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Look Back in Anger

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SYMPOSIUM: *LONE WOLF V. HITCHCOCK:* ONE HUNDRED YEARS LATER

FOREWORD: LOOK BACK IN ANGER*

Judith V. Royster**

January 5, 2003, marks the one hundredth anniversary of the United States Supreme Court's decision in *Lone Wolf v. Hitchcock*.[1] It has been a century now, a century in which surprisingly little has been written about the case and its impacts.[2] So this seemed like a good time to address *Lone Wolf*. A century ought to give perspective. A century ought to be enough time to look back dispassionately at the legacy of *Lone Wolf*. A century ought perhaps to blunt the anger at the Court's invocation of plenary power over the lands and lives of Indian people. But as the contributions to this symposium demonstrate, one hundred years later the reactions to *Lone Wolf* are still raw.

The *Lone Wolf* decision was the pinnacle of a sea-change in federal Indian policy. By the time *Lone Wolf* came to the Court, allotment had been formal congressional policy for nearly fifteen years.[3] Under the General Allotment Act of 1887,[4] lands held in trust for Indian tribes could be allotted to tribal citizens in eighty to 160-acre parcels, to be held in trust for twenty-five years while the Indian allottee assimilated to a life of agriculture, Christianity, and American citizenship.[5] The vast acreages not needed for allotments could be declared "surplus" lands and opened to non-Indian settlement.[6] The disposition of the surplus lands—"a danger that threatens much, and a dead weight that hangs heavily about the newly

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* With apologies to John Osborne, *Look Back in Anger: A Play in Three Acts* (Faber & Faber 1957).

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1. 187 U.S. 553 (1903).
2. One notable exception is Blue Clark, Lone Wolf v. Hitchcock: *Treaty Rights and Indian Law at the End of the Nineteenth Century* (U. Neb. Press 1994).
3. *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1 (1995).
4. *General Allotment Act*, 24 Stat. 388 (1887).
5. *Id.* at 389-90; *see* 25 U.S.C. § 348 (2000).
6. 24 Stat. at 389-90.

made citizen's neck"[7]—was crucial to the assimilation of the Indians. Only the occasional dissent voiced concern for the effects of the surplus lands program, arguing that "a wall of fire, a cordon of white settlements"[8] would eventually strangle the Indian allotments.[9]

The General Allotment Act required tribal consent to the cession of surplus lands,[10] forcing the federal government to negotiate cession agreements. Federal efforts to obtain surplus lands were frequently stymied by tribes that demanded a high price, or refused to sell.[11] Frustrated by the tribes' recalcitrance, federal officials—at least on occasion—resorted to manipulation and outright fraud. *Lone Wolf*'s cession agreement is a case in point. Not only did the General Allotment Act require tribal consent to sale of the surplus lands, so too did the treaty with the Kiowa and Comanche Tribes. The 1867 Treaty of Medicine Lodge[12] established a reservation in the Indian Territory, and expressly provided that no cession of reservation lands would be valid without the signatures of "at least three fourths of all the adult male Indians occupying [the reservation]."[13]

In 1892, federal negotiators and 456 adult males of the combined Kiowa, Comanche, and Apache Tribes signed a surplus lands agreement. The local Indian agent certified that 456 represented more than three-fourths of the adult males, but the tribes promptly claimed that the signatures had been obtained by fraud.[14] When the cession agreement was submitted to Congress for enactment, the Senate requested that the Secretary of the Interior determine whether the number of signatures did in fact comprise three-fourths of the adult males of the tribes. The Secretary replied unequivocally that it did not.[15] The bill failed in the Senate that term, but was reintroduced in the following Congress. The tribes reiterated their claim—supported by the Department of the Interior's information—that the number of signatures was not sufficient and that many of the signatures had been obtained by fraud. Congress nonetheless enacted the 1892 agreement, with modifications not agreed to by the tribes, into law.[16] Lone Wolf, on behalf of all members of the tribes, sued to enjoin the implementation of the statute.[17]

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7. Charles C. Painter, *The Indian and His Property*, in *Americanizing the American Indians: Writings by the "Friends of the Indian" 1880-1900*, at 114, 116 (Francis Paul Prucha ed., Neb. U. Press 1978) [hereinafter *Americanizing the American Indians*].

8. House Comm. on Indian Affairs, *Minority Report on Land in Severalty Bill*, in *Americanizing the American Indians*, *supra* n. 7, at 128; House Comm. on Indian Affairs, *Lands in Severalty to Indians, Views of the Minority*, H.R. Rpt. 46-1576, at 10 (May 28, 1880).

9. House Comm. on Indian Affairs, *supra* n. 8, at 122-29; H.R. Rpt. 46-1576, at 7-10.

10. 24 Stat. at 389-90.

11. Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920*, at 156 (U. Neb. Press 1984).

12. *Treaty of Medicine Lodge*, art. XII (Oct. 21, 1867), 15 Stat. 581.

13. *Id.* at 585.

14. *Lone Wolf*, 187 U.S. 553.

15. *Id.*

16. *Act of June 6, 1900*, 31 Stat. 672, 676-77 (1900).

17. *Lone Wolf*, 187 U.S. 553.

The Court's response is familiar to every student of Indian law. Notwithstanding the General Allotment Act, notwithstanding the Treaty of Medicine of Lodge, and notwithstanding the clear evidence of fraud, the Court held that Congress possessed the plenary power to unilaterally abrogate the treaty and enact the agreement into law. "We must presume," the Court wrote, "that Congress acted in perfect good faith in the dealings with the Indians .... In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation."[18] With an apparent lack of irony, the Court suggested that, if the tribes had been injured by Congress—"which we do not wish to be understood as implying"—then "relief must be sought by an appeal to that body for redress, and not to the courts."[19]

The reverberations of the *Lone Wolf* decision have been felt for the last one hundred years. Its practical effects were immediate. Within two years, Congress enacted six surplus lands acts without tribal consent or even negotiation.[20] In Oklahoma, the effects are visible from a series of maps. In 1890, shortly after the onset of the federal allotment and assimilation policy, Congress created the organized Oklahoma Territory out of the western half of the Indian Territory.[21] Over the next decade, much of the Oklahoma Territory was organized into counties. By 1899, when Congress was debating the bill to enact *Lone Wolf*'s surplus land agreement into law, the only Indian lands not organized into counties were the Osage, Ponca, Otoe, Wichita-Caddo, and Kiowa, Comanche, and Apache.[22] By 1906, only three years after the *Lone Wolf* decision, the entire Oklahoma Territory was organized into counties.[23] *Lone Wolf* cleared the last of the barriers in the way of Oklahoma statehood.[24]

The effects on Indian law, Indian tribes and peoples, and Indian cultures were equally pervasive. The articles and essays in this symposium explore those impacts. Many of the most prominent scholars in the field of federal Indian law today have taken the opportunity to share their analyses of *Lone Wolf* and its legacies. No two scholars take the same approach or even the same point of departure, highlighting the complexity of *Lone Wolf* and its importance in modern Indian law. We are proud to present this symposium issue on *Lone Wolf v. Hitchcock:* One Hundred Years Later, an exploration of one of the most influential, and most contemptible, decisions in all of Indian law.

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18. *Id.* at 568.

19. *Id.*

20. Hoxie, *supra* n. 11, at 157.

21. *Act of May 2, 1890*, 26 Stat. 81 (1890).

22. John W. Morris, Charles R. Goins & Edwin C. McReynolds, *Historical Atlas of Oklahoma* 54, 55 (3d ed., U. Okla. Press 1986): Oklahoma Territory, 1890-1899; Oklahoma Territory-Indian Territory, 1900.

23. *Id.* at 57: Counties of Oklahoma Territory and Recording Districts of Indian Territory, 1906.

24. Oklahoma was admitted to the Union in 1907. *Act of June 16, 1906*, 34 Stat. 267 (1906) (enabling act allowing the people of Oklahoma and of the Indian Territory to form a constitution and state government); *Proclamation of Statehood, Nov. 16, 1907*, Exec. Procl., 35 Stat. 2160 (1907).