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INDIAN WARS

A WAR OF LEGISLATION AND LITIGATION

Judge Elmer Dundy opened the United States District Court for session in Omaha, Nebraska on the morning of May 1, 1879. Several prisoners, who by their attorney's testimony appeared to be in bad shape, were led into the courtroom.[1] Yet these prisoners appeared in court of their own accord, for they had brought suit against the government of the United States of America seeking their freedom.

As members of the Ponca tribe, this band of Indians[2] under the leadership of Standing Bear, had been arrested by federal authorities after fleeing a reservation in Indian Territory and returning to tribal lands in Nebraska. Standing Bear and his fellow tribal members were now challenging the government to provide a Writ of Habeas of Corpus demanding to know under what right the government could continue to hold them against their will. The case of *Standing Bear v. Crook* came at the end of a century of conflict between the United States and its indigenous tribes; these struggles became known as the Indian Wars.

The naming of the conflict reflects the Anglo-American position from whose perspective the history is most often written. The title itself tells the layperson all he or she needs to know at a quick glance: this was a war waged against Indians. It is important to note here that both the name and the manner in which the history is told place emphasis on war. Bill Yenne calls the Indian Wars, "the longest and most misunderstood campaigns ever waged by the U.S. Army."[3] The grandiose title of his book *Indian Wars: The Campaign for the American West* reinforces the American-centric idea of a military campaign in the name of manifest destiny. Yenne categorizes

[1] Joe Starita. "The Case of Standing Bear: Establishing Personhood under the Law." *Court Review* 45, no. 1-2 (November 2007): 4.
[2] This is the common term of reference used to describe the American aboriginals at the time of the event and used in this paper as such.
[3] Bill Yennes. *Indian Wars: The Campaign for the American West* (Yardley, Pennsylvania: Westholme Publishing, 2008): vii.

his work as a military history whose goal is to provide, "in as much detail as possible," the "where, what, when, and how of the Indian Wars."[4] This arrangement most accurately reflects how society views the conflict: one purely of battles between brave warriors and federal troops.

Yet focusing exclusively on the aspect of warfare, one cannot begin to try and understand why the battles were fought in the first place. When asking this question, historians must begin to consider the perspective of the Indian as well as the American. In his work *Bury My Heart at Wounded Knee,* Dee Brown tells the story of the Indian Wars not from the American perspective looking westward, but from that of the Indian looking toward the east.[5] In Brown's words, the book tells the story of the Indian Wars, "as the victims experienced it."[6]

Alternatively, many Americans are vaguely aware, or perhaps even unaware that the Indian Wars took place at all. Vine Deloria, Jr. points to the continuing ignorance toward Indian culture and history in his work *Custer Died for Your Sins*, writing with the goal of "correcting misconceptions, and calling attitudes to account."[7] Deloria's work discusses sensitive topics such as the manner in which the federal government forced tribes to sign treaties, then ignored the provisions pertaining to the government whilst stringently enforcing the provisions pertaining to the Indians. Deloria also examines the policies of extermination and improper treatment imposed upon Indians by and through the government and its agencies. Such profound topics do not portray the United States in a favorable light, and run contrary to the idea of Americans as a peaceful and freedom loving people which may suggest why this portion of history is so unfamiliar to most Americans and so poorly represented within history.

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[4] Ibid.
[5] Dee Brown. *Bury My Heart at Wounded Knee: An Indian History of the American West* (New York: Picador, 2007): xxiv.
[6] Ibid.
[7] Vine Deloria, Jr. *Custer Died for Your Sins* (Norman, Oklahoma: University of Oklahoma Press, 1988): xiii.

Deloria's work points to another important element of the Indian Wars: the legal aspects. While treaties and civil cases are often presented as addendums to the larger battles occurring at the time, I would argue that the inverse is actually true. Although military engagements between federal forces and various tribes occurred throughout the nineteenth century, the true war was fought primarily in the legal sphere. The decision in *Standing Bear v. Crook* would completely alter the relationship between tribes and the federal government in the years to come. The case of Standing Bear is the culmination of nearly a century's worth of battles fought not on the battle field but in the courtroom. This paper will show how a feedback loop was created by means of legal cases influencing the legislative process which in turn affect policy toward tribes and ultimately become challenged in the court and begin the process anew. This loop would come to define and shape the on-going relationship between Indians and the United States in the eighteenth century.

Since colonization of the American continent by European powers began, relationships between the native inhabitants and European settlers had been mixed. By the close of the eighteenth century, the newly independent United States of America recognized the need to treat and conduct trade with Indian tribes. Originally, the power to negotiate with tribes was divided between the states and the national government operating under the Articles of Confederation.[8] Yet Madison alluded to the problem with this sharing of power in Federalist 42 stating, "How trade with Indians, though not members of a State, yet residing within its legislative jurisdiction can be regulated by an external force, without so far intruding on the internal rights of legislation, is absolutely incomprehensible." The solution, Madison argued, was resolved in the

[8] Yennes, 11.

federal constitution which gave Congress the power to, "regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes."[9]

Even from this early stage, one can see problems emerging over the question of how to categorize Indians. Were they residents of a state? Of the country? The Constitution clearly says no. The Commerce Clause definitively sets apart Indian tribes as independent entities not tied to any state, and thus purview to federal oversight. Furthermore, appropriation of representatives in Congress was determined by "adding the whole Number of free Persons… and excluding Indians not taxed."[10] Simply put, unless Indians became residents of a state (and thus subject to taxation), they were not considered citizens of the United States or any state therein.

As American settlers continued to spread beyond the original Thirteen Colonies, the matter over possession of land would resurface, specifically the conveyance of ownership. The matter would come to a head in the case of *Johnson v. M'Intosh*. The principle question in this case was whether Indians were able to convey land to private citizens. Although the case was concerned with Indian lands, neither party involved in the suit was of Indian ancestry.[11] Thomas Johnson and his fellow plaintiffs had obtained their land from the Illinois and the Wabash land speculation companies who had dealt directly with the Illinois and Piankeshaw tribes to purchase and then sublease the land. Alternatively, William M'Intosh had purchased a similar parcel of land from the United States government which had obtained the land via treaty cessions from the same tribes, but occurring after the sale to the Illinois and Wabash companies.[12] The case was initially heard in the U.S. District Court for Illinois and then appealed to the Supreme Court.

[9] Constitution of the United States of America, Article I, Section 8, Clause 3.
[10] Constitution of the United States of America, Article I, Section 2, Clause 3.
[11] Kenneth H. Bobroff. "Indian Law in Property: Johnson v. M'Intosh and Beyond," *Tulsa Law Review* 37, No. 2 (2001): 522.
[12] Bobroff, 522-523.

Writing for the majority, Chief Justice John Marshall would lay out the Court's opinion that would shape Indian relations well into the future.

Marshall began by presenting an in-depth examination of the doctrine of discovery which, "gave title to the government by whose subjects or by whose authority it was made."[13] Marshall went on to say that while the Indians maintained a diminished right to their land, "their power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it."[14] Put simply, European powers held exclusive title over the land they had "discovered" and settled.

This power was then relinquished to the government of the United States following the revolution. Marshall explained, "It has never been doubted that either the United States or the several states had a clear title to all the lands within the boundary lines described in the Treaty [of Paris], subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it."[15] Thus, as the crown had formerly claimed exclusive title via discovery, that title and right to hold exclusive power over it was now vested in the government of the United States.

As settlers continued to flood into the western territories, they began to pressure law makers to open new lands for settlement. A popular song of the time exclaimed, "All I want in this creation is a pretty little wife and a big plantation away up yonder in the Cherokee Nation."[16] Georgia in particular would come to grow increasingly frustrated with the slow acquisition of

[13] *Johnson v. M'Intosh* 21 U.S. (8 Wheat.) 543.
[14] Ibid.
[15] *Johnson v. M'Intosh* 21 U.S. (8 Wheat.) 543.
[16] Daniel Walker Howe. *What Hath God Wrought: The Transformation of America, 1815-1848* (Oxford, Oxford University Press, 2009), 414.

land via the treaty process and pressured the federal government to intensify their efforts bringing title over Indian lands to the forefront of the national stage.[17]

Georgia, well aware of Marshall's ruling in *Johnson v. M'Intosh*, believed American settlers had a right to the fertile Cherokee lands, and so began enacting a series of statutes designed to pressure the Cherokee out of Georgia in 1826.[18] The first of these resolves came in November in the form of Senate Resolution 414 which declared, "The extinguishment of the Indian title to all the lands within the limits of Georgia is a matter of not only constant, but urgent expediency." Because the *M'Intosh* case gave only the Federal government the power to negotiate over land, the resolution went on to urge the President of the United States to enter negotiations with the Cherokee Indians, "the purpose of which will be to extinguish the title to all or any part of the lands now in their possession."[19] Georgia continued to strip the Cherokee of their rights, prohibiting the testimony of Indians in court, and requiring Indians to obtain a permit to travel outside of Indian lands.[20] Acting within the guidelines of *M'Intosh*, Georgia had pressured the federal government through legislation to obtain the Cherokee lands for Georgians, while simultaneously enacting restrictive laws against Cherokees under powers reserved to the states.

The Cherokee responded in kind to the threatening overtures of the Georgia legislature by convening in New Echota in July 1827 to create a constitution. The Constitution of the Cherokee Nation was formed to "ensure tranquility, promote justice, and secure to ourselves and our

[17] Stuart Banner. *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2005), 192.
[18] Banner, 198.
[19] William C. Dawson. *Compilation of the Laws of the State of Georgia Passed by the General Assembly From the Year 1819 to the Year 1829, Inclusive* (Milledgeville, Georgia: Grantland and Orme, 1831), 66.
[20] Banner, 200.

posterity the blessings of liberty." It set the boundaries of the nation in accordance with the boundaries prescribed primarily by the first Washington Treaty of 1819, and created a republican form of government for the Cherokees that mirrored that of the United States.[21] The following year, the Georgia legislature declared that all lands within Georgia, "belong to her absolutely," and "that the Indians are tenants at her will." Furthermore, the legislature declared the Cherokee Constitution "inconsistent with the rights of [Georgia], and therefore not recognized by this government." [22]

Just as Georgia was citing *Johnson v. M'Intosh* and the Constitution to support its legislative prerogative, so too were the Cherokee using the same legal means to shape their policy. What had begun in *M'Intosh* as a question over Indian title to land, had now been used by the Georgia legislature to claim ownership over the Cherokee land. The Cherokee rejoinder was to declare themselves a sovereign power in whose affairs Georgia had no legal authority to interfere—a status Georgia refused to recognize. The Cherokee and Georgia were in the midst of ideological warfare and political one-upmanship both drawing upon the same legal source material to support their position and counter the other. Neither side backed down ensuring that conflict was bound to find its way back into the courts.

The year 1830 would prove pivotal to the battle between the Cherokee and Georgia. In May of 1828, the Cherokee had signed a new treaty with the United States in which the federal government provided enticements for resettling west of the Mississippi.[23] However by 1830 many Cherokee refused to leave Georgia despite the incentives. Spurred by recent gold

[21] Constitution of the Cherokee Nation.
[22] Dawson, 99.
[23] United States. Second Treaty of Washington, United States and Cherokee Tribe. May 6, 1828. *United States Statutes at Large* 7, 311

discoveries on Cherokee land, Georgia declared it would seize all Cherokee lands and pressured the federal government to remove the Indian squatters. As a result, on the 28th of May President Jackson signed into law "an act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi."[24] Wheels were in motion to categorically evict the Cherokee from their land.

Jackson had earned a reputation as a brutal Indian fighter in the Creek Wars and believed Indians to be brutal savages: butchers of women and children.[25] It was Jackson who had pushed for the bill, and by securing its passage, Jackson had gained the ability to change the nation's long enduring policy toward Indians.[26] In an address to Congress at the end of the year, Jackson proudly announced that "the benevolent policy of the government" regarding Indian removal was approaching a "happy consummation." Jackson asked, "What good man would prefer a country covered with forests and ranged by a few thousand savages to our extensive Republic…filled with all the blessings of liberty, civilization and religion?"[27] Jackson's message was clear: the Cherokee would go in order to make room for the civilized Americans. Just as both the Cherokee and Georgia had turned to *Johnson v. M'Intosh* to support their positions, so too did Jackson use Marshall's conclusion of federal supremacy in matters dealing with Indian tribes to bring forward his policy of Indian removal.

It was almost inevitable then that the battle between the Cherokee Nation and the State of Georgia, now backed by President Jackson, would find itself on the docket of the Supreme

[24] Indian Removal Act of 1830. Statutes at Large, 21st Congress, 1st Sess. (May 28, 1830), 411.
[25] Jon Meacham. *American Lion: Andrew Jackson in the White House* (New York: Random House, 2008), 31.
[26] Ibid., 145.
[27] Jackson, Andrew. Message to Congress. "On Indian Removal." December 6, 1830; Records of the United States Senate, 1789-1990; Record Group 46; National Archives.

Court. The first of two cases to arrive before the court was *Cherokee Nation v. Georgia* in which the Cherokee brought their suit before the court in accordance with Article III of the Constitution which gave the Supreme Court original jurisdiction over disputes between states and foreign governments.[28] The Cherokee listed the several treaties and conventions that it had signed with the government of the United States and which had been duly ratified by the Senate and argued that by these treaties, "The Cherokee Nation of Indians are acknowledged and treated as sovereign and independent States, within the boundary arranged by those treaties."[29] As a foreign nation, the Cherokee argued, Georgia had no right to exert authority over its lands or citizens.

The case was dismissed by the court. Writing for the majority, Chief Justice John Marshall wrote that, "It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations."[30] The questions over sovereignty had been settled: Indian tribes were not independent nations, but dependents of the federal government.

The battle raging in Georgia was far from over, however. In 1831, Georgia barred Christian missionaries from entering Cherokee lands, largely because they were an effective, vocal dissention of the removal policy. Two such missionaries, Samuel Worcester and Elizur Butler, were arrested by Georgia authorities after refusing the leave Cherokee lands. Both were tried, convicted, and sentenced to four years hard labor.[31] The conviction was appealed and a writ of certiorari issued by the Supreme Court would bring another Indian lands case before the

[28] Constitution of the United States of America, Article III, Section 2, Clause 1.
[29] *Cherokee Nation v. Georgia*. 30 U.S. (5 Peters) 1
[30] Ibid.
[31] Howe, 355.

court in the matter of *Worcester v. Georgia*. Because the court had previously classified Indian tribes as domestic dependents, the question arising in *Worcester* was whether tribal lands were subject to the jurisdiction of the state in which they resided, or that of the federal government.

Where the *Cherokee Nation v. Georgia* case had been a stunning defeat for the Cherokee, the ruling in *Worcester* could have been a resounding victory not just for the Cherokee, but for Indians as a whole. Marshall began by reversing his earlier opinion of European claims of ownership in *Johnson v. M'Intosh* stating, "It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other." Americans did not have the authority to claim title over Indian lands, Marshall argued, it simply gave colonists "the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell." Marshall continued, "Our history furnishes no example… of any attempt of the crown to interfere with the internal affairs of the Indians." Marshall concluded by declaring the Cherokee Nation "a distinct community occupying its own territory… in which the laws of Georgia have no force, in which the citizens of Georgia cannot enter."[32] Worcester's conviction was overturned, with the court having ruled that Georgia had no right to interfere with the affairs of the Cherokee. Furthermore, the purview of overseeing commerce and negotiating treaties were the responsibility of the federal government; therefore, Indian tribes would fall under the legal jurisdiction of the federal government.

The decision in *Worcester* supported the Cherokee in nearly every point of their argument and should have been a major victory, but it was not to be. Georgia refused to acknowledge the decision of the court and refused to release the two missionaries. Worcester and

[32] *Worcester v. Georgia*. 31 U.S. (8 Wheat) 515.

Butler petitioned the court to issue a writ to secure their release which the court granted when it returned to session in 1833. Jackson ignored the writ, and would remark, "The decision of the Supreme Court has fell still born, and they find that it cannot coerce Georgia to yield to its mandate."[33] Regardless of what the court said, removal of the Cherokee was to proceed as planned.

The feedback loop had created both positive and negative results at the conclusion of the conflict between the Cherokee and Georgia. On one hand, Indian rights were diminished by the ruling in *Cherokee v. Georgia*, classifying tribes as domestic dependents rather than sovereign nations. On the other hand, *Worcester v. Georgia* reversed the discovery doctrine and prohibited forced removal of Indians from their land. But the government would not adhere to the ruling, and this betrayal would ultimately lead to heightened suspicions among tribes when interacting with the government leading to further disputes and a continuation of the Indian Wars.

In 1858, government officials traveling through the Great Plains encountered the Ponca tribe and established a treaty with these people that, among other provisions, provided for federal protection in return for a cession of land. However, the lands ascribed to the Ponca were mistakenly granted to the Sioux in the Treaty of 1868. After several petitions, Congress would eventually acknowledge the treaty obligations, but rather than providing protection or restoring the Ponca's lost land, Congress instead provided meager funds "to indemnify the tribe for losses by thefts and murders committed by the Sioux."[34] Attitudes toward the Ponca would quickly

[33] Meacham, 204.
[34] Brown, 352.

change following the events at the Little Bighorn, and in 1876 Congress would add the Ponca to the list of tribes to be removed from the plains and resettled in Indian Territory.[35]

Among the tribes of the Ponca was a chief named Standing Bear. Standing Bear and his fellow chiefs refused to move. They wished to remain in their ancestral lands, they had made no agreements which required them to move, and the Ponca insisted that the United States adhere to its treaty obligations.[36] The government, however, had no intentions of negotiating with the Ponca. Standing Bear would later tell how, "The soldiers came with their guns and bayonets… They aimed their guns at us, and our people and our children were crying." Fellow chief White Eagle described how the Ponca were forced out of their lands "just as one would drive a herd of ponies."[37] In May of 1877, the Ponca were removed from their home on the Niobrara and marched to Indian Territory.

Their new home was unforgiving. The Ponca found the hot, arid climate difficult and were unable to grow many of their traditional crops. Illness ravaged the Ponca who were already weakened from malnutrition due to inadequate supplies furnished by the government.[38] When the last of Standing Bear's sons died, he begged his father to take him "to our old burying ground by the Swift Running Water." Standing Bear promised to do so, and set out with sixty-six fellow tribal members in January of 1879 to return his son's body home.[39] The U.S. Army intercepted the party on the Omaha Reservation and took the Ponca into custody.

[35] Ibid.
[36] Ibid, 355.
[37] Ibid., 356.
[38] Ibid., 357-358.
[39] Brown 358.

An Omaha attorney and son of Indian missionaries by the name of John Webster came to the aid of the Poncas.[40] Realizing that the Army could receive orders at any time to remove the Ponca back to Indian Territory, Webster obtained a writ of habeas corpus from the United States District Court served upon General Crook requiring him to show under what authority the Ponca were being held. Thus began the matter of *Standing Bear v. Crook*.[41] After forty years of Indian removal, that policy was now being challenged under the guidelines set forth in *Worcester* which prohibited forceful removal of Indian tribes and seizing of Indian lands.

The case was not a question over land, but rather whether Standing Bear, as an Indian, could be determined to be a person under the law. Additionally, if he was a person, was he guaranteed the rights of a citizen? Throughout the trial, the Ponca attorneys pointed to the Ponca's ways of life and work habits to demonstrate that the Ponca were a "civilized" people.[42] Judge Dundy agreed stating, "An Indian is a 'person' within the meaning of the laws of the United States, and has, therefore, the right to sue out a writ of habeas corpus in a federal court, or before a federal judge, in all cases where he may be confined or in custody under color of authority of the United States, or where he is restrained of liberty in violation of the constitution or laws of the United States." Dundy would go on to say, "That no rightful authority exists for removing by force any of the [Ponca] to the Indian Territory," and that "Indians possess the inherent right of expatriation… and have the inalienable right to 'life, liberty, and the pursuit of happiness.'"[43] In short, Indians were citizens of the United States with all the rights and privileges thereof. Because the Ponca had not signed any treaty with the government which

[40] Starita, 4.
[41] Brown, 359-360.
[42] Starita, 4.
[43] *Standing Bear v. Crook.* 25 F.Cas. 695 (C.C.D.Neb. 1879).

ceded their land or consented to their removal, the government could not force the Ponca to remain in Indian Territory against their will.

The Indian Wars were, and will always be, a war fought over land. But the war was not only a war of battles, it was a war of legislation and litigation. The fight which began with European conquest continued in the battles raged in courtrooms. The decision of the court in *Johnson v. M'Intosh* gave rise to the idea that Anglo-Americans held presumptive power over the title of the land; that it was theirs to do with as they please. The case also established that only the government of the United States had authority to negotiate with the various tribes over land.

The *Johnson v. M'Intosh* case would come to be used by a Georgia legislature eager to evict Cherokee inhabitants from lands full of bountiful soil and rich mineral ores. The Cherokee would counter-attack with the *M'Intosh* case as well, citing that only the federal government was empowered to negotiate with tribes, just as the federal government was empowered to negotiate with foreign nations. It was logical to conclude, the Cherokee argued, that tribes could be considered foreign states and thus not purview to any laws except its own. This idea was destroyed in the ruling of *Cherokee Nation v. Georgia* when the court declared tribes to be domestic dependents of the United States. The court quickly clarified its position further in *Worcester v. Georgia* stating that tribes were bound to federal authority, not the states in which they resided. Furthermore, the government could seek cession of lands by tribes through diplomatic negotiations, but the government could not force tribes to sell their land.

In the end the question remained, what did it mean to be a domestic dependent? Where did the Indian fit in to the American legal system? The case of *Standing Bear v. Crook* would answer those questions definitively by declaring Indians American citizens. Under the Equal

Protection Clause of the Fourteenth Amendment, Indians were guaranteed the same rights as any other American, including the right to petition and bring suit against the government for redress of grievances.

When one looks at the military engagements of the Indian Wars, each and every conflict stems back to these cases. In the majority of cases, blood was shed because settlers picked fights with Indian tribes believing they had a right to "civilize" the land. But blood was also shed because Indians would refuse forceful resettlement by the government, asking only that the government live up to its obligations outlined in the treaties it made with various tribes. And finally, blood was shed simply because Americans viewed Indians as sub-human "savages" rather than their fellow citizens.

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