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HONOR, *LONE WOLF*, AND TALKING TO THE WIND

Steve Russell*

We gather to address *Lone Wolf v. Hitchcock*,¹ a case wherein Anglo-American culture had a profound and deleterious impact on Indian culture. Coyote² must have delayed the release of *Windtalkers*³ for almost a year so popular culture would at the time of this symposium be raising the issue of how the destruction of Indian culture benefits the United States, a question tied to a modern method of analysis. *Lone Wolf* could be about the allotment policy it tested,⁴ or about the congressional power of treaty abrogation, but for most Indians it was about honor, a quaint idea in this age when *pacta sunt servanda* has given way to the “efficient breach” of contract, an idea said to be “[o]ne of the most enlightening insights of law and economics.”⁵

The consequentialist thinking of “efficient breach” analysis is foreign to most Indian thought. It is also a death sentence for Indian interests. An agreement is negotiated⁶ at a time when the Indians, if not victorious, are at least troublesome. It is breached at a time when the Indians are powerless, and the agreement is dependent on good will where little exists. Treaty abrogation is always efficient in that the costs of breaching the agreement are always less than the costs of compliance, and the deontological construction placed on the transaction by Indians sounds hopelessly naïve: “A word has power in and of itself. It comes

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1. 187 U.S. 553 (1903).

2. I am not the first legal scholar to take notice that “Coyote is linked to the law.” See Lenora Ledwon, *Native American Life Stories and “Authorship”: Legal and Ethical Issues*, 9 St. Thomas L. Rev. 69, 83 (1996). Coyote is often didactic, but Coyote also loves paradox, *id.*, something that suffuses federal Indian law. See Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 Ariz. St. L.J. 439 (1999). The paradox here is the United States’ reliance on Indian culture in wartime while working to destroy Indian culture in peacetime. Navajos would, one supposes, easily hear the voice of Coyote in this paradox. See J. Barre Toelken, *The “Pretty Language” of Yellowman: Genre, Mode, and Texture in Navaho Coyote Narratives*, 2 Genre 211, 221-22 (Sept. 1969).

3. *Windtalkers* (MGM 2002) (motion picture).

4. See generally Michael R. McLaughlin, *The Dawes Act, or Indian General Allotment Act of 1887: The Continuing Burden of Allotment. A Selective Annotated Bibliography*, 20 Am. Indian Culture & Research J. no. 2, 59 (1996).

5. Robert Cooter & Thomas Ulen, *Law and Economics* 290 (Scott, Foresman & Co. 1988).

6. While many of the agreements to which Indians have tried to cling with white knuckles were dictated more than negotiated, there was at least a pretense of government-to-government relations.

from nothing into sound and meaning; it gives origin to all things. By means of words can a man deal with the world on equal terms. And the word is sacred."⁷

In *Lone Wolf*, we were told that the destruction of Kiowa culture benefited not just the United States, but also the Kiowa.⁸ The Indians had tried to interpose the Treaty of Medicine Lodge⁹ to prevent the allotment of the Kiowa reservation.¹⁰ Allotment was a policy designed at once to destroy Indian culture and to transfer Native American land into Euro-American hands. Reservations were parceled out to individual Indians so the "surplus lands" could be opened for white settlement,¹¹ but the Indians would benefit as, freed from the burden of collective landholding, Kiowa hunters were transformed into yeoman, someday perhaps fit for American citizenship.

Many Indian leaders, correctly perceiving common landholding as a cornerstone of their culture, fought the allotment policy tooth and nail.¹² So it was that Lone Wolf, Principal Chief of the Kiowa, did battle with Ethan A. Hitchcock, Secretary of the Interior, for the treaty rights and the future of the Kiowa Nation. Lone Wolf contended that Kiowa lands were protected by treaty and by the Fifth Amendment. The Supreme Court had a ready answer:

The contention in effect 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. To uphold the claim would . . . materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians¹³

The relationship between destruction of the Kiowa land base and their "care and protection" was never clarified in the opinion. The Court simply asserted that "Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over *their interests*, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians."¹⁴ The Court presumed that "the United States would be governed by

7. N. Scott Momaday, *The Way to Rainy Mountain* 33 (U. N.M. Press 1969).

8. See *Lone Wolf*, 187 U.S. at 567.

9. *Treaty with the Kiowa and Comanche (The Treaty of Medicine Lodge)* (Oct. 21, 1867), 15 Stat. 581.

10. *Lone Wolf*, 187 U.S. at 558-59 (quoting Sen. Doc. No. 76 [56th Cong. (1899)]; H.R. Doc. No. 33376 [56th Cong. (1899)]).

11. *Id.* at 560.

12. Resistance to allotment was centered in leadership because the average Indian was simply not in a position to understand the implications. William T. Hagan, *American Indians* 142-43 (U. Chi. Press 1961). In addition to the litigation that culminated in the *Lone Wolf* decision, there was the "Snake Uprising" led by Chito Harjo among the Muskogee (Creek), James S. Olson & Raymond Wilson, *Native Americans in the Twentieth Century* 51 (B.Y.U. Press 1984), and there was both lobbying and active resistance led by Redbird Smith among the Cherokee. *Id.* at 91; Rennard Strickland, *The Indians in Oklahoma* 47 (U. Okla. Press 1980). According to my middle school Oklahoma history text, it took United States Marshals and cavalry to enforce Creek and Cherokee allotment. Victor E. Harlow, *Harlow's Oklahoma History* 244-46 (Harlow Publ. Corp. 1934). Resistance was centered in Oklahoma but certainly not confined to Oklahoma. Angie Debo, *A History of the Indians of the United States* 252-55 (U. Okla. Press 1970).

13. *Lone Wolf*, 187 U.S. at 564.

14. *Id.* at 565 (emphasis added).

such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race"¹⁵ and "a moral obligation rested upon Congress to act in good faith."¹⁶ The Kiowa would be stripped of their treaty rights in their best interests. Their religion and language would follow as they became yeomen.

The Kiowa were well aware that allotment was a path to even greater poverty than they suffered at the time¹⁷ and when the Supreme Court put its imprimatur on treaty abrogation, tribal land holdings of Plains Indians fell like so many dominos¹⁸ as the Kiowa lapsed into an "economic coma."¹⁹ Even the so-called Five Civilized Tribes, who already were yeomen, would eventually be subjected to allotment of their reservations. Yeomen or not, they would quickly be swindled out of their lands.²⁰ By the destruction of the reservations, Indian Territory became Oklahoma, and while Indians became poorer, they did not become white.

Cultural transformation was bound to be the result of allotment, whether it was a primary or secondary motivation, or even an unintended consequence. The motivations of dead people are always subject to dispute. In the case of the Kiowa, allotment was almost a mopping-up operation. N. Scott Momaday, one of the foremost contemporary Kiowa intellectuals, wrote of the reservation years:

The young Plains culture of the Kiowas withered and died like grass that is burned in the prairie wind. There came a day like destiny; in every direction, as far as the eye could see, carrion lay out in the land. The buffalo was the animal representation of the sun, the essential and sacrificial victim of the Sun Dance. When the wild herds were destroyed, so too was the will of the Kiowa people; there was nothing to sustain them in spirit.²¹

Momaday dates the death of the Kiowa religion from July 20, 1890, when troops from Fort Sill rode to the great bend of the Washita to end the Sun Dance by force.²² Momaday's grandmother was there that day, and today he has her memory, but not the Kiowa language.²³

So it was that over fifty years later, when the United States had need of American Indians to facilitate battlefield communication, recruiters had difficulty finding Indians who still were fluent in their indigenous languages.²⁴ The demise of Indian languages was part and parcel of the forced assimilation policy

15. *Id.*

16. *Id.* at 566.

17. Blue Clark, *Lone Wolf v. Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century* 42-44 (U. Neb. Press 1994).

18. *Id.* at 77-94.

19. *Id.* at 96.

20. See generally Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* (Princeton U. Press 1940).

21. Momaday, *supra* n. 7, at 3.

22. *Id.* at 10.

23. *Id.* at 10; see Clark, *supra* n. 17, at 31.

24. Margaret T. Bixler, *Winds of Freedom: The Story of the Navajo Code Talkers of World War II*, at 38-39 (Two Bytes Publ. Co. 1992).

underlying *Lone Wolf* and the Indian boarding school movement.²⁵ Forced assimilation policies were sometimes motivated by the best of intentions,²⁶ as expressed in the dictum attributed to Richard Henry Pratt, founder of the Carlisle Indian Industrial School:²⁷ “Kill the Indian in him to save the man.”²⁸ Pratt’s statement represents succinctly “[t]he general policy of the government was to civilize the natives in the sense of making them literate, English-speaking, Christian farmers like their White neighbors.”²⁹ Failure of this policy is sometimes attributed to governmental incompetence as much as Indian resistance,³⁰ and the very treaty at issue in *Lone Wolf* was violated by failure to fund government schools as promised, leaving the heavy lifting in Indian acculturation to economic forces and missionaries.³¹

It was partially in pursuit of an acculturation policy that the Navajo were rounded up by Kit Carson and imprisoned at the Bosque Redondo concentration camp, also known as Fort Sumner, New Mexico, where they died in great numbers.³² In order to gain their release, the tribe had to surrender all of their children between the ages of six and sixteen for “an English education.”³³ It was only in spite of the best efforts of the United States Government that the Navajo language was still available for battlefield communication in World War II.³⁴

The idea of using Native languages to communicate on open radio channels and field telephones was not invented in the Pacific theater of World War II. Choctaw served as code talkers in both world wars, as Creek, Menominee, Chippewa, and Hopi served in the European theater of World War II.³⁵ These tribes for the most part simply relayed messages in their Native languages.³⁶ In the

25. See generally David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928* (U. Press Kan. 1995).

26. See generally Lyman Abbott, *Criticism of the Reservation System*, in *Americanizing the American Indians: Writings by the “Friends of the Indian,” 1880-1900*, 31, 31-37 (Francis Paul Prucha ed., U. Neb. Press 1978) [hereinafter *Americanizing the American Indians*].

27. See generally Richard Henry Pratt, *Battlefield and Classroom: Four Decades with the American Indian, 1867-1904* (Robert M. Utley ed., U. Neb. Press 1987).

28. See generally Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in *Americanizing the American Indians*, *supra* n. 26, at 261.

29. Robert H. Lowie, *Indians of the Plains* 195 (McGraw-Hill 1954); See Olson & Wilson, *supra* n. 12, at 51.

30. See generally Olson & Wilson, *supra* n. 12, at 107-28.

31. Clyde Ellis, “A Remedy for Barbarism”: *Indian Schools, the Civilizing Program, and the Kiowa-Comanche-Apache Reservation, 1871-1915*, 18 *Am. Indian Culture & Research J.* no. 3, 85 (1994).

32. Lynn Robison Bailey, *Bosque Redondo: An American Concentration Camp* 1-6 (Westernlore Press 1970).

33. *Treaty with the Navajo*, art. VI (June 1, 1868), 15 Stat. 667, 669.

34. The Navajo Nation Government continues to make its best efforts to preserve the language today. See Heather Abel, *Navajo Spoken Here*, 27 *High Country News* 20 (Oct. 30, 1995) (available at <http://www.hcn.org/servlets/hcn.Article?article_id=1413>).

35. Doris A. Paul, *The Navajo Code Talkers* 7 (Phila. Dorrance 1973).

36. This statement may have to be qualified after the publication of *The Comanche Code Talkers of World War II*. William C. Meadows, *The Comanche Code Talkers of World War II* (U. Tex. Press forthcoming 2003). Meadows and Bernard Bossom, in an op-ed piece for the Seattle Post-Intelligencer, claim that seventeen tribes provided code talkers, and that the Navajo were not the only ones to use encoding within native languages. Bernard Bossom & William C. Meadows, *Code Talkers Served Their Country Well*, Seattle Post-Intelligencer B7 (July 26, 2002) (available at <http://seattlepi.nwsource.com/opinion/80037_codetalker26.shtml>).

Pacific theater, Indian code talkers made critical contributions to the island hopping campaigns against the Japanese, using a code within a code that was created by the Indians and continually revised during the war.³⁷ These code talkers were from Dinetah, Navajoland, and there are few places on earth more unlike the tropical Pacific islands where the code talkers wrote their names in history.

The buttes and hoodoos of Dinetah are familiar to anyone who grew up watching John Ford westerns,³⁸ in which Monument Valley stood in for any number of locations in the Wild West. That spectacular landscape opens John Woo's film, while James Horner's stolid European soundtrack offers the first clue that *Windtalkers* may not in fact center on the Dineh (Navajo) people or their land. Horner does offer a Native flute later, when it becomes associated with the character of one of the code talkers, Charlie Whitehorse (Roger Willie, Dineh, in his first major role).

Casting Roger Willie did not make *Windtalkers* a Dineh film, and the Native American Journalists Association noted that "in 1999, Navajos were already knocking the movie."³⁹ The same report indicated the status of indigenous languages remains precarious today: "One of the most important, and least reported, stories of Native America is the efforts of tribal elders and linguists to save the remaining 175 tribal languages, many of them near extinction."⁴⁰

Windtalkers might have been a practical lesson in the value of cultural diversity. Instead, it is focused on the personal torment of Sergeant Joe Enders (Nicholas Cage) over the alleged policy to kill code talkers in danger of capture. Enders' difficulties include: survivor guilt from being the only person to return from his previous assignment; fear of intimacy that reduces the only female character in the film (Frances O'Connor as Rita, a nurse who might have been Enders' love interest if he had one) to a foil for his rejections, author of a series of unread and unanswered letters; and a physical disability he must hide to stay in combat. Most difficult of all is an assignment that violates the fundamental bond of honor among United States Marines. That assignment is to protect "his" code talker, Ben Yahzee (Adam Beach, Canadian Saulteaux, also seen in *Smoke Signals*), if possible, but if that becomes impossible, then his assignment is "to protect the code."

There is substantial controversy about whether this policy to kill code talkers in danger of capture in fact existed. The Marine Corps flatly denies it. Actual code talkers interviewed for a History Channel documentary differed among

37. Bixler, *supra* n. 24, at 78, 157-73.

38. Ford's oeuvre contains approximately sixty westerns. Angela Aleiss, *A Race Divided: The Indian Westerns of John Ford*, 18 *Am. Indian Culture & Research J.* 167, 167 (1994); see generally Ken Nolley, *The Representation of Conquest: John Ford and the Hollywood Indian, 1939-1964*, in *Hollywood's Indian: The Portrayal of the Native American in Film 73-90* (Peter C. Rollins & John E. O'Connor eds., U. Press Ky. 1998).

39. Kara Briggs et al., *The Reading Red Report XVII* <<http://www.naja.com/docs/red.pdf>> (accessed July 11, 2002).

40. *Id.* at XI.

themselves, and skepticism ranged all the way to one man who claimed he did not even have a bodyguard. Code talker Samuel Smith told me⁴¹ that some of them were assigned bodyguards only after a code talker was taken as a Prisoner of War (“POW”) by American forces. While the code talkers were indoctrinated with the need to protect the code with their lives,⁴² it seems the bodyguards were deemed necessary to protect the code talkers from their own troops rather than from the Japanese.

Smith explained, without rancor, that in the island-hopping campaign there were often no fixed lines. The Japanese often popped up from behind. Most of the white folks who manned the frontline combat units had never seen a full-blood Indian, and the Dineh did, he supposed, look a bit like Japanese.⁴³ Published accounts of the Navajo code talkers support Smith’s statement that the role of the white “bodyguards” was to protect the Dineh Marines from other Americans.⁴⁴

In addition, it seems unlikely that the code talkers would be candidates for execution when in danger of capture and still employed to infiltrate Japanese positions⁴⁵ or as runners,⁴⁶ or in any other “close contact with the enemy.”⁴⁷ The central thread of the *Windtalkers* story appears to be an invention of screenwriters Joe Batteer and John Rice. As a plot device, it accentuates the fear of bonding Enders already had from being a lone survivor of a wiped out platoon and feeds the war movie cliché of the guys who are bonded by combat in spite of substantial differences.

Batteer and Rice did do some research. A real incident where a code talker was taken POW while skinny-dipping becomes, in the film, a confrontation with a racist Marine from the same unit as the code talker he is harassing. The torture of a Navajo POW in an attempt to break the code⁴⁸ finds its way into the script. A real incident on Saipan when code talkers were able to call off an artillery barrage by friendly forces is recounted.⁴⁹

41. Interview with Samuel Smith, code talker (June 20, 2002).

42. Bixler, *supra* n. 24, at 62; Paul, *supra* n. 35, at 83.

43. Looking Japanese was not always a disadvantage:

Tom White, because he looked Japanese, was able to clean out a pillbox all by himself. He stripped to the waist and just walked in. The Japanese thought he was one of them. He shot from the hip with a submachine gun and completely wiped out the enemy nest. He was able to do this with another pillbox, but was later killed on Peleiu. No citations were given for his heroism.

Bixler, *supra* n. 24, at 88. A similar incident appears in *Windtalkers*, and it is the white bodyguard rather than the code talker who is cited for heroism.

44. *Id.* at 81-82; Paul, *supra* n. 35, at 63.

45. Bixler, *supra* n. 24, at 78-79.

46. Paul, *supra* n. 35, at 69.

47. *Id.* at 61.

48. See Bixler, *supra* n. 24, at 81. In fact, Dineh who had not taken the code talker training were purposely set to the task of breaking the code by United States forces to see if they could do it. They could not. Paul, *supra* n. 35, at 30. At the gathering where I interviewed Samuel Smith, he demonstrated the code by speaking a message to the four Navajo speakers who were present, all of whom were able to render a literal English translation that made no sense at all.

49. Bixler, *supra* n. 24, at 80; Paul, *supra* n. 35, at 66.

Because the story is focused on Nicholas Cage's character, those parts of the Navajo story that make it Navajo are related in one-liners by Ben Yahzee, the movie character who wants to be a history teacher if he survives the war. He mentions "The Long Walk," as the Dineh call their encounter with genocide, but one line does not communicate a blood memory of what it means to be Navajo any more than I could put a reader in Cherokee skin by uttering the phrase "Trail of Tears."

Yahzee mentions in passing that Navajos were punished in boarding schools for expressions of their culture, but this does not tell us how that culture prepared the code talkers for their role with songs and prayers that are difficult feats of memory work, much more difficult than the World War II code.⁵⁰ We are never made aware that many code talkers are still alive today, even with diminished life expectancies for American Indians, because so many of them were in fact underage when they enlisted, a deception that was facilitated by the lack of written birth records on the reservation.⁵¹ The irony that the code talkers operated state-of-the-art communications gear, then returned to a reservation without electricity,⁵² is unexplored in the film, as is the national disgrace of the death rate on that reservation from "inanition"—medical jargon for starvation.⁵³ The long delay in recognition of the code talkers is at least understandable because their mission remained classified for years after the war.

I wonder about a scene where Enders comes to a spiritual understanding about his dishonorable assignment after drawing a cathedral (he is an Italian-Catholic) in flour left on a tabletop by Japanese civilians. Given the unlikely nature of the event (civilians leaving something edible and imported abandoned in a war zone), the scene appeared to me to show an obverse Navajo sandpainting, the "place where the gods come and go."⁵⁴ It seemed that Enders was cured "by ritually attacking evil and forcing it under control, hence yielding to good,"⁵⁵ but the film, unlike some of the writings on the code talkers,⁵⁶ tells us nothing about the sacredness of sandpainting, so the intent of the scene remains speculation.

It is a shame that *Windtalkers* does not allow the dominant culture to learn more about the Navajo. The cardinal Dineh value, *hozho*, is variously translated as "walking in beauty" or, simply, "balance." *Hozho* was illustrated the night I met Samuel Smith, when a woman asked him whether he forgave the Japanese. "For a long time I didn't," he said, "but one day I got sick and I went to a medicine man. He told me I would just get sicker unless I get rid of the bad feelings. He was right. Sometimes you have to fight, but then you have to

50. Bixler, *supra* n. 24, at 52.

51. *Id.* at 62; Paul, *supra* n. 35, at 23.

52. Bixler, *supra* n. 24, at 91.

53. George McColm, *An Ungrateful Nation* <<http://americanhistory.about.com/library/prm/blungratfulnation1.htm?terms=code+talkers>> (accessed Oct. 10, 2002).

54. Nancy J. Parezo, *Navajo Sandpainting: From Religious Act to Commercial Art 1* (U. Ariz. Press 1983).

55. *Id.* at 14.

56. Bixler, *supra* n. 24, at 31-33.

forgive.”⁵⁷ *Hozho* was demonstrated in 1974 when a young Japanese, Kenji Kawano, was hitchhiking on the Navajo reservation and chanced to be picked up by the late Carl Gorman, a code talker and father of the famous artist R.C. Gorman.⁵⁸ This chance encounter led to Kawano becoming the official photographer for the Navajo Code Talkers Association and to his publication of a book about the code talkers, with a forward by Gorman.⁵⁹

The Navajo Code Talkers Association, Smith told me, had a debate about the movie centering on whether they should make a major push for the truth. They decided not.⁶⁰ They decided that the white guys wanted to make a film to make money and knew how to make up a story to accomplish that because they are professionals.⁶¹ The code talkers decided that as long as the treatment of their role was respectful, they would not make a major issue about historical accuracy or whose story was in fact being told.⁶² Smith did strongly object to the title, claiming that the term “windtalkers” signifies persons who say much of little import.⁶³

That, at the end of the day, is the disappointment of *Windtalkers*. John Woo cut his directorial teeth in the Hong Kong mayhem-as-dance tradition, and he remains a master of screen action. Think of Steven Spielberg’s rendering of the Normandy beach in *Saving Private Ryan* and then think of action of that immediacy occupying most of a film. Aside from the question of taste, understand that if you have a pulse, it will be pounding, but there will be little contemplation of serious issues.

Popular recognition of the code talkers is long overdue. After years of rumors and almost a year of delay in the release date of *Windtalkers*, Indians in general and Dineh in particular had hoped for more than a western transported to the South Pacific. “Native Americans judge films partly on the complexity and sensitivity with which they represent contemporary Indians’ lives.”⁶⁴ This writer and every other Indian veteran has been called “Chief”⁶⁵ or subjected to more overt ridicule while serving active duty. Also, “[e]ducators are now beginning to see that they have been wrong in punishing children for speaking Navajo in school.”⁶⁶

There are larger issues to be explored than can be raised by a few rhetorical drive-bys woven into the fictional conflicts of a white man under fictional orders. Samuel Smith, brought up with the blood memory of The Long Walk, related to

57. Interview, *supra* n. 41.

58. Carl N. Gorman, Foreward to *Warriors: Navajo Code Talkers IX* (Northland Publg. Co. 1990) (photographs by Kenji Kawano).

59. *Id.*

60. Interview, *supra* n. 41.

61. *Id.*

62. *Id.*

63. *Id.*

64. Steven M. Leuthold, *Native American Responses to the Western*, 19 *Am. Indian Culture & Research J.* no. 1, 153, 161 (1995).

65. Bixler, *supra* n. 24, at 59-60; Paul, *supra* n. 35, at 71, 92, 94.

66. Paul, *supra* n. 35, at 137.

me the outrage he and his relatives felt about the sinking of the Arizona at Pearl Harbor with great loss of life, outrage that led him to enlist at age seventeen⁶⁷ even though Navajos could not vote even if they were twenty-one.⁶⁸ I was brought up with the blood memory of the Trail of Tears, and yet enlisted at age seventeen in the face of a much less immediate threat in Vietnam. This is how American Indians generally conduct themselves when the United States is at war,⁶⁹ and something is at work besides the recognition that white Americans, while they may not always be the best of neighbors, are still neighbors.

That something is honor, still a value among traditional American Indians. There was no such category as "American Indian" until the European colonists needed a collective name for us. We are many peoples bound together today by similar but not identical horrors.⁷⁰ The other thing that distinguishes us from any other ethnic minority is our treaties, the words in which our ancestors, innocent of law and economics, placed such trust. In those treaties, we bound our future to that of the United States, and that remains so even if cases like *Lone Wolf v. Hitchcock* cause us to wonder whether the United States feels similarly bound to us.

The Supreme Court, revisiting the policy at issue in *Lone Wolf*, recognized that allotment "quickly proved disastrous for the Indians."⁷¹ Indians did not become instant Jeffersonian yeomen,⁷² and those who did not lose their land altogether⁷³ (which is to say, those whose power to alienate the land was effectively restricted) soon became absentee landlords,⁷⁴ with their property leased for grazing by the Bureau of Indian Affairs⁷⁵ at a fraction of market value.⁷⁶

67. Interview, *supra* n. 41.

68. The capital of the Navajo Nation is in Window Rock, Arizona, a state where Indians were denied the franchise *de jure* until 1948, *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948), a practice that was common *de facto* at other times and places. See Daniel McCool, *Indian Voting*, in *American Indian Policy in the Twentieth Century* 105, 105-16 (Vine Deloria, Jr., ed., U. Okla. Press 1985); David Wilkins, *An Inquiry into Indigenous Political Participation: Implications for Tribal Sovereignty*, 9 Kan J.L. & Pub. Policy 732, 736-39 (2000). Some code talkers were well aware of this exclusion. Paul, *supra* n. 35, at 111.

69. Tom Holm, *Patriots and Pawns, State Use of American Indians in the Military and the Process of Nativization in the United States*, in *The State of Native America: Genocide, Colonization, and Resistance* 345, 345-46 (M. Annette Jaimes ed., South End Press 1992).

70. Steve Russell, *Apples Are the Color of Blood*, 28 Critical Sociology 56 (2002).

71. *Hodel v. Irving*, 481 U.S. 704, 707 (1987).

72. "They [friends of the Indian] thought the law would work the transformation and would by definition make the Indian a farmer." D.S. Otis, *The Dawes Act and the Allotment of Indian Lands* 103 (Francis Paul Prucha ed., U. Okla. Press 1973).

73. Two-thirds of the land allotted to individual Indians was lost by sale between 1887 and 1934. Wilcomb E. Washburn, *Red Man's Land/White Man's Law: The Past and Present Status of the American Indian* 145 (2d ed., U. Okla. Press 1995). As of 1995, the amount lost was three-fourths of the original forty million acres. *Id.* at 150.

74. "Cash generated by land sales to whites was quickly dissipated, and the Indians, rather than farming the land themselves, evolved into petty landlords, leasing their allotted lands to white ranchers and farmers and living off the meager rentals." *Hodel*, 481 U.S. at 707 (citation omitted). See Clark, *supra* n. 17, ch. 9; Debo, *supra* n. 20, at 85-86, 335-36, 357-58; Debo, *supra* n. 12, at 297-98.

75. Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stan. L. Rev. 1061, 1072-74 (1974).

76. It is tempting not to mention grazing leases of allotted land, since such mention is bound to rely heavily on oral traditions. Cherokees still do have oral traditions, not all of them ancient: Walter

Insider dealing and slipshod accounting began stripping Indians of their assets⁷⁷ and “the fractionation problem,” failure to anticipate devise and descent among peoples who had always held real estate in common, continues to obstruct contemporary efforts to undo the damage, as illustrated by the Supreme Court in this example:

Tract 1305 is 40 acres and produces \$1,080 in income annually. It is valued at \$8,000. It has 439 owners, one-third of whom receive less than \$.05 in annual rent and two-thirds of whom receive less than \$1. The largest interest holder receives \$82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives \$.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated \$8,000 value,

Spider fetched fire, Raven is brave, Rabbit plays tricks, and the BIA steals from Indians. Mineral leases involving tribally-owned land are more likely to be the subject of lawsuits. *E.g. Navajo Nation v. U.S.*, 263 F.3d 1325 (Fed. Cir. 2001), *cert. granted*, 123 S. Ct. 2326 (2002) (all parties to the appeal agree that the BIA-approved mineral lease was far below market value). The Department of the Interior Bureau of Land Management is infamous for approving grazing leases below fair market value. Wesley Carr Calef, *Private Grazing and Public Lands: Studies of the Local Management of the Taylor Grazing Act 72-76* (U. Chi. Press 1960); Phillip O. Foss, *Politics and Grass: The Administration of Grazing on the Public Domain 171-93* (U. Wash. Press 1960); Christopher McGrory Klyza, *Who Controls Public Lands?: Mining, Forestry and Grazing Policies, 1870-1990* ch. 5 (U. N.C. Press 1996). Even assuming that the Department of the Interior Bureau of Indian Affairs was more scrupulous in management of Indian agricultural leases than in management of Indian mineral leases, the BLM practices would have the effect of lowering the market value of Indian grazing land. The BLM was managing more than five times more acreage than the BIA. Calef, *supra*, at 49. The circumstantial evidence is strong, but until the accounting sought in *Cobell v. Norton*, 2001 WL 1555296 (Dec. 26, 2001), is forthcoming, Indians have only family stories. *E.g. Comm. on Int. & Insular Affairs, Indian Heirship Land Study, Vol. 1: Analysis of Indian Opinion as Expressed in Questionnaires* vol. 1, H.R. Comm. Print 86-27, at 130-31 (Dec. 31, 1960):

All my lands are leased in unit. I never get anything out of it so I don't dislike [sic] this way. I think a person could cancel this unit and make it the way they wanted individually. We like to handle this land by our own way. This land is worth two or three times the rent lease pay. Some lessee wanted to pay double but the head man in reservation is holding down. We wanted this to be changed and the regulation the way that should be.

Yes, I am sending you some papers that I received. They do not give the amount of money they are paying for lease or how long.

The bare minimum amount for which Indian land is leased is so low that white leasors lease it for practically nothing.

I feel that I am not receiving sufficient returns for the amount of acreage which is leased from this estate according of [sic] the valuation placed on this land. As I have been informed that my one-third interest in the 2 allotments would be approximately \$20 a year.

Id. As these statements (and many others) show, grazing leases of individual allotments do not involve enough money to justify litigation other than by class action. However, they are in the aggregate substantial thefts from people already impoverished by allotment and my assertion that these thefts are known by oral tradition would not be facetious to the thousands of victims.

77. Marion Clawson, *Uncle Sam's Acres* 309-14 (Greenwood Press 1970). The movement of Indian assets into white hands after allotment was simply a continuation under the BIA of the role of Indian agents in the reservation years, when it was “the commonly held belief that a few years as an Indian agent would guarantee the fortune of anyone not overly burdened by scruples.” Hagan, *supra* n. 12, at 125.

he would be entitled to \$.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at \$17,560 annually.⁷⁸

Legal doctrines available to the *Lone Wolf* Court could have supported a different outcome⁷⁹ had the law not been captured by the colonial enterprise⁸⁰ the history books call manifest destiny.⁸¹ That a major studio has allowed even a flawed film like *Windtalkers* to consider Indians as fully human⁸² represents incremental progress, perhaps part of a modern yearning for some connection to American Indians that does not involve homicide or theft.⁸³ That connection, the underlying issue in *Lone Wolf*, and the reason why Indians are so quick to volunteer for military service, might all be found in the quaint idea of honor so famously expressed by Justice Black in the dictum Indian lawyers call the all-purpose federal Indian law dissent: "Great nations, like great men, should keep their word."⁸⁴

The fact that damages for breach of contract must be computed in dollars does not mean that money was the only thing lost, any more than a damage award for wrongful death restores the *status quo ante*. Litigation is about money because it has to be. Honor does not have to be for sale unless we choose to sell it, but as long as the United States continues to mistake power for right and money for what it represents, Justice Black's opinion about honor will be talking to the wind.

78. *Hodel*, 481 U.S. at 713 (citations omitted). The nightmare of accounting for Indian trust funds continues in *Cobell v. Norton*, 2001 U.S. Dist. Lexis 20453 (D.C. Dist. Dec. 6, 2001).

79. See Supreme Court of the American Indian Nations, *Lone Wolf v. Hitchcock*, 8 Kan. J. L. & Pub. Policy 174 (1999).

80. Steve Russell, *The Jurisprudence of Colonialism*, 25 Leg. Stud. Forum 605, 607-08 (2001).

81. The term originated speaking of the annexation of Texas as part of "the fulfillment of our manifest destiny to overspread the continent allotted by Providence for the free development of our yearly multiplying millions." J.L. O'Sullivan & O.C. Gardiner, *Annexation*, 17 U.S. Mag. & Democratic Rev. 5 (1845) (available at <http://cdl.library.cornell.edu/cgi-bin/moa/moa-cgi?notisid=AGD1642-0017&byte=222214020>). The phrase is generally attributed to O'Sullivan, who was referring to the United States and North America, but looking at it as European colonialism there were two continents and both were already occupied. The neologism for the necessary conclusion is "genocide." See generally Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present* (City Lights Books 1998); see Bartolomé de Las Casas, *The Devastation of the Indies: A Brief Account* (Herma Briffault trans., Johns Hopkins U. Press 1992).

82. The debate on the humanity of Indians literally was held in the Sixteenth Century. See generally Lewis Hanke, *All Mankind Is One: A Study of the Disputation between Bartolomé de Las Casas and Juan Ginés de Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians* (N. Ill. U. Press 1974).

83. See generally Philip Joseph Deloria, *Playing Indian* (Yale U. Press 1998); Shari M. Huhndorf, *Going Native: Indians in the American Cultural Imagination* (Cornell U. Press 2001).

84. *F. Power Commn. v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

