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INDIAN EDUCATION: FEDERAL COMPULSORY SCHOOL ATTENDANCE LAW APPLICABLE TO AMERICAN INDIANS: THE TREATY-MAKING PERIOD: 1857-1871

Robert Laurence

Introduction

The attempt to provide the American Indian with a white European or Christian education is a process extending from the time of the earliest Spanish colonies¹ to the present day. The period during which the United States and the Indian tribes were treating (1778 to 1883²) is one part of that history, and the attempts by 11 of those treaties to compel school attendance by Indian children is a smaller part still. These attempts at compulsory school attendance constitute the topic of this paper.

Some justification is required, perhaps, for such a fine focus. The desirability of compelling school attendance is an issue that must be addressed by every government which institutes an educational program and, even given its desirability, the most effective method of implementing such a policy is not immediately obvious. Seen in this light, a study of attempts to compel school attendance is useful. Furthermore, compulsory school attendance in the social environment of a cultural interface presents difficulties that were not unique to the North American plains of the nineteenth century. And finally, a study of compulsory school attendance treaty provisions serves as an opportunity to analyze treaty-making in general and subsequent compliance (or non-compliance) with the treaty provisions.

Indian Education Prior to 1850

Indian education was not, of course, initiated by the United States government, but, insofar as this paper is concerned with federal Indian education policy, European efforts at education during the colonial period need be examined only briefly. The Spanish, French, and English all were involved in educational endeavors in North America, mostly in the context of missionary work. Adams notes that the former two countries were intent upon the modification of Indian culture, while the latter's primary aim was colonial settlement.³ This divergence of purposes, of course, affected the educational efforts of the European powers. At the close of the colonial period, educational programs for the

Indians were, if not commonplace, at least not unheard of. With the creation of the United States government, Adams notes a tendency to continue the English approach to Indian affairs, to wit:

military control whenever necessary, . . . a partially centralized administration, field supervision by government officials, the reserving of land to the tribes, the purchase of tribal land, the removal of Indian populations, the higher education of Indians in colleges and universities, and the assignment of education among the tribes to missionaries.⁴

Following some initial, early communication between representatives of the United States and various Indian tribes concerning education,⁵ the first treaty to include a provision for education was made on December 2, 1794, with the Oneida, Tuscarora, and Stockbridge Indians.⁶ Following this treaty, it was not uncommon to include educational provisions in treaties.⁷

The United States Congress supported these treaty obligations with varying degrees of enthusiasm. Cohen traces the history of appropriations for Indian education from 1802 onward,⁸ noting that between 1845 and 1855, while over \$2 million were expended for Indian education, less than 1/20 of this amount was contributed by the government.⁹ During the middle of the nineteenth century, a permanent annual appropriation of \$10,000 was the government's principal contribution to Indian education.¹⁰

With this background, the treaties containing compulsory school attendance provisions may be examined.

Compulsory School Attendance Treaty Provisions

The Treaties Involved. The first compulsory school attendance provision affecting American Indians is found in a treaty with the Pawnees, ratified by the Senate in 1858. Between that time and the close of the treaty-making period in 1871¹¹ the Senate ratified 10 other treaties containing compulsory attendance provisions. One other agreement, entered into in 1872 and containing a compulsory attendance clause, went unratified. Appendix I, *infra*, lists the 12 agreements.

The treaties divide themselves chronologically into two groups, separated by the Civil War.¹² Treaties with the Pawnees, Poncas, and Yankton Sioux were entered into in 1857-58, and the remainder of the treaties (with the exception of the unratified one) were entered into a decade later. The earlier treaties were made pursuant to the Act of March 3, 1853,¹³ which authorized the President

to enter into negotiation with the Indian tribes west of the States of Missouri and Iowa¹⁴ for the purpose of securing the assent of said tribes to the settlement of the citizens of the United States upon the lands claimed by said Indians, and for the purpose of extinguishing the title of said Indian tribes in whole or in part to said lands¹⁵

The later treaties were made following the passage of the Act of July 20, 1867: "An Act to establish Peace with certain Hostile Indian Tribes,"¹⁶ which established a "Peace Commission," in order

to call together the chiefs and headmen of such bands or tribes of Indians as are now waging war against the United States or committing depredations upon the people thereof, to ascertain the alleged reasons for their acts of hostility and . . . to make and conclude . . . treaty stipulations . . . as may remove all just causes of complaint on their part, and at the same time establish security for person and property along the lines of railroad now being constructed to the Pacific . . . and such as will most likely insure civilization for the Indians and peace and safety for the whites.¹⁷

The compulsory school attendance provisions of the pre-Civil War treaties contain three parts. First, the government agreed to establish on the reservation a manual-labor or normal-labor school for the tribe.¹⁸ Next, the members of the tribe agreed to send all their children between the ages of seven and 18 to that school for at least nine months out of every year. Finally, there was an enforcement clause, which varied somewhat between the three treaties. In each case, however, parents who were unwilling or unable to compel their children's attendance were liable to have their annuity from the government decreased. Furthermore, with respect to the Poncas, the President was granted the power to devise other measures to compel attendance, and might discontinue the allowance for support and maintenance of the school, should the Poncas fail to fulfill their commitment to compel attendance.

The compulsory attendance provisions of the post-Civil War treaties are all virtually identical and are set out here in full:

In order to insure the civilization of the tribes, entering into this treaty, the necessity of education is admitted, especially by such of them as are or may be settled on said agricultural reservations; and they therefore pledge themselves to compel their children, male and female, between the ages of 6 and 16

years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; the United States agrees that for every 30 children between said ages, who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education, shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than 20 years.¹⁹

The post-Civil War treaties contain no enforcement provision beyond that quoted above.

It is interesting to note that the compulsory attendance provisions in the treaties discussed above demanded much more of the Indian children and their parents than did similar legislation of the states and territories which began to appear somewhat later than the time of the treaties.²⁰ By 1869, when the last of the 11 treaties was ratified, only Massachusetts, Vermont, and the District of Columbia had compulsory attendance laws and of the 24 states which had such statutes in 1887, only New Hampshire's could match the later treaties in ages of application.²¹ It was not until 1918 that all states had adopted compulsory attendance laws.²² New Mexico's first such law, passed in 1891,²³ required all children (except those "under age," over sixteen, or physically disabled) to attend school for at least three months a year.²⁴ For failure to comply, a parent was liable for a fine of not less than \$1 nor more than \$25 or imprisonment for no more than 10 days.

Thus the compulsory school attendance provisions that appear in the Indian treaties discussed are seen, in perspective, to be ahead of their time in terms of similar legislation by the states and territories and much more demanding than such similar legislation. The following section will explore the rationale for the provisions.

The Rationale for Compulsory School Provisions. It is interesting to speculate on the rationale for compulsory attendance provisions in the 11 treaties and on the differences between the various provisions themselves. However, speculation on such an inquiry is likely to remain, as very little history is found to suggest why the provisions were added to 11 of 71 treaties made between 1857 and 1868.

One of the earliest references to compulsory (or at least *quasi*-compulsory) school attendance for Indians is found in a report from William Clark, Superintendent of Indian Affairs, to James Barbour, Secretary of War,²⁵ dated March 1, 1826, and forwarded by the Secretary to the Committee on Indian Affairs of the House of Representatives.²⁶ Clark recommended the “[e]stablish[ment of] common schools in the villages, to teach all the children to read, write and cypher, &c. A college education for a few, while the body of the nation is left in ignorance, has been proved, by the experience of more than two hundred years, to be a most unprofitable experiment”²⁷

However, little was done concerning Clark’s farsighted recommendation and no further recommendation of compulsory school attendance for Indian children is found until the time of the treaties, and then only in the treaties themselves.

Whatever Clark’s rationale for his recommendation might have been (and most of the discussion following the quoted passage deals with the efficient use of an educational trust fund), it is reasonable to suspect that the rationale of the treaty drafters was involved with the “civilizing” aspects of education, a rationale not limited to treaty-making with the Indians. Writing in 1866 (when few states or territories had compulsory attendance laws to match those in the treaties) and without reference to Indian education, Frederick Adolphus Packard noted: “Nothing human can secure the good order and prosperity of our country for any length of time, but the diffusion of education, intellectual and moral, among all classes and communities. We have no foe to the permanency of our free institutions more terrible than *ignorance*.”²⁸ Packard further urged “*control and superintendence* by competent men as shall not only sure thorough, systematic and uniform instruction in the required branches, but shall also enforce regularity of attendance during the required school term.”²⁹

The same two-step process—(1) that the defeat of “ignorance” by education in the practical arts and sciences, literature, and Christianity is a cure for superstition, crime, and misery,³⁰ and (2) that in order to be effective, this education must be compulsory (admittedly, among other traits) —this same process was probably the rationale for the compulsory attendance provisions found in the 11 treaties.

Evidence for this proposition is found in the annual Reports of the Commissioner of Indian Affairs for the years before the treaties were made. First is seen the fact that the Indians were in need of “civilizing.” Commissioner Lea wrote in 1852, “the impor-

tant lesson [is] that they must ere long change their mode of life, or cease to live at all. It is by industry or extinction that the problem of their destiny must be solved."³¹

Some tribes were seen, of course, to require more civilizing than others, and the picture obtained by reading the Reports of the Commissioners is clearly one of the importance of education in the desired process. For example, it was reported from Fort Leavenworth that the Delawares were behaving peacefully and that "during the past year the Delawares have again sent their children to the school, and I hope will continue to do so."³² On the other hand, the Pawnees and Poncas were reported as "guilty of depredations" and "lawless" and a method of "restraint" was sought.³³

It is not unreasonable to suspect, although the evidence is at best circumstantial, that the compulsory school attendance provisions appear in the treaties with those tribes seen the most in need of the white man's civilization. The post-Civil War treaties were made with tribes recently at war with the United States, and the quotation above is typical of comments regarding the Pawnees and Poncas during the early 1850's. Admittedly the Yankton and the Utes do not fit into this generalization, but they may be victims of guilt by association, having made treaties at the same time as the others.

Granted that education was necessary for the Indians, and especially for the "warlike" or "lawless" Indians, the compulsory nature of the treaty provisions must still be seen as an extraordinary requirement. Perhaps it was seen as a logical, reasonable, and necessary step to insure the effectiveness of education, although this seems unlikely, given the state of the law with respect to compulsory school attendance in the United States at the time of the treaties, and given further the impossibility of and apparent lack of intention to enforce the provisions.³⁴ Perhaps, too, the treaty draftsmen were influenced by progressive educational theorists and the Senate accepted this influence as proper (the latter is not discoverable because all of the treaties were ratified in Executive Session and, therefore, the debates, if any, in the Senate are unreported). More likely, perhaps, the compelling of attendance was seen as one step in the education process itself: "the duty of cheerful submission to lawful authority," in Packard's words.³⁵ Or, finally, the provisions, coupled at least with the earlier enforcement provisions, might have been seen as a way of reducing the commitment to educating the Indians,³⁶ in response to some impatient attitudes of the agents in the field. Typical of this attitude is: "I must say that I am of the opinion that the present ef-

fort to educate the Sioux is little better than a waste of time and money."³⁷

Whatever the rationale, the compulsory school attendance provisions were inserted in the treaties. The next section will discuss the enforcement of them.

Contemporary Education Facilities and Enforcement of Compulsory School Attendance Provisions. Whatever the rationale for the provisions, when the much urged³⁸ and welcomed³⁹ treaties were made and ratified with the Pawnees, Poncas, and Yankton Sioux, included was an obligation on the part of the government to provide a school and an obligation on the part of the Indians to compel attendance at that school.⁴⁰

As early as 1855 the construction of a school for the Pawnees had been urged by their agent⁴¹ (who also noted that if a school were built, the Indians would have no means of sending their children to it⁴²), but by the time of the treaty in 1857, no school had yet been built.⁴³ In 1860, a new agent to the Pawnees reported the existence of a "school farm," but that, "the unsettled condition of affairs on the reserve, and the want of a suitable building, has prevented me from putting into operation a school this season."⁴⁴ A school for the Pawnees was finally established and opened on July 1, 1862, under the direction of yet another agent and one Elmira G. Platt, teacher for the Pawnees,⁴⁵ and 16 children, 8 boys and 8 girls, were enrolled.⁴⁶ By 1863 the enrollment had doubled and Agent Lushbaugh suggested that if a new school were built, more scholars could be accommodated.⁴⁷ Teacher Platt reported glowingly that the "civilizing" process was beginning: "The boys . . . are rapidly gaining sufficient moral courage . . . to permit us to clip off their scalp lock, which is their badge of bravery, without keeping on their hats to hide its loss"⁴⁸

This school for the Pawnees continued to prosper,⁴⁹ in spite of hard times for the tribe during the late 1860's.⁵⁰ By 1868 there were two schools and 65 scholars on the Pawnee reservation,⁵¹ and by 1871 there were three schools with space for over 130 students.⁵²

The Poncas and Yankton Sioux were not provided with education facilities to the extent that the Pawnees were and, further, there were hints of corruption and mismanagement of funds. In 1862, J.B. Hoffman, agent to the Poncas, described in detail a manual-labor school being constructed.⁵³ It was reported that the school was to be in operation by the spring of 1864⁵⁴ and in 1863 the school was reported as existing although no scholars were in attendance.⁵⁵ Agent Hoffman resigned his post in 1864 and, in a moving farewell,⁵⁶ announced the progress toward civilization as

“very slow.”⁵⁷ Also in 1864 all the money in the manual-labor school fund was used to purchase food.⁵⁸

In 1866, a special agent to the Poncas and Yankton Sioux reported:

The Poncas have no school, and never had. The school-house erected at the agency [12 miles from where most of the Poncas live] by late Agent Hoffman was never finished, and should not be . . . It is twice as large as the wants of the tribe require; and the framework is as much too light as the building is too large . . . No funds have been expended for school purposes at this agency since Agent Potter took charge.⁵⁹

A school for the Poncas was finally begun in 1868, but was discontinued in 1869 due to lack of funds.⁶⁰ No school of any permanency was maintained for the Poncas until 1871.⁶¹

The Yankton Sioux had similar experiences, the special agent referred to above reporting: “I know by personal observation and by testimony that there is not and never was a school at the agency.”⁶² As late as 1871, thirteen years after the treaty, the only schools on the reservation seem to have been those supported by various missionary organizations.⁶³

In spite of the government’s unwillingness or inability to meet its educational obligation under the pre-Civil War treaties, thus making the issue of the Indians’ willingness to compel attendance arguably moot,⁶⁴ some discussion of that issue is in order. Unfortunately for the sake of objectivity, there is no expression available by the Indian parties to the treaties of their disposition toward compulsory attendance, and, hence, what information as there is must be gleaned from the reports of the whites. These reports present no consistent picture and the variation among the opinions probably has more to do with the prejudices of the reporter and the perspectives of the reporter’s office than any real attitudes among the Indians.

With those caveats, the Pawnees, Poncas, and Yankton Sioux are pictured by the reports as generally adverse to the idea of an English-Christian education. In 1859, for example, A.M. Robinson, Superintendent for the Central Superintendency of the Office of Indian Affairs noted: “I am not aware that this system [the manual-labor school system] has been received very favorably by civilized communities; and if this be true, it would be hopeless with the savage, as it combines the very essence of civilization, field labor, with application to books, either of which is adverse to

his nature."⁶⁵ The agent to the Yankton Sioux became more specific as to the cause for this aversion to "the very essence of civilization" when he noted in 1859 that "this [the instruction of Indian children in reading, etc.] will not be practicable until these wild wanderers become somewhat settled."⁶⁶ The agent's report was expanded upon by his superior, A.B. Greenwood, Commissioner of Indian Affairs, in discussing his office's policy toward the Ponca, Pawnee, Omaha, Otoe, and Missouri Indians, urging,

[T]heir concentration on small reservations . . . where they could be protected and be compelled to remain and adopt habits of industry with such control by the department over their annuities as would enable it, in the exercise of a wise discretion to apply portions or the whole thereof, to such objects and purposes as would tend to promote their welfare and improvement.⁶⁷

Elmira Platt, teacher for the Pawnees, added her voice to those who saw the seminomadic ways of the Indians as the greatest obstacle to the operation of the educational system, describing how her school began on July 1, 1862: "As they were starting for their summer hunt, notwithstanding the inauspicious circumstances under which we had entered our duties, owing to the efforts which had been made to prevent our gathering a school, they, at your [Agent Lushbaugh's] request, left with us sixteen children."⁶⁸

The problem having been identified, several solutions were available: the area of the reservations was drastically reduced⁶⁹ and the range of the Indians restricted.⁷⁰ The manual labor system of education was combined with the boarding school concept.⁷¹ Governor Newton Edmunds of the Dakota Territory in 1866 urged a straightforward plan for making the education system effective and insuring regular attendance:

I am clearly of the opinion that a plan that will separate pupil from parent I believe the one most likely to be attended with satisfactory results Should this plan be adopted, in order to secure the number of pupils desired at the opening of such schools I would call the whole tribe together, and after fully explaining to them all the objects and benefits of an education, I would ask them to designate from their number the persons desired to have [*sic*] educated. If, after this, enough had not been obtained, the chiefs and soldiers of each band should be called upon to make up the number.⁷²

As similar as this method of compulsory school attendance is to that used throughout the country today, with whites as well as Indians, it is much different than that used in 1866 in the Dakota Territory.⁷³

Regarding the pre-Civil War treaties, then, it is seen that little was done by the government toward the satisfaction of its obligation under the treaties. Nor was there an overwhelming desire (as perceived by the whites) on the part of the Indians to give up the old ways and to attend or to compel attendance at the white man's schools, such as they were. On balance, it would seem that the Indians were more willing than the government to fulfill their treaty obligations⁷⁴ and, as the government and the missionaries established more schools, they were well, if irregularly, attended.

The discussion above has dealt entirely with the pre-Civil War treaties and with the experiences with the Pawnee, Ponca, and Yankton Sioux tribes. Little would be gained by a recital as complete as that above for the later treaties. Suffice it to say that similar reports exist with respect to these later treaties.⁷⁵

In addition to the reports of the Commissioners of Indian Affairs, enlightening information is found in other sources. In 1879, the Committee on Indian Affairs reported to the House of Representatives that, ten years following the post-Civil War treaties, fewer than 1,000 youths had received schooling under the treaties, out of a school-age population (between six and 16, by the terms of the treaties) estimated to be 12,000. The Committee continued:

In what degree their failure to carry into effect these treaty provisions may be attributed to the failure on the part of the United States to provide adequate school facilities, or on the part of the several tribes to a disinclination or refusal to accept such facilities and compel the attendance of their children, your committee cannot definitely state, neither is it deemed material. It is clear that the mutual interests and well-being of Indians and government, as well as the cause of civilization and humanity, alike demand that these provisions be fully carried out and enforced.⁷⁶

Thirty-four years later, the adequacy of the education being furnished to the Indians under the 1868 treaties⁷⁷ was still being questioned. Commissioner Sells in 1913 reported that of 7,000 Navajo children of school age, only about 1,750 were receiving any education, whether at on-reservation, non-reservation, or mission schools.⁷⁸ And finally, in 1935, in the case of *Shoshone Tribe v.*

United States,⁷⁹ the Reporter notes that “practically the same condition as to their education” existed in 1904 as had existed in 1868 when the treaty with the Shoshone Tribe⁸⁰ was made.

Appendix II, *infra*, summarizes the educational facilities available to the parties to the post-Civil War treaties in 1871. Appendix III contains similar information for all tribes discussed ten years later in 1881.

Court Constructions of the Compulsory School Attendance Provisions

The 11 treaties that are the subject of this article have been involved in substantial litigation: over 100 cases have construed various sections of the treaties. However, court constructions of the educational provisions are rare.

In 1908, the United States Supreme Court heard the case of *Quick Bear v. Leup*,⁸¹ in which a first amendment challenge was made to a congressional appropriation to a Roman Catholic mission school on the Sioux reservation. The compulsory attendance provision of the treaty with the Sioux⁸² was not directly at issue, but the lengthy quotation from the government’s answer⁸³ provides useful information regarding the government’s view of Indian education following the Civil War.

Passing mention of the provision in the treaty with the Shoshone and Bannock tribes⁸⁴ was made in *Shoshone Tribe v. United States*.⁸⁵ In that case, the plaintiff tribe was seeking damages arising from the government’s decision to locate the Arapahoe Tribe on the reservation reserved by treaty to the Shoshone and Bannock tribes.⁸⁶ Part of that claim was for \$172,839.55, a portion of which was for one half of the expenditure by the government for education and treaty employees under Articles 7, 9, and 10 of the 1868 treaty from the time of the arrival of the Arapahoes on the reservation until June 30, 1927. In rejecting the plaintiff’s claim, the Court of Claims (Littleton, J.), noted that the plaintiff made only a “reference” to the government’s failure to provide educational facilities under Article 7 (which included the compulsory attendance provision), and,

[while]there is some evidence in the record that a school and a teacher were not provided for every 30 children in the Shoshone Tribe between the ages mentioned for the period specified . . . , the plaintiff makes no definite claim in this regard and the evidence does not establish that the schools and teachers furnished by the Government were not ade-

quate to take care of the number of children between the ages specified who could be induced to attend school.⁸⁷

One year after *Shoshone Tribe*, the issue of compulsory school attendance was directly at issue in *Sioux Tribe v. United States*,⁸⁸ in which the tribe sought damages in excess of \$18 million for the government's failure to provide educational facilities under Article 7 of the treaty with the Sioux.⁸⁹

The Court of Claims (Booth, C.J.), first addressed the issue of whether the Indians' obligation to compel attendance was a condition precedent to the government's obligation to provide schools and teachers. The court found that it was: "The Indians were *first* obligated to do certain things . . .,"⁹⁰ and one of the things the Indians were required to do was to compel their children to attend school. The court did not justify its finding of this order for the obligations, and, rather than discussing the difficulty of compelling children to attend schools the government had not yet provided, the court instead discussed the meaning of the word "compel" ("connotes positive action"⁹¹) as opposed to the word "induce" ("signifies persuasion"⁹²). The court ended its discussion of this point by stating, "[o]bviously the government was aware of the relationship existing between Indian parents and their children with respect to the latter's unwillingness to attend schools."⁹³

The plaintiffs countered such an argument by pointing to the language in Article 7 making it the duty of the agent to enforce compliance with the provision, thus attempting to shift the burden of compulsion to the government. The court made short shrift of the argument, pointing again to the parents' obligation to compel, noting the agent's lack of "authority to enforce obedience,"⁹⁴ and commenting that for the agent to compel attendance, "as some of them did, was but to invite demonstration of serious hostility, which actually occurred."⁹⁵ And, finally, the court construed the enforcement obligation to go only to the maintenance of the status quo, once the conditions envisioned by the treaty obtained.

The court next discussed the plaintiffs' contention that the parents, in fact, were willing to compel attendance. The court, however, avoided a probing discussion of this interesting claim by finding this issue "intertwined in so many aspects with the evidence introduced to establish the number of Indian children . . . that a discussion of one involves the other . . ."⁹⁶ The great bulk of the opinion, then, discusses the impossibility of accurately estimating the population of the tribe in the late nineteenth century and the resulting speculative nature of the damages. The court does not return to the plaintiffs' contention

that the parents were willing to compel attendance until the last sentence of the opinion: "As a matter of fact, we believe the Government furnished in the early history of the treaty school facilities in excess of the demand for them from the Indians themselves."⁹⁷ The court makes no reference to the record in support of this belief.

The plaintiffs' action was dismissed and the petition for certiorari was denied by the United States Supreme Court. No further cases have been reported in which similar claims were made.

Wilkinson and Volkman have found three "canons of construction" used by federal courts to interpret Indian treaties: "(1) ambiguous expressions must be resolved in favor of the Indian parties concerned; (2) Indian treaties must be interpreted as the Indians themselves would have understood them; and (3) Indian treaties must be liberally construed in favor of the Indians."⁹⁸ The court's construction of the treaty in *Sioux Tribe* does not fare well according to these standards. The court's discussion of the willingness of the Indians to compel attendance arguably goes to Canon 2. Also, one might generously conclude that the court's precise definition of the word "compel" removes any ambiguity which might make Canon 1 applicable. Canon 3, however, was unobserved, even assuming the most generous reading of the opinion. There is little indication that Article 7 of the treaty with the Sioux was construed in favor of the Indian parties to the treaty, let alone "liberally" construed.

In defense of the court's opinion, one factor may be important. There is a doctrine of Indian treaty-making which provides that a treaty represents a grant *from* the tribe, not *to* the tribe.⁹⁹ The compulsory school attendance provision fits into this doctrine, as an express grant from the tribe and, hence, perhaps does not merit the liberal construction which less explicit treaty provisions are given.

Cohen relegates *Sioux Tribe* to a footnote and probably rightly so.¹⁰⁰ The case is rather unenlightening on the obligations of the government under an Indian treaty, shedding more light, rather, on the difficulty of estimating tribal populations. It is not known, of course, what record plaintiffs were able to make and it is interesting to speculate on the results had the Pawnees, Poncas, or Yankton Sioux been plaintiffs. For in those treaties, the government's obligation preceded the Indians', the agents took regular, if not very accurate censuses, and the obligation of the government to enforce compliance was more precisely spelled out. Apparently *Sioux Tribe* was the only case to go to trial, and its reception there by the Court of Claims likely discouraged any further claims.

Conclusion

In 1891, legislation was passed extending compulsory school attendance to all Indians,¹⁰¹ and in 1929 much of the authority to enforce such attendance was given to the states.¹⁰² The 11 treaties then became a historical footnote, instructive for what they show about early white-Indian interaction, treaty-making, and promise keeping.

Appendix I

Tribe(s)	Date of (a) Agreement (b) Ratification (c) Proclamation	Citation (a) Official (b) Kappler ¹⁰³	CSA Provision Location
Pawnee	(a) 9/24/57 (b) 3/31/58 (c) 5/26/58	(a) 11 Stat. 729 (b) 764	Art. 3
Ponca	(a) 3/12/58 (b) 3/8/59 (c) 4/11/59	(a) 12 Stat. 997 (b) 772	Art. 2 Sec. 4
Yankton ¹⁰⁴ Sioux	(a) 4/19/58 (b) 2/16/59 (c) 2/26/59	(a) 11 Stat. 743 (b) 776	Art. 4 Sec. 4
Kiowa & Comanche ¹⁰⁵	(a) 10/21/67 (b) 7/5/68 (c) 10/25/68	(a) 15 Stat. 581 (b) 977	Art. 7
Cheyenne & Arapahoe	(a) 10/28/68 (b) 7/25/68 (c) 11/6/68	(a) 15 Stat. 593 (b) 984	Art. 7
Ute	(a) 3/2/68 (b) 7/25/68 (c) 11/6/68	(a) 15 Stat. 619 (b) 990	Art. 8.
Various Bands ¹⁰⁶ of Sioux & Arapahoe	(a) 4/29/68 (b) 2/16/69 (c) 2/24/69	(a) 15 Stat. 635 (b) 998	Art. 7
Crow	(a) 5/7/68 (b) 7/25/68 (c) 8/12/68	(a) 15 Stat. 649 (b) 1008	Art. 7

No. Cheyenne & No. Arapahoe	(a) 5/10/68 (b) 7/25/68 (c) 8/25/68	(a) 15 Stat. 655 (b) 1012	Art. 4
Navajo	(a) 6/1/68 (b) 7/25/68 (c) 8/12/68	(a) 15 Stat. 667 (b) 1015	Art. 6
Eastern Band of Shoshone & Bannock	(a) 7/3/68 (b) 2/16/69 ¹⁰⁷ (c) 2/24/69	(a) 15 Stat. 673 (b) 1020	Art. 7
Sisseton & Wahpeton Bands of Sioux	(a) 9/20/72 (b) Unratified (c) Unproclaimed	(a) Unratified (b) 1057	Art. 7

Appendix II¹⁰⁸

School Data for 1871

Tribe(s)	Population	Schools	Scholars	Teachers
Kiowa)				
Comanche)	4,994	1	24	1
Cheyenne)				
Arapahoe)	3,390	0	0	0
Ute ¹⁰⁹				
Sioux ¹¹⁰	19,712	1	115	4
Crow	4,100	1	9	1
Northern Cheyenne)				
Northern Arapahoe)	2,100	0	0	0
Navajo	8,234	1	40	1
Shoshone)				
Bannock)	2,000	0	0	0

Sisseton &
Wahpeton
Bands of Sioux

2,494

4

102

4

*Appendix III*¹¹¹*

School Data for 1881

Tribe(s)	Population	Population Wearing Citizen's Dress	School Age Children	No. of School Seats	No. of Schools	No. of Scholars	Avg. Daily Attendance	No. of Months School was Maintained	Amount Expended by ¹¹²
Pawnee	1,241	287	384	100	1	105	65	12	\$5,0
Ponca	515	53	122	100	1	70	20	7	\$5
Yankton Sioux	1,998	1,138	423	210	6	242	120	10	\$1,2
Kiowa)									
Comanche)	2,541 ¹¹³	730	800	320	2	222	153	10	\$17,1
Arapahoe									
Ute									
Bands of Sioux									
Crow	3,500	2,057	715	40	1	35	27	9	\$1,0
Northern Cheyenne									
Northern Arapahoe									
Navajo	16,000	3,313	4,000	40	1	21	16	4	\$1,2
Eastern Shoshone									
Eastern Bannock									
Sisseton & Wahpeton Sioux	1,377	1,377	242	95	3	81	48	12	\$3,4

*Where no information is given, it is because tribes have been divided and intermingled with other tribes so as to make statistical information not useful.

NOTES

1. As early as 1544, Spanish missionaries were at work north of the Rio Grande, and it is likely that this work included some educational efforts. A. FLETCHER, *INDIAN EDUCATION AND CIVILIZATION*, S. Exec. Doc. No. 95, 48th Cong., 2d Sess. 19 (1888).
2. The first Indian treaty entered into by the United States was with the Delawares, 7 Stat. 3 (1778) (Kappler, at 3) [for ease of reference to Indian treaties, citations are given to *INDIAN TREATIES 1778-1883* (C. Kappler, ed. 1904, 1972 reprint by Interland Publishing, Inc.), made Sept. 17, 1778. The last treaty to be ratified by the Senate was with the Nez Perce, 15 Stat. 693 (1868) (Kappler, at 1024), made Aug. 13, 1868. Treaty-making was ended by the Act of Mar. 3, 1871, 25 U.S.C. § 71 (1970), although some "agreements" were made with certain tribes and some of these agreements were even ratified until as late as 1883. *See, e.g.*, Agreement with the Columbia and Colville, ch. 180, 23 Stat. 79 (1884) (Kappler, at 1073), made July 7, 1883.
3. E. ADAMS, *AMERICAN INDIAN EDUCATION: GOVERNMENT SCHOOLS AND ECONOMIC PROGRESS*, 6-26, (1946).
4. *Id.* at 26.
5. *See, e.g.*, F. COHEN, *FEDERAL INDIAN LAW*, 238, n.17 (1942).
6. 7 Stat. 47 (1794) (Kappler, at 37). The provision appears in Article III and might easily be overlooked: "The United States will...provide...for the expense of employing...persons to manage the mills...to instruct some young men of the three nations in the arts of the miller and sawyer...."
7. *See* COHEN, *supra* note 5, collects citations to all the educational provisions at 239, notes 23-27.
8. *Id.* at 240.
9. The figures: Total expenditures= \$2,150,000; U.S. contributions= \$102,107.14; from Indian treaty funds= \$824,160.61; from Indian nations= \$400,000; from private charities= \$830,000; *id.* at 561, quoting from REPORT OF THE SECRETARY OF THE INTERIOR (1855).
10. Act of Mar. 3, 1819, ch. 85, § 2, 3 Stat. 516, 517, *repealed by* Act of Feb. 14, 1873, ch. 138, § 1, 17 Stat. 437, 461.
11. Treaty-making was abandoned by the Act of Mar. 3, 1871, 25 U.S.C. § 71 (1970).
12. Treaty-making did not stop during the Civil War, averaging about four treaties per year during the war years.
13. 10 Stat. 226, ch. 104 (1853). *See* REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1858), at 14 [hereinafter these Reports will be cited Comm. Rep. (date)].
14. The Pawnees, Poncas, and Yankton Sioux lived in what are now the states of Nebraska, North and South Dakota.
15. 10 Stat. 226, 238, ch. 104, § 2 (1853).
16. 15 Stat. 17, ch. 32 (1867).
17. *Id.*
18. It is not clear from the treaties themselves whether the schools were to be boarding or day schools.
19. Other than the numbering of the article involved, the only variation from the provision in the text is in the treaty with the Utes, in which "are or may be settled on said agricultural reservation" is replaced by "are or may be engaged in either pastoral, agricultural or other peaceful pursuits of civilized life on said reservation." The reason for this variation is not clear. The treaty with the Utes is otherwise distinguishable from the other post-Civil War treaties considered in that it does not specifically refer to a cessation of hostilities or a desire to maintain peace.
20. A concise compilation of the dates of compulsory school attendance enactments and ages of application is given in STEINHILBER & SOKOLOWSKI, *STATE LAW ON COMPULSORY ATTENDANCE* 3 (1966). A complete discussion of the history of compulsory school attendance is beyond the scope of this article, but *see generally, id.* 2-3, and R. POUNDS, *THE DEVELOPMENT OF EDUCATION IN WESTERN CULTURE*, 200, 246, 270 (1968). F. EMMONS, *CITY SCHOOL ATTENDANCE SERVICE* (1920) discusses the historical development and rationale of compulsory school attendance laws at 1-8, but there is reason to question the accuracy of some of the dates given there for enactment of compulsory school attendance laws.

21. STEINHILBER & SOKOLOWSKI, *supra*, note 20, at 3.
22. *Id.*
23. 1891 N.M. Laws, ch. 25, § 42, N.M.C.L. (1897)§ 1555.
24. This statute was amended by 1903 N.M. Laws, ch. 39, § 1 to limit the children affected to those between 7 and 14. 1909 N.M. Laws, ch. 121, § 1 removed the three-month requirement and required instead that children attend school “during the entire time such school is in session in each scholastic year in their respective communities.”
25. The Office of Indian Affairs, the predecessor of the Bureau of Indian Affairs, was originally established within the War Department on July 9, 1832, 4 Stat. 564, ch. 174. The office was transferred to the Department of the Interior on that department’s creation in 1849, 9 Stat. 395, ch. 108.
26. H. DOC. NO. 124, 19th Cong., 1st Sess. (1826), reprinted in 2 THE NEW AMERICAN STATE PAPERS: INDIAN AFFAIRS 682 (T. Cochran, general ed. 1972).
27. *Id.* at 5; 2 THE NEW AMERICAN STATE PAPERS: INDIAN AFFAIRS 685.
28. F. PACKARD, THE DAILY PUBLIC SCHOOL IN THE UNITED STATES 7 (1866) (emphasis in the original).
29. *Id.* at 24 (emphasis in original).
30. *Id.* at 7.
31. Comm. Rep. (1852), at 3. Later in the same report Commissioner Lea noted the “radical defect” in the Indian character as an “impatience of regular labor.” *Id.* at 4.
32. Comm. Rep. (1852), Doc. No. 26, at 81, from Thomas Johnson, Indian Agent, [hereinafter USIA] at Ft. Leavenworth.
33. Comm. Rep. (Manypenny) (1855), at 5.
34. See text, beginning at note 38.
35. PACKARD, *supra* note 28, at 19. An indication of the perceived desirability of this objective of education as applied to Indian education is seen in Comm. Rep. (1852), *supra* note 31: “One of the surest guarantees of the good conduct of our Indians is an adequate knowledge of the power of the government. Where such knowledge prevails, it is comparatively easy to control them; but where displays of our power have been feeble or fitful, the natural tendencies of the Indian to rapine and slaughter operate with but little restraint.” Comm. Rep. (1852), at 4. This imposition of compulsory school attendance laws on the Indians might be seen as a mere practical demonstration of “our superior strength.” Lea’s words, *id.* However, as will be seen, the compulsory school attendance provisions were enforced in a “feeble or fitful” way, of which Commissioner Lea presumably would not have approved.
36. Support for this rationale is found in *Sioux Tribe v. United States*, 84 Ct. Cl. 16 (1936), *cert. denied*, 302 U.S. 40 (1937), discussed at length, *infra*, at notes 88-102.
37. Comm. Rep. (1850), Doc. No. 18, from S.M. Cook, USIA at Kaposia, 82.
38. See, e.g., Comm. Rep. (1856) (Manypenny), at 8, Doc. No. 28 from John B. Robertson, USIA to the Omahas, and Doc. No. 29 from Samuel Allis, interpreter to the Pawnees.
39. See, e.g., Comm. Rep. (1851) (Denver), at 154, Doc. No. 64 from William W. Dennison, USIA to the Otoes, Missourias, and Pawnees; Comm. Rep. (Mix), Doc. No. 29 from Dennison, 104; Comm. Rep. (1859) (Greenwood), at 14.
40. It should be noted that, in the pre-Civil War treaties, the obligation to provide a school is mentioned before the actual compulsory school attendance provision, while in the post-Civil War treaties, the order is reversed. Court construction of this ordering is discussed *infra* in the text at note 90.
41. Comm. Rep. (1855) (Manypenny), Doc. No. 29 from George Hepner, USIA to the Pawnees.
42. *Id.* Agent Hepner’s remark suggests the connection between education and land policy. The latter was to be a major issue in the United States policy toward the Indians in the second half of the nineteenth century, and the Act of Mar. 3, 1853, which resulted in 12 pre-Civil War treaties, including the three considered here, extinguished Indian title to over 25 million acres of land. Comm. Rep. (1859) (Greenwood).
43. Comm. Rep. (1858) (Mix), Doc. No. 29 from Dennison.
44. Comm. Rep. (1860) (Greenwood) Doc. No. 33 from J.L. Gillis, USIA to the Pawnees. An interesting sidelight to Agent Gillis’ report is that the greatest obstacle he saw

to the building of a suitable schoolhouse is the scarcity of lime and clay for mortar and bricks. Agent Gillis apparently felt that, unlike the other buildings erected on the reservation, schoolhouses must be brick (presumably red, and with a bell and flagpole).

45. Comm. Rep. (1862) (Dole), Doc. No. 19 from Benjamin F. Lushbaugh, USIA to the Pawnees, and from the teacher for the Pawnees. The teacher's name is reported variously as Elmira G. Platt, Elvira G. Platts, and several permutations. The first will be used here.

46. *Id.* The most contemporaneous estimate of the population of the Pawnee Tribe is a census report in 1864 showing 3,350 tribe members. Comm. Rep. (1864) (Dole), Doc. No. 265. "Statement indicating the schools, population, wealth, and farming of the different Indian tribes." Such census reports are occasionally confessed to be inaccurate. *See, e.g.,* Comm. Rep. (1860) (Greenwood), Doc. No. 31 from Redfield, USIA to the Yankton Sioux.

47. Comm. Rep. (1863) (Dole), Doc. No. 131, from Lushbaugh.

48. *Id.* Doc. No. 132 from Platt.

49. A report in 1866 that no school for the Pawnees was in operation seems erroneous. *See* Comm. Rep. (1866) (Cooley), Doc. No. 170, "Statement showing population, wealth, and education of the different tribes of Indians within the United States for 1866." This mistaken report probably accounts for the Commissioner's recommendation that "a more effective and permanent interest should be established in this school, [and that therefore] arrangements are nearly perfected for placing it under the charge of the Methodist Mission board." *Id.* at 44. This seems not to have been done, although it is conceivable that the Commissioner had his tribes mixed up, or that another school for the Pawnees was being discussed. This problem of incomplete, inconsistent, and inaccurate reports is found throughout the materials available.

50. In 1864 the Pawnees had a crop failure due to drought and grasshoppers. Comm. Rep. (1864) (Dole), Doc. No. 129 from Burleigh.

51. Comm. Rep. (1868) (Taylor), Doc. No. 58 from Platt.

52. Comm. Rep. (1871) (Clum, Acting Comm.), Doc. No. 59 from J.M. Troth, USIA to the Pawnees.

53. Comm. Rep. (1862) (Dole), Doc. No. 37, from J.B. Hoffman, USIA to the Poncas. In the same report, Agent Hoffman discusses his theory of aboriginal education: "the only system of education to be successfully adopted amongst them is that combined of labor and book instruction, and *feeding*. The Indian must first be taught the benefits and made to experience the comforts to be derived from labor; and to induce him to labor it must be attractive to him . . . But there is one thing which infinitely transcends all others in its influence over the Indian and that is his controlling organ, his stomach. An appeal to this, if judiciously made, is, on the old and young alike, irresistible. It is, therefore, my intention to adopt this system in the school." *Id.* (Emphasis in the original.)

54. Comm. Rep. (1863) (Dole), Doc. No. 69, from Hoffman.

55. *Id.*, Doc. No. 324, "Statement, etc."

56. In spite of Agent Hoffman's rather cold plan for educating the Poncas quoted in note 53, he seems to have developed a deep affection for the Indians and this final statement was very critical of the government's handling of a recent incident between the Iowa cavalry and the Poncas.

57. Comm. Rep. (1864) (Dole), Doc. No. 118, from Hoffman.

58. *See id.*, Doc. No. 135, a letter from Newton Edmunds, Governor and ex officio Superintendent of Indian Affairs, Dakota Territory, to Commissioner Dole, requesting such an expenditure. The permission was granted, *id.*, Doc. No. 136: "Necessity knows no law", *id.* The Poncas had been devastated by the same drought mentioned *supra*, note 50.

59. Comm. Rep. (1866) (Cooley), Doc. No. 67, from Alexander Johnson, Special USIA.

60. Comm. Rep. (1869) (Parker), Doc. No. 84, from William H. Hugo, USIA to the Poncas.

61. Comm. Rep. (1871) (Clum, Acting Comm.), Doc. No. 87, from James Laurence, Teacher for the Poncas, reporting an enrollment of 17 girls and 33 boys.

62. Comm. Rep. (1866) (Cooley), Doc. No. 67 from Burleigh.

63. Comm. Rep. (1871) (Clum, Acting Comm.), Doc. No. 86 from S.D. Webster, USIA to the Yankton Sioux.

64. *See text infra*, at notes 88-102.

65. Comm. Rep. (1858) (Mix), Doc. No. 22 from Robinson.
66. Comm. Rep. (1859) (Greenwood), Doc. No. 32 from Redfield.
67. *Id.*
68. Comm. Rep. (1862) (Dole), Doc. No. 19 from Lushbaugh. *See also* Comm. Rep. (1863) (Dole), Doc. No. 68 from W.A. Burleigh, USIA to the Yankton Sioux: "Owing to the absence of most of the Indians, our school has not prospered as I could desire [see text, *supra* at note 62], nor can it prosper as long as the parents insist upon taking their children with them when they go out upon their customary hunting tours."
69. *See* note 42, *supra*
70. *See* text, *supra*, at note 17, discussing the Act of July 7, 1867.
71. *See* Comm. Rep. (1864) (Dole): "I have had occasion myself to urge the establishment and liberal support of manual labor schools in all cases where practicable, as distinguished from ordinary day schools. Our reports this year from the various agencies fully confirm my opinion on this subject. . . . The attendance upon the day schools is generally irregular and the pupils are so frequently kept away by their parents, sometimes for a long period of time, as to lose the little knowledge that they gained. . . while no influence has been exerted upon them to make them appreciate the dignity and real independence of labor."
- In his report of the previous year, Commissioner Dole singled out Elmira Platt's school for the Pawnees for special mention and, in so doing, indicated his belief that, if the manual labor system of education were adopted universally on the reservations, there would be little problem with attendance. Comm. Rep. (1863) (Dole).
72. Comm. Rep. (1866) (Cooley), Doc. No. 65 from Edmunds.
73. The Dakota Territory did not enact compulsory school attendance legislation until 1883. STEINHILBER & SOKOLOWSKI, *supra* note 20, at 3.
74. *But see* *Sioux Tribe v. United States*, 84 Ct. Cl. 16, *cert. denied*, 302 U.S. 740 (1936), *and* text, *infra*, at notes 88-102.
75. *E.g.*, a school for the Navajos was not opened until Aug. 15, 1870, two years after the ratification of the compulsory school attendance provision. The school was attended on the average, by about 20 students. Comm. Rep. (1871) (Clum, Acting Comm.) Doc. No. 35 from Charity A.G. Menaul, teacher for the Navajos. To the same effect is *id.*, Doc. No. 44 from J.H. Aylsworth, teacher for the Crows. *See also* *Shoshone Tribe v. United States*, 82 Ct. Cl. 23 (1935), point 4 of the Reporter's Statement of the Case, at 30.
76. "Industrial Training Schools for Indian Youths," H. REP. No. 29, 46th Cong., 1st Sess. (1879).
77. The post-Civil War compulsory school attendance provisions were written to extend only twenty years, *see* text, *supra*, at note 19, but some of the treaties were extended beyond that 20-year limit. *See, e.g.*, § 17, 25 Stat. 888, 894, with respect to the treaty with the Sioux, 15 Stat. 635 (Kappler, 998). The treaty with the Kiowas, Comanches and Apaches, 15 Stat. 581 (Kappler, 977), on the other hand, was not extended. *See United States v. Myers*, 206 F. 392 (8th Cir. 1913).
78. Letter from Cato Sells, Commissioner of Indian Affairs, to John H. Stephens, Chairman of the House Comm. on Indian Affairs, dated Aug. 25, 1913, and included in H. DOC. No. 1030, 63d Cong., 2d Sess. (1914). Commissioner Sells' concern for the Navajos bore fruit in 1918. The Act of May 25, 1918, 40 Stat. 561, 568, included an appropriation of \$100,000 for Navajo schools. This compares with an appropriation of \$2,000 in 1880. Act of May 11, 1880, 21 Stat. 114, 121.
79. 82 Ct. Cl. 23 (1935). *See* text, *infra*, at notes 84 -87.
80. 15 Stat. 673 (Kappler, 1020).
81. 210 U.S. 50 (1908).
82. 15 Stat. 635 (Kappler, 998).
83. The footnote marked † beginning at 210 U.S. 50, 56 (1908).
84. 15 Stat. 667 (Kappler, 1015).
85. 82 Ct. Cl. 23 (1935).
86. 15 Stat. 667 (Kappler, 1015), art. II.
87. 82 Ct. Cl. 23, 86 (1935).
88. 84 Ct. Cl. 16 (1936), *cert. denied*, 302 U.S. 40 (1937).

89. 15 Stat. 635 (Kappler, 998).
90. 84 Ct. Cl. 16, 27 (1936), *cert. denied*, 302 U.S. 40 (1937) (emphasis added).
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 28
95. *Id.*
96. *Id.*
97. *Id.*
98. Wilkinson & Volkman, *Judicial Review of the Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CALIF. L. REV. 601, 617 (1975) (footnotes to authority omitted; bracketed material added). See *Antoine v. Washington*, 420 U.S. 194 (1975); *McClanahan v. Ariz. Tax Comm.*, 411 U.S. 164 (1973); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).
99. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-61 (1932); Wilkinson & Volkman, *supra* note 98.
100. COHEN, *supra* note 5, at 242, n. 72.
101. 26 Stat. 989, 25 U.S.C. § 284.
102. 45 Stat. 1185, U.S.C. § 231.
103. Explanation of the Kappler citation is given *supra*, at note 2.
104. This spelling will be consistently used throughout this paper. Other spellings seen in the original documents are "Yancton" and "Yanckton."
105. This treaty was supplemented on the same day by another treaty to include the Apaches, who agreed "to observe and faithfully comply" with the provisions of the earlier treaty. 15 Stat. 589 (1868) (Kappler, 982).
106. Brule, Oglala, Miniconjou, Yactonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, San Arcs, and Santee.
107. Kappler erroneously reports ratification on Feb. 26, 1869.
108. The information in this table is drawn from Comm. Rep. (1871) (Clum, Acting Comm.), Doc. No. 118, "Statistics of Education, etc., 1871." Some misgivings have been expressed at note 46, *supra*, regarding the accuracy of the Commissioner's reports, and this table should be interpreted in the light of those misgivings.
109. The Utes were not identifiable in the source used.
110. The various bands of Sioux who were parties to the treaty of Apr. 29, 1868, were assigned to several agencies and these figures are a summary of the information from those agencies.
111. The information in this table is drawn from Comm. Rep. (1881) 272-91.
112. In many cases, this amount was supplemented by a significant missionary expenditure.
113. The Kiowas and Comanches shared their education facilities with some 1,614 other Indians of various tribes at the same agency. The numbers given, except for population, include these other tribes.

