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LEGAL REMEDIES DENIED TO INDIAN NATIONS UNDER U.S. LAW

By Robert T. Coulter

LACK OF REDRESS

Does U.S. law enable the Indian peoples and Indian governments to vindicate their rights as distinct peoples and as nations? The answer is no. Leaving aside the question of whether Indian nations are sovereign and entitled to recognition under international law, and ignoring may aspects of U.S. law that are disadvantageous to Indian peoples and governments, four principal characteristics of U.S. law make such vindication impossible.

The horrible wrongs to Indian nations committed by the United States and its citizens, both historically and presently, are well-established and copiously documented. The question of greatest concern to other nations, to nongovernmental organizations and to other observers is whether the United States and its legal system provide a legal and effective means for redressing these wrongs.

Under well-accepted principles of international law, national governments, arguably including Indian governments, are not obliged to resort to municipal law remedies for national wrongs. Nevertheless, if such remedies were available, the need for international attention and action would be lessened. The United States' legal system does not, however, offer such legal procedures for determination of the most fundamental Indian claims and controversies.

The law of the United States does not permit the legal redress of the most serious wrongs to Indian nations and Indian peoples because the fundamental legal issues are not subject to judicial review. In addition, U.S. law through the legislature and the courts has conclusively resolved the most crucial legal issues in favor the United States and contrary to Indian interests. Finally, no real remedy is provided for some classes of cases such as claims against the United States.

To be sure, restricted legal remedies are available for certain wrongs to individual Indian people and, to a very limited extent, for wrongs to Indian nations or "tribes." However, it can be stated with certainty

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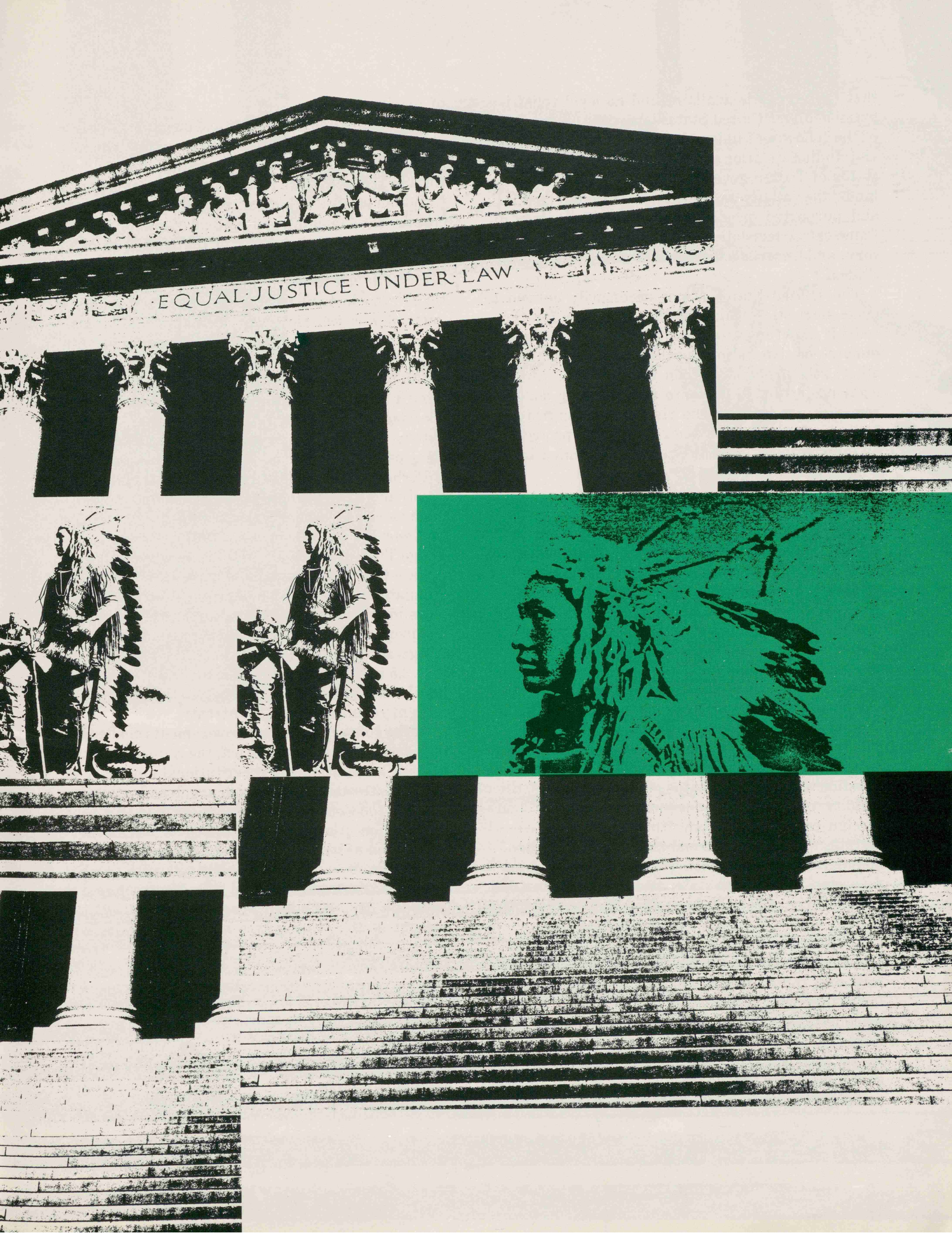
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that no remedy is available and no legal relief is possible under United States law with respect to any of the following fundamental issues of Indian rights and Indian relations with the United States: the status of Indian governments; the title to Indian lands; the validity and operation of Indian treaties and purported or alleged treaties; the power of Congress to legislate over Indian people and territory; and historic Indian claims against the United States.

The United States is not necessarily obliged to make domestic legal remedies available for the redress of wrongs to other nations, for it is well understood that nations, in their relations with each other, rely principally upon international law for legal protection. But where municipal or domestic remedies are lacking, the right of the aggrieved Indian nations to claim and resort to the protection of international law can scarcely be denied by the United States

The political question doctrine

The rule of United States constitutional law known as the "political question" doctrine has served to preclude from court review most of the legal issues that are central to the protection of Indian rights. The result has been that the courts of the United States are unable to provide any remedy for the most fundamental wrongs to Indian nations.

Simply stated, the political question doctrine holds that the courts will not decide an issue that has been committed for determination by the Constitution to the legislative or executive branch of government. The following issues of importance to Indian nations have been excluded from court review by the political question doctrine: the status of Indian nations; the validity of treaties under international law and foreign constitutional law; the validity of Federal statutes under international law; the international boundaries of the United States; the territorial sovereignty of foreign states and Indian nations; and the existence of foreign insurgents, governments, and states.

The only areas of law in which the political question doctrine has been consistently applied are foreign relations, Indian affairs, and certain questions relating to internal governmental processes. Certainly a demonstrable constitutional commitment exists reserving foreign relations to the executive and legislative branches—the "political" departments of the government. By far the greatest application and the principal thrust of the doctrine is in the field of foreign relations.

The application of the political question doctrine to Indian affairs thus appears to be an implicit categorization of Indian matters within the field of foreign relations. The result of applying this doctrine to Indian affairs is that Indian nations are treated in certain fundamental and critical respects just as other nations of the world in the United States courts. It is not contended that the political question doctrine is not properly applicable to Indian affairs, though the doctrine has been applied overbroadly in particular cases. However, if Indian affairs are treated in the courts in the same manner as affairs with foreign nations, and Indian nations are subject to the same legal disabilities as foreign nations with regard to the application of the political question doctrine, fairness and consistency suggest that Indian nations be regarded as separate nations for other legal purposes.

Perhaps the best illustration of how the political question doctrine functions to deny Indian governments a remedy under United States law is the case of *Lone Wolf v. Hitchcock* (1903). By the Medicine Lodge Treaty of 1867, a reservation was created for certain tribes in Oklahoma. Article 12 of the treaty stipulated that no cession of reservation lands would be valid unless at least three-fourths of the adult male members of the tribes gave their consent. In 1900, Congress ratified an agreement that purported to cede 2.5 million acres of that same Indian land to the United States, but which lacked the three-fourths consent required by the 1867 treaty.

In the suit by the Indian governments challenging the constitutionality of the act, the Supreme Court refused to question the constitutional authority of Congress to abrogate rights guaranteed by treaty. Because the Court considered the issue to be a political question, it never considered the tribes' claims that the cession agreement had been obtained by fraudulent misrepresentations, that the requisite number of adult males had not signed the agreement, and that Congress had amended the agreement without the consent of the tribes. As a result, the tribes were denied a remedy for a gross violation of their treaty rights.

More recently, a Federal district court invoked the political question doctrine to preclude consideration of the issue of whether Congress can legally and constitutionally legislate and extend criminal jurisdiction over territory that is by treaty reserved to another sovereign power, an Indian nation (*United States v. Cooper*, 1975). The defendants in *Cooper*


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challenged the assertion of criminal jurisdiction by the United States over Indian people on the Pine Ridge reservation, arguing that the Fort Laramie Treaty of 1868 reserved such jurisdiction to the Sioux.

For American Indians, the political question doctrine has meant that the courts will not consider whether Congress has exceeded its legal authority in enacting laws concerning the subject matter areas mentioned above. The doctrine also means that even obviously fraudulent treaties ratified by Congress will not be questioned by the courts. Acts of Congress that purport to "terminate" Indian nations will not be questioned by the courts. Likewise, executive decisions to recognize or not to recognize Indian governments will not be questioned by the courts. Thus, it can be seen that virtually all important matters are beyond the power of the courts entirely.

Recently, however, there has been a hint that the political question doctrine may be losing some of its force as an impediment to Indians seeking justice in American courts. In *Delaware Tribal Business Committee v. Weeks*, the plaintiff challenged the constitutionality of two acts of Congress providing for the distribution of certain Indian Claims Commission awards. The Supreme Court concluded that the political question doctrine did not prevent it from determining whether a particular statute is constitutional. The challenged statutes, however, were found by the court to be constitutional and were upheld.

The rule of "Tee-Hit-Ton"

Closely related to and growing out of the political question doctrine is the substantive rule of law usually referred to as the rule of *Tee-Hit-Ton*, from the decision of the U.S. Supreme Court in *Tee-Hit-Ton Indians v. United States* (1955). This legal ruling concerns title to Indian land, but it has such broad ramifications that it makes impossible the vindication of Indian rights in a wide variety of cases.

The Tee-Hit-Ton Indians argued that their rights were violated when the United States refused to compensate them for timber taken from lands they had held since time immemorial and that had never been ceded. The U.S. argued that it did not recognize any property right in the Tee-Hit-Ton Indians, and that therefore, it could take the Indians' property without due process and without compensation.

The Supreme Court accepted the government's argument and wrote:

> It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession, not specifically recognized as ownership by Congress.
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> After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians. No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability.

In a recent decision by a unanimous three-judge Federal court in Washington, D.C., the court applied the *Tee-Hit-Ton* rule to decide the case. The court wrote:

> Clearly emerging from the holding of the Court in *Tee-Hit-Ton* are several principles which have a direct bearing upon this case: (1) fee title to the Indians' aboriginal land is vested in the United States even if an Indian tribe can claim that it originally held Indian title to the land; (2) any right which Indians of today have in such former Indian territory is a mere right of possession or occupancy, subject at any time to taking or extinction by Congress; and (3) recovery for past wrongs to the Indians who were deprived of their lands is a matter of legislative grace rather than legal liability on the part of the United States. Harsh as these rules may seem, they remain the law applicable to plaintiff's claim. (*Osceola v. Kuykendal*).

The *Tee-Hit-Ton* rule has never been supported by

law or history. The Supreme Court cited inaccurate authority to support the *Tee-Hit-Ton* decision. The Court relied almost entirely upon a mistaken reading of the opinion in *Johnson & Graham's Lessee v. McIntosh* (1823). There, the Court decided that title to land derived from an Indian government grant is not good when subsequently the same land is ceded by the Indian government to the United States and later granted by the U.S. to another party. The case does not support the view that Indians have no legally protectable interest in their lands. Furthermore, the "conquest" relied upon by the Court never occurred. The Congress and the Executive have consistently taken the legal position that the United States has never based its claim to Indian land upon the right of conquest.

The rule of *Tee-Hit-Ton* is a shocking and, frankly, racist rule of law. Yet the United States, in all its branches, uses and defends the rule. For example, the Justice Department, while purporting to represent the Passamaquoddy and Penobscot people in their claims against the State of Maine, has advised the court in that case that, in the view of the Justice Department, Congress can and should take action to extinguish the aboriginal right of the Indians. Attorneys studying the matter and advising Congress have concluded that the *Tee-Hit-Ton* rule permits Congress to extinguish aboriginal Indian land rights without legal process and without compensation.

Plenary power doctrine

Today, Congress' power over Indian affairs is often said to be "plenary," meaning almost absolute. The power of Congress to legislate concerning Indian affairs has become practically unlimited largely because the courts have considered Congress' power over Indians to be a political question beyond the scope of judicial review. With minor exceptions, United States courts have consistently refused to find any constitutional restrictions on the exercise of power by Congress over matters relating to Indians. Throughout the history of Indian-U.S. relations, only three acts of Congress relating to Indians have been declared unconstitutional; and one of the three was unrelated to the question of the power of Congress to affect Indian rights. In the other two cases, the acts of Congress were declared invalid only because they infringed rights previously recognized or created by Congress, not because they infringed Indians' inherent or aboriginal rights.

The origins of the plenary power doctrine and its legal foundations are unclear. The plenary power doctrine is closely related to the political question doctrine discussed previously. Because the issue of the scope of congressional power in Indian affairs was deemed to be a political question, the courts refused to place limits on the exercise of that power. No court has made any effort to discover or state the legal principles from which the plenary power doctrine derives, yet the doctrine continually functions to deny legal protection to Indian rights.

The case most often cited in support of the plenary power doctrine, *Lone Wolf v. Hitchcock,* merely assumed, without historical or constitutional analysis, that Congress always possessed plenary power. Most cases in which the constitutional power of Congress was an issue were concerned primarily with providing some justification for this shocking doctrine.

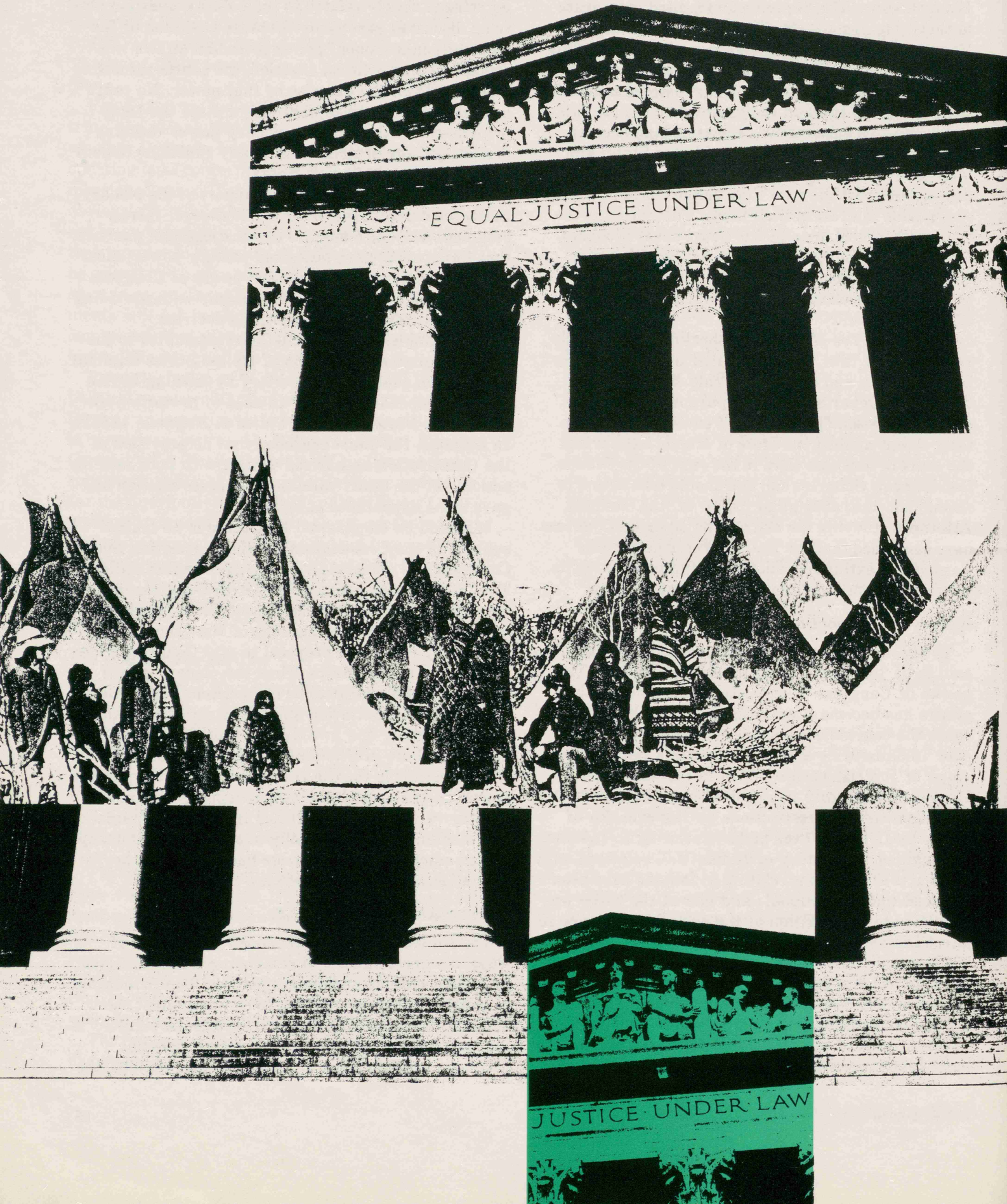
For example, the Supreme Court attempted to justify the unilateral extension of United States criminal jurisdiction over Indian territory by labeling Indian nations "dependent wards" in need of protection by the United States (*United States v. Kagama,* 1886). In *Kagama,* the Court conceded that no provision of the Constitution authorized Congress to take such an action, yet the Court validated Congress's action and gave it the appearance of legality.

It should be emphasized that there is no textual support in the Constitution for the proposition that Congress has plenary authority over Indian nations. The only express grant of power to Congress with respect to Indian affairs is the power to regulate commerce. In fact, the authors of the Constitution specifically rejected a proposal to give Congress wider powers in Indian affairs. Thus the plenary power doctrine would appear to be inconsistent with both the letter of the Constitution and the intent of its authors.

Nevertheless, the two recent opinions by the Supreme Court in *Oliphant v. Suquamish* and *U.S. v. Wheeler* reaffirm the Court's reliance upon the plenary power doctrine. In these two decisions, the court even more strongly than it has in the past premises its reasoning upon the wholly unexamined and unsupported assertion that Congress has plenary authority over all aspects of Indian affairs.

Indian claims against the U.S.

The United States has responded in a variety of ways to a great number of compelling claims asserted by Indian nations and Indian peoples. The foundation of United States law relating to claims against the United States has been the doctrine of sovereign immunity. Sovereign immunity in itself does not necessarily create injustice. Like all other nations, the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United States has refused to be sued without its consent, and this rule is applied to Indian claims as well as all others.

From time to time, Congress has passed acts granting narrow waivers of sovereign immunity and permitting Indian claims to be heard. As a rule, all such claims were heard only in the United States Court of Claims, which has power to grant only money awards and which has consistently interpreted its jurisdictional acts in an exceedingly narrow manner. Claims for the return of land or for the specific enforcement of treaty provisions have never been permitted.

In 1946, the Congress established the Indian Claims Commission, an administrative agency designed to hear and determine Indian claims. The Claims Commission, far from settling the old claims honorably, has become a travesty—a mill for liquidating Indian claims by paying a few cents on the dollar, destroying Indian rights to their former land holdings, and summarily excusing the United States from its solemn treaty obligations. Those who have benefited from Indian Claims Commission activity have been primarily the large mineral companies, ranchers, and other holders of lands illegally seized from their Indian owners, and the few attorneys who have handled the claims and who take 10 percent of all awards. One law firm is said to have received over $15 million for Indian Claims Commission work.

The Claims Commission has taken the position that it can grant only money awards. No other claims are heard, even though no such limitation is expressed in the statute. Attorneys representing claimants are permitted to take 10 percent of any award on a contingent fee basis. This is another factor inducing Indian people to make money claims, since that is the only means by which they can retain and pay their attorneys.

It is rarely explained to Indian people that making a claim through the Indian Claims Commission will result in loss of land rights and treaty rights. The legal effect of the payment of an Indian Claims Commission award for the taking of Indian land is to eliminate any legal claim for return of the land. With respect to land claims, a Claims Commission judgment "in favor" of Indian claimants includes an adjudication that the Indian rights to the land have been forever extinguished. In other cases, attorneys make compromises and settlements that have the legal effect of conceding and destroying forever vast land rights and other rights guaranteed by treaties.

Most of the injustices created by the Indian Claims Commission are difficult or impossible to correct because the Commission refuses to adhere to generally accepted standards of procedural due process and fair play. Claims may be and often are made on behalf of an entire Indian nation by a few individuals claiming to be representative members of the nation. The Claims Commission statute gives the Indian governments established under the Indian Reorganization Act and largely controlled by the Bureau of Indian Affairs the exclusive right to bring claims on behalf of the tribes they supposedly represent. In no case is the claimant required to notify anyone other than the United States that the claim is being made. There is no requirement that other interested parties be notified or be heard. Where Indian people have sought to intervene to oppose unauthorized or unwise claims, the Claims Commission has refused to permit intervention or even to grant a hearing.

To date there has been no successful legal challenge to the Claims Commission's lawless proceedings. With the Claims Commission scheduled to go out of existence in 1978, it appears unlikely that the courts will act now to curb the abuses.

In a very few instances, the United States has responded to Indian land claims by returning land for Indian use. In these cases, however, the land was not returned outright but merely held in trust by the United States for the use of the Indians involved.

The United States has never established, nor even sought to establish, an honorable and fair means for permanently resolving Indian claims. What is needed is the establishment of a claims settlement procedure acceptable both to the United States and to the Indian governments. Until such a mechanism is established through negotiation, mediation or otherwise, a vast unmet legal obligation will remain upon the United States.

Indian nations and Indian peoples cannot expect a legal resolution of their conflicts with the U.S. by resorting to its legal system. For many Indian nations, resort to international law and the support of the international community interested in human rights may be the most appropriate approach to future controversies.

In any event, it is or ought to be clear that the relations between Indians and the United States are not merely domestic affairs. The United States cannot continue to subject Indian peoples to all the legal disadvantages of foreign nationhood and yet insist that Indian affairs are not a matter for international concern and that Indian nations are not subjects of international law.

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