UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON RULES

HEARING ON
"LEGAL AND PROCEDURAL FACTORS RELATED TO SEATING A CHEROKEE NATION DELEGATE IN THE U.S. HOUSE OF REPRESENTATIVES"

TESTIMONY OF

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Good morning, Chairman McGovern, Ranking Member Cole, and other distinguished members of the Committee.

My name is Lindsay Robertson and I am a professor at the University of Oklahoma College of Law and currently Visiting Senior Scholar and Indigenous Law Center Visiting Professor at the UC Hastings College of the Law. I have been a professor of Federal Indian Law for more than 30 years and taught Constitutional Law for more than 25. From 2000-2010, I served as Special Counsel on Indian Affairs for Oklahoma Governors Frank Keating and Brad Henry. It is an honor to have been invited to address this committee on this important topic.

My role today is to provide an overview of Federal Indian Law for those committee members for whom the field is not familiar terrain.

Tribal governments in the United States are both pre-constitutional and extra-constitutional. That is, they existed before European settlement and they operate apart from and not directly subject to the Constitution. The power that tribal governments exercise is inherent, not delegated by the United States. Federal Indian Law deals in large measure with sorting out which sovereign - federal, state or tribal - has jurisdiction over activities that occur within tribal lands, which the U.S. code calls "Indian Country".

The United States recognizes more than 500 tribal nations, all of which the U.S. Supreme Court has characterized as "domestic dependent nations" – nations, and not simply aggregations of individuals sharing a particular heritage, but domestic nations, not foreign nations, and therefore having a special relationship to the United States. In the same decision in which it recognized the tribes as "domestic dependent nations" – Cherokee Nation v. Georgia (1831) – the Court described that relationship as being like that of "a ward to his guardian." In 1886, in Kagama v. United States, the Court recognized a substantive legal consequence to this relationship. As guardian, or trustee, the United States has power to legislate over Indian affairs, but also the responsibility to exercise that power to the ultimate benefit of the tribes.

During most of the Nineteenth Century, following the British colonial model, the United

States engaged with tribal governments by treaty. These treaties often provided for cession of tribal lands, but they covered many other areas as well: military and political alliance, trade relations, and criminal jurisdiction, for example. In one instance - the Treaty of New Echota of 1835 - they provided for the sending of a delegate to the U.S. House of Representatives.

As the federal courts long ago understood, during virtually all of the period of U.S.-tribal treaty-making severe inequalities existed in the relative bargaining power of tribes and the United States. Treaties were universally prepared in final form in English, employing American legal concepts often unfamiliar to tribal signatories. Commonly, the U.S. Army was an active presence during negotiations, resulting in intimidation. To reflect this reality courts interpreting treaties with tribes have employed canons of construction similar to those used in interpreting adhesion contracts: ambiguities are interpreted in the tribes' favor, treaties are liberally construed in favor of the tribes, and treaty provisions are interpreted as the tribes would have understood them. Other treaty construction rules arise from the United States' role as guardian for the tribes. Because the United States is guardian, for example, Congressional abrogation of treaty rights requires clear evidence of intent to abrogate.

All tribes of course have different treaty rights, their nature and scope based on individual circumstances, and although I suppose it is a theoretical possibility, to the best of my knowledge there has never been an equal protection claim brought by one tribe against another based on a treaty right. Similarly, although it is clear that in international relations treaties may be either self-executing or non-self-executing, I know of no historical instance of an Indian treaty being held to require implementing legislation prior to the vesting of rights.

I thank you for holding this hearing and for allowing me the opportunity to appear. I would be happy to answer any questions.

Thank you.