ignore and unilaterally terminate Indian rights under the Medicine Lodge Treaty. Second, did the Act of June 6, 1900 and related supplementary acts deprive Appellants of their lands without due process of law in violation of the Fifth Amendment of the United States Constitution? Finding that the doctrine of plenary power cannot be justified under either the tribal or international law that binds this Court and is truly suspect under even United States constitutional law, this Court determines that it need not, and perhaps should not, resolve the second issue which is a question of internal United States constitutional law.

II. Discussion

A. Lack of Power of the United States Government to Abrogate Indian Treaties Without Tribal Consent

This matter turns on the question of the continuing binding effect of the Medicine Lodge Treaty entered into in

1868 between the Kiowa, Commanche, and Apache Tribes (KCA) and the United States government. This treaty not only guaranteed the communal landholdings of the KCA, it also provided in Article 12 that any further cession of land by the KCAs would require the signatures of three-quarters of the adult males of the KCA tribes. To its credit, when the United States sought to implement on KCA land its allotment policy adopted in the Dawes General Allotment Act of 1887, it did not initially seek to impose that policy on the KCA tribes unilaterally, but, rather, continued the long- standing historical practice of diplomatic negotiations employed between Indian nations and Anglo-American powers since first contact between indigenous and Euro-American civilizations. Despite an 1871 United States statute ending the formal process of treaty negotiations to end the primacy of the Senate (over the House of Representatives) in approving federal Indian treaties, as the facts of this case show, the United States continued its long-standing practice of diplomatic negotiations with the Indian tribes to gain Indian consent for any federal policy that would affect them. See 25 U.S.C. § 71. The successful results of such negotiations were often labeled agreements, after adoption of 25 U.S.C. § 71, and ratified by the United States Congress, as statutes (in which both houses of the Congress participated), rather than treaties (which are ratified only by the Senate).

In this case, the United States therefore sent treaty negotiators into KCA country, as it had long done in negotiating agreements and land cessions with the nation's original occupants and owners. Before this Court, Lone Wolf and the other KCA petitioners do not contest the power of their sovereign Indian tribes or of any of the country's first nations to cede their land to the United States or anyone else though treaty nor do they contest the right of the United States as a sovereign nation to negotiate with their tribes for such a cession or for the imposition of an allotment policy on tribal land tenure to bring it into conformity with the interests of the United States, which traditionally holds most land title under private individual ownership, rather than communally, like the tribes. Lone Wolf and the other KCA petitioners do not claim that the KCA tribes and the United States could not mutually agree as sovereign nations by full and fair consent to a treaty that changes tribal land tenure to adopt individual private property and to cede to the United States "surplus" lands not required for this purpose. Rather, they claim here that the KCAs had not fully and fairly consented to such an agreement as required by the Medicine Lodge Treaty, since most of the native signatures appearing on the English written manuscript embodying the United States understanding of the document were secured by fraudulent misrepresentations to non-English speaking tribal members, who could not read he English text of the document they were asked to sign, regarding the true nature of the document they signed. Alternatively, they argue that the United States effort to impose allotment on them and take their "surplus" lands did not secure the three-fourths adult male signatures required by the Medicine Lodge Treaty for any further cessions of KCA land. Finally, the petitioner's argue that if the involuntary imposition of allotment and the taking of so-called "surplus" lands for non-Indian homesteading is found to be legally effective, it is nevertheless unconstitutional under the fifth amendment to the United States Constitution as an uncompensated taking.

The Secretary of the Interior resists the force of the KCA petitioners' argument by claiming that tribal agreement or consent to allotment is irrelevant and unnecessary since the United States claims broad plenary power over Indian affairs and consequently can unilaterally modify or abrogate Indian treaty rights at will by subsequent federal legislation, as it did here when Congress enacted the so-called KCA allotment "agreement" as a statute. Therefore, according to the Secretary's argument, both the issue of fraud and the question of compliance with the three-quarter signature requirement are irrelevant to the disposition of this case since Congress has the plenary authority to unilaterally impose the allotment policy on the KCA tribes and to sell their surplus lands as trustee. The Secretary claims Congress exercised its plenary power by the 1900 legislation. Additionally, the Secretary notes that the KCAs secured certain subsequent concessions from Congress, including enlarged grazing lands, in the debates over adoption of that legislation and later sought and secured compensation in a claims process for perceived unfairness in the implementation of the allotment legislation.

1. Applicable Law

As a preliminary matter this Court must address the issue of the applicable law, often known as the choice of law issue. In their outstanding and very helpful briefs to this Court, the parties have argued the first question, the plenary power issue, based primarily on international and domestic American constitutional law.

The sovereignty of tribal governments predates and survives the United States constitutional system. See Siegfried Wiessner, American Indian Treaties And Modern International Law, 7 St. Thomas L. Rev. 567, 588 (1995). The

authority of this Court is derived from the sovereign status of Indian nations. In contrast to federal and state courts, this Court does not trace its roots to English common law. Nell Jessup Newton, Permanent Legislation to Correct Duro v. Reina, 17 Am. Indian L. Rev. 109, 123 (1992). Therefore, in analyzing the claims presented this Court is not required to adhere the traditional analyses under the United States Constitution.

This Court is bound instead by traditional notions of fundamental fairness which mirror the protections found in the Bill of Rights, including due process rights. Newton, supra, at 112. The issue to be decided here is whether the land transfer scheme arising from the Act is consistent with the notion of fundamental fairness. In deciding what is fundamentally fair, this Court will review the Medicine Lodge Treaty, tribal common law and traditions, and international legal norms. This approach to justice is vastly different from the Anglo-American system. As described by one observer:

Tribal courts are justice-administering courts that trace their roots to a nonadversary system of justice, while struggling to chart their own course by melding those aspects of the Anglo American system the dominant society has imposed upon them with Indian traditions of listening and judging.

Newton, supra, at 123. See generally, Gloria Valencia-Weber, Tribal Courts: Custom and Innovative Law, 24 N.M. L. Rev. 225 (1994).

As a Court responsible to the over 500 sovereign indigenous nations found within the United States, this Court deems it appropriate to begin with tribal law, attempting to ascertain the understanding and meaning of the KCA's treaty relationship with the United States as those nations would have understood them consistent with their culture. language, traditions, and tribal law. This approach is consistent with maxim of interpretation employed the United States Supreme Court since its famous decision in 1831 in Worcester v. Georgia, 31 U.S. 515, 582 (1830) ("How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.") In Worcester, Chief Justice Marshall indicated that for the United States to discharge its sovereign trust obligations toward Indian nations established under the treaty relationship, Indian treaties must be interpreted as the Indian parties understood them.

Since each Indian nation is specific and unique in its traditions, language, culture and law, it would, perhaps, be best to explore the tribal law, oral, written, and customary, of the KCA tribes surrounding the issues of the meaning of treaty obligations. The court cannot and will not venture such a tribally specific analysis, however appropriate, in this case for two reasons. First, in their otherwise outstanding briefs and oral submissions that parties have not chosen to enlighten the Court, as perhaps they should have, on the specific KCA law surrounding these questions. This Court, composed of tribal judges from various tribes (albeit none of the KCA nations), is ill-informed and ill-equipped to unilaterally declare the tribal law and traditions of the KCA nations without a proper informative record having been made by the parties or supplied to the court by consulting tribal elders, tribal traditions, religious or spiritual leaders, and written and oral descriptions of KCA laws and traditions. Second, since the first issue posed affects all tribes in the United States, or at least all treaty tribes, this Court thinks it appropriate in this case to look to those tribal customs and traditions that are shared in common by many tribes, rather than focusing attention solely on the specific laws and customs of the KCA tribes, which it might otherwise do in an appropriate case.

Additionally, this Court is bound by customary international law since it represents over 500 sovereign nations that customarily have respected their treaty obligations in conformity with international legal obligations.

Finally, the KCA tribes have argued that the 1900 legislation is unconstitutional under the Constitution of the United States since traditional constitutional legal analysis will not support the unilateral abrogation of Indian treaty rights by Congress or the alteration of KCA land tenure laws without their consent. While this Court normally would be loathe to enforce an action adverse to Indian law and custom where illegal under the law of the sovereign which created it, in this case out of respect for the United States, and its Supreme Court, as a coordinate and co-equal sovereign, this Court finds it unnecessary to ultimately rest its decision on American constitutional law, although, as indicated below, it too shares the KCA tribal members' doubts regarding the constitutionality of the 1900 legislation under the United States constitution.

2. Tribal Law & Abrogation of Indian Treaties

The essence of the laws, customs, and traditions of most tribes involves respect for the autonomy, self-determination, and right of individual decision-making of both the individual and the community. This critical sense of liberty and autonomy greatly influenced western legal thinkers, such as John Locke, after contact between Indian and European societies and thereby contributed much to the emergence of western democratic traditions. See generally, Donald A. Grinde, Jr., Iroquois Political Theory and the Roots of American Democracy, in Exiled In The Land Of The Free: Democracy, Indian Nations, And The U.S. Constitution 13 (1992); Donald A. Grinde, Jr. & Bruce E. Johansen, Exemplar Of Liberty: Native America and The Evolution Of Democracy (1991); Indian Roots of American Democracy (Josaee Barreiro ed., Akwe:kon Press, Cornell Univ. 1992) (1988);. Donald A. Grinde Jr., The Iroquois and the Founding of the American Nation (1977).

Thus, Indian tribal societies often are organized internally around networks of kinship relationships that serve to temper and check the autonomy afforded the individual under tribal traditions. Under many customary tribal forms of organization, individuals follow community norms and tribal customary law not because of fear of individual punishment, as in western societies, but, because of community values of reciprocity and obligation taught to all tribal members when they are young. Failure to honor such values would bring dishonor, and, sometimes, restitutionary obligations, upon one's kinship group. Thus, keeping one's word and preserving one's honor constitute important norms of kinship relations honored by most tribes. See generally, Jane Richardson, Law and Status Among Kiowa Indians (1940); Bernard Mishkin, Rank and Warfare Among the Plains Indians (1992) (both describing in more detail Kiowa customary law)

For societies organized around networks of extended kinship obligations and expectations, it is not surprising that Indian tribes generally understood the diplomacy involved in treaty negotiations as an extension beyond the tribe of the kinship obligations that governed their internal political relationships. The United States government and before it, the French and British colonial authorities in North America long understood this traditional Indian method of dealing with political relationships. This understanding is evident in the very term which the United States (and before it the British and French colonial authorities) repeatedly used in its dealings with the Indian tribes - the Great Father. Far from being the paternalistic icon of superiority often assumed by those unfamiliar with Indian treaty diplomacy, the Great Father political metaphor captured the Indian understanding of the obligations that Euro-American governments assumed in the treaty process. In Indian societies, the role of the father is to protect and provide for his children, not to control, direct, or otherwise govern or punish them. Thus, the United States assumption of treaty obligations of political and military protection and to provide the annuities or federal services and benefits through the Indian treaty process meant that the United States government would perform the role of the "Great Father" in the kinship relationship established by the treaty process. See, e.g., Richard C. White, The Middle Ground: Indians, Empires, and Republics in the Great lakes Region, 1650-1815, 15-19, 82-90 (1991) (explaining the significance of familial metaphors in native understandings of diplomacy); see also, Cherokee Nation v. Georgia, 31 U.S. 1 (1830) (discussing the obligations of protection the United States assumed in its early treaty relationship with the Cherokee Nation). Even among themselves, Indian tribes traditionally employed kinship metaphors to describe their diplomatic relationships. See, e.g., Francis Jennings, Empire of Fortune 346-8 (1988) (discussing Iroquois use of kinship and gender metaphors to describe Delaware subservience to Iroquois political dominance)

Kinship relationships are not easily captured in written documents, particularly for most Indian tribes who, like the KCAs, relied almost exclusively on oral traditions to capture the essence of their history, traditions, and treaty obligations, sometimes supplemented by witten recods like winter counts.. Therefore, for most Indian tribes, treaty obligations are not merely words on paper, but living, breathing political relationships to which the tribes and their members develop strong emotional attachments and incredible senses of loyalty and affinity. Treaty obligations, like kinship ties, therefore are to be honored, revered, and frequently renewed. For example, during the colonial period of American history, the Iroquois met regularly, often annually, with the Albany Indian commissioners to renew and solidify their treaty relationship. During these treaty councils, the parties periodically rekindled the covenant chain of friendship that bound the Iroquois Confederation into a firm alliance with, initially, the colonies, and, later, the original thirteen states.

Thus, when the KCAs entered into the Medicine Lodge Treaty they solemnly pledged their fidelity to the treaty, as they would to any kinship tie, and they had every expectation that the United States would adhere to its end of the

bargain, just as they would trust the word of a respected relative.

In short, in native terms, there is no power on the part of signatory to a treaty to unilaterally abrogate or modify the treaty, as the United States purported to do in the disputed 1900 legislation. To do so signifies a marked familial disrespect and would bring shame and approbation on any party (and any of the their allies) who acted in such a deceitful and disingenuous manner.

Indeed, American jurisprudence at times has recognized and honored this point. Ever since the United States Supreme Court's decision in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the federal courts have indicated that in light of the language disparity and potentiality for cross-cultural misunderstanding evident in the treaty making process, Indian treaties must be interpreted as the Indians would have understood them. E.g., United States v. Winans, 198 U.S. 371, 380-81 (1905); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Tulee v. Washington, 315 U.S. 681, 684-85 (1942); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938). Since this discussion indicates that Indians never understood that any treaty they entered into with the United States could be legally or morally breached, abrogated, or modified unilaterally by only one signatory to the treaty, even basic American jurisprudence would suggest that the United States Supreme Court erred when it first held in The Cherokee Tobacco, 78 U.S. 616 (1870), and in its opinion in this case that the federal government could unilaterally abrogate or modify Indian treaties. No less a jurist than Justice Hugo Black of the United States Supreme Court nicely captured the basic thrust of Indian understandings of treaty obligations when he said, "Great nations, like great men, should keep their word." FPC v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

Consequently, under the tribal laws, customs, and political understandings of most tribes in the United States, including the KCAs, no single party to a treaty has any authority to legally or morally unilaterally terminate, abrogate, or modify the agreement. To do so would be a gross breach of respect due to allied family members and bring great shame and moral approbation on the transgressor. Thus, under the laws of the tribes served by this Court, the court is bound to hold that the United States has no power whatsoever to breach the Medicine Lodge Treaty by adopting the 1900 legislation. In order for the 1900 legislation to be valid, the United States would have needed to validly secure the knowing signatures of three-fourths of the adult males of the KCA tribes, which it admittedly did not do. Therefore, the 1900 legislation cannot and will not be recognized as valid by any tribal court.

3. International Law and Tribal Treaties

a. Applicability of International Law

Appellant argues that international law should be applied to this proceeding because a treaty between the United States and an Indian nation is no different than a treaty between any other sovereign nations. Respondent counters that the relationship between the United States and the Indian tribes is "unique and anomalous" and therefore not subject to the general rules of international law.

It is true that international law should be applied to this proceeding, although a treaty between the United States and an Indian nation is, in some ways, different from a treaty between most other "sovereign nations" that appear before international tribunals. "International law" or "the law of nations" generally refers to the law that governs the relationship between nation states; the history of international law can be characterized as a series of discussions where nation-states come together to have their voices heard. The history of colonialism throughout the world has created an international scene in which the voices of indigenous groups historically have been suppressed on the international scene in favor of the voices of the nations that colonizing them.. Recently, however, this situation has begun to change, as evidenced both by the numerous conventions and declarations promulgated by international organizations, beginning with the International Labour Organisation's 1957 Indigenous and Tribal Populations Convention and Recommendation, through to the Inter-American Commission on Human Rights' 1997 Proposed American Declaration on the Rights of Indigenous Peoples and by the increasing number of cases brought before international tribunals involving disputes between indigenous peoples and non-indigenous states.

Furthermore, a treaty between the United States and an Indian nation is different in two respects from a treaty

between other sovereign nations. First, in addition to the sovereign-to-sovereign relationship between the United States and any Indian nation, the two nations share another relationship, often referred to as a trust relationship. Under this relationship, as described in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), the United States owes an obligation toward the Indian tribes to protect their territorial autonomy and their sovereignty. Chief Justice Marshall described the relationship in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560 (1832), as like the feudal states of Europe, such as the Principality of Monoco, San Marino, Angora, or the like, some of which today are voting members in the United Nations. He noted:

'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state.' At the present day, more than one state may be considered as holding its right of self government under the guarantee and protection of one or more allies.

Id.

Second, the relationship between the United States and any Indian tribe located in this country, unlike the relationship between, say, France and Britain, is complicated by several facts: Indians are simultaneously members of tribes and citizens of the United States; Indian nations are located within the exterior borders of the United States; and Indian nations today cannot easily choose to sever diplomatic relationships and political alliances with the United States, as other nations, theoretically, could do. Perhaps most importantly, the relationship between the United States and the Indian nations has been tainted by the history of colonialism, in which the United States has appropriated the territorial base of the Indian nations and often unilaterally and in violation of treaty and other obligations illegally extended its political hegemony over Indian peoples and their territory. Nevertheless, both the United States and the Indian nations are each sovereign nations.

On the other hand, this relationship based on a history of colonialism is not totally unique to the United States and the Indian nations. Quite the contrary: independent nations on many continents, with the exception of Europe, have a history of colonialism and therefore a similar experience of a relationship between a colonizing power and the indigenous peoples who inhabited those lands before colonization by European powers. Consequently, to assert, as Respondent does, that the relationship between the United States and the Indian nations is "unique and anomalous" is to totally ignore and misunderstand perhaps the most influential phenomenon of modern global history: colonialism. No doubt Respondent bases his assertion on one of the seminal cases in federal Indian law, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) in which Chief Justice John Marshall states: "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." Marshall, however, was writing in 1831. In 1998, the relationship between the Indians and the United States is not the least bit unusual in terms of international relations.

Although this court sits in and serves the jurisdiction of the American Indian Nations, the dispute is between the United States and an Indian nation, and insofar as the law of the United States or the tribal of law the KCAs or any other tribe is applicable, international law is also applicable. The courts of the United States have consistently asserted that international law, or "the law of nations," is part and parcel of the law of the United States. In The Paquete Habana, 175 U.S. 677 (1900), the Supreme Court stated: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction..." Id. at 700. More recently, and certainly not inapposite to the case at bar, the Sixth Circuit indicated that the courts have a "duty" to interpret statutes "in the light of recognized principles of international law." United States v. Reagan, 453 F.2d 165, 170 (6th Cir. 1971). Similarly, as civilized and moral states, Indian tribes, including the KCAs, adhere to the basic human rights conceptions and obligations of international law in their dealings with their own people and the governments of other nations and their citizens.

Respondent argues that Congress' plenary power over the Indian nations under the American constitution gives it the power to unilaterally abrogate the Medicine Lodge Treaty signed with the Kiowa and Comanche Indians in 1867. While Respondent may or may be correct as a matter of domestic American law (a discussion best left to the next section of this opinion), as a matter of United States obligations under foreign relations law applicable to its dealings with the sovereign Indian nations located within its borders, however, Respondent is clearly mistaken.

The Restatement (Third) of the Foreign Relations Law of the United States, section 115(1)(b) states: "That a rule of

international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation. (Emphasis added.) Clearly, then, the United States must be held to its obligation to the Kiowa and Comanche Indians under the Medicine Lodge Treaty.

Finally, as alluded to above, international law is "the law of nations." Since this case involves a dispute between two nations, it is difficult to understand why the law of nations would not apply. As Appellant points out, the relationship between indigenous and non-indigenous peoples, historically, was the province of international law. While nine-teenth and early twentieth century European colonialism attempted submerge the voice of indigenous and other colonized people into the domestic law of the colonizing state, the lesson of the post-World War II decolonization movement clearly have been that colonized peoples are not merely the pawns of the domestic law of the dominant nation that colonized and asserted political hegemony over them. See generally, S. James Anaya, Indigeneous Peoples in International Law 80-88 (1996) They have rights of sovereignty and self-determination and theses rights are protected by international law. Notwithstanding the changes in international law over the course of the relationship between the United States and the Indian nations, then, that relationship is still the province of international law. Id.

b. International Treaty Law

A fundamental principle of the law of treaties is expressed in the maxim pacta sunt servanda: treaties are binding. P.K. Menon, An Introduction to the Law of Treaties 43 (1992). The principle is a cornerstone of customary international law; it has been affirmed by international law commentators from Francisco de Victoria in the sixteenth century, Francisco de Victoria, De indis et de ivre belli reflectiones (Classics of International Law Series, 1917) to Lord McNair in the late twentieth century, Lord McNair, The Law of Treaties (1961), and its importance has been recognized in declarations between nations for more than one hundred years. In 1871, for example, the Protocol of London asserted "an essential principle of the law of nations that no power can liberate itself from the engagement of a treaty" without the consent of all parties. Menon, supra, at 44. More recently, the Vienna Convention, adopted by the United Nations Conference on the Law of Treaties in 1969 and entered into force in 1980, reduces the principle to writing. Article 26 of the Convention is entitled "Pacta sunt servanda" and states simply: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." In the international legal system, the Vienna Convention is viewed as a codification of customary international treaty law. 7 Encyclopedia of Public International Law 459 (1984). Furthermore, the pacta sunt servanda concept is replicated in section 321 of the Restatement (Third) of the Foreign Relations Law of the United States: "Every international agreement in force is binding upon the parties to it and must be performed by them in good faith."

Failure of parties to carry out their treaty obligations can result in material breach of the treaty. Article 60(b) of the Vienna Convention defines a material breach as "the violation of a provision essential to the accomplishment of the object or purpose of the treaty." The Medicine Lodge Treaty was entered into, in part, to ensure a land base for the Kiowa and Comanche (and, later, Apache) Indians. The Treaty allowed for the possibility that the parties might agree to modify or terminate the terms of the agreement; Article 12 provides the mechanism for such a change. To effect a valid cession of the land in question, three-fourths of the adult male Indians occupying the lands would have to sign an agreement to that effect. Undoubtedly, Article 12 resulted from an understanding that future generations might have some valid reason to change the terms of the treaty. But as a precaution that the terms were not changed lightly, Article 12 required a full 75 percent -- well over a majority -- agreement of the adult males of the tribe. Since the possibility of later changed circumstances was foreseen by the express treaty language, only by complying with the procedures set forth and solemnly agreed to between the contracting parties can the treaty be modified to accommodate such future changes. The record indicates, however, that the United States agent did not obtain the signatures of three-fourths of the adult males. Therefore, the United States violated a provision essential to the accomplishment of the object of the treaty, by diminishing the land base of the Indians and altering the manner in which they held their land in a way not authorized by the terms of the treaty.

Admittedly there is some uncertainty as to whether the 562 Indian signatures represented 75 percent of the "adult" males. The resolution of this question is unnecessary, though, because regardless of the number of signatures on the treaty, Congress' subsequent legislative enactment was not done in good faith. First, even if the United States' agent

obtained the required number of signatures, he did not do so in good faith. The Indians were not fully informed as to the meaning of the new agreement and most of the signatures were obtained by fraud. Then, when faced with the prospect of having their land base diminished, a council of 571 tribal members -- nine more than the number that allegedly signed the agreement -- indicated their disapproval of it. Confronted with this conflict, the United States Congress nonetheless enacted the 1900 legislation without ensuring that it had adequately and in good faith complied with the provisions of Article 12 of the Treaty.

Thus, not only did the United States breach the Medicine Lodge Treaty in 1900 by enacting legislation that directly conflicted with both the terms and the purpose of the treaty, but it did so in egregious violation its international law duty of good faith. A second vital canon of international law is the principle of good faith. With respect to treaties, this duty of good faith is embodied in the Vienna Convention, Article 26, and the Restatement (Third) of the Foreign Relations Law of the United States, section 321, both quoted above. Additionally, the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation Among States, passed in 1970 by the United Nations General Assembly, indicates that the duty transcends treaty-making and is a general obligation of international actors, who have "the duty to fulfill in good faith (their) obligations under the generally recognized principles and rules of international law." 7 Encyclopedia of Public International Law 107. The Kiowa and Commanches have throughout acted in good faith with respect to the treaty and have completely discharged their obligations under the treaty. It is the United States which acted in bad faith in enacting the 1900 legislation in violation of its international law obligations.

It is true that the United States Congress unilaterally abrogated the Medicine Lodge Treaty with the Kiowa and Comanche Indians nearly a century before the Vienna Convention was entered into force. But, at least with respect to the maxims discussed herein (i.e., pacta sunt servanda and the principle of good faith) the Convention merely provided a written expression of well- established rules of customary international law, which, as indicated above, predate the Medicine Lodge Treaty. Thus, the concern that the Convention is being applied retroactively is unwarranted, since so many of the rules that the Convention embodies were in force at the time the Treaty was signed (and, later, illegally abrogated).

In sum, international treaty law requires that parties to an agreement between sovereigns such as the Medicine Lodge Treaty to perform the obligations they have agreed to and to do so in good faith. The United States, by adopting the 1900 legislation which unilaterally altered KCA land tenure and illegally seized KCA land in violation of the terms of the Medicine Lodge Treaty, effected a material breach of the treaty, in direct violation of international law.

III. The Lack of "Necessity" to the International Community of Empowering Congress with "Plenary Power" over Indian Nations

Respondent directs our attention to the Universal Declaration of Human Rights adopted by the United Nations in 1948. In effect, he intimates that the sovereignty of Indian nations is inconsistent with at least two of the rights enumerated in the Declaration. Respondent points in particular to the "preferences" that tribes are entitled to give to Indians, and the fact that Indian nations have authority over non-Indians living on Indian land. Respondent's concern is misplaced.

The Preamble to the Universal Declaration indicates that one impetus for the development of the Declaration was a recognition that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind." The United Nations proclaimed the rights listed in the Declaration in the hopes of fostering a world where the human rights of all people are promoted and protected. The history of the relationship between the United States and the Indian nations is fraught with precisely the sort of "barbarous acts" the international community was referring to in the Preamble. Any steps taken to remedy the lingering harms of that historical relationship must be evaluated not only with reference to the Universal Declaration of Human Rights but also being mindful of the need for reparations. It is simply inaccurate to suggest that Indian preferences and/or Indian sovereignty are a violation of any internationally recognized human rights without considering the context of those preferences and that sovereignty - that context being the disregard for the basic human rights of Indians that accompanied colonialism. To further imply that Congress' plenary power over Indian nations is necessary because

the United States is at risk of sanction in the world community by virtue of some supposed human rights violations perpetrated by the tribes is to engage in a bait and switch routine with an historically oppressed people and is not only a misappropriation of customary international law but a travesty of justice.

Respondents' reference to the International Covenant on Civil and Political Rights is similarly misguided. This Covenant, like the Universal Declaration, signifies a recognition among the members of the international community that human rights are not equally enjoyed around the world. A key aspect of the Covenant is the creation of a Human Rights Committee (Article 28) charged with evaluating country reports (Article 40) and facilitating the resolution of conflicts based on violations of rights (Article 41). A recent Committee report expressed "(concern) that aboriginal rights of Native Americans may, in law, be extinguished by Congress" and recommended "that steps be taken to ensure that previously recognized aboriginal Native American rights cannot be extinguished." U.N. Doc. CCPR/C/79/All 50 (1995). In light of both the aforementioned history of the relationship between the United States and the Indian nations and the on-going concern in the international community for the rights of Native Americans, Respondent's suggestion that that Congress' plenary power over Indian nations is necessary is nothing more than a perpetuation of the very injustice that the international community is attempting to eradicate, namely, colonialism.

Indeed, Respondents' professed concern under Article XXV of the International Covenant on Civil and Political Rights with assuring that the full territorial sovereignty of Indian tribal nations in the United States is not recognized and with assuring plenary colonial power in Congress over the internal affairs of Indian tribes in order to protect the rights of political participation of non- Indians affected by tribal government is a profoundly disingenuous and ironic argument to anyone familiar with the history of federal Indian policy and colonization it brought to Indian peoples. The plenary power doctrine which the Respondent defends in this case was a late nineteenth century invention of the United States Supreme Court to justify expanding American imperialism in Indian country during the late nineteenth century and, in particular, its allotment policy reflected in the facts of this case. Stephens v. Cherokee Nation 174 U.S. 445, 478 (1899), United States v. Kagama, 118 U.S. 375 (1886); United States v. Sandoval (1913). While the highest court of the United States claimed at that time in this case that the United States had exercised plenary power from the inception of its relationship with the Indian tribes, nothing could be further from the truth, as indicated in the next section. Indeed, a majority of the United States Supreme Court never even asserted the existence of such a plenary power until its decision in Stephens v. Cherokee Nation in 1899. For present purposes, however, the important point is that at the time most Indians were not citizens of the United States and could not vote for the Congress that claimed a right to govern their lives under its invented plenary power. Thus, the doctrine of plenary power over Indians asserted that time in this case constituted the central legal tenet of the effort by the government of the United States to provide some legal pretext for its unjustifiable colonial expansion of its power. The plenary power doctrine therefore constitutes a legal instrument of American colonialism, used to rationalize the imposition of alien legal policies on non-consenting and non- voting Indian populations. This effort at legal rationalization constituted the ultimate act of colonialism and a gross violation of the same international law norm on which the Respondent purports to rely. It is therefore truly ironic and clearly wrong to have the Respondent argue that the United States must exercise plenary power over Indian tribes to protect its citizens rights of political participation when the members of the Kiowa, Commanche, and Apache tribes had absolutely no right to vote for the Congress that enacted the 1900 legislation.

As much of the rest of the world has already realized, undoing the lingering effects of colonialism will often render the former citizens of the colonizer power subject to the sovereignty and jurisdiction of the colonized. Respondents political participation argument is nothing less than a reversal of that theme in an effort to perpetuate American colonialism over Indian peoples. This Court therefore cannot and will not accept that argument. It finds that this purported international law justification for the United States' plenary power doctrine is but a subterfuge for the continuation of American colonialism over Indian peoples and a suppression of their inherent aboriginal sovereignty and international rights of self-determination.

Based on the forgoing discussion, it is clear that the 1900 federal legislation not only violates the law of the affected tribes, but it also violates traditionally accepted norms of customary international law, now codified in important international conventions. For both reasons, the legislation must be declared invalid and of no force and effect.

A. The Plenary Power Doctrine in American Constitutional Law

The Appellant has also argued that the 1900 legislation is invalid under American domestic law, notably under the United States Constitution. It claims that under the American constitution, the Congress was never granted plenary power over Indians affairs and that it therefore lacked the power to enact the 1900 legislation.

Just as the highest court of any tribe is the final authority on the law of that tribe and should not be reviewed by the courts of other sovereigns on the meaning of tribal law, so the United States Supreme Court is the highest authority on United States domestic constitutional law. Consequently, the norms of respect and honor due another sovereign (concepts that lie at the core of the political relationships of most tribes) caution against this Court overturning or otherwise disagreeing with the decision of the United States Supreme Court in this case on a matter of its own domestic law. This Court therefore declines to rest its decision in this matter on American constitutional law, despite the artful and powerful argument mustered against the plenary power doctrine by the Appellant.

Nonetheless, since the tradition of Indian political relationships with the United States has been one of dialogue (i.e. talking matters out), this Court has decided to offer its views (while not resting its decision on this basis) on the matter. In so doing, it hopes to create a legal dialogue between sovereigns on the propriety and continued vitality of the so-called plenary power doctrine in the field of Indian affairs relied on by the United States Supreme Court in its decision in this case. Specifically, this Court finds absolutely no justification for the doctrine in the history of relationships between the Indian nations and the United States or in the history or original intent of the United States Constitution. It finds that the doctrine was a late nineteenth century legal invention created by the United States Supreme Court to attempt to legally rationalize expanding American colonialism over Indian tribes in violation of prior treaties and arrangements and should, like all legal doctrines and institutions supporting colonialism, be rejected in a post-colonial world. Additionally, this Court respectfully suggests that the doctrine has no textual or other foundation in the language of or history surrounding the adoption of the United States Constitution. In short, the plenary power doctrine is a colonial myth rooted in the imperialist history of the late nineteenth century policies of the United States with respect to Indian and foreign nations that should be, for that reason, rejected and abandoned.

Until the late nineteenth century neither the European colonial powers that governed North America in the early post-contact period nor the United States purported to govern internal tribal relations. Tribal legal relationships and internal tribal disputes were exclusively governed by tribal law, the Indian tribes exercising exclusive sovereignty over matters occurring within their territory that affected only the persons who lived in Indian country. American constitutional law long recognized this relationship. In Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 547 (1831), Chief Justice John Marshall recognized this long-standing legal tradition, indicating that during the colonial period the British Crown never assumed it had to the power to govern Indians directly. Rather, the authority of the colonial power was thought to be limited to protecting the tribes from outside aggression or invasion and to control their relations with foreign powers. Within their own territory, they constituted the exclusive governing authority. As Chief Justice Marshall summarized the matter:

> Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only.

The early treaties with the Indian tribes repeatedly recognized the exclusive governance of Indian country by the tribe that controlled the land. For example, Article V of the Treaty of Hopewell with the Cherokee Nation, one of the treaties interpreted by Chief Justice Marshall in Worcester provided that if any citizen of the United States or other person who was not an Indian illegally settled in the lands of the Cherokees, "the Indians may punish him or not as they please." 7 Stat. 18. The Treaty of Dancing Rabbit Creek between the Choctaw and the United States clearly contemplated exclusive Choctaw sovereignty and control over the persons and property found on Indians lands. Thus, the preamble (which the Senate refused to ratify) asserted that the Choctaw signed the treaty so that "the Choctaw may live under their own laws in peace with the United States and the State of Mississippi." Therefore Article IV of the treaty provided:

that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendents; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said Choctaw Nation from, and against all laws except such as from time to time may be enacted in their own National Councils....

The original constitutional documents adopted by the United States government also recognized that the national power was limited to managing the bilateral political, economic and social relations between Indian tribes and American citizens or those under the protection of the federal government. Thus, Article IX of the Articles of Confederation gave to the Continental Congress:

the sole and exclusive rights and power of...regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.

The phrase "regulating the trade and managing all affairs with the Indians," nicely summarized the limits of national authority - regulating bilateral relations between the United States and its citizens, one the one hand, and the Indian tribes, on the other. The power was a diplomatic and economic in nature, not a power to govern the Indians as individuals or to regulate the Tribes in the absence of their consent manifested in a treaty.

The Constitution of the United States continued the tradition of limited power reflected in the Articles of Confederation. The Constitution contains two explicit references to Indians. Article I, Section 2, Clause 3 excluded "Indians not taxed" from the apportionment formula for representation and direct taxation, reflecting the fact that the time of the adoption of the document Indians were not citizens of the United States and not subject to its governing authority, including the power of taxation. Article I, Section 8, Clause 3 authorized Congress to "regulate Commerce...with the Indian Tribes." Until the second section of the fourteenth amendment adopted in 1868 repeated the "Indians not taxed" exception as part of an apportionment formula for representation, these two references remained the only constitutional references to Indian affairs in the United States Constitution.

Until the late nineteenth century, the United States Constitution was never thought to authorize the United States government to directly govern the Indian tribes or the affairs of their members without the consent of the Tribe through a treaty or other agreement. Thus, in the early Trade and Intercourse Acts adopted between 1790 and 1834 to govern Indian affairs, Congress only asserted authority over non-Indians who entered into trade, land dealings, liquor sales, or social contact with Indian tribes. See generally, Francis Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834 (1962). Initially, these statutes did not directly apply to Indians at all. Later they were amended to permit federal prosecution of Indians who committed crimes against the person or property of non-Indians under the protection of the United States, but only if they had not already been punished by the laws of their tribe. Act of Mar. 3, 1817, ch. XCII, 3 Stat.383, now found at 18 U.S.C. § 1152. Thus, prior to 1885, the only time Congress asserted any governing power over Indians for activities occurring within Indian country involved those limited situations where they harmed others under the protection of the United States government and where the United States government, through diplomatic or other pressure, was unable to get their tribes to act to satisfactorily redress the harm.

Another example of the limited nature of federal constitutional power to impose its authority on Indian tribes can be found in the history of the implementation of the Indian Removal Act of 1830, ch. 148, 4 Stat. 411. While that statute announced the official policy of the United States government to remove all tribes from within the boundaries of states east of the Mississippi River, the United States did not regard itself to possess the constitutional power to unilaterally impose that policy on the affected tribes. Rather, removal treaties were individually negotiated with the affected tribes in order to gain their consent for such a change in their land ownership and location. E.g., Treaty of Dancing Rabbit Creek with the Choctaw, 7 Stat. 333, Treaty of New Echota with the Cherokees, 7 Stat. 478, Treaty of Washington with the Creeks, 7 Stat. 366.

Thus, as late as 1883, the United States Supreme Court held in Ex parte Crow Dog, 109 U.S. 556 (1883), that the United States government lacked the power to try a member of the Brule Sioux Band of the Sioux Nation for the murder of another member of the same band on the tribe's reservation. At that time, almost 400 years after the first contact of Indian tribes with Europeans, the power to govern such intratribal matters remained exclusively with the sovereign Indian nation on whose lands the crime was committed. Thus, the internal governance of an Indian nation

constituted a matter exclusively within the jurisdiction of that sovereign Indian nation. It was not within the power of Congress to control and neither Congress nor its colonial predecessors had ever claimed any lawful authority to govern such matters.

American colonialism and the Euro-American imperial impulse to control the destinies of other non-consenting, non-white peoples began to erode the proper understanding of the limits of American constitutional authority in Indian affairs during the late nineteenth century. In its drive to forcibly impose its governance and its assimilationist policies on non-consenting Indian peoples, the United States developed a far broader and more threatening conception of its constitutional power in Indian affairs, known as the plenary power doctrine. Originally, the doctrine was developed to legally rationalize the assertion by the United States of political hegemony over tribes that had not consented to its exercise. Originally, the assertion of plenary power was justified not on constitutional textual grounds, but as a trusteeship power - a classic colonial legalization of so-called "white man's burden" argument then used by other European societies to rationalize colonialism in Africa and Asia. See generally, Robert N. Clinton, Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law, 46 Ark. L. Rev. 77 (1993)

Thus, in United States v. Kagama, 118 U.S. 375 (1886), the United States Supreme Court sustained the constitutionality of the Federal Major Crimes Act, the first federal statute to assert federal jurisdiction over intra-tribal matters without relying on any textual source in the United States Constitution or on any grant authority contained in a treaty. Indeed, the Kagama Court, recognizing the limited reach of the textual constitutional sources of congressional power, specifically rejected the notion that the Indian commerce clause could sustain a federal statute regulating intra-tribal crimes. Rather, the Court grounded its decision on the power of the United States as trustee to assert a protective power over Indian tribes. The Supreme Court therefore sustained the constitutionality of this intrusion on the governing authority of tribes on the following grounds:

> These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local; ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

Id. at 383-84. Thus, initially, the United States Supreme Court sought to rationalize the expanding political hegemony of the federal government over Indian tribes not on constitutional textual sources, but, rather, on some notion of trusteeship derived from late nineteenth century notions of racial superiority and the "white man's burden" theme of Euro-American colonialism. The Kagama decision therefore did not represent a reasoned exposition and interpretation of any textual source of constitutional authority grounded in the United States Constitution. Rather, it expressly rejected the only textual source of constitutional authority in Indian affairs as insufficiently broad to sustain the significant expansion of federal authority over tribal Indians reflected in the Major Crimes Act.

In its decision in this case, the United States Supreme Court continued its legal rationalization for American colonialism. Relying on Kagama, the Court's opinion emphasized the dependence of these Indians on the United States as protector and trustee and suggested "[t]hat Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress." Lone Wolf, 187 U.S. at 567. Furthermore, the Court asserted, "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

In point of fact, Congress never had previously exercised any authority, let alone "plenary power" over the "tribal relations of Indians." As Chief Justice Marshall's remarks in Worcester indicated, the colonial powers, including the United States, had never previously exercised power and authority over "the internal affairs of the Indians." The suggestion by the United States Supreme Court in its decision in this case that Congress "from the beginning" had asserted plenary power over "the tribal relations of Indians" is a gross misrepresentation of legal history, apparently offered for the sole purpose of legally rationalizing a colonial expansion of United States political hegemony over non-consenting Indian peoples.

Indeed, had the plenary power doctrine constituted the original interpretation of the Constitution, one would have thought both it would be grounded in early interpretations of constitutional text and that a long string of prior cases could be found sustaining the exercise of such plenary authority. Neither proposition withstands close scrutiny. As Kagama demonstrates, the trusteeship power upon which the United States Supreme Court's decision in Lone Wolf rests was not grounded on any constitutional language. Rather, it emerged from late nineteenth century colonial notions of racial superiority that suggested Euro-American peoples should imperatively dominate aboriginal peoples whom they thought were in need of their sheltering protection. Furthermore, the decisions of the United States Supreme Court themselves demonstrate that the so-called plenary power doctrine invoked by the United States Supreme Court in Lone Wolf was not a long-standing constitutional doctrine. Rather, the plenary power doctrine of Lone Wolf constituted a recent invention of the Court to legally rationalize late-nineteenth century American colonialism. Thus, prior to 1899, just four years prior to the United States Supreme Court's decision in this case, the Court had never suggested to existence of any plenary power of Congress over the tribal relations of Indians. The first time the phrase was ever used occurred in an off-handed remark Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899), where the Court offered its views about power of Congress to authorize the federal courts for the Indian territory to determine the tribal citizenship of certain Indians to determine their eligibility to share in the allotment of tribal property under federal statutes and agreements with the affected tribes. The Court indicated:

> The United States court in the Indian Territory is a legislative court, and was authorized to exercise jurisdiction in these citizenship cases as a part of the machinery devised by congress in the discharge of its duties in respect of these Indian tribes, and, assuming that congress possesses plenary power of legislation in regard to them, subject only to the constitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument.

Id. (Emphasis supplied). Three years later the Court's remark in Stephens was relied upon in Cherokee Nation v. Hitchcock, 187 U.S. 294, 306 (1902), sustaining the power of the federal government, as trustee, to lease certain Cherokee lands. The Court in Hitchcock, cited Stephens and said, "The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed." Thus, at the time the Supreme Court decided this case, the federal government's claims of plenary power over tribal relations had a legacy of only four years, based on isolated sentences derived from the Stephens and Hitchcock opinions. Thus, far from being "exercised...from the beginning," the plenary power doctrine asserted in Lone Wolf, while having intleectual origins that could be traced to Kagama, really had very shallow legal roots. In none of these cases had the United States Supreme Court relied on the text of the United States Constitution to justify its plenary power doctrine nor had they considered international law, the treaties that bound the United States, or the historical traditions spelled out in Worcester of leaving the Indian nations to govern their internal affairs through their own sovereignty. In light of this history, both the so-called trusteeship power and the plenary power doctrine that it spawned should be seen for precisely what they were - legally insupportable inventions of a late nineteenth century American court designed to legitimate otherwise legally insupportable exercises of colonial authority over non-consenting tribal governments.

Other post-colonial courts have already recognized that broad late nineteenth and early twentieth century assertions of trusteeship obligations often served merely as rationalizations for colonialism and, accordingly, decline to sustained them. For example, in South West Africa (Phase 2), 1966 I.C.J. 61, 134-35, the International Court of Justice declined to recognize the juridical character of trusteeship obligations in the late nineteenth and early twentieth centuries where not directly derived from the League of Nations mandate system.

Today, even the United States Supreme Court has rejected the trusteeship as an independent source of congressional power. In McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 n. 7 (1973), noting that "[t]he source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulation commerce with Indian tribes and for treaty making."

Since the roots of the plenary power doctrine asserted in Lone Wolf rest entirely and completely on the trusteeship power rejected in the McClanahan decision, presumably because of its obvious relationship to rejected and immoral late nineteenth notions of racial superiority and colonialism, the continued vitality of the plenary power doctrine must be questioned as an illegitimate and illegal invention designed to legitimate otherwise insupportable American colonial claims to political hegemony over the tribal relations of Indians. Unfortunately, to date, the Supreme Court

has not reconsidered the doctrine and continues to reiterate its insupportable colonialist claims to total and complete colonial authority over Indian nations under the guise of the plenary power doctrine. E.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.")

In short, a careful review of the history of American constitutional power governing relations between the United States government and Indian nations, suggests that the exclusive sources of American constitutional power are the Indian commerce clause of article I, section 8, clause 3 of the United States Constitution and various powers of the federal government to negotiate and ratify treaties with Indian tribes. The treaty power obviously requires effective tribal consent for its exercise. Properly seen, the Indian commerce clause cannot support the plenary power doctrine announced in the United States Supreme Court decision in this case. The Indian commerce clause gave Congress the power to regulate "commerce...with Indian tribes," not the commerce of the Indian tribes. Even the Kagama decision recognized that it did not grant Congress the power to regulate the internal affairs of the tribes. It was intended to grant the United States only plenary power to govern its relations with Indian tribes, not the affairs of the tribes. Clearly, neither of these powers justifies the United States government abrogating its obligations under a prior treaty with an Indian tribe and simultaneously asserting an enlarged scope of governing power over the peoples who are signatories to that treaty without their effective consent. Thus, the vice in the decision of the Supreme Court in this case is not merely that it held that the United States government could unilaterally abrogate treaties with Indian tribes without their effective consent, as the federal government also can do with treaties with foreign nations, it is that the United States also unilaterally asserted an enlarged power to unilaterally govern Indian tribes through its insupportable plenary power doctrine as a result of the treaty abrogation. That enlarged power never occurs when the United States unilaterally abrogates a treaty with a foreign nation.

In this case, the statute in question affects the method by which Indian tribes and their members will hold their land. It affects tribal control over tribal resources and the relationship of tribal leaders to their members. Clearly, the allotment process contested by the petitioners is part of the internal affairs of the tribes. The Worcester decision, the limitations of the Indian commerce clause, and the long-standing traditions that governed the relations of Euro-American governments and Indian tribes until the late nineteenth century all suggest that that such matters were outside of the authority of Congress and must be left to the governance of Indian tribes unless the tribes otherwise consent in conformity with tribal law. Since the KCAs, under their own laws, were just as bound by Medicine Lodge Treaty as was the United States, their consent could only be lawfully given under their own law through the knowing signatures of the three-quarters of the adult male population of the Tribe. Since even the United States government conceded that the requisite number adult male signatures had not been knowingly secured, one must question the legitimacy under United States domestic law of the allotment statute questioned in this case.

Nevertheless, it is not for this Court to revise United States constitutional law. It can point out the inconsistency of the American plenary power doctrine with the history of constitutional power, with the facts of history, with international law, with the decisions of even the United States Supreme Court, and with basic notions of human rights and morality. Nevertheless, the basic respect and honor which is due a coordinate sovereign indicates that the responsibility to revise American constitutional doctrine lies with the United States Supreme Court, not this Court. Accordingly, this Court cannot and will not rest its decision on American constitutional law even though it rejects the legal, historical, and moral legitimacy of the plenary power doctrine upon which the United States Supreme Court decision in this case rests. Only a colonial power can decide to change its own law and decolonize its approach toward relations with the sovereign aboriginal nations that predated its occupancy. The colonized peoples can resist colonial authority by force, through national liberation movements, through international law and nonviolent resistance, but they cannot unilaterally change the law of the colonizer power. This Court therefore can articulate its concerns about the manner in which the plenary power doctrine bolsters and rationalizes an insupportable assertion of political hegemony over sovereign Indian peoples. It cannot change American constitutional law, as much as it might like to do so.

IV. Taking Indian Land as a Violation of the Fifth Amendment and Fundamental Fairness

Since this Court has ruled the 1900 legislation providing for the allotment of KCA lands was illegal under tribal and international law, it need not decide the takings claim asserted by the KCA petitioners under the fifth

amendment to the United States Constitution. Furthermore, as noted above, this Court cannot revise the constitutional law of another sovereign - the United States government. Nevertheless, just as this Court voiced its views on the legitimacy of the plenary power doctrine in the interests of creating a legal dialogue with the jurists of the federal and state courts who continue to defend American colonization of Indian peoples through such doctrines, it will offer its views on the takings question without resting its decision on those grounds or otherwise attempting to change United States constitutional law.

As noted above, this Court does not trace its roots to English common law. Nell Jessup Newton, Permanent Legislation to Correct Duro v. Reina, 17 American Ind. L.R. 109, 123 (1992). Therefore, in analyzing a takings claim this Court is not required to adhere to a due process analysis under the United States Constitution. This Court also looks to international norms relating to indigenous populations. The following norms apply: (1) the distinctive nature of indigenous peoples' collective rights; (2) the centrality of territorial rights to indigenous peoples' survival; (3) the recognition of indigenous peoples' right to self-determination and autonomy; and, (4) legal protection of indigenous peoples' rights. See Frank Pommershiem, A Path Near The Clearing: An Essay On Constitutional Adjudication In Tribal Courts, 27 Gonzaga Law Review 393, 412 (1992).

The third norm, that of territorial rights, is of particular significance in this case. Land is sacred to the American Indian way of life and highly valued in American Indian culture and religion. In the words of one Indian man:

> An Indian's land is his faith, his religion, the repository of the bones of his fathers, part of his own being - everything save the lives of his people, that he holds most sacred.

Charles Wilkinson and John Volkman, Judicial Review of Indian treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" - How Long a Time is That? 63 Cal. L. Rev. 601, 610 n. 37 (1975) (citing Alvin Josephy, The Nez Perce Indians And The Opening Of The Northwest, 333 (abr. Ed. 1971)).

Because of the importance placed on land, many treaties with plains tribes were settled with a spiritual ritual of smoking a pipe to represent the sacredness of the obligations. Pommershiem, supra, at 399. Historically speaking, treaties were the vehicle through which Indian nations conferred rights to Indian lands to the United States government. In exchange for the land, Indian nations, such as the Kiowa, Comanche and Apache, sought guarantees that the reservation established by the treaty "would be the final determination as to what the white man would desire and receive from the tribe [[[[[s]." Weissner, supra, at 571.

Treaties "represent a high point of tribal sovereignty when tribes dealt with the federal government on a true government-to-government basis." Pommershiem, supra, at 398. Treaties are "not only a law but also a contract between two nations and must, if possible, be so construed as to give full force and effect to all of its parts." Black's Law Dictionary, Fifth Edition. Treaties, together with tribal constitutions, provide the cornerstone of tribal law even though treaties were often one-sided and tainted with fraud, corruption, unfair dealing, lack of authority and duress. Weissner, supra, at 578.

It is well established that treaty negotiations often involved misrepresentation, fraud, bribery, threats and coercion by United States negotiators. Wilkinson, supra, at 610. Treaties rarely afforded full recognition to the authority structures of the tribes and were rarely for the mutual gain of the parties. Wiessner, supra, at 574. Treaties, such as the Medicine Lodge Treaty, were for the specific purpose of restricting Indian nations to small parcels of land to clear the way for white settlement as part of the westward expansion. Wiessner, supra, at 571.

There are also several historical accounts of breach of treaty obligations by the United States. In one instance, a government negotiator within two weeks of concluding treaty negotiations with Northwest tribes opened ceded lands for white settlement which was an express violation of the treaty terms. Wilkinson, supra, at 611, fn. 49, citing Josephy, supra, at 337-338. Similarly, when gold was discovered in the Black Hills, the United States army breached treaty obligations with the Oglala Sioux Tribe. As described by one man:

> Pashuka [Long Hair, General Custer]...led his soldiers into the Black Hills...to see what he could find. He had no right to go in there, because all that country was ours. Also the Wasichus [white man] had made a treaty with Red Cloud (1868) that said it would by ours as long as grass should grow and water flow. Later I learned that Pashuka has found there much of the yellow metal that makes the Wasichus crazy;....I asked my father what they were talking about...and he told me that the Grandfather at Washington wanted to lease the Black Hills so that Wasichus

could dig yellow metal, and that the chief of the soldiers had said if we did not do this, the Black Hills would be just like melting snow held in our hands, because the Wasichus would take that country anyway.

John G. Neihardt, Black Elk Speaks, The Legendary "Book of Visions" of an American Indian, 666-68 (1972).

In this case, the evidence shows that the number of signatures obtained by the U.S. government negotiators did not comply with the three-fourths requirement of Article 12 of the Medicine Lodge Treaty. Article 12 provides:

No treaty for the cessation of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying the same.

Furthermore, facts in evidence also show that the Kiowa, Comanche and Arapaho tribes petitioned Congress to ignore the terms of the 1892 Agreement due to fraudulent misrepresentation by United States negotiators with respect to the price to be paid to the Indians for the land. The terms of the Medicine Lodge Treaty specified that surplus lands be sold for $2.50 per acre, not $1.00 per acre which was the price actually paid to the three tribes pursuant to the Act of 1900. The evidence also shows that Congress unilaterally modified the 1892 Agreement during the legislative process without resubmitting the legislative changes back to the three tribes for their consent.

The Petitioners and Respondents do not dispute the validity of the Medicine Lodge Treaty as a binding agreement. The Medicine Lodge Treaty is, by definition, both a law and a contract between four individual nations. Because the Medicine Lodge Treaty represents the original, unadulterated agreement between the parties, this Court is bound by notions of honor and respect to uphold the sacred covenants contained in the treaty, including the rights conferred by the tribes to the United States government.

The language of Article 12 of the Medicine Lodge Treaty is unambiguous. It requires the signatures of three fourths of the male population of the three tribes to dispose of land. Both Appellants and Respondents agree that United States negotiators failed to secure the required number of signatures necessary for consent. The 1892 Agreement, upon which the Act of 1900 was based, is void for lack of mutual consent necessary to modify the treaty. The subsequent legislation, the Act of 1900, which effected the land transfer scheme and formally modified the treaty, disposed of Indian lands at price far below that expressly required by the terms of the treaty.

As stated previously, this Court exists outside the Anglo-American legal system. If the protections of the Bill of Rights did apply to this case, the Fifth Amendment would certainly require the federal government to compensate the Kiowa, Comanche and Arapaho people for the taking of private property without just compensation. Laurence Tribe, American Constitutional Law (2nd ed. 1988), 1473, fn. 37, citing United States v. Sioux Nations of Indians, 448 U.S. 371 (1980). In the Sioux Nations case, the Unired States Supreme Court upheld the Sioux tribes' deprivation of property claim against the federal government as a violation of the Fifth Amendment.

Since the concept of fundamental fairness mirrors the protections contained in the Bill of Rights, the result reached by the Supreme Court in the Sioux Nation case should also be applicable here. The contractual and legislative attempts by the United States to modify the termsof the Medicine Lodge Treaty are invalid. The Act of 1900 which effected the land transfer scheme was based on an agreement that lacked mutual consent.

The terms of the agreement, as understood by the KCAs, require $2.50 more per acre in addition to that already paid to the tribes for the "surplus" lands ceded to the United States government by the KCA tribes. In addition, in order to effectuate the federal policy of allotment, the 1900 legislation simply took tribally owned land and transferred its ownership to individual tribal members without any compensation to the tribes at all. This Court therefore believes that the Act of 1900 constitutes an uncompensated taking of property in violation of long respected tribal and international notions of fundamental fairness and, possibly, in violation of the fifth amendment takings clause of the United States Constitution. Accordingly, the decision by the United States Supreme Court in this case, which denied the deprivation of property claim asserted by the Kiowa, Comanche and Arapaho nations, should be reconsidered.

V. Remedies

Almost a century has passed since the United States government announced in this case that it had plenary power over Indians, that it could unilaterally extinguish and ignore Indian treaty rights, that it could by legislative fiat greatly enlarge the exercise of its colonial power over non- consenting Indian peoples, and that it could take Indian lands that it presumably held in trust for Indians, give them to non-Indians at less than market value, and exercise complete dominion over the remaining tribal lands to effectuate federal, rather than tribal, policy objectives. This gross assertion of colonial hegemony over the Kiowa, Commanche, and Apache peoples had continuing effects. Non-Indians have now lived on the lands illegally taken from the KCAs for nearly a century. For nearly a hundred years, their children have been born and their dead buried on lands long-ago promised in the Medicine Lodge Treaty for the exclusive use of the Kiowa, Commanche, and Apache peoples. Indian peoples, with a strong sense of attachment to land, are not unmindful of the fact that non-Indians might also over time develop such an attachment, although in general white culture does not seem to value its relationship to land in general and particular land areas in quite the same spiritual way as Indian peoples.

Neither this Court nor the KCAs can undo and rewrite history. Despite the breadth and significance of the ruling we announce today, we therefore cannot easily issue an order that will immediately restore the KCAs to complete and immediate possession of the lands they illegally lost through the 1900 legislation. In any event, the traditional Indian way, perhaps not as commonly followed by tribal courts today, is to invoke the traditional remedy of shaming to rectify a wrong. Clearly the decision announced today by this Court reflects the fact that United States has long hidden behind the doctrine of plenary power and its illegal assertion of right to breach Indian treaties, to take Indian resources, exercise unjustified colonial power over non- consenting peoples, and otherwise behave in a fashion that violates basic international law protections of human rights, the international law notions surrounding the force of treaties, and the international norms surrounding the protections of indigenous peoples. In so doing, it has totally ignored tribal law and the sovereignty of the Indian nations over the lands in question as well as solemn agreements it signed with those sovereigns to recognize both the Indian nations' sovereignty and its claims to both ownership and governance over those resources. It is the United States whose illegal actions permitted non-Indians to occupy KCA lands in violation of the Medicine Lodge Treaty. For now this Court is content to publicly announce that fact and leave the preliminary decision about how to rectify this wrong to the federal government.

In the Indian way, however, wrongdoers who do not promptly heal the harm they have caused through compensation and apology that restores harmony to the community or kinship relationships they disrupted are subject to greater sanctions. Such sanctions might include shaming by the community or, in some tribes, ultimate ostracism and banishment for their inability to live in a peaceful, respectful way in harmony with their neighbors and for bringing dishonor to their family.

As a result of its order in this case, this Court expects the United States to promptly attempt to heal the wrong it did to the Kiowa, Commanche and Apache peoples through the 1900 legislation and to work with those tribes to restore harmony and balance to the relationship established by the Medicine Lodge Treaty that was disrupted by the disrespectful, unfair, and illegal unilateral actions taken by the federal government that were at issue in this case. In that tradition, this Court retains continuing jurisdiction over this matter. It trusts and respects the federal government with whom many of the Indian tribes have long-standing treaty relationships to undertake remedial reform on its own initiative as a result of the order of this Court.

In the unfortunate event, however, that the government of the United States government fails to behave in a respectful and honorably fashion and fails to promptly take appropriate actions required to restore balance to the federal- tribal relationship, this Court would be required on appropriate further application of a party to undertake any and all appropriate actions to bring shame to the reputation and honor of the United States in appropriate international tribunals and in the eyes of the world community, as gross violator of the lawful rights of indigenous peoples, an unreformed colonialist and racist power bent on domination of non-consenting sovereign peoples, and as a community that fails to respect the international law norms associated with the sanctity of treaties, the protections of indigenous lands and peoples, and the decolonization of non-consenting peoples. At some point, it might be forced to explore other appropriate remedial options, including but not limited to international trade sanctions, embargoes, or the like, as was done by the world community to put and end to the apartheid regime of the former government of the Union of South Africa. It trusts, however, that the exercise of its continuing jurisdiction will not require such action. Like many of the Indian nations it represents, this Court trusts that the United States government

one day soon will recognize that its respect and honor are at stake in manner in which it upholds its Indian treaty obligations and that it will commence treating the Indian nations with which deals with the same respect and honor that they have shown to the United States. Indian nations have never claimed the right to renege on treaties they lawfully made with the United States, even when the United States government repeatedly failed to honor its obligations under those treaties. The United States should begin treating the Indian nations with the same respect and honor the tribes have long shown to it. The members of this Court pray that this case may be the start of that new relationship.

As a result of the foregoing, this Court is unanimously of the firm conviction that the decision of the United States Supreme Court in this matter cannot be justified based on tribal and international law and must be overturned. While not resting its decision on this ground, this Court also questions whether the plenary power doctrine announced by that Court in this case or its treatment of the fifth amendment takings claim comports with the legal history, original intent, or proper interpretations of the United States Constitution.

IT IS SO ORDERED.

Notes

Although the Vienna Convention technically applies to treaties between states, the reach of the rules embodied by the Convention extend beyond the articulated limits of the Convention, for two reasons. First, because so many of the rules are foundations of customary international law, those rules apply to all international treaties. Second, Article 3 of the Convention indicates, inter alia, that the rules contained within the Convention are, in fact, applicable to agreements between "states and other subjects of international law," which accurately characterizes the Medicine Lodge Treaty, an agreement between a state and an indigenous nation. Specifically, Respondent cites Article 2 of the Declaration:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Respondent also cites Article 21:

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority o government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Respondent cites the following:

Article I, section 1:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article XXV:

Every citizen shall have the right and the opportunity,...without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country.

and Article XXVI:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit an discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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