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The Apex of Congress' Plenary Power over Indian Affairs: The Story of *Lone Wolf v. Hitchcock*

> It [*Lone Wolf*] is a very remarkable decision. It is the *Dred Scott* decision No. 2, except that in this case the victim is red instead of black. It practically inculcates the doctrine that the red man has no rights which the white man is bound to respect, and, that no treaty or contract made with him is binding. Is that not about it?
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> Senator Matthew Quay (R. Pennsylvania), U.S. Congressional Record 2028 (1903).[1]

The Supreme Court's opinion in *Lone Wolf v. Hitchcock*[2] stands as the high water mark of Congress' plenary power over Indian affairs. *Lone Wolf* legitimized Congress' decision to abrogate the Treaty of Medicine Lodge with the Kiowa, Comanche, and Plains Apache (KCA) and open up the KCA reservation to white settlement. By deeming Congress' abrogation of the Treaty a purely political matter and solidly within the constitutional authority of the Congress, the Court empowered Congress to intervene in Indian affairs without concern for prior treaty promises or the Bill of Rights. Despite contrary treaty provisions, compelling evidence of fraud on the part of the United States, and complete disregard for tribal property rights, the Court allowed the KCA reservation—like many others of the period—to be broken up into individual homesteads pursuant to the 1887 General Allotment Act.[3] All remaining land was treated as "surplus" and put up for sale to the public at rates often well below market value.

The immediate consequences of the Court's decision to the KCA were profound. Intended to break up the collective, communal existence

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[1] As cited in David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court* 116 (1997).

[2] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[3] 25 U.S.C. § 331 et seq.

of Indian peoples and turn Indians into self-sufficient farmers and ranchers, by all accounts, allotment was a devastating failure.[4] As many argued even before its implementation, the allotted lands were too small and not sufficiently arable to support a family. Further, by ending collective land holdings and communal tribal life, allotment decimated tribes, tribal culture, and the tribal land base as it simultaneously opened up the west to white settlement and expansion. As one scholar asserts: "Allotment attacked Indian tribalism, root and branch."[5] In the years following allotment, subsequently imposed state taxation, fractionalization of interests through inheritance, and lack of sophistication in both farming and private land ownership led to the loss of many of the individual farmsteads. In the case of the KCA, for example, their land holdings shrank from 2.9 million acres down to a mere 3,000 by the early 1930s. Numerous tribes across North America similarly suffered the devastating consequences of allotment then, and many still do today.[6]

Many federal Indian treaties promised perpetual protection for collective tribal territories, and thus could have thwarted federal allotment policy, unless the Indians agreed to new terms. Congress pressed forward with allotment regardless. It was a new era in federal-tribal relations. From its inception, the United States had followed the British practice of conducting Indian relations via treaty, viewing tribes as distinct nations that governed their own affairs, separate from federal and state governments. In 1871, however, Congress barred further treaty-making with the Indians. And in 1885 it enacted the first law directed at controlling tribes' internal affairs, a law that criminalized conduct involving only Indians. In the 1886 case of *United States v. Kagama*,[7] the Supreme Court upheld this law, determining that Congress had plenary authority to regulate tribes' internal affairs because tribes were "wards" of the federal government. By ruling that the federal government had jurisdiction over a murder committed by an Indian against another Indian on an Indian reservation, the Court legitimized Congress' efforts to govern internal tribal matters, even though no textual basis for that power exists in the Constitution. Buttressed by the *Kagama* Court's assertion that Indian nations were dependent wards vis a vis the United States, *Lone Wolf* adopted the language of wardship and continued *Kagama*'s line of reasoning with devastating results.

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[4] *See* Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 6 (1995). For a thorough discussion of allotment in relation to the "five civilized tribes," see Angie Debo, *And Still the Waters Run* (1973) (1940).

[5] Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of* Lone Wolf, 38 Tulsa L. Rev. 5, 6 (2002).

[6] For discussions of allotment as it related to the Comanche, see William T. Hagan, *United States–Comanche Relations: The Reservation Years* 111 (1976) (hereinafter "Relations"); and as to the Kiowa, see Blue Clark, Lone Wolf v. Hitchcock: *Treaty Rights and Indian Law at the End of the Nineteenth Century* 95–96 (1999).

[7] United States v. Kagama, 118 U.S. 375, 376 (1886) (see Chapter 5, this volume).

Thus, *Lone Wolf*'s legacy goes far beyond authorizing the allotment of Indian lands. The case held that Congress' actions in regards to Indian affairs—even if opposed by tribes, prohibited by treaty, or destructive to Indians themselves—would not be questioned by the courts. As the Supreme Court now infamously wrote of Congress' abrogation of the treaty in the *Lone Wolf* case: "[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."[8] The decision fully revealed the United States' intention to subject Indian tribes increasingly to Congress' will. Congress' decision to end treaty-making as the primary method of dealing with Indian nations in 1871 had bolstered the view of Indians as dependent wards of the United States. Moreover, a perception of Indians as non-citizens—the Indian Citizenship Act was not passed until 1924—whose affairs paralleled those of foreigners within United States borders, was consistent with Congress' exercise of its plenary authority in other areas during the same period, such as immigration.[9] The *Lone Wolf* Court advanced and confirmed the view that Congress had the constitutional power to unilaterally abrogate its treaties with tribes, just as it did with foreign powers, when deemed necessary. In this sense, *Lone Wolf* was not only in line with the Court's increasing deference to Congress in matters involving Indians, but also signaled a move towards the expansive plenary authority of Congress during the period generally.[10]

If the Court's dubious creation of a virtually limitless plenary power over Indian affairs—first in *Kagama*, then in *Lone Wolf*—is easily traced through the Court's Indian Law jurisprudence, the circumstances that gave rise to the actual case of *Lone Wolf v. Hitchcock* before the Supreme Court prove to be far more complex and obscure. Lone Wolf's journey to the highest court in the land was complicated by the conflicts between powerful interest groups at play in Indian country in the late 1800s. By this time, more than thirty Indian tribes had been "removed" from eastern lands to the Indian Territory to make room for white expansion. At the same time, railroad development and mineral extraction were spreading westward, causing an influx of non-Indians into the region.[11] Though most Indians on reservations suffered horribly during this period, some tribal leaders were able to make deals with Texas ranchers

[8] Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

[9] Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31, 62–63 (1996).

[10] *Id.* at 60 (noting that the theory of plenary power present in *Kagama* presents itself again in *The Chinese Exclusion Cases* before it reemerges again in *Lone Wolf*). Walter Echo-Hawk shows the similarity between *Lone Wolf* and the cases from that same era concerning United States rule over its overseas colonies. In both instances, he argues, the Court refused to apply constitutional guarantees available to United States citizens. *See* Walter R. Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* 177–80 (2010).

[11] Hagan, *supra* note 6, at 2–7; Clark, *supra* note 6, at 21

to open up tribal lands for grazing, leading to lucrative payments for "grass money."[12] By 1890, for example, more than a third of the total land in the KCA reservation was leased for cattle grazing. These payments buttressed tribal Indians, with significant payments going to leaders like Quanah Parker and Lone Wolf, whose own lives and stories as great Indian leaders converged but then later fractured in the fight for the West.[13]

The lines built by the railroads to bring settlers eager to exploit the resources found in the Indian Territory broke up this valuable grazing land. Thus, critical alliances were formed out on the Plains. Cattlemen and tribal Indians who benefited from large Indian land holdings largely opposed allotment, and those wealthy ranchers teamed up with the pivotal Indian Rights Association, the leading advocate of Indian rights in the day, to fund the tribes' litigation all the way to the Supreme Court.[14] On the other side, the United States government, railroad interests, and proponents of westward expansion pushed for breaking up reservations and opening the country to settlement and development.[15] And, in the midst of these powerful, diametrically opposed groups were the competing interests of and complex relationships among missionaries, army officers, intermarried whites, licensed traders, and potential settlers.[16] The stage was set for an epic battle on the Plains over the Indian Territory and who would control it and its vast resources.

On a personal note, this case holds more than merely intellectual appeal for me. My own Potawatomi family was similarly "removed" from our aboriginal lands in the upper Midwest in the late 1800s, eventually taking a reservation in the Indian Territory.[17] Ultimately, our reservation was also opened to allotment, and, like so many other families, we lost that land shortly thereafter. My family—then an inter-married assemblage of Potawatomi and Irish—moved south, and became cotton, wheat, and cattle farmers in southwestern Oklahoma. Thus, I was born and raised in Kiowa County, Oklahoma, on a farm only a stone's throw away from the places where many of these battles were fought: Mount Scott, Fort Sill, Mountain View, Rainy Mountain, and others. Lone Wolf is one of a few small farming towns remaining in Kiowa County today, as is Gotebo, so named for the Kiowa leaders who once lived on and fought

[12] For a discussion of "grass money" and its role in shaping land rights on the southern plains, see Clark, *supra* note 6, at 34–35 and Hagan, *supra* note 6, at 150–56.

[13] Clark, *supra* note 6, at 35.

[14] For a detailed discussion of the role of the Indian Rights Association in the politics of the day, see William T. Hagan, *The Indian Rights Association: The Herbert Welsh Years 1882–1904* (1985).

[15] Frederick E. Hoxie, *The Campaign to Assimilate the Indians, 1880–1920*, at 44–45 (2001).

[16] Clark, *supra* note 6, at 34.

[17] For a full account of the removal and resettlement of the Potawatomi Indians, see R. David Edmunds, *The Potawatomis: Keepers of the Fire* (1978).

for that land. The tribal headquarters of the Kiowa Nation sits in Carnegie, Oklahoma, just across the county line in Caddo County. I was fortunate to grow up with and become very close to many Kiowa during my two decades in Oklahoma, including the extensive Mammadatey family, direct descendants of the great Lone Wolf.

For most whites on the rural plains, the mythic "land run" that established many of the current farming homesteads in this part of the world is a pleasant but faint relic of Oklahoma history. For the Kiowa, the story of Lone Wolf and other tribal leaders who stood alongside him to fight the abrogation of the Medicine Lodge Treaty, and the sequence of events leading up to the allotment of their lands might as well have taken place only yesterday. The consequences of allotment were and are fresh and raw. To my mind, the Kiowa of my upbringing held true to descriptions reaching back to the late 1800s: characterized as possessing "fierce independence," "headstrong attitudes," and beholden to a "warrior culture."[18] Today, many Kiowa still talk of the area as "Kiowa country" and recall with pride their dominance of the southern Plains. But the devastating effects of allotment and its concomitant ills continue to taint life's potential for the Kiowa, as for many other Native peoples in North America. Thus, despite subsequent Supreme Court cases that seem to lessen the impact of *Lone Wolf*'s unrelenting vision of congressional plenary authority over Indian affairs, the story behind the case reminds us of the human dimensions of the law, as well as its enduring consequences.

Factual Background

The 1867 Treaty of Medicine Lodge

In his seminal book, *Lone Wolf v. Hitchcock*, Blue Clark explains that "[t]he Kiowa played a dominating role in the nineteenth-century history of the southern plains." Common to other "plains warrior[s]" they followed the horse and buffalo culture. With their aboriginal homeland in central Montana, the Kiowa strategically forged alliances with other Indian nations before they moved southward in the mid–1800s. During this time, the Plains Apaches (or Kiowa–Apaches) "merged with the Kiowas proper." Along with the Comanche, their longtime allies, these tribes ruled the southern Plains: "[a]s mounted warriors, the Kiowas and the Comanches had few equals."[19]

Initial official relations between the Plains tribes and the United States government extend back only a few decades prior to *Lone Wolf*. Having had little contact with whites even by the mid–1800s, early interactions were understandably strained.[20] Communications were difficult, and this difficulty laid the foundation for future relations between the Indians who ruled large tracts of land in the southern plains and the

[18] Clark, *supra* note 6, at 18.

[19] *Id.*

[20] *Id.* at 19.

government that increasingly desired it. As the westward expansion of white settlers increased, the tribes came under pressure to make way for railroad lines and the movement of settlers through their lands.[21]

Early on, hostility marked the relationship between the Plains Indians and invading whites. Cognizant of the obstacles hostile relations posed to achieving Congress' objectives, federal policy-makers began to favor a peace process to take control of Indian land and compel the Indians' assimilation. An early Peace Commission, formed by Congress in 1867, sought to "remove the causes of war" on the Plains, reshape territorial boundaries, and "establish a system for civilizing the tribes."[22] Treaty-making was still the dominant method of procuring lands and peace assurances from the Indians, and many treaties were made during this period. In a matter of years, the United States signed various treaties with the Comanche, the Kiowa, and the Apache to further its policy agenda. Each subsequent agreement guaranteed greatly reduced tribal land holdings in exchange for, among other things, protected white passage and westward expansion. Even so, at the time of an 1865 treaty between the United States and the Kiowa and Comanche, the Tribes' reservation spanned a vast area of 93 million acres, containing land that is now bordered by eastern New Mexico, southeastern Colorado, southwestern Kansas, western Oklahoma and northern Texas.[23]

But relations between Indians and whites were increasingly fraught. Drawn by the lure of gold in California, fertile farmland in Oregon, and an expanse of plentiful natural resources, white travelers moved west, crossing Indian Territory in the process.[24] Convinced that further Indian land cessions and promises of peace would help to ameliorate the violent situation, the United States decided to again negotiate with the Kiowa and Comanche. In October of 1867 almost 5,000 Indians—"history's largest assemblage of Indians on the southern plains"[25]—gathered near Medicine Lodge Creek in southern Kansas. As reflected in the resulting treaty, leaders from the United States military and the Kiowa and Comanche were present at the meeting. No Apache attended, as they became incorporated with the Kiowa and Comanche and subject to the Treaty through a supplemental treaty with the government entered into in 1868.[26]

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[21] Jacki Thompson Rand, *Kiowa Humanity and the Invasion of the State* 38–40 (2008).

[22] Clark, *supra* note 6, at 19 (citing Cong. Globe, 40th Cong., 1st Sess., Senate, July 20, 1867, p. 753, for passage of S. 136; signature of President on p. 755. 15 Stat. 17).

[23] Hagan, *supra* note 6, at 21–22; Clark, *supra* note 6, at 23.

[24] For a detailed description of westward movement and the events leading up to the Medicine Lodge Treaty, see Hagan, *supra* note 6, at 1–43.

[25] Clark, *supra* note 6, at 21.

[26] The Plains Apache joined the Kiowa and Comanche subject to a supplemental treaty entered into on August 25th, 1868. Transcript of Record at 3, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (citing to Bill of Complaint (Complaint) in Supreme Court of District of Columbia, filed June 6, 1901).

Negotiations produced the 1867 Treaty of Medicine Lodge, which ultimately served as the central source of contention between the KCA and the United States over thirty years later in *Lone Wolf v. Hitchcock*. The Treaty of Medicine Lodge contained sixteen Articles mutually agreed upon by the Tribes and the United States.[27] Through its provisions, it achieved a number of things: in particular, the Treaty set forth the Tribes' agreement to secure peace in the territory, which would facilitate westward expansion of whites; it redefined, and significantly shrank, the territory of the KCA reservation; and, as part of its civilizing mission, it clarified the obligations taken on by the United States to the Tribes in exchange for land and peace.

Like similar agreements of the era, the Treaty sought to obligate the parties to peaceful co-existence, stating in Article One that "[f]rom this day forward all war between the parties to this agreement shall forever cease." Thus, the Tribes agreed that they would not kidnap, raid, or attack whites. The Treaty further stipulated that the Indians would no longer oppose the seemingly inevitable westward expansion of whites, as manifested in the construction of railroad lines, wagon roads, or mail stations. Succumbing also to federal jurisdiction, the Tribes agreed in Article One to "deliver up" "bad men among the Indians" to the United States, to be tried according to American law.

One of the Treaty's primary purposes, of course, was to diminish the territory of the KCA. Article Two of the Treaty accordingly reduced the lands of the KCA to a little more than 2.9 million acres from its original size of over 90 million acres—or 50,000 square miles—of land. The Tribes accepted the new territorial boundaries on the United States' promise, also contained in Article Two, that the land was to be "set apart for the absolute and undisturbed use and occupation of the tribes herein named" and that the United States would not allow others to "pass over, settle upon, or reside in the territory described in this article." In Article Ten, the United States also committed to ceasing payment of the 1865 treaty annuities, and substitute instead annuity payments required under the 1867 Treaty for a period of thirty years.

Consistent with the policy of the day, the Treaty also contained numerous provisions designed to facilitate the civilization of the Indians. These included promises by Indian parents to send their children to government-run schools, and promises on the part of the United States to build numerous structures on the reservation and provide for certain services to the Indians, including a physician, carpenter, farmer, blacksmith, miller, and engineer, all included in Article Nine. Article Six of the Treaty also provided that any Indian "head of a family" could choose to "commence farming", and select a tract of land within the reservation "not exceeding three hundred and twenty acres in extent." This land would then "cease to be held in common," and would be "occupied and held in the exclusive possession of the person selecting it, and of his

[27] The Treaty of Medicine Lodge, 15 Stat. 581 (1867), *as reprinted in* Clark, *supra* note 6, at 115, 121–22 (hereinafter Medicine Lodge Treaty).

family so long as he or they may continue to cultivate it." Similarly, if an individual Indian elected to farm, he, too, could get an 80–acre parcel of land to cultivate, also with exclusive rights of possession. When the Indian agent was satisfied that the Indian was commencing farming in good faith, he could get seeds and implements to assist in this pursuit.

Significantly, Article Twelve stated that "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." Eventually, Article Twelve's requirements would become the center of the dispute between the Indians and the United States government, ultimately serving as a core subject of inquiry in the litigation.

Blue Clark's work characterizes the negotiations and signing of the Treaty as a sad event for the Indians. He reports that during negotiations, tribal leaders conveyed deep sorrow over the way of life they saw slipping away. Clark writes of how warriors like Satanta, a Kiowa, told the commissioners that reservation life was anathema to his peoples' way of life, and that "[w]hen we settle down, we grow pale and die."[28] The Comanche leader, Ten Bears, also reportedly pleaded with the commissioners:

> I was born on the prairie, where the wind blew free and there was nothing to break the light of the sun. I was born there where there were no enclosures and where everything drew a free breath. I want to die there and not within walls.[29]

According to Clark, the tenor of negotiations was one of government officials emphasizing the Hobson's choice the Indians faced. Senator Henderson reportedly told the Indians that insisting upon continuing in their way of life would only mean their extermination. Successful treaty negotiations, on the other hand, could at least secure the immediate future for the Tribes and their families because of the payment of annuities and other benefits guaranteed to Indians by the government. Pressure to accept new treaty terms was palpable.

The chiefs ultimately signed the Medicine Lodge Treaty on October 21, 1867.[30] One Kiowa signatory, Poor Buffalo, reportedly said of the signing: "[w]e raised our hands and told the Great Spirit that it was a sacred thing."[31] Soon after signing, the KCA moved to the new reservation. Clark theorizes that when the Tribes relocated, they did not actually expect to be confined to reservation boundaries. With prior

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[28] Clark, *supra* note 6, at 24 (citing Carl C. Rister, *Satanta: Orator of the Plains*, Southwest Review 17, Autumn 1931, at 83).

[29] *Id.* (citing Cora Hoffman Parrish, *The Indian Peace Commission of 1867 and the Western Indians* 43–44 (M.A. thesis, Univ. of Okla. 1948)).

[30] Transcript of Record at 2, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (referring to Complaint).

[31] Clark, *supra* note 6, at 25.

treaties, even as the land base was reduced, the United States had not strictly confined the Indians to the reservation territory, and the Tribes had oftentimes continued to utilize their old hunting grounds without incident. But the landscape of Indian Territory was rapidly changing. Pressure to open up lands to white settlement was increasing. Clark explains that "commissioners adhered to a familiar policy of quieting frontier conflict, confining Indians to smaller parcels of land, opening the remainder to settlers, and introducing Anglo–American civilization through force, farms, schools, and missions."[32]

Consequently, in the years following the Medicine Lodge Treaty, when the Indians hunted and ventured beyond reservation borders, they were pushed back by military force. To cut away at Indian opposition, tribal leaders were arrested and sent far away for imprisonment. Such was the fate of Lone Wolf, who became very ill while imprisoned by the federal government in Florida. When he returned to his reservation in 1879, he "passed his name, his medicine, and his shield" to a young Kiowa warrior named Mamay-day-te, or "Lone Wolf the Younger." Shortly thereafter he died, marking what has been called "the end of the war history of the Kiowa." Around the same time, other great leaders, such as Satank (Sitting Bear), Kicking Bird, and Satanta (White Bear) also passed away. During this period, the federal government strategically undermined tribal leadership and attempted to disaggregate the Tribes to ensure their dependence on the government. One government agent, P.B. Hunt, boasted: "I have endeavored to destroy tribal relations as much as possible, and also to destroy the influence of certain chiefs." Overhunting and waste by whites resulted in the disappearance of the buffalo on the Plains around this time, increasing desperation among reservation Indians. The Kiowa called the summer of 1879 the "horse eating sun dance" time because they were forced to kill and eat their horses to avoid starvation.

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[32] *Id.* at 26. The following discussion of the aftermath of the Medicine Lodge Treaty derives from Clark, *supra* note 6, at 27–29.

Mamay-Day-Te (adopted son of Lone Wolf) c. 1870
Photo by William S. Soule

This period also marked the convergence and ultimate fracture of two powerful Indian leaders. Taking his place as a leader of the Kiowa was Lone Wolf the Younger, a proud, full-blood tribal Indian and warrior who had made his reputation in raids into Texas and Mexico. Lone Wolf was not his original name. It was bestowed upon him in 1874 by the

great Kiowa war chief, Lone Wolf the Elder, for avenging the deaths of the Elder's son and nephew at the hands of Texas Rangers.[33] Once the Kiowas were confined to a reservation, Lone Wolf the Younger and his followers lived in an isolated part of the reserve, earning the name "Implacables" from the local Indian agent because of their resistance to farming, government hand-outs, and Christianity.[34] At the same time, another Indian leader, Quanah, rose to power among the Comanche. Quanah was the son of Peta Nocona, chief of the Quahada band of Comanche Indians, and Cynthia Ann Parker, a white woman who had been captured by the Comanche as a girl.[35] Parker later became the Chief's wife and the mother to Quanah, becoming, for all purposes save blood, a Comanche. But years later, Cynthia Ann Parker and her little girl, Quanah's little sister, Prairie Flower, were captured back by whites during a battle. Cynthia Parker reportedly tried to return to her Comanche family, particularly her children, many times, but to no avail. She died in despair at the age of thirty-seven, shortly after Prairie Flower passed from pneumonia.

Despite being raised Comanche, Quanah held tight to the memory of his mother, and kept a large painting of her holding Prairie Flower in his home for the duration of his life.[36] Quanah's name itself evinces his ongoing, internal conflict over his identity: later in life he took his mother's surname of Parker, as he struggled to navigate his place among Indians and whites. Undoubtedly, Quanah's striking, unusual features—he had dark skin, long hair, and piercing blue eyes—aided him in dealing with whites during this period. According to biographer Bill Neeley, Quanah was always torn between "an Indian father from a doomed culture and a white mother from the encroaching one."[37]

Both men garnered great respect, led their people, and negotiated delicate and defining relationships with cattle ranchers. Lease arrangements between the cattlemen and the KCA were highly profitable. Between 1885 and 1906 the cattlemen paid the Indians an estimated $2 million, from which prominent Indian leaders benefited the most.[38] The Indians called these payments "grass money." The chiefs were also paid monthly stipends to ensure that members of their bands would not bother the cattlemen's herds.[39] Quanah, in particular, reportedly collected "large sums" from cattle ranchers as evidenced by his relatively

[33] *See id.* at 29–30

[34] *Id.* at 30.

[35] For a full discussion of the life story of Quanah Parker, see Bill Neeley, *The Last Comanche Chief: The Life and Times of Quanah Parker* (1995).

[36] Hagan, *supra* note 6, at 132 (photograph of Quanah in his bedroom with a portrait of his mother and Prairie Flower in the background, ca. 1890).

[37] Neeley, *supra* note 35, at 2.

[38] *Id.*

[39] William T. Hagan, *The Indian Rights Association: the Herbert Welsh Years, 1882–1904*, at 168 (1985).

lavish lifestyle.[40] While many Indians reportedly struggled to live on the haphazardly distributed government rations sent to the reservation, Quanah lived in Star House, a spacious ranch-style home on the reservation so named for the white stars built into the roof's tiles. An open practitioner of polygamy, Quanah had several wives and many children who lived with him during his time at Star House.[41]

Quanah Parker and his family at Star House. (Courtesy of the Fort Sill Museum, Fort Sill, Oklahoma)

Though both men maintained relationships with cattlemen in their own way, Quanah Parker and Lone Wolf ultimately parted ways. Where Quanah Parker astutely navigated Indian Territory politics, hosting Senators and even the President, Lone Wolf more overtly fought against government efforts to take KCA land.[42] As Blue Clark recounts, Lone Wolf and his band of followers created a resistance movement, taking up residence near Mount Scott and near Elk and Rainy Mountain Creeks on the reservation. They opposed the government at every turn, fighting efforts to put their children into government run schools and to turn them all into farmers and Christians. But land seekers pressed forth, even in the face of Indian opposition. And the United States government "anxiously looked to the region for new settlement areas for homesteaders."[43]

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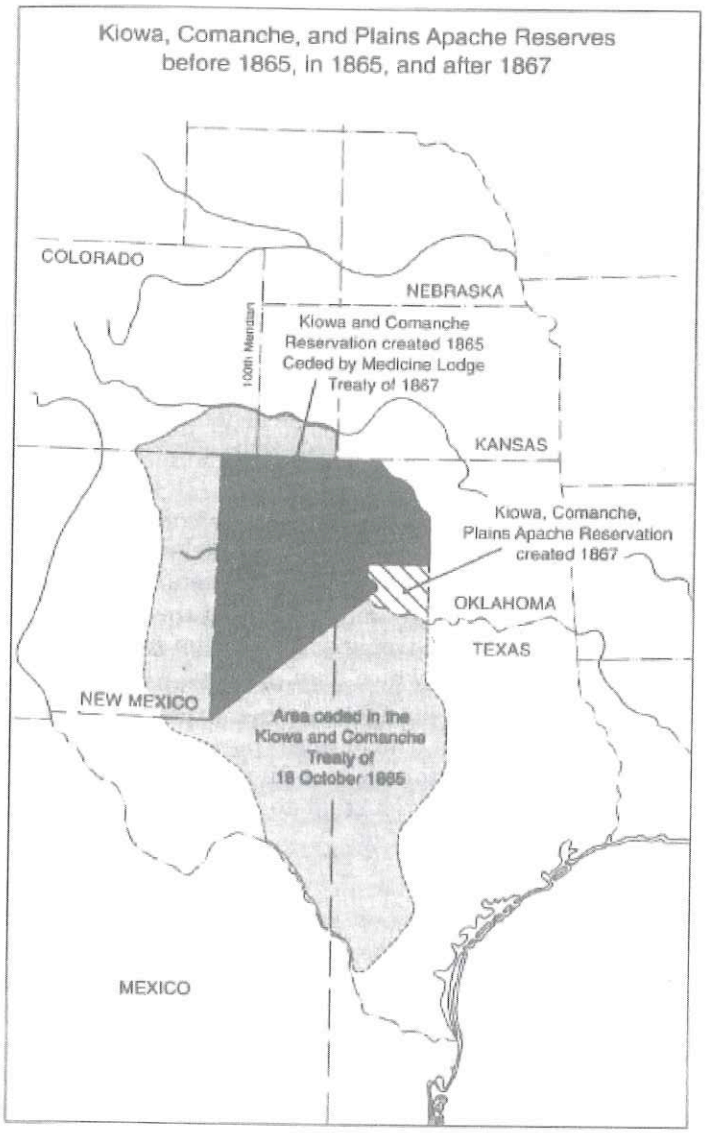
[40] Hagan, *supra* note 6, at 237.

[41] *Id.* at 186–88, 243–45.

[42] *Id.* at 279–80.

[43] Clark, *supra* note 6, at 30.



Map 1. Kiowa, Comanche, and Plains Apache reserves before 1865, in 1865, and after 1867.

The Allotment Act

Only twenty years after the signing of the Medicine Lodge Treaty, Congress passed the 1887 General Allotment Act.[44] The General Allot-

[44] 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331–381 (1983)). For background on the General Allotment Act, see Nell Jessup Newton et al., *Cohen's Handbook of Federal Indian Law* §§ 16.03[2][a]–[e] (2005 ed.).

ment Act was intended to break up communally held tribal land and allot smaller parcels to individual Indians or Indian families. Individual ownership, it was assumed, would help the Indians turn to an agricultural economy and thus facilitate their assimilation into white culture. With the depletion of the buffalo and their confinement to reservations, Indians had become increasingly dependent on the federal government for their survival. Allotment was promoted as a remedy for this dependence, and was advocated by diverse groups, including those whose sincere interest was to aid the Indians, as well as those who only wished to see Indian land opened up for white settlement.[45]

The Jerome Commission

The actual allotment of land was authorized by specific legislation that implemented or supplemented the Act. Accordingly, in 1892, a Commission sent by the United States arrived in Indian Territory to negotiate land cessions with the KCA. The Commission, comprised of David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, arrived on the KCA reservation at Fort Sill and began trying to convince the Indians to sign the agreement.[46] Cultural and linguistic barriers made communications difficult, and served as the foundation of complaints later over the question of the KCA's knowledge and consent to the agreement's terms. Interpreters included Joshua Givens, a Kiowa who had married a white woman, and Edward Clark, a white man, both of whom would later be the subject of allegations of fraud and deceit.[47]

Annuities guaranteed to the Tribes pursuant to the Treaty of Medicine Lodge were not set to expire until thirty years after inception, in 1898.[48] Thus, the KCA were reluctant to renegotiate with the government agents. Even though many, like Lone Wolf, seemed to be convinced by this point that opening up the reservation was ultimately inevitable, the overwhelming desire of the Tribes was to delay negotiating a new deal.[49] The 1892 official Report of the Proceedings of the Councils held by the Commission reflects the Tribes' concerns. When it was Lone Wolf's turn to speak, he emphasized the Tribes' reluctance to accept what the Commission proposed, stating, "[t]his commission made us feel uneasy."[50] Lone Wolf's chief concerns were that the commission pro-

[45] Newton et al., *supra* note 44, at 77.

[46] Transcript of Record at 4, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (referring to Complaint).

[47] *Id.* at 4–5.

[48] Medicine Lodge Treaty, Art. X.

[49] Letter from the Secretary of the Interior, in response to Resolution of the Senate of January 13, 1899, Relative to Condition and Character of the Kiowa, Comanche, and Apache Indian Reservation, and the Assent of the Indians to the Agreement for the Allotment of Lands and the Ceding of Unallotted Lands, S. Doc. No. 77, at 2, 8, 55th Cong. (3d Sess. 1899) (referring to copy of a report of the proceedings of the councils held by the commission which made the agreement of 1892) (hereinafter S. Doc. 77).

[50] S. Doc. No. 77, *supra* note 49, at 19 (report on September 28, 1892 meeting between Indian council and commission). The following account of Lone Wolf's concerns is taken from this report at pages 19–20.

posed to make pivotal changes to the Treaty of Medicine Lodge, but very few of the KCA were able to understand exactly what would happen and how it would affect their lives. Noting that few of them could speak or understand English, most were uneducated, and none of them had been taught to live as farmers, Lone Wolf reiterated that allotment for the KCA at that point would "mean[] sudden downfall for the three tribes." Most importantly, he reiterated that none of them had been raised to be farmers: "If each of us were given 160 acres we would not be able to work it like white people—a white man is taught from his youth up to work, we are not—and instead of this 160 acres being a blessing it will be disastrous." Lone Wolf made clear that, even if the government was trying to help them as it claimed, and even if allotment was inevitable, they did not feel that they were in a good position to become independent homesteaders. This sentiment is reflected in Lone Wolf's statement to the Commission regarding the Indians' path toward civilization:

> Now we have several good schools on the reservation, and to them we intend to send our children, where they will be taught the arts of manual labor. There they will learn to live like white people, and soon then they will be civilized. We advised our people to build houses, and quite a number of them today are living in houses. Some are building and still others are contemplating building. For that reason, because we are making such rapid progress, we ask the commission not to push us ahead too fast on the road we are to take.

He concluded with a passionate plea: "This morning in council the Comanches decided not to sell the country, and the Kiowas decided not to sell the country, and the Apaches decided not to sell the country. And I do not wish the commission to force us. That is all."

Negotiations were difficult, as the Tribes pressed for a delay in the abrogation of the Treaty of Medicine Lodge. Negotiations continued for a week and a half. Along with Lone Wolf, Quanah Parker and other leaders—such as Tabananaka, Stumbling Bear, and Big Tree—spoke up in the negotiations against the Jerome Agreement.[51] In addition to the Tribes' reluctance to see allotment take place before the Treaty ran, particular contested issues included the government's unwillingness to specifically delineate the amount of land to be allotted, or the price to be paid to the Tribes.

Eventually, general terms were set forth:

1. 160 acre allotment for every member of the three tribes;
2. $2 million for the surplus land remaining after allotment;
3. $250,000 of the $2 million would be distributed to the Indians; the rest would be kept in the U.S. Treasury at 5% interest, or $75,000 per year, $25 per capita.[52]

[51] *Id.* at 8–30.

[52] *Id.* at 36–40.

In light of the Tribes' concerns that they would find themselves destitute after allotment, as had the Cheyenne and other tribes, Commissioner Sayre made this promise: "Now, when this is done the Kiowa, Comanche and Apache tribes of Indians will be richer than any community of 3,000 white people that live anywhere on the face of this earth." Sayre went on to warn the Tribes that the Treaty of Medicine Lodge was set to expire, and, with it, the government annuities. It was in their best interest, he argued, for them to have another agreement in place prior to its conclusion, lest they face even more difficult times.[53]

The Commission was now armed with a document, and they began collecting signatures. Foreshadowing an issue of critical import in the later litigation, the Jerome Agreement included the addition of non-Indians to the list of allottees. These parties, all self-interested in some respect, worked with the Commission to procure signatures.[54] Because Fort Sill was within the Comanche section of the reservation, the signers were primarily Comanche. Since the Medicine Lodge treaty required assent by ¾ of the adult male tribal members for any new land grant, the commissioners decided to move to Anadarko to get more Kiowa signatures.[55]

Before the commission even left Fort Sill there were claims that the interpreters were promised favors for not translating properly.[56] As Lone Wolf's complaint later detailed, many of the KCA suspected the translators of perpetrating fraud on the Tribes. One in particular, Joshua Givens, was an interpreter whose name had been included in the Agreement to receive 160 acres. According to Clark, Givens was widely believed to be unscrupulous:

> Givens would sit at the entrance to troop headquarters and have Indian soldiers sign a petition when they were actually signing the treaty, he would also threaten the soldiers if they did not sign, or order them to sign—Givens told others that he was going to secure the Jerome Agreement no matter what the opposition.[57]

Indian Agent Brown had a similarly low opinion of Givens. "The reputation borne by Joshua Given [sic] in this community warrants the belief that he was capable of any deception that he might think would be to his advantage."[58]

As the Tribes became more suspicious of the Commission and the manner in which signatures were being collected, the Indians demanded

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[53] *Id.*

[54] *See*, Hagan, *supra* note 6, at 210–11.

[55] *Id.* at 211–13 (discussing the signature-gathering process among Comanche and Kiowa).

[56] *Id.* at 213.

[57] Clark, *supra* note 6, at 46.

[58] S. Doc. 77, *supra* note 49 (citing to a report of Capt. Hugh G. Brown, acting Indian agent, dated Aug. 28, 1893).

to see the document. Big Tree, a Kiowa, told the commissioners, "I do not want to hear; I want to see the writing."[59] Tensions rose. Eventually, tribal members gathered at the Methodist Church and drafted a document that charged they had been defrauded by the commission's procedures and by the interpreters. The tribal members were now almost unanimously opposed to the agreement. Before Jerome and his commissioners even left the reservation, Lone Wolf and others who had signed went to them and asked to "see the paper they had signed; this was refused, and their request to have their names erased from the agreement was also refused."[60] Lone Wolf later claimed that they were "threatened with violence if they persisted in their opposition." Jerome ultimately left the reservation with 456 signatures, more than ¾ of the adult male tribal members as certified by the Indian Agent, though this, too, was also contested in the forthcoming litigation.[61]

The Fight Before Congress

Congress received the Jerome Agreement in January of 1893, three months after commissioners finished their work on the KCA reservation. Its veracity was immediately called into question. The Tribes fought ratification of the Agreement with funding and support from cattlemen as well as from the Indian Rights Association (IRA).[62] The IRA was a prominent, Philadelphia-based advocacy group formed in 1882 that worked diligently on behalf of Indian interests during the period, though almost always with assimilationist goals in mind.[63] The IRA wrote letters to senators denouncing the bill, calling it "utterly destructive of that honor and good faith which should characterize our dealings with any people, and especially with one too weak to enforce their rights as against us by any other mean as than an appeal to our sense of justice."[64] Though the IRA recognized that allotment was inevitable, they argued that the size of the allotments must be increased if the Indians were to be truly self-supporting. Their resistance to allotment aligned them with the cattlemen in fighting for Indian interests, but put them at odds with the railroad industry that supported smaller grants.[65]

A ratification bill was introduced in Congress in 1892 and every year until it was ultimately ratified eight years later.[66] The ratification fight

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[59] Clark, *supra* note 6, at 48.

[60] S. Doc. 77, *supra* note 49, at 6 (referencing report of Capt. Hugh Brown, acting Indian agent).

[61] Transcript of Record at 6–8, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (referencing Complaint).

[62] *See* Hagan, *supra* note 6, at 256.

[63] *See generally* Hagan, *supra* note 39.

[64] *Id.* at 250 (citing letter of Herbert Welsh to George F. Hoar, March 14, 1900, IRAP, R10).

[65] *Id.* at 213.

[66] Clark, *supra* note 6, at 52–55.

focused primarily on two issues: grazing leases and the suitability of the land for farming. As reflected in a letter from Secretary of the Interior Bliss to the Senate regarding the proposed allotment, the character, quality, and quantity of the proposed allotments would not start the Indians toward a path of self-sufficiency. To the contrary, Bliss argued:

> As to the character of the reservation, the soil is rich and productive and the climate mild, but the rainfall is too uncertain to be depended upon for agriculture. It is far better adapted for grazing, and may be classed as a good grazing country. It is doubtful if the Indians could sustain themselves by agriculture, and it is my judgment that the quantity of land to be allotted under the agreement referred to in the resolution is not sufficient to sustain them at stock raising. The allotments ought to be double that area.[67]

Bliss' successor, Secretary Hitchcock, agreed with that assessment:

> Even at stock raising, however, and with plenty of grazing lands, it does not appear that all of them could make a living without some assistance, for some years, at least. At farming, I should regard them as incapable of self-support, and especially in a country so poorly adapted to agriculture and where crops fail much oftener than they mature.[68]

Advocates of allotment continued to insist that the land was of sufficient quality to support the allotment policy.[69] They proceeded to warn Congress that turning Indians into assimilated farmers was the only way to ensure their "rapid civilization."[70] As one Indian Territory judge put it, allotment was "the only practical method of solving the so-called 'Indian problem.' "[71] Others reiterated their belief that the Indians so vigorously opposed allotment only because they had been co-opted by the cattlemen. "It is generally believed in the Territory that [the lands] have been withheld from settlement through the influence of a few wealthy cattlemen who control the Indian chiefs and head men[.]"[72] As the Chief Justice of the Oklahoma Territory Supreme Court wrote, the

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[67] S.Doc. 77, *supra* note 49, at 1–2.

[68] Letter from the Secretary of the Interior, in response to Resolution of the Senate of December 14, 1899, a Report Relative to the Quantity, Nature, and Character of the Lands of the Kiowa, Comanche, and Apache Reservation, Together with a Schedule of the Leases, Showing Names of Lessees, the Areas of Their Leases, and the Annual Rental S. Doc. No. 75 at 4 (1st Sess. 1900) (hereinafter S. Doc. 75).

[69] Additional Papers Pertaining to the Amendment Providing for the Ratification of an Agreement with the Kiowa, Comanche, and Apache Tribes of Indians in Oklahoma, Formerly a Part of the Indian Territory, Intended to be Proposed to the Indian Appropriation Bill (H.R. 7433) S. Doc. No. 170, Part 2 at 3 (1st Sess.) (referencing letter from John H. Burford, chief justice of the supreme court of Territory of Oklahoma) (hereinafter S. Doc. 170, Part 2).

[70] *Id.* at 2 (referencing letter from Hon. Hosea Townsend, judge of the United States court for the southern district of the Indian Territory).

[71] *Id.*

[72] *Id.* at 5.

Kiowa and Comanche were ready to hold their lands in severalty and become farmers; thus, he expressed his wish that "the cattlemen, who have for years controlled the Indians, Indian agents, and special agents, would be compelled to remove their herds and give way to a higher civilization."[73]

The Tribes continued to fight ratification legislation by sending delegations to Washington year after year, detailing their objections to ratification. But, after an eight-year battle, the bill was ratified in 1900. In the final compromise, allotments were to stay at 160 acres, but lobbyists for the Rock Island Railroad ultimately agreed to set aside a separate 480,000 acre large pasture that would be held in common by the three tribes. In addition, the Indians would be guaranteed at least $500,000 for the land they were losing.[74]

Lower Court Proceedings

As historian William T. Hagan writes in his book, *United States–Comanche Relations*, ratification of the Jerome Agreement in the 1900 Act marked the conclusion of the fight for many of the Indians, including Quanah Parker.[75] This was a pivotal moment in the relationship between Quanah and Lone Wolf. Despite being discouraged from doing so by the Indian Agent, a delegation including Eschiti, Quanah, and William Tivis for the Comanche, and Apiatan and Lone Wolf's nephew, Delos Lone Wolf for the Kiowa, traveled to Washington anyway on funds raised by Lone Wolf and Big Tree. They requested a meeting with President McKinley—who had also appointed Clinton F. Irwin, the judge in Oklahoma who would later reject the Indians' request for a temporary restraining order to stop allotment of their reservation while litigation was pending—hoping to persuade him against opening up the KCA reservation. But the meeting was reportedly quite brief and had no impact. According to Hagan's account, the President was firm: "Congress had spoken and the Indians must conform."

As Hagan tells it, Quanah and the principal chiefs of the three tribes were resigned to their fate. Quanah accepted that there was nothing more he could do, and the terms of the Jerome Agreement were not as bad for the KCA as other allotment agreements had been for other tribes. Quanah thus continued to explore opportunities for himself and his family in Indian Territory, remaining a friend to cattlemen and freely moving between the Indian and white worlds. But Lone Wolf, with Delos by his side, was not ready to submit, even though continuing the fight against allotment was a politically dangerous path for Lone Wolf. It put him at odds with Agent Randlett, who worked to undermine Lone Wolf's position in the Tribe. Undoubtedly, Quanah and Lone Wolf had each chosen their own defining and, quite separate, paths.

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[73] *Id.* at 4.

[74] Hagan, *supra* note 6, at 260 (relating terms of eventual compromise).

[75] *Id.* at 262. The following discussion draws upon material at pages 260–80.

In the spring of 1901, with financial backing from the IRA and cattlemen, Lone Wolf and his supporters went to Washington and hired attorney William M. Springer to aid in continuing their fight. Springer had been in the House of Representatives for twenty years. Subsequently, he had worked as a federal judge in Indian Territory for some time before returning to Washington. Controversy surrounded Lone Wolf's choice. Some government officials expressed distrust of Springer, and Lone Wolf was accused of being a pawn of Texas cattlemen. Certainly, the cattle ranchers were pivotal in the litigation story. Documents show they contributed around $2 million to Lone Wolf's legal fight from 1885–1906.[76] As Clark recounts in his book, the cattlemen's interests certainly were aligned with Lone Wolf. Though Lone Wolf's motives remain unclear, some historians hold to the belief that Lone Wolf risked all to continue the fight against the Jerome Agreement, and "[t]he Kiowa leader's self-interest and the desire of cattlemen to retain their profitable leasing arrangements coincided."[77] Whatever his motivation, hiring Springer marked the beginning of a new period of conflict between the tribal leaders in Oklahoma—including Quanah—and Lone Wolf's legal team.

The Supreme Court of the District of Columbia

On June 6, 1901 Springer took legal action. He filed a bill of complaint in the Supreme Court of the District of Columbia (a trial court, despite its name) seeking a temporary injunction to stop the allotments and block the opening of the reservation lands.[78] The complaint, totaling 15 single-spaced pages, laid out in detail the allegations giving rise to the lawsuit, cataloguing the events from Medicine Lodge to the Jerome Agreement. Springer originally filed the complaint solely on behalf of Lone Wolf, as principal chief of the Kiowa Tribe of Indians, but later amended it to include Eshitie, principal chief of the Comanche Tribe of Indians, White Buffalo, Ko–Koy–Taudle, Mar–Mo–Sook–Car–Wer, Narwats, Too–Wi–Car–Ne, Williams Tivis, and Lone Wolf's nephew, Delos K. Lone Wolf, all members of the Kiowa, Comanche, and Apache confederated tribes of Indians. This same group had been tribally-appointed at a general council days earlier to serve as delegates in Washington to prevent the opening up of the KCA reservation.[79]

The complaint detailed allegations to support the Tribes' contention that the United States had made—and unconstitutionally broken—promises made in the Treaty of Medicine Lodge. The Tribes claimed the Jerome Agreement deprived them of their lands without due process of

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[76] Clark, *supra* note 6, at 59.

[77] *Id.*

[78] Transcript of Record at 1, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (referencing Complaint).

[79] Transcript of Record at 19, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (referencing Motion for Leave to Amend Bill).

law and were "contrary to the Constitution of the United States" for several reasons:

1. the KCA were fraudulently induced to sign the treaty [meaning the Jerome Agreement][80] and "none of those who signed said treaty understood its provisions;"
2. the Jerome Treaty was not signed by ¾ of the adult male members of the Tribes as required by the Medicine Lodge Treaty;
3. the KCA had, in fact, protested the agreement from the beginning; and
4. the version ratified by Congress had been significantly amended and those amendments had not been submitted to KCA for their approval.[81]

Each claim was alleged in detail, with the complaint centering much more on factual allegations than on the law. Springer began by setting forth the importance of the Treaty of Medicine Lodge, emphasizing the mutual promises made and kept as between the federal government and the KCA. He reiterated Treaty language guaranteeing that the KCA reservation was to be "set apart for the absolute and undisturbed use and occupation of the Kiowa and Comanche [and Apache] tribes of Indians" and that the United States had "solemnly" agreed it would allow no others to "pass over, settle upon, or reside in the territory described in said treaty."[82] The complaint emphasized the lack of Indian consent to the abrogation of the Treaty, noting that "[n]o land, occupied by Indians under treaties or agreements, has ever been taken away from them by the Government, except with their consent, given in a written treaty or agreement, until the taking, in the case at bar . . .".[83] The complaint also acknowledged the promises the Tribes had made in return for protections in regards to their lands: namely, relinquishing that territory outside their new reservation, ceasing opposition to railroad expansion, and keeping peace with white civilians and military efforts in the Western Territories.[84]

A principal complaint of the KCA was that the Jerome Agreement had been altered from the time it was signed (even if fraudulently) until it was ratified by Congress. One prominent example, which came to light

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[80] Although Congress ended treaty-making with tribes in 1871, subsequent agreements—like the Jerome agreement—were analogous to treaties for both tribes and the United States government in many respects and, accordingly, are referred to throughout the proceedings as such.

[81] Brief and Argument of Appellants in the Supreme Court of the United States, Lone Wolf v. Hitchcock (1902) at * 6–7 (hereinafter Appellants' Brief).

[82] Transcript of Record at 3, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (referencing Complaint).

[83] Appellants' Brief at 9–10.

[84] Transcript of Record at 4, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (referencing Complaint).

later in Senate documents, was that certain non-Indians had managed to get their names inserted into the Jerome Agreement so that they, too, could receive allotments of Indian land. Specifically, the non-Indian wife of interpreter Joshua Givens and translator Edward L. Clark had their names included in the agreement, which stated that they were "equal with the Indians in sharing the lands of the tribe."[85] The Jerome Agreement also granted 160–acre allotments to Hugh L. Scott, an officer of the United States Army, and George D. Day, the United States Indian agent, along with five other white men.[86] The Tribes pointed this out to demonstrate that the negotiations had not been conducted in good faith on the part of the government, and the Jerome Commission was motivated by its own self-interest to procure signatures.

Curiously, the provisions of the agreement naming non-Indian allottees were among several sections that were changed between the time of the signing of the Jerome Agreement and its ratification. The names of the non-Indians were ultimately removed from the agreement, and Senate documents confirm that the federal government found these provisions to be highly suspect, at best.[87] Numerous other provisions were also changed between the time of signing and ratification.[88] These alterations raised a second critical point for the KCA, who argued that Congress should not be able to unilaterally alter the provisions of the agreement without the Indians' consent.[89] Even though many treaties by this time had been procured in questionable ways, and, in some instances, under duress or fraud, the United States had at least facially adhered to the idea that agreements could not be unilaterally changed and imposed on the Indians. Questionable though they might have been, efforts had always been made to ensure the agreements were mutual and met at least superficial requirements of fairness. The fact that so many provisions of the agreement had been altered and never resubmitted to the Tribes for their consent further undermined the legitimacy of the Jerome Agreement as ratified by Congress.

The lack of consent troubled others as well. As the complaint points out, William A. Jones, the Commissioner of Indian Affairs, had sent a letter to the Secretary of the Interior, informing him that there was a bill pending in Congress to amend the Jerome Agreement, and it would be put into effect "without submitting the amendments or the amended treaty to the Indians for their approval." The complaint alleges that the letter went on to state that "it was certainly a novel proposition in law that one party to an agreement may, without the consent of the other, alter or modify an essential part of such contract," and that "it is

[85] *Id.* at 5.

[86] *Id.*

[87] S.Doc.77, *supra* note 49, at 2.

[88] Transcript of Record at 9–11, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (referencing Complaint).

[89] *Id.* at 8.

apparent that no court of law would uphold or enforce any contract so altered or amended." According to the complaint, the Commissioner's letter emphasized "the fact that in all our dealings with the Indian tribes no instance was found where an agreement had ever been amended by Congress without providing for the assent of the Indians interested." Accordingly, he argued that the Jerome Agreement, at least in the form in which it was being presented to Congress, should be rejected.

Another central argument focused on the allegation that the United States had not complied with the Treaty of Medicine Lodge in relation to Article Twelve. That provision stipulated that the Treaty could not be abrogated without the signatures of at least ¾ of the adult male Indians in said tribes. Even with allegations of fraud aside, Lone Wolf's complaint alleged that the total number of Indian males exceeded the number claimed by the Indian Agent. According to the complaint, "Agent Day falsely represented to the Interior Department that there were only 562 adult male members of said tribes, and that the 456 names of adult male members who signed said treaty were more than ¾ of all the adult male members of said tribes." Lone Wolf directed the Court to the census conducted by the Secretary of the Interior that showed that, as of 1900, there were 639 adult male members of the Tribes, making the agreement 23 signatures shy of the requisite ¾.[90] The Tribes' contention was verified by Ethan A. Hitchcock, who was the Secretary of the Interior at the time of the signing of the Jerome Agreement as well as at the time of the filing of the lawsuit. Hitchcock reported officially to Congress that:

> It therefore seems that besides willful misrepresentation and false translations to the Indians, as charged, to influence their action and induce them to sign the agreement, that the department was also misled as to the actual number of adult male Indians in the tribes.[91]

Thus, according to the complaint, even with all allegations of fraud aside, the mechanism in the Treaty itself that allowed for modification or abrogation, was unmet.

Beyond the issue of the requisite number of signatures, the essence of Lone Wolf's complaint centered on accusations of fraud and deceit. It included allegations that those acting as interpreters and translators "falsely and fraudulently misrepresented the provisions of said treaty, so that as signed it did not express the wishes of said Indians." It also averred that the signatures "were obtained by false and fraudulent translation of said treaty" and "that no members of said tribes of Indians would have signed the same had they been truly informed as to the provisions of said treaty." Plaintiffs emphasized that, upon learning the Jerome Agreement had not been "correctly and truly translated to them" "they at once proceeded to make known to the said commissioners that they had been deceived in reference to the provisions of said

[90] *Id.*

[91] *Id.*

treaty, and that they desired to withdraw their names from the same; but they were not permitted to do so, but, on the contrary, they were threatened with violence if they persisted in their opposition to said treaty." The complaint details their fight in Congress, beginning in 1892, and talks about a meeting of the KCA at Mount Scott on the reservation in 1899, in which the Tribes came together and asked that the Jerome Agreement not be ratified by Congress.[92] There were reportedly 571 adult male members of the KCA at that Mount Scott meeting, and they all signed the petition asking that the Jerome Agreement not be ratified by Congress, because "those who signed that treaty were misled by those who presented the Government, though the interpreters employed by the commissioners appointed to treat with them."

In support of their plea, they explained why Indian agents had been able to procure any signatures whatsoever for the Jerome Agreement. These included allegations that the Tribes had been told if they did not sign, all their lands would be taken from them under the Dawes Act and that they had no lawyers to advise them as to the proper course of action at the time. It further emphasized that Lone Wolf did not speak English, and few members of the Tribes could speak or understand the language, causing them to rely entirely upon the interpreters, hired by the United States, to tell them what the Jerome Agreement said. Lone Wolf argued that the KCA understood the government to be their guardian, that they "relied implicitly upon the honesty and good faith of the said commission and their interpreters;" "they believed that said treaty [the Jerome Agreement] fully and faithfully represented their wishes;" and that "soon after the signing the said treaty the said Indians discovered that they had been deceived, imposed upon, and defrauded by their alleged guardian and protectors."

Finally, the KCA also insisted that the land deal encompassed in the Jerome Agreement would destroy the Tribes. They claimed that the terms were so detrimental to them that the "Indians would be doomed to destruction as a people, as other Indian tribes had been, by reason of the prematurely opening of their reservations to the settlements of white men"; that "their lands were not adapted to agricultural purposes" but were better suited for cattle grazing. The complaint alleged that the amounts of land to be allotted to them under the Jerome Agreement were unsatisfactory and "insufficient for their support on account of the quality of their said lands." Consistent with the tenor of the times, the Indians claimed that they had made great inroads in their process of civilization and assimilation, hoping this would sway the court. They emphasized they were not "drunkards," that they "had placed their children in schools provided by the Government," they were taking up Christianity, and they were "striving in the right way to fit their people for the day" when they would have to be self-sufficient.

In sum, the KCA argued that the Jerome Agreement, if ratified, would allow over 2 million acres of land of the KCA to be settled by

[92] *Id.*

"white men" "in violation of the[ir] property rights." Moreover, the complaint argued that this act would deprive them of their lands without due process of law in violation of the Constitution of the United States.[93] They contended that Congress' ratification was unconstitutional and in violation of "solemn treaty provisions." Finally, Lone Wolf pleaded: "unless restrained by this honorable court the said respondents will cause irreparable injury, wrong, and oppression to and the deprivation of the property rights of your orator and all the other members of said confederated tribes of Indians." Accordingly, Lone Wolf's complaint asked that the court grant a temporary injunction, pending final hearing on the case, which would prevent the United States from proceeding further to carry out the provisions of the Jerome Agreement.

Immediately after the complaint was filed, the court issued a Rule to Show Cause, requiring the defendants to present reasons why, if any, the temporary injunction should not be granted. Not quite one week later, Secretary of the Interior Hitchcock filed an affidavit in opposition to the request for a temporary injunction. In essence, Hitchcock claimed that the injunction should be denied because the Indians, including Lone Wolf and others, had already selected and taken allotments for themselves. He claimed, in fact, that each and every member of the KCA (with the exception of perhaps a dozen Indians) had already taken allotments, and they had not since forfeited them. For the ceded lands, Hitchcock asserted, the KCA had been compensated, and the issue of lands had been settled. In conclusion, he also referenced the 480,000 acres of land that had been inserted in the Jerome Agreement prior to ratification, which were to be set aside for the common use of the KCA and held in common to serve as grazing lands. He averred that these lands were selected and set aside with the approval of a council composed of the chiefs and headmen of said Indians and that by accepting these things, the KCA, including Lone Wolf, had "assented to and ratified the said agreement."[94]

The next day, Lone Wolf filed an affidavit in response, contesting Hitchcock's claims. Lone Wolf asserted that he had not, in fact, accepted an allotment of land. He also asserted, again, that neither he nor the majority of the KCA accepted the Jerome Agreement as legitimate. His affidavit claimed the Jerome Agreement "is repudiated as an act of injustice, spoliation, and robbery." Lone Wolf's sense of urgency about the situation was apparent. He emphasized that there was a delegation of Indians that "will arrive in this city [Washington, D.C.] on tomorrow" to dispute the opening of the KCA reservation to white settlement.[95]

[93] Although the complaint did not expressly invoke the Takings Clause of the Fifth Amendment, variations on the verb "to take" appear throughout the complaint.

[94] Transcript of Record at 17–18, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (referencing affidavit of Secretary of the Interior Hitchcock).

[95] Transcript of Record at 19, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (referencing affidavit of Lone Wolf).

Based on these documents, the court issued an opinion by Justice A. C. Bradley on June 21, 1901, denying the KCA's Application for Temporary Injunction. The eight-page opinion initially questioned, but ultimately acknowledged, the court's jurisdiction over the case. Then, in detail, the court recounted the Tribes' claims and efforts to defeat ratification of the Jerome Agreement. In a brief discussion, the court referenced Congress' 1871 decision to end treaty making with the tribes, stating that "no question is made as to the power of Congress to so enact, to substitute the form of contract for the form of treaty in dealing with the Indians respecting their rights. . . ."[96] Acknowledging that the KCA's primary contention was that "the act ratifying the treaty and the acts supplementary thereto are unconstitutional and void, as depriving them of their property without due process of law," Justice Bradley quickly clarified that "it is difficult to define with exactness the meaning of that phrase" and that "[w]hat is due process of law under given and conditional and circumstances would fail to reach the constitutional requirement under others."

Here, the court determined, the manner in which the disposition of the KCA land had been decided followed the "ordinary course" seen "in many like cases where Indians of other tribes have agreed to accept lands in severalty, with compensation for lands taken by the Government and thrown open for settlement." He concluded: "It is the usual process." The opinion asserted that, even if there were misunderstandings and deception, these did not constitute due process violations, as they "were matters for the consideration of Congress" and "it is to be assumed that they were carefully considered and determined with due regard to the public interests and the rights of the Indian." If the new act ratified by Congress had been substantially altered from that originally signed by the Tribes, this alteration did not present a problem for Justice Bradley. He rejected contract analogies upon which the KCA had relied, and rested his opinion, instead, on the relationship he saw between the United States and the Indian tribes:

> If the validity of the legislation depended upon the concurrence of the Indians in its various provisions, the objection would have great force, but manifestly the existence of such a necessity would be an almost insuperable obstacle to all legislation in which their rights are concerned; it would be inconsistent with the relation that they occupy to the government, and in direct conflict with that sovereignty that the United States of necessity, of right, and in fact exercises over them. They are not independent nations. They are dependent wards of this nation in a state of pupilage, subject to the control of Congress.[97]

The times, as the court saw it, had shifted. Treaty making had ended after over a hundred years, and now the court, citing *Kagama*,

[96] Transcript of Record at 29, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (referencing opinion of Justice Bradley).

[97] *Id.* at 30 (internal quotations omitted).

opined: "Congress has determined upon a new departure, to govern them [the Indians] by acts of Congress." The court's framing of the question as one of a purely political nature and completely within the constitutional authority of Congress set the stage for the future opinions.

The Tribes' application for a temporary injunction was denied. Subsequently, the defendants filed a Demurrer to the Bill of Complaint and Amendment Thereto, seeking to dismiss the case on the grounds that (1) the bill of complaint did not state grounds upon which plaintiffs were entitled to relief; (2) the court lacked subject matter jurisdiction over the suit; and (3) as individual Indians, the complainants were without title to the relief prayed for. Bradley issued a Final Decree sustaining the demurrer on June 29, 1901, dismissing the bill of complaint.[98]

Oklahoma State Court

Around the same time that the case was pending in federal court, Springer filed a similar lawsuit in Canadian County, Oklahoma to prevent the opening of the so-called "surplus" lands to allotment. The plaintiffs included Lone Wolf, Eschiti, White Buffalo, Ko-koy-taudle, Mar-mo-car-wer, Nar-wats, Too-wi-car-ne, William Tivis, and Delos K. Lone Wolf. The defendant was William A. Richards, the Assistant Commissioner of the General Land Office, who was in charge of platting and opening the surplus lands. The Canadian County Probate Judge granted the restraining order and halted the disposal of the individual Indian tracts until the matter could be legally clarified.[99]

Ultimately, however, this effort also failed. A preliminary opinion was issued on July 29, 1901, and a final decree on August 17, 1901, rejecting the plaintiffs' request and refusing to grant the temporary restraining order issued by the probate judge. The decision was made by a Canadian County Judge, Clinton F. Irwin, who had been appointed in 1899 to serve as Associate Justice of the Supreme Court of Oklahoma Territory by President McKinley, a strong supporter of allotment.

The fight against allotment in the courts of the Oklahoma Territory were ill-fated. With District of Columbia Supreme Court Justice Bradley's opinion defeating Lone Wolf's special appeal in hand, a Department of Interior attorney, Willis Van Devanter—who would ultimately argue the case for the United States in the Supreme Court—printed copies of Bradley's decision and mailed the decision to every judge in Oklahoma.[100] Springer did not give up the fight, and again sought relief in Oklahoma in September 1901, asking the Oklahoma Territory Supreme Court to

[98] Transcript of Record at 34–35, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (referencing Demurrer and Final Decree).

[99] Clark, *supra* note 6, at 61–62.

[100] *Id.* at 63.

halt the opening of the reservation. However, the Oklahoma Territory Supreme Court also rejected Springer's claim.[101]

The Federal Appeals Court Decision

In June of 1901, Springer appealed the D.C. Supreme Court's dismissal of the bill to the Court of Appeals of the District of Columbia based on the same arguments previously presented. On July 4, 1901, while the appeal was pending, President McKinley issued a Proclamation ordering that the "surplus lands" of the Kiowa, Comanche, and Apache Indians (among others) be opened on August 6, 1901 for white settlement via lottery.[102]

A few months later, on December 4, 1901, Chief Justice Alvey of the D.C. Court of Appeals affirmed the lower court's decision.[103] In an opinion similar to Bradley's, Justice Alvey set forth the facts giving rise to the case, recounting them in similar fashion to the lower court opinion. The Court of Appeals then went on to describe, yet again, the grounds upon which the KCA sought judicial intervention: namely, that the acts of Congress were unconstitutional and their land had been taken without due process of law. Like the trial court, the appellate court sided with the United States.

As to the conflict between the Medicine Lodge Treaty and an act of Congress, the court wrote, "the treaty must yield, and the act of Congress be allowed its full operation and effect." Once again referencing the Congress' 1871 decision to end treaty-making with Indian nations, the court opined that "treaties, in the international sense, are no longer the instruments to be employed in dealing with our dependent Indian tribes, but, instead of treaties, such conventions or contracts as Congress may authorize or approve." Because congressional legislation was now deemed the appropriate method by which to govern the Indians, it was clear that Congress had the constitutional authority to abrogate via statute treaties with Indian nations. Accordingly, opined Alvey, there were no viable grounds upon which the Tribes could bring the case. Even if the United States had engaged in fraud and deceit as was alleged, "[A]cts of Congress can only be impeached and declared void by the courts for the want of constitutional authority to enact them." Thus the substantive issues of fraud "are matters that pertain to legislative action exclusively, and with which courts have nothing to do."

In sum, Alvey affirmed the lower court's decision to dismiss the bill of complaint, writing:

> [k]eeping in mind, therefore, the dependent relation of the Indian tribes to the US, and the nature of the right under which they occupy the lands assigned to them, it is quite clear there is no room

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[101] *Id.*

[102] 187 U.S. 553, 563 (1902) (citing 32 Stat. at L. Appx. Proclamations, 11).

[103] Transcript of Record at 40–44, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (Opinion of the D.C. Court of Appeals).

> for the application of the principle of due process of law as between the Indians and the US, in a case such as the present. The question is not of a private right, but is of a public qualified right of occupancy by the Indian tribes, and no portion of the Indians can set up or assert any mere individual right as a vested right in the lands as against the Government. The power and control over the subject matter is vested in Congress, and is therefore a political as distinguished from a judicial subject of inquiry.

Ultimately, Judge Alvey may have been somewhat sympathetic to Lone Wolf's arguments. After Springer filed a Motion for Re–Argument,[104] Justice Alvey quickly denied the motion, but indicated, perhaps, some interest in seeing the Supreme Court address the merits of the Indians' claims:

> The case is of a nature that can be taken to the Supreme Court of the United States, and we shall be greatly gratified if that high tribunal may be able to find a way for affording a remedy for what is alleged to be a grievous wrong to the Indians.[105]

In the midst of the Supreme Court litigation, Lone Wolf wrote a deeply moving letter to his lawyer, predicting, "[w]e [the KCA] think we ought to have by rights the say so in some things, but the way things are running we have no rights whatever."[106] Sadly, Lone Wolf's letters to Springer foretold the Court's result.

Appeal to the Supreme Court

As William Hagan's historical account details, the Indian Rights Associastion (IRA) was actively involved in the *Lone Wolf* litigation. They had assisted with staving off ratification of the Jerome Agreement in Congress, based specifically upon their belief that the quality of the land made it unrealistic to think the Indians would be able to adequately farm and support their families on 160 acres.[107] After the defeat in the appeals court, the IRA agent S. M. Brosius urged the executive committee of the IRA to pursue an appeal to the Supreme Court. He did so even in the face of weak IRA support, as many members believed at this point that few of the KCA were behind Lone Wolf. It had come to light that the Indian agent, Randlett, had convinced most of the chiefs and headmen, including Quanah, that it was against their best interests to continue to pursue the litigation. But Brosius believed the principle at stake was worth fighting for, as he felt certain a negative decision in *Lone Wolf* would give Congress the freedom to arbitrarily take any and all remaining Indian lands. Ultimately, the IRA agreed and allocated

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[104] Transcript of Record at 45, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (Motion for Re-argument).

[105] *Id.* at 47 (Opinion on Motion for Reargument).

[106] Wilkins, *supra* note 1, at 112 (citing to July 1902 letter from Lone Wolf to Springer).

[107] Hagan, *supra* note 6, at 212.

money for the appeal and to pay another lawyer, Hampton Carson, to assist Springer.[108]

When tapped to help with Lone Wolf's case, Carson had already enjoyed a long and successful career as a lawyer. He was a graduate of the University of Pennsylvania Law School, and he subsequently taught there as well. By all accounts, he was a prolific speaker and writer in history and law, and a member of the Philadelphia cognoscenti.[109] Perhaps most curiously, he was one of approximately forty men who started the Indian Rights Organization in 1882 at the home of Herbert Welsh.[110] Despite the ultimate outcome in *Lone Wolf*, Carson was selected only a few years later to serve as Pennsylvania's Attorney General.

Springer and Carson presented a strong case for Lone Wolf and the KCA. In a lengthy, 80–page brief, they appealed the lower court's decision, making mostly constitutional and treaty based arguments. They focused first on the claim that the United States had never taken Indian property and opened it to white settlement without at least some modicum of Indian consent. Thus, they asserted, the Court of Appeals had committed reversible "fundamental error" by asserting that the Tribes "have no title in lands they occupy" and, further, that any interest they did have could be destroyed by the government capriciously. Ultimately, they pointed out that "[i]n no instance has the United States regarded the Indian right of occupancy of land as simply a right to occupy at the mere will of the Government."[111]

The appellants' brief spent considerable time laying out the case for obtaining Indian consent prior to the seizure of Indian lands. Citing to prior relations between the United States government and Indian nations, they claimed: "It thus appears that there is no instance on record where the Government has ever deprived the Indians of the occupancy of land held by treaty or agreement with the United States, except in pursuance of another written treaty or agreement, and even amendments to such treaties, or agreements proposed by the Senate or Congress have been submitted to the Indians for their approval, before taking affect [sic]."

Having set forth their case that consent was required but not obtained, they then focused on their next claim: that the United States had always treated the right of occupancy "as sacred as that of the United States to the fee," citing to seminal Supreme Court jurisprudence regarding Indian title, including *United States v. Cook*[112] and *Worcester v. Georgia*.[113] Relying on *Worcester*, appellants also highlighted the Indian

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[108] *Id.* at 213.

[109] Finding Aid to the Carson Papers, http://www.hsp.org/files/findingaid0117carson.pdf (last visited June 15, 2010).

[110] Hagan, *supra* note 39, at 16–17.

[111] Brief of Appellants at * 9–12 (1902), Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[112] United States v. Cook, 86 U.S. 591 (1873).

[113] Worcester v. Georgia, 31 U.S. 515 (1832) (see Chapter 2, this volume). Brief of Appellants at 16 (1902), Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

law canons of construction, which require the Court not to construe treaties in a way to prejudice the Indians.[114] In case after case, they pointed to precedent they believed would prohibit the United States from unilaterally imposing the 1900 Agreement on the KCA.[115] They reiterated their factual claims: the signatures had been obtained by fraud; even if they were not obtained by fraud, they did not constitute ¾ of the adult Indian males on the reservation; and, finally, the Jerome Agreement as ratified in 1900 had been unilaterally changed from the version that left the reservation in 1892.

Perhaps their most important argument was that the case of the abrogation of the Medicine Lodge Treaty did not merely raise a political question.[116] Calling upon the Supreme Court to reverse the error made by the Court of Appeals, appellants stated that the Appeals Court decision was "contrary to the universally recognized principles of justice and equity," which even it recognized by ultimately asking the Supreme Court to "find a way for affording a remedy" for the "grievous wrong to the Indians."[117] Treaty abrogation that resulted in the taking of tribal property was not, they argued, a political question, but one that was squarely within the purview of the judiciary. Because the Treaty of Medicine Lodge created vested property rights in the reservation land, their land was protected by the Constitution.[118] And to deprive them of it, they argued, violated their constitutionally protected rights to due process under the law and just compensation for taking of their property. Accordingly, there were justifiable issues before the Court that must, they contended, be addressed.

In order to prevail, Springer and Carson would have to convince the Court that Lone Wolf's lawsuit was different from recent cases where the Court had found issues concerning Indian affairs to be merely political questions. In their brief, they distinguished numerous cases, including the 1890 decision in *Cherokee Nation v. Southern Kansas Railway Co.*,[119] where the Court had held that Congress could grant railroads leases to cross Indian lands. But most critical were their efforts to distinguish their case from the Court's recent and policy-altering decision in *United States v. Kagama*.[120] In *Kagama*, the Supreme Court had upheld the constitutionality of the Major Crimes Act of 1885, penalizing offenses committed by one Indian against another. In doing so, the Court justified Congress' authority over Indian affairs based, largely, on its conception of Indian tribes as wards of the United States.

[114] *Id.* at 22.

[115] *Id.* at 16–26.

[116] *Id.* at 26.

[117] *Id.* at 27–28.

[118] *Id.* at 30.

[119] Cherokee Nation v. Southern Kansas Railway Co., 135 U.S. 641 (1890).

[120] United States v. Kagama, 118 U.S. 375 (1886) (see Chapter 5, this volume).

Sensing that *Kagama* marked a potential sea change in federal policy toward Indians, Springer and Carson argued that its holding should not control Lone Wolf's case, as "the only question involved [in *Kagama*] was as to the power of Congress to subject the Indians to laws which provided that offences committed by one Indian against another should be tried in United States Courts, instead of tribal Courts."[121] The lawyers returned to the argument that the case at hand, by contrast, dealt not with purely political matters, but affected the Indians' vested property rights, the adjudication of which was properly before the Court.

While the appeal to the Supreme Court proceeded, the government continued to use other legal mechanisms to end the litigation, including filing a Motion to Dismiss Appeal in June 1902 on mootness grounds.[122] Secretary of the Interior, Ethan Hitchcock, filed an Affidavit in Support of the Motion. Hitchcock's foremost point was that the Tribes, including the named complainants, had already taken allotments, and all the remedies for which the lawsuit was filed were moot. Appellees' Brief reiterated the same.[123]

Springer and Carson's Reply Brief contested these claims, arguing that the case involved many issues still unresolved that would be materially affected by an injunction issued by the Court. Significantly, their brief focused on the claim that many of the Indians, including Lone Wolf, had not taken allotments as the government claimed. Moreover, many of the payments promised under the Jerome Agreement had not been made, and some sums were still in dispute. Appellants attached to their brief several affidavits in support. One of these, submitted by Lone Wolf, evidences not only Lone Wolf's continued fight against allotment, but also his break with Quanah Parker. He states that Quanah Parker had been misinforming the tribal Indians and scaring them with claims that if they did not get behind Quanah, they would never see any money for their lands, nor would the 480,000 acres of promised common land be delivered. Lone Wolf went on to assert that Quanah Parker's acts are "part of a conspiracy to procure the dismissal of the said suits now pending in the courts . . . and thus to thwart, by fraud and misrepresentation, the effort of this affiant . . . to protect in the courts the rights of all the Indians . . . secured to them by a solemn treaty with the United States."[124] Another affidavit from Kiowa Tribe headman Go-te-bo similarly averred that he had not accepted money for his lands, and that he knew that the Indians had been threatened by the Indian Agent to take

[121] Brief of Appellants Before the United States Supreme Court at 63 (1902) Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[122] Motion by Appellees to Dismiss Appeal, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[123] *Id.* at 83.

[124] Reply Brief of Appellants in Opposition to Motion to Dismiss Appeal Before the United States Supreme Court at 18–19 (1902) Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (referring to March 4, 1902 Affidavit of Lone Wolf).

the payment, or they would never see any money for their lands.[125] Other affidavits, filed by Ko-mal-ty, Little Bow, and Poor Bear, made similar claims.[126]

While the Motion to Dismiss was pending, the parties pursued parallel briefing on the merits. Assistant Attorney General Willis Van Devanter prepared and submitted the Brief for Appellees.[127] Van Devanter—who had, as previously discussed, sent Bradley's pro-allotment opinion to all Oklahoma Territory judges—had been the chief justice of the Wyoming Supreme Court and later served as an assistant attorney in the Department of the Interior. He was known for being a "rigid conservative" and developed a reputation for fighting against Indian interests.[128] Shortly after arguing against Carson in the Supreme Court, he was appointed to the Eighth Circuit Court of Appeals. A few years later, in 1911, he was elevated to the Supreme Court, where he filled the seat vacated by Justice White, the author of the *Lone Wolf* opinion.[129]

Van Devanter's brief echoed the federal government's familiar, and previously winning, position. The brief immediately zeroed in on Congress' decision to end treaty-making with the Indian nations in 1871, and cited to *Kagama* as evidence for the government's changing perception of the Indian nations.[130] Characterizing tribes as uncivilized wards of the state, Van Devanter situated all congressional decisions over Indian affairs squarely within the authority of Congress. He wrote on behalf of the United States:

> It was demonstrated [by this time] that the Indian was absolutely incapable of protecting himself in his new surroundings or of determining what was for his advantage . . . [T]o afford the Indian that protection which the laws of humanity demanded should be given him, and to prevent as far as possible the evil consequences to both parties which would necessarily flow from the clash between civilization and savagism, it was necessary that the Government should intervene and assume complete control over the Indians.[131]

The remainder of the government's brief painted a picture of Indians as savage and in dire need of the United States' assistance. This status, it was argued, further justified the assertion of Congress' absolute and plenary authority over the Indian. Such dominion would assist

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[125] *Id.* at 21.

[126] *Id.* at 25–27.

[127] Appellees Hitchcock et al., Brief Before the United States Supreme Court (1902) Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[128] Wilkins, *supra* note 1, at 127.

[129] Wilkins, *supra* note 1, at 111, 127–8.

[130] Appellees Hitchcock et al., Brief Before the United States Supreme Court at 16 (1902) Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[131] *Id.* at 15–16.

the Indian on the road to assimilation, civilization, and an understanding of private property:

> There was nothing in his [Indian] connection with the land that tended to his civilization or improvement, financially, or otherwise ... The Indians had not become self-supporting and had made no advance in that direction which would justify a hope that they ever would become so under the old system. It was not only the right, but the imperative duty of the United States to change this condition of affairs and to make such provision for these people as would start them upon the road to self support and civilization. To successfully accomplish this it is necessary that each individual should be invested with the ownership of a tract which he should look upon as his own ... The indefinite, intangible, undivided, and indivisible interests of the individual in the tribal right of occupancy must be replaced by a defined, separate, and distinct person right in and to a specific tract of land.[132]

Oral arguments were held on October 23, 1902 and the majority opinion was issued on January 5, 1903. In a perplexing move, Justice Edward Douglass White wrote for the Court in *Lone Wolf*, just seven short years after penning the majority opinion in *Talton v. Mayes*,[133] a case in which the Court "vigorously reaffirmed inherent tribal sovereignty."[134] Certainly, White's jurisprudential legacy is a mixed one, as he is also well known for joining the majority opinion in the infamous case of *Plessy v. Ferguson*,[135] which upheld the segregationist, separate-but-equal doctrine, but then also wrote for the majority again in *Guinn v. United States*,[136] which struck down Southern states' racially discriminatory voting provisions, the so-called "grandfather" clauses, as unconstitutional.

Whatever his ultimate convictions regarding the rights of racial minorities within the United States, White's opinion in *Lone Wolf* was perfectly clear regarding the majority's views on the issues before the Court. White first set forth appellants' position that Congress could only abrogate the Treaty of Medicine Lodge and open up KCA lands in accordance with the provisions set forth in the treaty, and to have done otherwise violated rights guaranteed to them by the Fifth Amendment.[137] But he quickly dispelled any notion that the Court would rule in favor of the Tribes, stating simply: "We are unable to yield our assent to this view."[138] Returning to the language of wardship, and the characteriza-

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[132] *Id.* at 93.

[133] Talton v. Mayes, 163 U.S. 376 (1896).

[134] Frickey, *supra* note 5, at 5.

[135] 163 U.S. 537 (1896).

[136] 238 U.S. 347 (1915).

[137] *Lone Wolf*, 187 U.S. at 564.

[138] *Id.*

tion of the Indians as previously accepted in *Kagama*, the Court opined that the dependent status of the Indians belied their claims to vested property interests in their lands. To give effect to the Indian's property rights, he wrote, "ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States."[139]

White conceded that the Court had, time and again, stated that the Indian right of occupancy was "sacred as the fee,"[140] citing to, among others, the early decisions by Chief Justice Marshall. Nevertheless, he stated, these prior opinions had never dealt expressly with the plenary authority of Congress to administer the property of the Indians. Whereas, the "[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."[141] White reiterated that the government had dealt with tribes through treaties until 1871, but that relationship had ceased. Indian nations were no longer seen as independent, but were dependent wards, fully within the control of Congress. Moreover, the Court wrote, as with foreign nations, even where there were treaties with Indian nations, if those treaties conflicted with acts of Congress, they could correspondingly be abrogated.[142]

The Court restated its new position on Indian affairs: that there was no doubt, nor had there ever been one, that Congress could abrogate a treaty with Indians where such provisions went against the interests of the United States. Moreover, in regards to the Indians, their dependency on the government gave rise to a duty to protect them, but also a corresponding power to decide their fate, treating them as wards of the United States. Where Congress had abrogated the Treaty and taken their land, it had not deprived them of a guaranteed property interest, but had facilitated "a mere change in the form of the investment of Indian tribal property."[143] Ultimately, then, the Court held that, even if the Indians were wronged, their appeal would have to be to Congress, not to the courts of the United States.

The decision of the Court of Appeals was upheld, and Lone Wolf and his people were struck a crushing blow.

The Immediate Impact of Lone Wolf v. Hitchcock

The Indian Rights Association said of *Lone Wolf*: "it is now distinctly understood that Congress has a right to do as it pleases; that it is under no obligation to respect any treaty, for the Indians have no rights

[139] *Id.*

[140] *Id.* at 564–65.

[141] *Id.* at 565.

[142] *Id.* at 565–66.

[143] *Id.* at 568.

that command respect."[144] But, in all truth, the practical reality of allotment had already taken effect on the ground. President McKinley's July 4, 1901 Proclamation that the government would open up the "surplus" lands of Indian Territory on August 6, 1901 had already spurred a massive influx of non-Indian would-be settlers. Clark reports that, by July, 24, 1901—over a year before *Lone Wolf* even reached the Supreme Court—150,000 people had already registered for the lottery that would be held to select those entitled to a 160 acre homestead. The railroad took in over $2 million in ticket sales from passengers headed to the land office on newly completed lines. As 1901 drew to a close, the lottery produced 11,638 homestead entries. The new lands were carved into three new counties: Comanche, Kiowa, and Caddo. As Clark writes, "Anglo–American society surrounded and engulfed the Kiowa and other Indians."[145]

But if there had been any question before about the constitutionality of Congress' decision to open up Indian lands to non-Indians, *Lone Wolf* relieved any such uncertainty. As a result, *Lone Wolf* cleared the way for western politicians to swiftly introduce and move through Congress further allotment acts without the impediment of tribal consent. Within just two years of *Lone Wolf*, Congress passed six of these acts, with devastating results for many tribes.[146] Even the 480,000 acres of land set aside for the common use of the KCA in the 1900 Act—which had come to be known as "Big Pasture"—was opened for white settlement only six years later.[147]

Lone Wolf and the Kiowa people faced devastating losses in land holdings as a result of allotment. As Blue Clark writes about *Lone Wolf*'s legacy, on the KCA reservation the average per capita holding of land during the 1880s was just under 160 acres. By 1934, when Congress banned further allotment, it had plummeted to 17 acres. By the time Clark's book was published in 1995, it was down to just over 10 acres for tribal members. This calculation means a devastating loss of 90% of all landholdings for the Kiowa, from a preallotment total of 2.9 million acres to just above 3,000.[148] As Clark laments: "Loss of land, lack of rental and lease income, and few marketable skills left the Kiowa deeply impoverished by the 1920's, with an unemployment rate among Kiowa males above 60 percent, establishing a pattern than persists down to the present. The *Lone Wolf* decision cast a whole people into an economic coma."[149] And, ultimately, the Supreme Court's decision reached far and wide, justifying in subsequent years even more seizures of Indian land.

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[144] Hagan, *supra* note 6, at 280 (citing Twenty-first Annual Report of the Executive Committee of the Indian Rights Association at 24 (Philadelphia, 1904)).

[145] Clark, *supra* note 6, at 65–66.

[146] *See* Royster, *supra* note 4, at 14; Clark, *supra* note 6, at 77–94.

[147] Clark, *supra* note 6, at 89–94.

[148] *Id.* at 95.

[149] *Id.* at 96.

Thus, *Lone Wolf*'s legacy cannot be disentangled from the vestiges of allotment. Though the government repudiated the allotment policy in 1934, noting that it was a miserable failure, its consequences continue to shape the lives of contemporary Indians.[150] First, given that many Indians who held on to their lands died intestate, their allotments were divided up among their lineal descendants. In only a few generations, the land holdings allocated to any particular individual had diminished radically, with some today spanning only a few square feet.[151] The result is an enormously inefficient system, causing thousands of acres of land to become virtually useless to their owners, who often have little or no contact with one another, and, therefore, no practical way to coordinate ownership or use decisions.[152]

A related, and equally unfortunate, allotment story is at the heart of the now famous *Cobell* litigation, where thousands of Indian plaintiffs are suing the United States government for its mismanagement of Individual Indian Money (IIM) accounts ranging in the billions of dollars.[153] The accounts were part of the government's obligation to maintain records and administer revenues produced from Indian land (for oil, gas, grazing, etc. leases) for individual Indians under the General Allotment Act. Through a combination of an old, unwieldy accounting system and wanton negligence, the U.S. government has lost or squandered billions of dollars of Indian monies, all part and parcel of allotment policies.[154] It is now clear that the Indian claimants will only receive compensation for these monetary losses through a statutorily-imposed settlement, as an accounting has been shown to be largely infeasible. The proposed settlement awaiting approval by the United States Senate would require the federal government to create a $1.412 billion Accounting/Trust Administration Fund, a $2 billion Trust Land Consolidation Fund, and a $60 million Indian Education Scholarship Fund to compensate for monetary losses.

Finally, because allotment broke up the contiguous lands of the Indian nations, it left a randomly distributed land pattern in Indian country. This effect, known as "checkerboard" land ownership, may turn out to be the most detrimental of all to Native nation-building. It means that, in many places, one will find tribally owned land situated next to non-Indian owned land, situated next to Indian trust land, situated next to individual Indian-owned fee land, and so forth.[155] The Supreme Court could have insisted that all reservation land, regardless

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[150] *See* Frickey, *supra* note 5, at 6.

[151] *See* Kristen A. Carpenter, *Contextualizing the Losses of Allotment Through Literature*, 82 N.D. L. Rev. 605, 618–20 (2006).

[152] *See* Frickey, *supra* note 5, at 7.

[153] For a discussion of the case in the context of the significance of allotment, see Carpenter, *supra* note 153, at 618–20.

[154] *Id.*

[155] *See* Frickey, *supra* note 5, at 8.

of ownership status, was Indian country and therefore subject to tribal authority to mediate against the negative jurisdictional ramifications of checkerboard land status.[156] Instead, it has sharply restricted tribal jurisdiction over non-Indian fee lands,[157] rendering tribal governance exceedingly difficult. The checkerboard pattern has also led the Court to hold that certain reservations were "diminished" in size by white settlement.[158] The result is decreased tribal jurisdiction, a lessening of tribal control over territory, and corresponding attacks on tribal sovereignty.[159]

In all these ways, and others, *Lone Wolf* continues to resonate with and influence the lives of contemporary Indians. In places such as southwestern Oklahoma, still the home of the Kiowa—where poverty and its concomitant ills are a routine part of life—Native people continue to live out the consequences of policies and philosophies that were at their zenith in the *Lone Wolf* era.

Conclusion: The Continuing Jurisprudential Legacy of Lone Wolf

Lone Wolf—representing the most blatant assertion of plenary power over Indian affairs ever expressed by the Court—maintains a curious contemporary position in legal scholarship. Certainly, even at the time of its issuance, it was the subject of harsh criticism, often compared—then and now—to the abhorrent *Dred Scott* decision.[160] Contemporary scholars universally condemn the case.[161] But the plenary power doctrine, which it has come to represent, is situated in a more nuanced position in contemporary Indian politics and Indian affairs.

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[156] *Compare* 18 U.S.C. § 1151(a), defining "Indian country" for purposes of federal criminal jurisdiction to include all land within reservation boundaries, regardless of ownership status.

[157] *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981) (see Chapter 16, this volume).

[158] *See* Frickey, *supra* note 5, at 21–24.

[159] Many tribes have come to the realization that the only solution for this problem is the painstaking and costly process of repurchasing their own ancestral territories. One of the earliest such initiatives is the White Earth Land Recovery Project, a non-profit organization that restores tribal lands of the White Earth Indian Reservation in Minnesota. For a creative approach to recovering tribal lands, see Stacy L. Leeds, *Borrowing from Blackacre: Expanding Tribal Land Bases Through the Creation of Future Interests and Joint Tenancies*, 80 N.D.L. Rev. 827 (2004).

[160] *See, e.g.*, Quote of Senator Matthew Quay (R. Pennsylvania), U.S. Congressional Record 2028 (1903), as cited in Wilkins, *supra* note 1, at 116 (1997); Frickey, *supra* note 5, at 5.

[161] *See, e.g., Symposium:* Lone Wolf v. Hitchcock*: One Hundred Years Later*, 38 Tulsa L. Rev. 1 (2002) (a collection of articles by renowned scholars—including Judith V. Royster, Philip P. Frickey, Joseph William Singer, Frank Pommersheim, T. Alexander Aleinikoff, Stacy L. Leeds, Anthony G. Gulig, Sidney L. Harring, Bryan H. Wildenthal, and Steve Russell—condemning *Lone Wolf*).

The so-called plenary power period in the United States reached its height in the *Lone Wolf* era, but the tide quickly turned. Less than a decade after *Lone Wolf*, the Court quickly moved away from the conception of Indian nations as divested of all sovereignty and entirely dependent on the federal government.[162] In fact, some scholars argue that the "entire plenary power era lends itself to the interpretation ... that federal authority as well as tribal sovereignty is inherent under international law, and that these competing powers are to be mediated by conceiving of tribes as dependent sovereigns—that is, sovereign with respect to their internal affairs while subject to supervening federal control."[163] Other scholars, similarly, have noted an almost immediate shift away from the conception of plenary power advanced in *Lone Wolf*. And subsequent cases, such as *Delaware Tribal Business Committee v. Weeks*[164] and *United States v. Sioux Nation of Indians*,[165] provide even more evidence that the vision of plenary power put forth in *Lone Wolf* no longer holds sway. As the Court in *Sioux Nation* wrote: "*Lone Wolf's* presumption of congressional good faith has little to commend it as an enduring principle for deciding questions of the kind presented here."[166]

The flip side, of course, is that, unlike *Dred Scott*, *Lone Wolf* has never been fully repudiated.[167] The United States government continues to rely on the case to justify broader assertions of control over Indian nations. In this sense, *Lone Wolf* undoubtedly reminds us of the expansive and potentially unjust exercise of federal power over Indian nations. At the same time, Indian Law practitioners and scholars have long since recognized the pragmatic efficacy of the flip-side of plenary power: Congress' obligation to act in furtherance of Indian nations.

Today—perhaps more than ever before—Native people are able to affect the political process to reverse some of the devastating Indian Law opinions coming out of the Supreme Court. Consider the perils of allotment described above. All three scenarios—fractionalization, an accounting for lost funds in allottees' accounts managed by the federal government, and disputes over tribal jurisdiction on allotted reservations—present issues of great concern in Indian country. As the Supreme Court becomes ever more opposed to Indian interests, more and more Indians—individually and through their tribes—are using their political power to appeal directly to Congress to effectuate change. And Congress has responded, if with limited success.

Congress has tried twice, first in the 1980s and again a decade later, to devise legislation to consolidate Indian lands back into tribal commu-

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[162] Frickey, *supra* note 5, at 5.

[163] *Id.*

[164] 430 U.S. 73 (1977).

[165] United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

[166] *Id.* at 414–15.

[167] Frickey, *supra* note 5, at 5.

nities. Though the Supreme Court twice struck down Congress' efforts to utilize its plenary power in an attempt to rebuild the tribal land base, the legislation at least demonstrated that Congress' plenary power could be used to ameliorate the wrongs of allotment.[168] Similarly, as discussed previously, the Indian plaintiffs in *Cobell* are relying on Congress, not the courts, to devise an adequate compensation scheme for those losses associated with the IIM accounts.[169] And legislation like the "*Duro* fix"[170] reversed a negative Supreme Court ruling on the issue of tribal jurisdiction, and re-affirmed inherent sovereignty of tribal governments to assert criminal jurisdiction over all Indians who commit crimes within their territories. This recognition bolsters tribal sovereignty and, in turn, tribal self-government.[171] Congress has also used its plenary power in environmental protection legislation, affording tribes greater governing authority over even checkerboard reservations pursuant to both the Clean Water Act[172] and the Clean Air Act.[173]

Thus, there is possibility in plenary power, just as it provides opportunities for harm. Like so many other past circumstances involving the United States and Indian peoples, Indians are in a difficult spot. Where the guardianship facet of plenary power makes it possible for the Congress to legislate on behalf of tribes, some argue it must simultaneously be acknowledged that a corresponding, negative power—to destroy tribes—similarly exists. Accordingly, there continues a lively scholarly debate over the scope and role of the plenary power doctrine in Indian affairs and in litigation involving Indian rights.[174] The result, it seems, is that *Lone Wolf*'s legacy will, for better or worse, long live on.

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[168] Hodel v. Irving, 481 U.S. 704 (1987); Babbitt v. Youpee, 519 U.S. 234 (1997).

[169] *See* S. Res. 248 (2003).

[170] Department of Defense Appropriations Acts, Pub. L. No. 101–511, Section 8077(b), (c), 104 Stat. 1856, 1892 (1990).

[171] *See* Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 Ariz. St. L.J. 889, 906–908 (2003).

[172] Clean Water Act, 33 U.S.C. Section 1377(e) (1988) (treating tribes as states for purposes of the Act).

[173] Clean Air Act, 42 U.S.C. Section 7474(c) (1988) (authorizing tribes to designate air quality classifications on "lands within the exterior boundaries of reservations").

[174] This issue, perhaps more than others, has garnered much debate. *See* Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wis. L. Rev. 219 (1986); Robert Laurence, *Learning to Live With the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 Ariz. L. Rev. 413 (1988); Robert A. Williams, Jr., *Learning Not to Live With Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live With the Plenary Power of Congress Over the Indian Nations*, 30 Ariz. L. Rev. 439 (1988); Robert Laurence, *On Eurocentric Myopia, The Designated Hitter Rule and "The Actual State of Things,"* 30 Ariz. L. Rev. 459 (1988).

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