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by Edward C. Valandra

Introduction: Lakota Political Consent

In the formative years of the Lakota-American relationship, it was the expected norm of the Lakota that the United States must secure their consent prior to any U.S. policy decision which would effect the Lakota. Thus the formative years of Lakota-American interactions are replete with examples of treaties and agreements which recognized this norm of obtaining Lakota political consent.

However, in the contemporary Lakota-American relationship, the historically established norm of Lakota consent is no longer a viable part of this relationship. U.S. policy decisions, which impact Lakota society, are unilaterally implemented without Lakota consent. For example, Lakota males who are eighteen must register for the U.S. military draft as a condition to receiving federal aid for education.

If applying the norm of the formative years today, the United States would have to secure the consent of the Lakota that, registering for the draft is a condition that Lakota males must meet in order to receive federal aid for their education.

The use of this example is important because the Lakota and the United States have already agreed on the question of federal aid for education with respect to the Lakota people. Specific provisions in a previous agreement have already committed the United States to financing the education of the Lakota people. The United States, as a condition for a peace settlement with the Lakota, agreed to the Lakota demand that the United States would provide educational facilities, personnel, and scholarships for Lakota education.[1] Thus, the draft registration represents an additional condition to what the Lakota had initially agreed.

The question of why Lakota consent is missing in the contemporary Lakota-American relationship is the subject of this paper. For the Lakota, political consent is an important principle in their exercise of self-determination, especially when U.S. policy decisions such as the draft registration condition for federal aid discards Lakota consent. Hence, my thesis is that the Federal policy of granting U.S. citizenship to Lakota people is, in effect, a policy to extinguish the principle of Lakota political consent by "politically incorporating" the Lakota into the body politic of the United States.

One of the objectives of this thesis is to disclose how the political incorporation of the Lakota people into the American political system is inconsistent with the political realities of the world today. Thus this paper will discuss three topics, the history of political incorporation through U.S. citizenship, U.S. citizenship and its application to extinguish Lakota political consent, and Lakota political coexistence in the United States.

The Process of Political Incorporation from 1868 to 1924

The historical process of the political incorporation of the Lakota people into the U.S. body politic has its origins in a bilateral agreement commonly referred to as the Fort Laramie Treaty of 1868. This document was the culminating event which ended fifteen years of military hostilities between the Lakota and the United States. The first article prefaces the nature of this agreement, "...all war between the parties shall forever

cease." In suing for peace, the United States acknowledged that there shall be a political relationship which shall govern the interactions between the Lakota people and the people of the United States. The premise of this political relationship between the two peoples was that Lakota consent would necessarily be required to amend or affect any of the provisions of the bilateral agreement or any U.S. action which would affect the Lakota.

In the Ft. Laramie Treaty of 1868, Article Six provided a process by which a Lakota individual could acquire U.S. citizenship. Under this provision, the acquisition of U.S. citizenship was tied to having an allotment of land. Briefly, if a Lakota individual wanted an allotment of land, said allotment had to be within the exterior boundaries of the Lakota nation. Once an allotment was selected, a certificate was issued containing a description of the land and the name of the person to whom the allotment belongs; after said certificate was endorsed, it was recorded in a book entitled "Sioux Land-Book," and upon the issuing of a patent for the allotment a Lakota automatically became a U.S. citizen. This provision of article six was voluntary. That is, it required that a Lakota individual would, at the very least, consent to invoking this provision in the first place.

Because the allotments were to be within the exterior boundaries of the Lakota nation, and the fact the Lakota asserted its geo-political sovereignty over any person residing within its territory, it was apparent that U.S. citizenship would not alter any fundamental change for a Lakota individual other than the fact that he or she would have dual citizenship.

The next agreement between the Lakota and the United States that had some bearing on the U.S. citizenship question was the Great Sioux Agreement Act of 1889. With the exception of one important provision, the Great Sioux Agreement incorporated various sections of the General Allotment Act of 1887 verbatim.

Section Nine of the Great Sioux Agreement Act proved to be the discriminating provision because the General Allotment Act of 1887, as a matter of federal policy, mandated that allotments be issued to indigenous people whether they requested them or not. U.S. citizenship was part and parcel of the allotment process, and the mandating of allotments forced U.S. citizenship upon those indigenous people who were subjected to the application of the General Allotment Act. However, Section Nine of the Great Sioux Agreement Act included language stating that allotments, and hence U.S. citizenship, were not compulsory without the consent of the majority of the adult Lakota.

There were two other acts by the U.S. legislature regarding U.S. citizenship that had general applicability to Lakota people. One U.S. law, which was enacted in 1888, extended U.S. citizenship, to Lakota women by virtue of their marriage to a white American male. The other U.S. law, enacted in 1919, concerned Lakota men (and women) who served in a U.S. military establishment during WWI and who had been honorably discharged. These veterans would be granted U.S. citizenship if they formally requested it. These two U.S. laws marked an anomaly because U.S. citizenship was usually predicated upon a Lakota having an allotment of land first and then U.S. citizenship second.

During the first twenty-five years of the twentieth century, the United States began the forced political incorporation of the Lakota people, first through its general allotment policy and then with the enactment of a 1924 statute.

In the late 1890s, the United States took the initiative and began the process of allotting Lakota homelands to the Lakota without any regard to the two previous documents--the 1868 and 1889 agreements -- which required Lakota consent prior to any allotment of Lakota homelands. Generally, under the allotment law of 1887, the United States would issue a (trust) patent to the holder of an allotment and said holder would automatically have his or her U.S. citizenship.

However, in 1906, the U.S. legislature amended its allotment law in two ways.[2] The first amendment was that U.S. citizenship would be granted after the trust patent expired, which was a standard twenty-five period. Prior to this amendment U.S. citizenship was granted at the initial issuing of the trust patent. The second amendment was that the Secretary of the Interior, at his discretion, could terminate the status of a trust patent at any point and issue a fee patent to a holder of an allotment. In effect, then, this would constitute a grant of U.S. citizenship for indigenous people.

Eleven years after the 1906 amendments to the general allotment law of 1887, the United States initiated a policy which resulted in the issuing of fee patents to most Lakota people. The issuing of fee patents was based upon a blood quantum. That is, fee patents would be issued to all Lakota who were "less than one-half Indian blood." This policy decision was within the purview of the Secretary of the Interior's discretion, but it was a policy that unilaterally forced U.S. citizenship upon those Lakota people who were subjected to this

forced fee patent policy.

Roughly seven years after the forced fee patent policy, the U.S. legislature enacted the Indian Citizenship Act of 1924 which read, in part, "Non-U.S. citizen Indians are declared to be citizens of the United States." This U.S. law was all encompassing and thus completed the political incorporation of the Lakota people into the body politic of the United States.

Hence, within a span of sixty years the process of political incorporation of the Lakota people was completed. From this point forward, the American political system would engage in a political policy to distort and erode at least one fundamental reality of the Lakota-American relationship--the principle of Lakota political consent.

U.S. Citizenship: Political Participation to Extinguish Lakota Political Consent

During the seventy years after the Indian Citizenship Act, the American political system has been engaged in an overall policy in which the principle of Lakota consent is in a political equilibrium. As it is today, the tension within this political equilibrium is to shift toward the extinguishment of Lakota consent.

Why the American policy is shifting toward the extinguishment of Lakota consent can be found in a policy which originated in 1950s. Today the basic ideology underlying the policies of the American political system can summarized in House Concurrent Resolution 108 (1953):

> it is the policy...to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States.

In the 1950s this policy became known as the Termination policy, and one of the major sponsors was Senator Watkins of Utah. The Senator wrote an article concerning what the fundamental concept of the Termination policy was to entail for the Lakota people. Within the Senator's article were five statements which are excerpted below:

> he or she can stand with us in the enjoyment and responsibilities of our national citizenship
>
> would possess all the attributes of complete citizenship a fellow American
>
> we...should grant them all the rights and prerogatives pertaining to American citizenship
>
> the realization of their national citizenship with other Americans.

The analysis of these five excerpts and HCR 108 meant that the Lakota would have the same relationship to the United States as other non-Lakota U.S. citizens. Thus, the outcome of the Termination policy discarded the principle of Lakota consent to that of politically participating in the American political system. This shift to participating within the American body politic undermined the historical and political relationship of the Lakota people enjoyed with the United States.

For the Lakota, one of the first experiences with the transition from political consent to political participation was with the U.S. law, P.L. 280. P.L. 280 was to be a direct transfer of political sovereignty from the United States to its political subdivisions (i.e., states) even though indigenous peoples, including the Lakota, petitioned against its enactment. The main reason the Lakota petitioned against its enactment was because there was no provision for indigenous peoples' consent to such a transfer of authority. However, the position of the United States was expressed in a letter concerning the matter of indigenous consent:

> Now let me say a few words about the principle of Indian "consent"... [W]e must start, I believe, with the fact... that Indians are citizens and now have the privilege of the ballot in 48 states. This means that they are represented in Congress just as other citizens are and that they have the same rights... of petitioning the Congress and stating their views before Congressional committees considering legislation. What you are proposing--and let us be quite clear about this--is that, over and above these normal rights of citizenship, the Indians should also have a special veto power over legislation which might affect them. No other element in our population...now has such a power and ever has had in the history of our country. In short, it seems to me that the principle of Indian "consent"... has most serious Constitutional implications. With full respect for the rights an needs of the Indian people, I believe it would be extremely dangerous to pick out any segment of the population and arm its members with authority to frustrate the will of Congress which the whole people has elected. (Douglas McKay, Secretary of the Interior, November 3, 1955)

The HCR 108, the excerpts from Senator Watkin's article, and the Secretary of the Interior's letter all point out that political incorporation of the Lakota would have an extinguishing effect on the principle of Lakota political consent today.

One other U.S. law, the "Indian Civil Rights Act" (P.L. 90-284), passed in 1968, was "to ensure that the American Indian is afforded the broad Constitutional rights secured to other Americans." Briefly, P.L. 90-284 imposed a statutory--not constitutional--bill of rights upon the Lakota peoples' governments. Although having U.S. citizenship, the Lakota were already subject to the constitutional provisions under state and federal sovereignty, but not under Lakota sovereignty.

The Lakota, along with other indigenous peoples, petitioned against its application to their respective governments. The U.S. law contained many acculturation features as well as infringing into the internal political affairs of the Lakota. More importantly, much like the P.L. 280, Lakota political participation in the American political system did little to prevent P.L. 90-284 from being passed.

These two U.S. laws, P.L. 280 and 90-284, are only two of many samples which show how the Lakota, as U.S. citizens, fare as participants in the political affairs of the United States. Since Lakota political consent has been either disregarded or discarded, the American political system is literally unlimited in what it can, and has, forced upon the Lakota people.

Although the U.S. legislature is furthering the policy to extinguish the principle of Lakota political consent, the U.S. judiciary has, in all probability, done as much or more political damage to this principle than its sister branch, the U.S. legislature. The primarily reason for this political damage is that most issues before the U.S. judiciary often involve indigenous self-determination cases which have general applicability to all indigenous peoples. For example, the U.S. Supreme Court can hold, as it did in 1978, that a particular indigenous government had no criminal jurisdiction over non-indigenous people who are physically within their territory.

The impact of this Supreme Court also stripped the Lakota of any criminal jurisdiction over non-Lakota people who are physically within the exterior boundaries of Lakota homelands. After approximately thirteen years after this ruling, there continues to be no attempt within the American political system to address how this ruling requires the political consent issue of the Lakota. Part of the justification of this ruling is based upon the political incorporation of indigenous people as the court stated:[3]

> Indian reservations "are a part of the territory of the United States. [I]ndian tribes hold and occupy [the reservations] with the assent of the United States, and under their authority." [Upon] *incorporation* into the territory of the United States, the Indian tribes and the exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty (emphasis added).

This statement by the U.S. judicial system reveals that incorporation is enough to extinguish political consent of the Lakota people if the exercise of that consent is in conflict with the overriding interest of the U.S. political system. A following case study will illustrate how the American political system interprets political incorporation of the Lakota and Lakota political consent as being in conflict with the overriding interest of the United States.

In the early 1970s, the administrative component of the American political system engaged in a dialogue with indigenous peoples who presented, to the United States, twenty points on the state of indigenous affairs within the United States. The twenty points were chosen because they do serve to explain how the American political system justifies it policy or policies toward Lakota people.

Of all twenty points, seven of the points involve the re-establishment of Lakota political consent through a treaty relationship with the United States. Only the first point is analyzed because it best represents the argument of my thesis.

The first of the twenty points stated that a provision of the 1871 Indian Appropriation Act should be repealed because said provision within the 1871 act terminated the exercise of negotiating political documents (i.e., treaties) between the Lakota and the United States. By repealing the provision, the first point was calling for the restoration of the constitutional treaty-making authority of the United States with respect to the Lakota-American relationship.

Excerpts taken from the book *Behind the Trail of Broken Treaties* exposes the full intent of U.S. policy on the issue of Lakota consent. The excerpt below is the United States' response to the first point.

> Over one hundred years ago the Congress decided that it was no longer appropriate for the United States to make treaties with Indian tribes. By 1924, all Indians were citizens of the United States

and of the states in which they resided. The citizenship relationship with one's government and the treaty relationship are mutually exclusive; a government makes treaties with foreign nations, not with its own citizens.

The following comments are Vine Deloria Jr.'s reply to the United States. Note how Mr. Deloria's reply gets to the basis of the American policy to extinguish Lakota consent.

> The treaty points were most strenuously rejected by members of the administration task force on the vague grounds that the Indian Citizenship Act of 1924 had precluded the United States from dealing with Indian tribes by treaty because the individual members thereof happened to be United States citizens.
>
> This response generally characterizes the approach of the administration and seems to mean that the subject has been rejected without much consideration of the value of the proposal for contemporary times and in the context of the world situation today.

Thus the re-establishment of the treaty making process with the Lakota is paramount to having Lakota political consent restored as well.

Lakota Political Co-existence

Almost thirty years prior to Vine Deloria's commentary on the U.S. response against point one of the twenty points, global movements for self-determination were emerging after the second world war. This movement was primarily led by the people of the "third world" who successfully challenged European colonialism within their homelands. Although initially the self-determination movement was in terms of decolonialization, now the concept of self-determination has evolved into an international principle, if not a right, which now applies to peoples who have been "politically incorporated" into an external political system without their consent.

Self-determination, at its most fundamental level, is also about peoplehood. The international community, in the era of self-determination, has articulated some basic criteria regarding what constitutes a people. In 1951, for instance, the International Commission of Jurist outlined what it considered to be such criteria:

> A people having a common history, racial or ethic ties, cultural or linguistic ties, religious or ideological ties, common territory or geographical area, common economic base, and sufficient number of people.

Almost twenty years after the International Commission of Jurist criteria, the International Court of Justice, in 1970, stated similar criteria:

> A group of persons living in a given country or locality having a race, religion, language, and traditions of their own and united by the identity...of race, religion, and tradition in sentiment of solidarity, with a view of preserving their traditions, maintaining their form of worship, insuring the instruction of upbringing of their children in accordance with the spirit and tradition of their faith and rendering mutual assistance to each other.

Of course, incorporation into the body politic of an external political system is often at the expense of those characteristics which define the fundamental nature of peoplehood. The common fate of peoples who have been subject to involuntary incorporation is their assimilation or acculturation into the social, religious, economic, and political norms of the external political system.

The concept of peoplehood and the principle that self-determination embraces a peoples' right to "freely determine their political status and freely pursue their economic, social, and cultural development" exposes U.S. indigenous policy as inconsistent, if not hostile, to the principle of Lakota political consent,[4] especially when U.S. policy decisions adversely effect the Lakota people socially, economically, and politically. And because of U.S. political hostility toward the Lakota, there are numerous laws, court decisions, and executive decrees emanating from the American political system which all have a least common denominator: to extinguish Lakota political consent by terminating the Lakota peoples' sense of being a "distinct society." And one method, as the thesis of this paper argues, has been to grant U.S. citizenship to the Lakota people.

Today, nearly two decades after the twenty points were first articulated, global trends are demonstrating that the American policy to extinguish Lakota political consent is truly "inconsistent within the context of the

self-determination movements of today" (Deloria, 1974, xii). The Solidarity movement of the Polish people, the fall of the Berlin Wall, and the independence of Lithuania, Estonia, and Latvia are examples of peoples who were politically incorporated or annexed into an external political system without their consent. It is the political incorporation into an external political system that the Lakota people share with these people.

As the Lakota people continue to assert the principle of political consent in the contemporary Lakota-American relationship, the self-determination movement of the Lakota people is challenging the American policy of extinguishing political consent. The issue of political consent is being framed as a political incorporation problem for the Lakota people. In a recent editorial, "Should U.S. Citizenship be a Question Raised?" (*Sicangu Sun Times*, March 19, 1992, p. 6), the point of the editorial focused on Lakota sovereignty and how U.S. citizenship of Lakota people, especially the leadership, has distorted the one fundamental nature of Lakota political consent--peoplehood. The editorial put the question in the following manner:

> The root of the problem lies in what we think of ourselves as being--citizens of a sovereign tribal nation or citizens of the United States? Can we be both? Is that working and can it work? Or should we become one or the other?

The whole process of politically incorporating the Lakota into the American political system, the global events which have transpired before, and since, the twenty points were articulated twenty years ago, and the development of Lakota self-determination within the context of the pre-1900 Lakota-American relationship is raising the point of Lakota political co-existence within the United States today.

The basis for Lakota political co-existence is already established by an historical Lakota-American relationship. The American people and the Lakota people entered into a political relation with each another, and this political relationship was expressed and defined in bilateral agreements that required the mutual consent of both peoples.

However, the incorporation of the Lakota people into the American body politic has been eroding the principle of Lakota political consent to its current state of affairs today: it has no meaningful application. Unilateral U.S. political action is now the norm, and this norm adversely affects the political integrity, economic security, and the health and welfare of the Lakota people.

The global self-determination trends are recognizing that the right of political consent must be taken into account by the world community, including the United States. The International Treaty Council, a non-governmental organization of the United Nations, submitted a document to the United Nations Working Group on Indigenous Populations (7129183). Part Five on jurisdiction, which upholds the essence of Lakota political consent, states in part:

> No state shall assert or claim to exercise any right of jurisdiction over any indigenous nation or people or the territory of such indigenous population *unless pursuant to a valid treaty or other agreement freely made* with the lawful representatives of the indigenous nation or people concerned (emphasis added).

However for treaties or agreements to be freely made by the Lakota people--referring to the editorial in the *Sicangu Sun Times*--it asks its Lakota readership a pertinent question which would be a first step to Lakota political consent as well as political co-existence:

> If you were given a choice of whether to be a tribal citizen or a U.S. citizen, which would you choose and why?

It is a question the Lakota should have been asked over seventy years ago by the United States.

Notes

1 See Fort Laramie Treaty of 1868.

2 The Burke Act of 1906.

3 **Oliphant v. Suquamish Indian Tribe** 1978. 435 U.S. 191.

4 International Covenant On Economic, Social, and Cultural Rights: Part I, Article 1. General Assembly Resolution 2200 (XXI) of 16 December 1966.

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