AGREEMENT WITH THE GROS VENTRES TRIBE OF INDIANS, 1868.

ARTICLES OF AGREEMENT AND CONVENTION MADE AND CONCLUDED AT FORT HAWLEY, MONTANA TERRITORY, ON THE THIRTEENTH DAY OF JULY, IN THE YEAR OF OUR LORD EIGHTEEN HUNDRED AND SIXTY-EIGHT, BY AND BETWEEN W. J. CULLEN, COMMISSIONER DULY APPOINTED AND AUTHORIZED ON THE PART OF THE UNITED STATES, AND THE CHIEFS, HEADMEN, AND DELEGATES REPRESENTING THE GROS VENTRES TRIBE OF INDIANS, THEY BEING DULY AUTHORIZED FOR SUCH PURPOSE BY THEIR TRIBE.

July 13, 1868.
Unratified.

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ARTICLE I.

Perpetual peace, friendship, and amity shall hereafter exist between the United States and the Gros Ventres Tribe of the Blackfeet Indians, parties to this treaty.

ARTICLE II.

The aforementioned tribe of Indians do hereby mutually, jointly, and severally agree and covenant that they will maintain peaceful and friendly relations towards the whites, and that they will in the future abstain from all hostilities whatever against each other, and cultivate mutual good will and friendship, not only among themselves, but towards any other tribe or tribes that may dwell upon the reserved land, as in Article III described and set forth, or adjacent thereto.

ARTICLE III.

We, the chiefs, headmen, and delegates of the Gros Ventres Tribe of Indians, being by our said tribe authorized and directed, do hereby cede and relinquish to the United States all the lands now or at any time heretofore claimed or possessed by them wherever situated, (said lands being more particularly described in the third and fourth articles of a treaty made between the United States and the Blackfeet Nation and other tribes of Indians, dated October 17, 1855) except all that portion of country described as follows, namely:

Commencing at a point where the parallel of 48° north latitude intersects the dividing ridge of the main chain of the Rocky Mountains; thence in an easterly direction to the nearest source of the Teton River; thence down said river to its junction with the Missouri River; thence down the Missouri River to the mouth of Milk River; thence due north to the 49th parallel of north latitude; thence west on said parallel to the main range of the Rocky Mountains; thence southerly along said range to the place of beginning, which last said described tract or portion of country is hereby reserved to and set apart for the said Blackfeet Nation and Gros Ventres Tribe of Indians for their occupancy,
possession, and enjoyment, excepting, and it is hereby provided and agreed that in the event of a treaty being made by the United States with the Crow Tribe of Indians whereby it may be stipulated that the said Crow shall remove to and live on the land hereinbefore described and reserved to the use and benefit of the Gros Ventres Tribe of Indians, and under the supervision and control of the same agent, and occupying and using in common all agency buildings, together with the services of each of the employees as may be deemed practicable, said Indians shall be permitted to do so, and shall be treated in all respects by Gros Ventres Tribe of Indians as owners in common of said lands, and entitled to all privileges and benefits thereto pertaining, the same in all respects as though they were parties to this treaty; and the said Indians, parties to this treaty, do hereby further agree that so soon as suitable agency buildings are erected they will settle permanently upon said reservation and do all in their power to encourage agricultural pursuits among their people.

ARTICLE IV.

The said tribe of Indians consent and agree for the purpose of establishing traveling thoroughfares through said tract of country so reserved and set apart as aforesaid, and the better to enable the President to execute the provisions of this treaty, roads of any and every description, military posts, bridges, and lines of telegraph, houses for agencies, mission schools, shops, mills stations and for any other purpose, may be constructed, out of any material thereon found, and permanently use as much land as may be necessary for the various purposes above enumerated, including the use of wood for fuel and land for grazing; and that said lines of travel and the navigation of all streams, shall be forever free to citizens of the United States, and the United States are hereby bound to protect said Indians against depredations and other unlawful acts which white men traveling on or passing through said reservation may commit.

ARTICLE V.

No white person, unless in the employment of the United States or duly licensed to trade with the Blackfoot Nation or Gros Ventres Tribe of Indians or members of the families of such persons, shall be permitted to reside or make any settlement upon any part of said tract or portion of country so reserved and set apart as aforesaid, nor shall said Indians alienate, sell, or in any manner dispose of any portion thereof except to the United States.

ARTICLE VI.

The said tribe of Indians, parties to this treaty, desire to exclude from the tract of country reserved to their use, as hereinafter stated and set forth, the use of ardent spirits or other intoxicating liquor, and to prevent their people from drinking or using the same. Therefore, it is provided that any Indian or half-breed belonging to said tribe who is guilty of bringing such liquor into the Indian country, or drinks the same, may have his or her proportion of the annuities, hereinafter mentioned, withheld from him for said time as the President may determine, and they shall likewise be liable to the same punishment as white persons for the same offense under the laws of the United States.
THE UNRATIFIED TREATY OF 1868.

ARTICLE VII.

The said Gros Ventres Tribe of Indians, parties to this treaty, hereby acknowledge their dependence upon the United States and their obligation to obey the laws thereof; and they further agree to obligate themselves to submit to and obey said laws, and all other laws which shall be made by Congress for their government and the punishment of offenses, and they agree to exert themselves to the utmost of their ability in enforcing all those laws, under the direction of the Superintendent of Indian Affairs or agent, and they pledge and bind themselves to preserve friendly relations with the citizens of the United States, and to commit no injuries to or depredations on their persons or property; they also agree to deliver to the proper officer or officers of the United States all offenders against the treaties, laws, or regulations of the United States who may be within the limits of the country hereby reserved and set apart as aforesaid, whenever required to do so by the said officer or officers. And the said Indians, parties to this treaty, agree that they will not make war upon any other tribes, except in self-defense, but will submit all matters of difference between themselves and other Indians to the United States for adjustment, and will abide thereby, and if any of the Indians, parties to this treaty, commit depredations upon any other Indians within the jurisdiction of the United States, the same rule shall prevail in regard to compensation and punishment as in cases of depredations against citizens of the United States.

ARTICLE VIII.

In consideration of the foregoing agreements, stipulations, and cessions, and on condition of their faithful observance by the said tribe of Indians, parties to this treaty, the United States agree to expend annually for the Gros Ventres Tribe of Indians, in addition to the goods and provisions distributed at the time of signing of this treaty, for and during the term of twenty years from and after the ratification of this treaty, the several sums and for the purpose following, to wit:

For the support of one physician and for the purchase of medicine, $600; for one blacksmith, $600; for one school teacher and the necessary books and stationery for the school, $450; for the instruction of said Indians in farming and the purchase of seeds, etc., $600; and for annuity payments, the sum of $25,000, to be expended in such useful goods, provisions and other articles as the Secretary of the Interior, at his discretion, may from time to time determine: Provided, That so much of said annual sum of twenty-five thousand dollars as the Secretary of the Interior shall deem proper may be expended in stock animals and agricultural implements, and in establishing and instructing in agricultural and mechanical pursuits such of said Indians as shall be disposed thereto, and in the employment of mechanics for and providing care and support for the sick and infirm and helpless orphans of their numbers, and in any other respect promoting their civilization and improvement. And to enable the said tribe of Indians, parties to this treaty, to enter upon a civilized career, free from all indebtedness, the United States further agree that, in addition to the annuities above stipulated to be paid to all such persons as may be entitled thereto, such sum or sums as the tribe of Indians may be justly indebted to them in, or by reason of such persons having furnished goods, provisions or supplies to said tribe of Indians, or by reason of depredations heretofore committed upon the property of such persons by said Indians, not exceeding in all the sum of twenty-five thousand dollars.

ARTICLE IX.

The half-breeds of said tribe and those persons, citizens of the United States, who have intermarried with Indian women of said
tribe, and continue to maintain domestic relations with them, shall not be compelled to remove to said reservation, but shall be allowed to remain undisturbed upon the lands hereinbefore ceded and relinquished to the United States, and they shall be allowed each to select from said ceded lands 160 acres of land (not mineral), including, as far as possible, their present homesteads, the boundaries of the same to be made to conform, as far as practicable, to the United States surveys, and when so selected the President of the United States shall issue to each of said persons so selecting the same a patent for such quarter section of land, with such restrictions on the power of alienation as in his discretion he may see fit to impose; and until such patent shall issue, there shall be no power of alienation of said lands by any person for whose benefit such selections are authorized to be made; and it is further understood and agreed that the half-breeds of said tribe shall share equally per capita with the Indians aforementioned in the distribution of annuity goods, and that the said tribe of Indians shall have the right to select and appoint a proper and suitable person to assist in the distribution of annuity goods and see that they are distributed fairly and equally.

ARTICLE X.

It is understood and agreed by and between the parties to this treaty that if any of the Indians, parties hereto, shall violate any of the stipulations herein contained, the United States may withhold for such length of time as the President and Congress may determine, any portion or all of the annuities to be paid to said tribes under the provisions of this treaty.

ARTICLE XI.

This treaty shall be obligatory upon the contracting parties whenever the same shall be ratified by the President and Senate of the United States, and shall continue in force for twenty years from and after the said date, unless sooner violated and broken by said Indians.

In witness whereof, the said W. J. Cullen, commissioner on the part of the United States, and the undersigned chiefs, headmen and delegates of the aforesaid tribe of Indians, parties to this treaty, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

W. J. CULLEN, Special Commissioner. (SEAL)

SITTING SQUAW, his X mark. (SEAL)
WHITE EAGLE, his X mark. (SEAL)
LITTLE WHITE CALF, his X mark. (SEAL)
WAR EAGLE BONNET, his X mark. (SEAL)
WEASEL HORSE, his X mark. (SEAL)
LEFT HAND, ASINAROBIN, his X mark. (SEAL)
STAR ROBE, his X mark. (SEAL)
BULL'S HEAD, his X mark. (SEAL)
"BLACKFOOT CLAIM."

THE UNRATIFIED TREATY OF 1868.

HEADMEN.

IRON COLLAR,  his X mark.  (SEAL)
BIG BEAVER,  his X mark.  (SEAL)
THUNDER CHIEF,  his X mark.  (SEAL)
BLACKBIRD,  his X mark.  (SEAL)
BULL ROBE,  his X mark.  (SEAL)
YOUNG BEAR,  his X mark.  (SEAL)
BEAR SHIRT,  his X mark.  (SEAL)
TALL EAGLE,  his X mark.  (SEAL)
WHITE MOON,  his X mark.  (SEAL)

Executed in the presence of:----

OLAN C. CULLEN, Secretary.
ALFRED T. VAUGHAN,  [initials]
J.T. FEIDLER,  [initials]
ALEX CULBERTSON, United States Interpreter.
LOUIS REVIER, (his X mark), Interpreter.
CYPRIEN MOTT,
GEORGE W. BOYD,
HONORÉ LAFITAN,

THE ABOVE TREATY WITH THE GROS VENTRES TIBE OF INDIANS WAS
NOT RATIFIED AND WAS NOT PROCLAIMED IN COMPLIANCE WITH ARTICL
XI OF THE SAID TREATY.
February 11, 1869.

Executive Session.

MR. THAYER. I move that the time for taking a recess be extended until five minutes past four o'clock, to enable me to move for an executive session simply to refer some treaties. I state to the Senate that it is absolutely necessary that it should be done.

MR. SUMNER. I agree with the Senator; we do need an executive session.

MR. THAYER. Just to refer some papers. I have no other object. I move that the time for a recess be extended until ten minutes past four.

THE PRESIDENT, pro tempore. It is moved that the Senate extend the time for the recess ten minutes.

The motion was agreed to.

MR. THAYER. I now move that the Senate proceed to the consideration of executive business.

The motion was agreed to; and after some time spent in the consideration of executive business, the doors were reopened, and the Senate (at ten minutes past four o'clock) took a recess till seven o'clock p.m.

EXECUTIVE SESSION OF FEB. 11, 1869.

(CONFIDENTIAL)

40th Congress, 3d Session. Executive FF.

Message from the President of the United States transmitting treaties between the United States and the following named tribes or bands of Indians, to wit:

FF, the Crows, Ventres, dated July 13, 1868.
GG, the River Crows, dated July 15, 1868.
HH, the Blackfeet, made Sept. 1, 1868, and
II, the Shoshonies, Bannacks and Sheep Eaters, made Sept. 24, 1868.

Senate, Feb. 11, 1869.

Read treaties.

Treaties were respectively read the first time, referred to the Committee on Indian Affairs, and with the accompanying papers ordered printed in confidence for the use of the Senate.

Executive Mansion, Feb. 4, 1869, to the Senate of the United States, letter of transmital from Andrew Johnson, President, laying before the Senate treaties concluded with various bands and tribes of Indians by William J. Cullen, Special Agent for Indians in Montana, namely, treaty concluded at Fort Hawley with Crows, Ventres; at Fort Hawley with River Crows; and at Fort Benton with Blackfeet, composed of the tribe of that name, and the Blood, and Piegan tribes, Treaty with mixed bands of Shoshonies, Bannacks, and Sheep Eaters, concluded at Virginia City, and letter of the Secretary of the Interior dated the third instant, and the report of the Commissioner of Indian Affairs, dated the second instant, explaining the provisions of the several treaties and suggesting and amendment to some of them, and submitting maps and papers connected with said treaties are also herewith transmitted.
BLACKFOOT CLAIM.

THE UNRATIFIED TREATIES OF 1868, EXECUTIVE DOCUMENTS. (CONFIDENTIAL)

Department of the Interior.
Washington, D.C.
Feb. 3, 1869.

Transmits the treaties with the above Indians and the report of the Commissioner of Indian Affairs, dated 3d instant; expresses concurrence with views of the Commissioner of Indian Affairs as expressed by him with regard to the propriety of amending some of the provisions of the treaties. Signed by O.H. Browning, Secretary. To Andrew Johnson, President.

Office of Indian Affairs.
Department of the Interior.
Washington, D.C.
Feb. 3, 1869.

Transmits letters and maps; outlines the respective treaties. States that in the eighteenth article of the treaty with the Gros Ventres, it is provided that the United States shall pay to persons to whom the Gros Ventres may be justly indebted for goods, provisions or supplies furnished them, such sum as they may be entitled to on account there-of, and by reason of any depredations heretofore committed by the tribe upon their property not exceeding in all the sum of $35,000.

"To these provisions of this treaty as well as to those of a similar character in the treaty with the Blackfeet and that with the Crows I respectfully call attention, believing them to be impolitic and inadvisable; but if they are entertained at all, I suggest the propriety of amending the treaties with respect to the indebtedness to their traders being so amended as to provide that such indebtedness shall be ascertained by a commission to be appointed for that purpose whose report shall be submitted to Congress and that the provisions in regard to depredations be stricken out as there is a remedy in the matter of depredations by Indians provided under the Act of June 30, 1834, regulating trade and intercourse with Indians tribes." It was also suggested that the definite expression as to how long the treaty should remain in force should be omitted. According to the best information received, the Gros Ventres number about 3,000 souls. The treaty with the River Crows, who are estimated to number about 3,500, provides for the relinquishment of their title and right to all lands, etc., and for their settlement upon the tract reserved for the use of the Blackfeet and Gros Ventres. The Blackfoot Nation by their treaty relinquish lands claimed or possessed by them described in the treaty of Oct. 17, 1855. The treaties hereof submitted are important and required by the unsettled conditions of the Indians and the rapid progress of the settlements of the country they claim, by the whites, and if ratified, in my judgment, the fulfillment of their stipulations will greatly subserve the interests both of the Indians and the citizens of the territory. I recommend them to the favorable consideration and action of the President and Senate.

Very Respectfully,

W.H. Naylor.

From Commissioner of Indian Affairs, to Hon. O.H. Browning, Secretary of the Interior.

Fulfilling treaty with Blackfoot, Bloods and Piegans, House Bill, line 30, §45,00, $80,000. This is the amount stipulated to be paid these Indians in the unratted treaty of Sept. 1, 1868.

Commissioners' report, Page 3.

By the 11th article of the treaty of 1868 with the Gros Ventres is obligatory upon its ratification and to continue 30 years unless sooner violated and broken by the Indians. It is suggested that a definite expression as to how long the treaty shall remain in force should be omitted.
Mr. OWEN presented the following

DECISION RENDERED BY THE ARIZONA SUPREME COURT IN THE PROCEEDINGS INSTITUTED BY THE INDIAN RIGHTS ASSOCIATION FOR A WRIT OF HABEAS CORPUS IN THE CASE OF CERTAIN INDIANS IMPRISONED WITHOUT TRIAL, WITH ACCOMPANYING PAPERS.

JUNE 29, 1909.—Ordered to be printed.

WASHINGTON, D. C., June 28, 1909.

To the Senate of the United States:

On behalf of the Indian Rights Association I inclose, as a memorial, the decree of the supreme court of Arizona, with accompanying papers, in the matter of the petition by By-a-lil-le and other Navajo Indians for a writ of habeas corpus. These Indians have been imprisoned for one year and eight months and subjected to hard labor, upon approval of the Commissioner of Indian Affairs, without a charge having been filed against them in any court of law, without benefit of counsel or proceeding by due course of law.

The decision in this case marks an epoch, guaranteeing to the red man those rights secured to our forefathers by Magna Charta.

Very respectfully,

S. M. BRÖSIUS,
Agent Indian Rights Association.

INDIAN RIGHTS ASSOCIATION,
709 PROVIDENT BUILDING,
Philadelphia, April 15, 1909.

IMPRISONMENT WITHOUT TRIAL.

For the information of our members and the general public we give below a decision recently rendered by the Arizona supreme court in the habeas corpus proceedings instituted by this association on behalf of certain Navajos who were imprisoned, as we contend, without warrant of law, by the arbitrary action of the Commissioner of Indian Affairs. We also append a reply by Doctor Grammer to the article in "The Outlook" of January 30, 1909, by Hon. F. E. Leupp, Commissioner of Indian Affairs, defending his "Law or no Law" method of dealing with the Indians, as enunciated by him at the Lake Mohonk conference in October, 1908.
This matter was taken up by the association because it was believed to be one of fundamental importance in dealing with Indians. We contend that the Indian is a person within the meaning of the Constitution and can not be deprived of his liberty "without due process of law." The court of first instance, in Arizona, denied the application for a writ of habeas corpus. The association appealed the case to the territorial supreme court, where a unanimous opinion was rendered reversing the lower court. The department has announced its intention of appealing from this decision, and the case may yet be argued in the United States Supreme Court. Under the circumstances, while the matter may not be regarded as finally settled, it is deemed proper to acquaint our members with the case as far as it has been developed.

It is worthy of note that criticism upon the commissioner's action, which he treated as a proof of bias and captious opposition on the part of the critics, has been sustained as rightful by a weighty judiciary. It is worthy of mention that the criticism upon the commissioner's action, which has been justified by such an important judiciary, was stigmatized at the Mohonk conference by the commissioner himself as so clearly biased that he had to asperse the motive of those who made it. It is not too much to say that the commissioner's attitude of pronounced hostility to any suggestion or criticism is one of the great difficulties in the way of this association.

It should be noted that after the habeas corpus proceedings were begun, six of the Indians were released by the Commissioner of Indian Affairs. By-a-lil-le and Polly are still held in confinement in default of $5,000 bail.

In the Supreme Court of the Territory of Arizona, No. 273.

In the matter of the application of Bi-a-lil-le and seven others for a writ of habeas corpus.—Opinion.

Appeal from the district court of the second judicial district; Hon. Fletcher M. Doan, Judge.

Mr. O. Gibson, for petitioners; Mr. J. L. B. Alexander, United States attorney, for the respondent.

Opinion by Nave, J.: A group of Navajo Indians, under the leadership of Bi-a-lil-le, threatened serious trouble upon the Navajo Reservation. Upon the representations of the Secretary of the Interior, the Secretary of War sent two troops of cavalry into the vicinity of the reservation to serve as a repressing influence upon the Indians. After a conference with the Indian agent, the officer in command of the troops determined it to be wise to arrest Bi-a-lil-le and certain of his companions. Accordingly, he made a night march to Bi-a-lil-le's camp and captured him and his immediate followers about daybreak the next morning. While this arrest was being made, the troops were fired upon by other Indians in the vicinity. The fire was returned. The casualties were two Indians killed and one wounded, except that a horse of one of the soldiers was killed. Upon the recommendation of the Secretary of the Interior, without a trial or hearing of any sort, Bi-a-lil-le and seven of his companions were transported to Fort Huachuca, Ariz.
“where,” to quote the Secretary of the Interior, “they are to be confined for an indefinite period at hard labor. They can be released whenever it may be deemed wise to do so, each case to be considered on its own merits. The time for the release of these prisoners has been left to the judgment of the War Department.”

These Indians, setting up in detail the facts of which the foregoing statement is a brief abstract, and averring that their detention is unlawful, petitioned the district court of the second judicial district for a writ of habeas corpus directed to the commanding officer at Fort Huachuca to the end that they be discharged. The writ was denied and from its denial petitioners have prosecuted this appeal. The contention of petitioners is that they are deprived of liberty without due process of law, in contravention of article 5 of the amendments to the Constitution of the United States.

The detention of these Indians is supported by the respondent upon three contentions. One of these contentions is that it is authorized by the provisions of section 2149, Revised Statutes of the United States, which reads as follows:

The Commissioner of Indian Affairs is authorized and required, with the approval of the Secretary of the Interior, to remove from any tribal reservation any person being therein without authority of law, or whose presence within the limits of the reservation may, in the judgment of the commissioner, be detrimental to the peace and welfare of the Indians; and may employ for the purpose such force as may be necessary to enable the agent to effect the removal of such person.

The inadequacy of this contention is self-evident. Authority to remove troublesome persons from a reservation does not imply authority to detain them in confinement after such removal; hence the detention of these Indians is not maintainable by reason of the provisions of this section or of any of its implications.

The second contention is that the facts disclose the petitioners to be prisoners of war, and hence lawfully to be held in military custody. We do not infer from the facts that a state of war existed at the time of the apprehension of the petitioners, nor does it appear that it was or is the view of the Secretary of the Interior or of the Secretary of War that a state of war existed then or exists now between the Indians and the United States. It affirmatively appears that, though in the custody of the War Department, these Indians are maintained at the expense of the Interior Department and are to be confined at hard labor for an indefinite period as a punishment to them and an object lesson to the rest of their tribe, in the language of the Secretary of the Interior, because they “have defied the Government and its authorities; they have impeded the progress of the other Indians in their efforts to improve and better their condition; they armed themselves, * * * threatened to kill any person or persons who molested them, and fired first upon United States troops in the discharge of their duty.” Confinement at hard labor is a characteristic of the punishment of criminals and not, under the code of modern civilized warfare, an incident of the detention of prisoners of war. We do not assume that we have jurisdiction to interfere with the treatment accorded them were they in fact prisoners of war; but we point to the fact of their confinement at hard labor as inconsistent with a theory that they are regarded by the executive departments as prisoners of war. The consideration and freedom from unnecessary restraint which, within our judicial knowledge,
marked the detention of Spanish prisoners during our recent war and has marked the detention as prisoners of war of Geronimo and his band of Apaches, warrant, as fully as our patriotic pride also demands, that we attribute to the executive departments the most enlightened chivalry in their attitude toward prisoners of war. It is manifest that petitioners are not prisoners of war.

As a third contention, it is urged with great earnestness that the Indians are but wards of the Government, and therefore are subject to administrative correction of their conduct as are other wards to the correction of their guardians; that the disposition which has been made of these Indians is pursuant to a long-followed policy of the Departments of the Interior and of War; and that it is highly salutary in safeguarding the relations of the Indians to the Government and to their white neighbors and, indeed, among themselves. However salutary in its results and desirable such a method of dealing with recalcitrant Indians may be and however long such a system may have prevailed, it can not be sanctioned unless there is authority for it in the acts of Congress. Indians are not wards of the executive officers, but wards of the United States, acting through executive officers, it is true, but expressing its fostering will by legislation. We may pass as unnecessary to determine the question whether Congress may constitutionally vest in executive officers such summary authority as is here sought to be exercised. Our attention has not been directed to legislation expressly authorizing such summary methods. Comprehensive authority is conferred upon the President by sections 463 and 465, Revised Statutes of the United States, to control the conduct of Indian affairs by his regulations, but we do not find a general rule or regulation promulgated by or under the authority of the President applicable in this case.

The Supreme Court of the United States, in Bad Elk v. United States (177 U.S., 529), has held that an executive officer in the Indian Service has no authority to direct arrests in the absence of law, rule, or regulation authorizing such direction, and that the conduct of an Indian is not to be held misbehavior in the absence of a law, rule, or regulation so defining it. Among the necessary implications of that decision is that, there being no law, rule, or regulation defining what conduct of Indians shall be deemed reprehensible and subject them to correction, it does not rest in executive discretion to administer corrective punishment. We deem this conclusion inevitable, and determinative of this case irrespective of the question whether such summary discipline might be sustained if pursuant to a rule or regulation.

The position of these particular petitioners, members of the Navajo tribe, is fortified by one of the stipulations of the treaty between the United States and the Navajos, which is as follows:

If bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws. (Art. 1, treaty of June 1, 1868; 15 Stat. L., 667.)

This stipulation amounts to a covenant that bad Indians shall not be punished by the United States except pursuant to laws defining their offense and prescribing the punishments therefor.
While Congress by its legislation may disregard treaties, the executive branch of the Government may not do so.

The district court was in error in denying the writ of habeas corpus.

The proceedings in the court below were solely upon the petition. The United States attorney appeared on behalf of the United States and argued against the granting of the writ without filing a demurrer or other formal pleading. The trial judge rendered an opinion in writing which appears as part of the record, in which we find it has been suggested by the court and agreed to by counsel, that, in effect, "the ruling may be as though the writ had been granted and the applicants were here in person before the court."

* * * If the writ should be granted by the court, the granting of the writ would be equivalent to the release of the applicants for the writ, and the writ will not be denied unless the court is satisfied from the hearing that the applicants would be remanded to the custody of those now having them in charge." The petition contains at full length what purport to be all of the proceedings of the Departments of the Interior and of War, resulting in the detention of petitioners. In view of that fact, we construe the expression of the trial court as disclosing the stipulation that, if the facts upon the petition disclose that petitioners are entitled to be discharged, the judgment of the court should be to discharge them. Therefore, it will be adjudged that the judgment of the trial court be reversed and that the petitioners be discharged, with leave to the respondent, however, to present within fifteen days, reasons, if any there be, why, instead of discharging the petitioners, we should remand the cause with direction to the trial court to grant the writ.

FREDERICK S. NAVE,
Associate Justice.

We concur:
EDWARD KENT, Chief Justice.
RICHARD E. SLOAN, Associate Justice.
JOHN H. CAMPBELL, Associate Justice.

SUPREME COURT,
Territory of Arizona

I, F. A. Tritle, jr., clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing to be a full, true, and correct copy of the opinion rendered by said supreme court on the 20th day of March, A. D. 1909, in the matter of the application of By-a-lil-le and seven others for a writ of habeas corpus.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 25th day of March, A. D. 1909, at Phoenix, Ariz.

[seal.]

F. A. TRITLE, JR.,
Clerk Supreme Court of Arizona.
In the supreme court of the Territory of Arizona, No. 273.

In the matter of the application of By-a-lil-le and seven others for a writ of habeas corpus.

At this day respondent gave notice of appeal to the Supreme Court of the United States, and moved the court that applicants be held on bail until the determination of the appeal by the Supreme Court of the United States under rule 34 of said Supreme Court, and it was ordered by the court that the notice of appeal be noted and that applicants be each enlarged in the sum of $5,000, and it was further ordered that respondent may have leave to withdraw its notice of appeal upon application to the Chief Justice therefor.

SUPREME COURT, { ss.
Territory of Arizona, }

I, F. A. Tritle, jr., clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing to be a full, true, and correct copy of the order made and entered by said supreme court on the 20th day of March, A. D. 1909, in the matter of the application of By-a-lil-le and seven others for a writ of habeas corpus, admitting applicants to bail.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 25th day of March, A. D. 1909, at Phoenix, Ariz.

[seal.]

F. A. Tritle, Jr.,
Clerk Supreme Court of Arizona.

[From the Springfield (Mass.) Republican, March 15, 1909.]

QUESTION OF "LAW OR NO LAW" IN TREATMENT OF THE INDIANS.

REPLY OF THE INDIAN RIGHTS ASSOCIATION TO COMMISSIONER LEUPP’S SURPRISING ASSERTION.

To the editor of the Republican:

The question raised by Commissioner Leupp in his article on "Law or no law in Indian administration," in The Outlook of January 30, is of fundamental importance. The Indian Rights Association has undertaken to test the validity of his conclusion as to the relation of an executive agent to the law by an appeal to the courts; but it is eminently desirable that the public, who read the commissioner’s vehement explanation, should know the issues involved. They are much larger than the question whether the commissioner was misrepresented by those who quoted his own words, "law or no law," as the keynote of his remarks about the Navajo Indians. But we must not fall into the custom which, according to Freeman, spoils so much historical writing, and content ourselves with allusions instead of telling a plain tale. The commissioner began his explanatory statement with the Mohonk conference, but the controversy can not be understood without going further back and beginning at the beginning.

In October, 1907, William T. Shelton, superintendent of the Eastern Navajo Reservation, Shiprock, N. Mex., requested that cavalry be sent into his reservation to arrest a troublesome Navajo
named By-a-lil-le, that he might be confined long enough to show that the time for bad men was past; or, if this were not thought expedient, that the troops might be stationed in the vicinity of By-a-lil-le's camp long enough to give the Indian police courage. The more drastic of the two methods was chosen. The cavalry surrounded the Indians' hogans at daylight, and arrested By-a-lil-le and his men. There was some shooting by the soldiers and on the part of some Indians in the vicinity, though not by the prisoners, and two Indians were killed by shots in the back. A search of all the hogans only brought to light three old rifles, one Colt revolver and several knives. Such a lack of warlike equipment suggests that the milder remedy of camping in the vicinity by the troops would probably have been sufficient to overawe the Indians and reduce their spirits to the necessary subordination. Still, it is easier to discern the right course in the light of experience, and there is here no controversy over the killing of these Indians and the arrest of the band. They had been made to feel most unmistakably the power of the Government, and it might have seemed that they had been sufficiently schooled. If it was not thought wise to allow them to remain on the reservation, the superintendent had the undoubted authority to remove them, or if he was unwilling to set them at liberty in new scenes, he might have brought them into court. Western courts are not generally weakly indulgent to the red man. Neither of these lines of action, however, was taken. Without the decree of any court, martial or civil, By-a-lil-le and seven other Indians were incarcerated, with the approval of the commissioner, in a military prison in Arizona, at hard labor for an indeterminate period.

At the conference at Lake Mohonk, last October, Mr. Leupp tells us that he was intensely indignant when he heard that a resolution was to be offered that would test the sense of the conference upon such imprisonment without trial. The commissioner is obliged to admit that in his vehement anticipatory defense he said that he would take such measures if he thought the public safety required it, "law or no law." This language does not appear in the report, and the commissioner withdraws it as too crude and unqualified. Still, he claims that his character for clemency and fairness is so well known that it should have protected him from misconstruction. So, if he is obliged to confess that he spake unadvisedly with his lips, he also feels it necessary to charge his critics with "dishonesty" and "malice." After learning the facts and reading this explanation, most people will probably agree that the blunt and pointed expression that he withdraws describes his attitude very fairly. After all, the point of language is of minor importance. The main points are Mr. Leupp's attitude toward those who differ from him and his theory of the relation of the law to the public welfare.

The commissioner asserts with pride that his policy of treating Indian offenders in a state of barbarism by dealing out justice according to his own personal views has justified itself by its success, on the principle that "the proof of the pudding is the eating." No one, however, can read his passionate article, with its charges upon his critics of "malice," "dishonesty," "paltering," "vituperation," and "angry clamor" without realizing that his theory has made our commissioner a very lofty personage, who is inclined to regard any difference of opinion about the legality of his acts as a proof of moral
obliquity. So far is he from inviting scrutiny and welcoming an interchange of opinion that the very idea of the expression of criticism filled him with indignation, as he confesses in his case. Yet, if the Indian Commissioner has the right to put Indians in prison without trial, simply upon his own judgment that a prison is the best place for them, such a tremendous power ought to be carefully watched, and such a conference as Mohonk might well interest itself in the wisdom with which such extraordinary authority was exercised.

Indian agents, through whom he must gain his information, are but fallible men, and it was no less a person than Lincoln who said that no man could safely be trusted with absolute power over another. Indian agents are not a class of men who, according to the opinion of them expressed by President Roosevelt, in a recent message, can wisely be allowed to feel themselves exempt from criticism. Even if the criticism should prove mistaken, the discussion could hardly fail to do good. It was, however, resented deeply by Mr. Leupp, and is characterized in scathing terms. His kindliness and clemency, he holds, should have prevented anyone from regarding the imprisonment of Indians for sixteen months, without trial, as an act of oppression. This is certainly a great claim.

There are, however, many who believe that the law of the land is a better defense of our rights than the kindly temper of our officials. Indeed, it is the deepest source of our controversy with the commissioner that on his statement at Mohonk, and in his treatment of these Indians, he shows an inadequate sense of the value of law as a means of securing the public weal. He ignores the courts. His theory is that the public safety is to take precedence of the public safeguards. This mistake lay at the bottom of the worst excesses of the French Revolution. To quote Lord Morley:

Couthon laid the theoretic basis [of the infamous law of 22d Prairial] in a fallacy that must always be full of seduction to shallow persons in authority: "He who would subordinate the public safety to the inventions of juris-consuls, and to the formulas of the courts is either an imbecile or a secondrate." As if the public safety could mean anything but the safety of the public! "All becomes legitimate and even virtuous," Helvetius had written, "on behalf of the public safety," but Rousseau was wiser in his marginal note, "The public safety is nothing unless the individual enjoys security."

Have we not an example of Couthon's fallacy in the commissioner's article, in "The Outlook," when he writes: "The mere technical definition of the rights of any person under the law is always subordinate to the question of the social order?" What better way is there of teaching an Indian the greatness of the law than by showing that it can save as well as punish? How can the social order be better preserved than in the exaltation of the law? By-a-lil-le and Polly, with their companions in prison for sixteen months, knotting on a cord the days of their imprisonment at the discretion of a distant commissioner, will hardly agree that the right to liberty or a fair trial comes under the head of a "mere technical definition."

In spite of the warnings of the commissioner of possible evils in consequence of the liberation of these men, the Indian Rights Association applied for a writ of habeas corpus. The court of first instance denied the application, but the denial was anticipated. Nevertheless, something has been accomplished, since six of the prisoners have since been released. An appeal has been taken in behalf of the other two, and the friends of order and liberty will not rest until, if
necessary, the Supreme Court of the United States has decided whether or not Indians are persons within the meaning of the article of the Constitution that declares that no person (except certain classes in which Indians are not included) shall be deprived of life, liberty, or property without due process of law. Of one thing we may be absolutely certain, and that is that the greatest tribunal in the world, as Bryce has taught us to call it, will give no countenance to the doctrine, so fruitful of tyranny and injustice, that the law can be safely ignored, if in the judgment of an official its restraints stand in the way of the public welfare.

CARL E. GRAMMER,
President of the Indian Rights Association.

PHILADELPHIA, March 1, 1909.

DEPARTMENT OF JUSTICE,
Washington, June 22, 1909.

Sir: In accordance with your oral request to be informed of the action of the department in the matter of the prosecution of the appeal in the Supreme Court in the case of By-n-lil-la and others, petitioners for a writ of habeas corpus, I beg to say that after careful consideration of the matter the Government has decided not to prosecute the appeal. Instructions have to-day been given to the United States attorney for Arizona, by wire, to ask leave of the chief justice of the supreme court of Arizona, in accordance with an order of that court, to withdraw notice of the appeal; also instructing him to have the petitioners discharged from custody at once, and stating that this department has requested the Secretary of the Interior to arrange, by wire, to have the petitioners restored to their homes in the Navajo Reservation at government expense.

Respectfully,

LLOYD W. BOWERS,
Acting Attorney-General.

S. M. BROSIUS, Esq.,
Agent Indian Rights Association,
McGill Building, Washington, D. C.
BLACKFOOT CLAIM.

AGREEMENT WITH THE RIVER CROW TRIBE OF INDIANS, 1866. UNRATIFIED.

(II) Kappler, 2 Ed., pp. 714, et seq.)

Articles of agreement and convention made and concluded at Fort Hawley, Montana Territory, on the 15th day of July, in the year of our Lord one thousand eight hundred and sixty-eight, by and between W. J. Cullen, Commissioner, duly appointed and authorized, on the part of the United States, and the chiefs, headmen and delegates representing the River Crow tribe of Indians, they being duly authorized for such purposes by their tribes.

ARTICLE I. Perpetual peace, friendship, and amity shall hereafter exist between the United States and the River Crow Tribe of Indians, parties to this treaty.

ARTICLE II. The aforementioned tribe of Indians do hereby mutually, jointly, and severally agree and covenant that they will maintain peaceful and friendly relations among themselves, and cultivate mutual good-will and friendship not only among themselves, but toward any other tribe or tribes that may dwell upon the reserved lands as in Article Third described and set forth, or adjacent thereto.

ARTICLE III. We, the chiefs, headmen, and delegates of the River Crow Tribe of Indians, as heretofore signed by us, and being by our said tribe thenceunto authorized and directed, do hereby cede and forever relinquish and surrender to the United States all their right, title, claim and interest in and to all lands claimed, held, or possessed by them wherever situated; said lands being more particularly described as follows, namely: Commencing at a point where the Powder River empties into the Yellowstone River; thence up said Powder River to its source, including all its tributaries; thence southerly in a straight line from the Pumpkin Butte on Powder River to the Platte River, at or near the Red Butte; thence easterly to the base of the Rocky Mountains, intersecting the headwaters of the Missouri River; thence northeasterly in a straight line to the Moccasins River; thence down said Moccasins River to its junction with the Missouri River; thence down the Missouri to its junction with Dry Fork; thence up said Dry Fork to its source; thence easterly to the place of beginning. And it is hereby agreed by the parties to this treaty that the said River Crow Tribe of Indians shall be located upon a certain tract of country reserved and set apart for the use and benefit of the Blackfeet Nation and Gros Ventres Tribe of Indians; said land being more particularly described and set forth in a treaty made and concluded at Fort Hawley, Montana Territory, July 13, 1868, between the United States and the Gros Ventres Tribe of Indians, whereby stipulations are made for the location of said Crow Indians on a reservation adjoining that of the Gros Ventres, so be under the supervision and control of the same agent, occupying and using in common all agency buildings, together with the services of each of the employees as may be deemed practicable, and to be treated in all respects as owners in common of said lands, and entitled to all the privileges and benefits thereto pertaining, the same in all respects as though they were parties to the Gros Ventres treaty, and the said River Crow Tribe of Indians shall be protected in such location against any annoyance or molestation on the part of the whites or Indians; and they do hereby agree that so soon as suitable agency buildings are erected they will settle permanently upon said reservation, and do all in their power to encourage agricultural pursuits among their people.

ARTICLE IV. No white person, unless in the employment of the United States, or duly licensed to trade with the Indians located on the reserved land hereinafore stated, or members of the families of such persons, shall be permitted to reside or make any settlement upon any portion of said tract or portion of country so reserved and set apart as aforesaid, nor shall the said Indians alienate, sell, or in any manner dispose of any portion thereof except to the United States.

ARTICLE V. The said tribe of Indians, parties to this treaty, desire to exclude from the tract of country reserved as hereinafore stated and set forth, the use of ardent spirits or other intoxicating liquor and to prevent their people from drinking or using the same; therefore it
is provided that any Indian or half-breed belonging to said tribe who is guilty of bringing such liquor into the Indian country, or who drinks the same, may have his or her proportion of the annuities hereinafter mentioned withheld from him or her for such time as the President may determine, and they shall likewise be liable to the same punishment as white persons for the same offense under the laws of the United States.

ARTICLE VI. The Crow Tribe of Indians, parties to this treaty, hereby acknowledge their dependence upon the United States, and their obligation to obey the laws thereof; and they further agree and obligate themselves to submit to and obey said laws and all other laws which may be made by Congress for their government and for the punishment of offenses; and they agree to exert themselves to the utmost of their ability in enforcing all those laws under the direction of the Superintendent of Indian Affairs, or agent, and they pledge and bind themselves to preserve friendly relations with the citizens of the United States, and to commit no injuries to or depredations on their persons or property; they also agree to deliver to the proper officer or officers of the United States all offenders against treaties, laws, or regulations of the United States, and to assist in discovering, pursuing, and capturing all such offenders against the treaties, laws, or regulations of the United States who may be within the limits of the country reserved and set apart for the use of the said Crow and other tribes of Indians, whenever required to do so by said officer or officers. And the said Crow Tribe of Indians, parties to this treaty, agree that they will not make war upon any other tribe except in self-defense, but will submit all matters of difference between themselves and other Indians to the United States for adjustment, and will abide thereby; and if any of said Indians, parties to this treaty, commit depredations upon any other Indians within the jurisdiction of the United States, the same rule shall prevail in regard to compensation and punishment as in cases of depredations against citizens of the United States.

ARTICLE VII. In consideration of the foregoing agreements, stipulations, and cessions, and on condition of their faithful observance by the said tribe of Indians, parties to this treaty, the United States agree to expend annually for the Crow Tribe of Indians, in addition to the goods and provisions distributed at the time of signing this treaty, for and during the term of twenty years, from and after the ratification of this treaty, the several sums and for the purposes following, to wit:

For the support of one physician and for the purchase of medicines, $500.
For one blacksmith, $500.
For one school teacher and the necessary books and stationary for the school, $450.
For the instruction of said Indians in farming and for the purchase of seeds, etc., $500; and for annuity payments the sum of twenty-five thousand dollars to be expended in such useful goods, provisions, and other articles as the Secretary of the Interior, at his discretion, may from time to time determine: Provided, That so much of said sum of twenty-five thousand dollars as the Secretary of the Interior may deem necessary may be expended in stock animals, and agricultural implements and in establishing and instructing in agricultural and mechanical pursuits such of said Indians as shall be disposed thereto, and in the employment of mechanics for them, and providing care and support for the sick and infirm and helpless orphans of their number, and in any other respect promoting their civilization and improvement. And to enable said tribe of Indians, parties to this treaty, to enter upon a civilized career free from all indebtedness, the United States further agree that, in addition to the annuities above stipulated to be paid, to pay all such persons as may be entitled thereto such sum or sums as the said tribe of Indians may be justly indebted to them in,
AGREEMENT WITH THE RIVER CROW TRIBE OF INDIANS, 1836. UNRATIFIED.

by reason of such persons having furnished goods, provisions, or supplies to said tribe of Indians, or by reason of depredations heretofore committed upon the property of such persons by said Indians, not exceeding in all the sum of twenty-five thousand dollars.

ARTICLE VIII. The half-breeds of said tribe and those persons, citizens of the United States, who have intermarried with Indian women of said tribe, and continue to maintain domestic relations with them, shall not be compelled to remove to said reservation, but shall be allowed to remain undisturbed upon the lands hereinbefore ceded and relinquished to the United States, and they shall be allowed each to select from said ceded lands one hundred and sixty acres of land (not mineral), including as far as possible their present homesteads, the boundaries of the same to be made to conform as far as practicable to the United States surveys; and when so selected by the President of the United States shall issue to each of said persons so selecting the same a patent for such quarter section of land, with such restrictions on the power of alienation as in his discretion he may see fit to impose; and until such patent shall issue there shall be no power of alienation of said lands by any person for whose benefit such selections are authorized to be made; and it is further understood and agreed that the half-breeds of said tribe shall share equally in the distribution of annuity goods, and that the said tribe of Indians shall have the right to select and appoint a proper and suitable person to assist in the distribution of annuity goods, and see that they are distributed fairly and equally.

ARTICLE IX. It is understood and agreed by and between the parties to this treaty that if any of the Indian parties hereto shall violate any of the stipulations herein contained, the United States may, withhold, for such length of time as the President and Congress may determine, any portion or all of the annuities agreed to be paid to said tribe under provisions of this treaty.

ARTICLE X. This treaty shall be obligatory upon the contracting parties whenever the same shall be ratified by the President and Senate of the United States, and shall continue in force for twenty years, from and after the said date, unless sooner violated and broken by said Indians.

In testimony whereof, the said W. J. Cullen, commissioner on the part of the United States, and the undersigned chiefs, headmen, and delegates of the aforesaid tribe of Indians, parties to this treaty, have heretounto set their hands and seals at the place and on the day and year hereinbefore written.

W. J. CULLEN, Commissioner,

HORSE GUARD, his X mark,

WHITE SIDE, his X mark,

LITTLE SOLDIER, his X mark,

TWO WEASEL, his X mark,

TWO BELLY WOMAN, his X mark,

SPANIARD, his X mark,

MEDICINE HAIR, his X mark,

LINKEDY, his X mark,

BULLS NOSE, his X mark,

LONG NECK, his X mark,

BULLS COCK, his X mark,
BLACKFOOT CLAIM.

AGREEMENT WITH THE RIVER CROW TRIBE OF INDIANS, 1868. UNRATIFIED.

THE WOODCUTTER, his X mark, (SEAL)
WOLF POISON, his X mark, (SEAL)
THE RATING MAN, his X mark, (SEAL)
THE ONE THAT IS IN EVERY WAY, his X mark, (SEAL)

Executed in the presence of -
TAKOB SNIDER, Interpreter.
ALFRED C. VAUGHAN,
M.T. HAMILTON,
J. BEIDLER,
DAVID HANEY,
CAPTAIN STEV LEVI LEOTI,
GEORGE W. BOYD,
ALEX. CULBERTSON, Interpreter.
OLUM O. CULLEN, Secretary.