

II. A Brief Historical Overview of the Relationship between the Federal Government and American Indian Tribes in the Nineteenth Century

Indian Policy: The Colonial Legacy

During most of the colonial era, the British Crown dealt with the Indian tribes as foreign sovereign nations. While there was and is no clear definition of what makes a nation sovereign, there are a number of generally accepted attributes that qualify something as sovereign.

- There must be a distinct, unique group of people who must have a distinct language, a distinct moral and religious structure, and a distinct cultural base.
- These people must have a specific geographic area that they control and regulate.
- Within that area, they must possess governmental powers, including the power to tax and the power to change their government if they see fit.
- These governmental powers must be acknowledged by the people who are subject to them, and they must be enforceable by some sort of authority, whether it be military, police, or general citizen control.
- A sovereign entity must be recognized by another sovereign. For Indian tribes, that recognition has taken place through treaties.

At the time of European contact with the North American continent, all Indian nations originally exercised the *powers of sovereigns*. They recognized the sovereignty of other Indian Nations by forming compacts, treaties, trade agreements, and military alliances. All colonial powers also recognized the sovereignty of Indian nations by entering into treaties with various nations.

In short, Indian nations were sovereign entities that negotiated as independent, foreign nations with the colonial administrations of Britain and its colonies. Such negotiations took the form of government-to-government treaties agreed upon by representatives of the British Crown and by Indian tribes.

However, the British Crown gradually reinterpreted the nature of tribal sovereignty. As individual colonists continually encroached upon Indian lands, the British Crown assumed a protectorate position - arguing that the Crown must protect the tribes against colonial excesses and injustice. To that end, in 1755, the British government assumed direct responsibility for Indian affairs. The British were worried about the French who continued to gain the loyalty of frontier tribes. So British representatives recruited tribes to fight on the British side during the *French and Indian War*. At the War's end, the British adopted the first formal policy directed at protecting the Indians. The *Proclamation of 1763* established a western boundary along the crest of the Appalachian Mountains across which white settlers could not cross. As such, it provided a boundary that distinguished "Indian Country" from non-Indian country.

Nineteenth Century Indian Relations with the United States of America.

After the colonists won their independence from England, they immediately claimed ownership of all Indian lands west of the Appalachians by right of conquest over Britain - the belief which originated with the Catholic Church that when a Christian people found land settled by a non-Christian people, they had the God-given right to conquer the land and convert the people to Christianity.

Before the Constitution was signed, the *Northwest Ordinance of 1787* mapped out the manner in which the United States government would deal with the Indian nations. The Ordinance proclaimed that the government would observe "the utmost good faith" in dealing with Indians and promised that their lands would not be invaded or taken except "in just and lawful wars authorized by Congress." At the same time, however, the Ordinance provided a blueprint for national expansion into Indian territory. Thus,

from the very beginning of the US government, Indian policies have been contradictory - in writing, most aimed to act in good faith toward the Indians, but in practice, these policies endorsed actions most beneficial to the non-Indian population.

When the Constitution was written, it included a provision that established federal authority over the conduct of Indian relations. In Article 1, Section 8 (*Commerce Clause*) the Constitution declares that “The Congress shall have the power to... regulate Commerce with foreign nations and among the several states, and with the Indian tribes.” Thus, the Constitution specified that there were two primary and sovereign levels of government - federal and tribal. In short, Indian sovereignty was inherent and Indian nations were equal to foreign nations and had all the sovereign powers of a foreign nation.

Because Indian nations were sovereign, the federal government immediately faced what soon became known to non-Indians as the “Indian problem.” While European Americans wanted to move westward and conquer all the land to the Pacific Ocean, it was clear that the hundreds of sovereign Indian nations were not going to willingly or voluntarily give up their land. Consequently, the United States government took two steps:

- signing hundreds of treaties with Indian nations, treaties which in turn were bolstered by a series of US Supreme Court Decisions; and
- passing dozens of laws designed to define relations between the federal government and Indian nations.

Treaties and Supreme Court Decisions

Treaties were legal, government-to-government agreements between two legitimate governments - the United States and an Indian nation. When an Indian tribe signed a treaty, it agreed to give the federal government some or all of its land as well as some or all of its sovereign powers. In return, when an Indian nation gave up land through a treaty, it entered into a *trust relationship* with the federal government in which the government promised to provide benefits and rights to the American Indian peoples in exchange for their land. The trust responsibility, in turn, bound the United States to represent the best interests of the tribe, protect the safety and well-being of tribal members, and fulfill its treaty obligations and commitments.

The basis for the federal relationship with Indian nations and for tribal sovereignty began to be redefined by the *US Supreme Court* as early as 1823. Beginning with *Johnson v. McIntosh*, the Supreme Court has produced two competing theories of tribal sovereignty:

- the tribes have inherent powers of sovereignty that predate the “discovery” of America by Columbus; and
- the tribes have only those attributes of sovereignty that Congress gives them.

Over the years, the Court has relied on one or the other of these theories in deciding tribal sovereignty cases. Whichever theory the Court favored in a given case largely determined the powers the tribe had and what protections they received against federal and state government encroachment.

In what is known as the *Marshall Trilogy*, the Supreme Court established the doctrinal basis for interpreting federal Indian law and defining tribal sovereignty.

- ***Johnson v. McIntosh (1823)***. This case involved the validity of land sold by tribal chiefs to private persons in 1773 and 1775. The Court held that while the Indians were the rightful

occupants of the land, tribes had no power to grant lands to anyone other than the federal government. The federal government, in turn, held title to all Indian lands based upon the “doctrine of discovery” - the belief that initial “discovery” of lands gave title to the government responsible for the discovery. Thus, the right of Indians to complete sovereignty was limited as European Americans had exclusive title to the land which they had “discovered.”

- ***Cherokee Nation v. Georgia (1831)***. The Cherokee Nation sued the State of Georgia for passing laws and enacting policies that not only limited their sovereignty, but which were forbidden in the Constitution. The Court’s decision proclaimed that Indians were neither US citizens, nor independent nations, but rather were “domestic dependent nations” whose relationship to the US “resembles that of a ward to his guardian.” Thus, Indian nations did not possess all the attributes of sovereignty that the word “nation” usually implies. This ruling set a legal basis for the trust relationship in which the US had the duty to protect Indian tribes which were “domestic dependent nations.”
- ***Worcester v. Georgia (1832)***. A missionary from Vermont who was working on Cherokee territory sued the State of Georgia which had arrested him, claiming that the state had no authority over him within the boundaries of the Cherokee Nation. The Court, which ruled in Worcester’s favor, held that state laws did not extend to Indian country. Thus, the ruling clarified that Indian tribes were under protection of the federal government and that Congress had plenary, or overriding power, over all Indian tribes.

Thereafter, Indians had a kind of limited sovereignty that was to be governed by paternalistic trust and subject to the interpretation of the US government. In other words, Indian nations would have to trust the US government to do what was best for them in some areas.

The first treaty that was signed by the US government was with the *Delawares* in 1778 during the Revolutionary War. The revolutionary government promised that if the Delawares helped their fight against the British, they would be given statehood in the future. Between 1778 and 1868 - 90 years - 371 treaties were signed. These treaties focused primarily on the way the US government would handle Indian land and the resources on those lands. In 1871, Congress formally ended the government to government treaty-making power. No longer would Indians have any negotiating power or say about their treatment at the hands of the US government. Thereafter, such determinations would be made as Congress passed various federal policies and laws.

Federal Policies and Laws

From 1930 throughout the remainder of the Nineteenth Century, four specific policies were adopted by the federal government, each of which was supported by a series of laws: removal, reservations, allotment and assimilation, and elimination.

Removal. By the early 1830s, about 80,000 members of the *Cherokee, Creek, Choctaw, and Seminole* tribes lived on land that many Americans felt could be more profitably farmed and settled by non-Indians. But all four tribes had signed treaties with the federal government guaranteeing the right to maintain their sovereign systems of tribal government within their ancestral lands. Not surprisingly, these tribes were unwilling to give up their land and to negotiate new treaties with the federal government that would give away part of the land.

President Andrew Jackson decided that a new federal policy would be necessary in order to remove the Indians from their lands. Thus, he supported the *Removal Act of 1830* which gave him the right to make land “exchanges” by forcibly removing the four tribes from their ancestral lands against their will.¹ Consequently, more than 30 tribes were removed to the area that came to be known as *Indian Territory* - the area that now comprises the state of Oklahoma.

Between 1830 and 1840, somewhere between 70,000 and 100,000 Native Americans living in the East were forcibly resettled by the US Army. Many others were massacred before they could be persuaded to leave; an unknown number died from disease, exposure, and starvation suffered during the *Trail of*

Tears as well as on other enforced, long-distance marches westward to Indian Territory.

While the removal policy helped to alleviate the immediate “Indian problem,” as more and more Americans continued to move westward, they found many other Indian tribes living in freedom throughout the continent. Because these Indians prevented non-Indians from settling in many desirable areas, and because many white settlers did not feel safe living amidst the Indian “danger,” another new policy was created to deal with the Indians. This time, Indians would be confined to a land reserved exclusively for their own use - areas that came to be called reservations.

Reservations. The men who created the reservation system believed that if Indians could be confined to one particular geographical place reserved for them, they could become “civilized” and assimilated into American life. They could be encouraged to stop being Indians and to become like white men. Thus, the reservations were to make sure the remaining tribes were converted to Christianity and “saved”; taught English, sewing, and small-scale farming; and ultimately, Americanized.

While some Indians adjusted to life on the reservation, the vast majority did not become more like the white man. Indeed, most fought to maintain their Indian culture and traditions. The reservation system survived for almost two decades before it was clear that all Indians were not going to be confined and that the vast majority were not going to become Americanized. Thus, a new policy was created - allotment.

Allotment and Assimilation. Many Americans had come to believe that Indians would never become Americanized as long as they lived in large reservation communities in which they celebrated their cultural and spiritual traditions and owned land communally. Further, American policy makers believed that the reservation did not give the Indian an incentive to improve his or her situation. So, the federal government’s new policy was designed to detribalize the Indian by destroying the idea of communal land ownership on the reservations. This policy became law under the *Dawes Severalty Act of 1887*.

The Act allowed the President to give, or allot, portions of certain reservation land to individual Indians - 160 acres to each head of family and 80 acres to others - to establish private farms, and authorized the Secretary of Interior to negotiate with the tribes for purchasing “excess” lands for non-Indian settlement. Each head of family would receive final title to the land and American citizenship *after* a 25-year period during which they had willingly assumed responsibility for the land.² Any land remaining after allotment would be sold to whites; all proceeds were to be used to “civilize” Indians on the reservation.

At the same time that the Dawes Act was being conceptualized, American policy makers were also experimenting with a new assimilation policy. Some reasoned that for Indians to really become assimilated,” Indian children would have to be taken from their *tribal environment* and reeducated. Thus it was that in 1879, a former Indian fighter, Colonel Richard Pratt, created the first large Indian academy in the nation - the *Carlisle Indian Industrial School* in Pennsylvania - dedicated to totally Americanize Indian children.

Within a few years, federal authorities forced Indian parents to either send their children to an off-reservation boarding school such as Carlisle, or to boarding schools established in remote areas of Indian reservations. The boarding school had become the primary tool of assimilationists.

And what awaited the Indian children upon their arrival? The teachers spent the first few days forcing the children to discard their Indian ways and adopt American ways. For example:

- Children were forbidden to speak their native language, often under threat of physical punishment.
- Their long hair was clipped to the skull, sometimes as part of a public ritual in which the child was forced to **renounce** his or her Indian origins.

- Their loose-fitting clothing and moccasins were taken away and burned. *Boys* were then given military uniforms and *girls* were forced to wear tight-fitting, Victorian-style dresses.
- They sometimes were told never to use their Indian names and were given an American name instead.
- They were forbidden to practice any cultural or religious rituals, usually under threat of punishment, and were instead told that they would be expected to become devoted Christians.

Once the rules were clear, then children became involved in the daily routine which was defined by military drill and structure. Children attended school one half of each day, and the other half was spent in training for several skills - mechanics, printing, and agriculture. For most Indian children, the *results were difficult*. In shedding their "Indianness," they were neither accepted into American society, nor were they able to comfortably resettle into traditional Indian society.

The results of the boarding schools policy and the Dawes Act were catastrophic for American Indians.

- Indians lost even more of their land. When allotment went into effect, Indians still owned over 138 million acres of land. But when Dawes was repealed 47 years later, 90 million acres had passed from Indian hands into the hands of whites, representing a 60% loss of land.³
- Indians suffered enormous loss of their cultures and languages.
- Indian family life was greatly disrupted by forcing Indian children to attend boarding schools.

Ultimately, allotment and assimilation *policies failed* to assimilate Indians and force them to accept a more settled, Americanized way of life. Toward the end of the nineteenth century, a large number of Indians and several Indian nations still lived in communal groups that refused to live on reservations or to be involved in allotment. Thus, the federal government moved ahead with another policy to deal with these recalcitrants - elimination.

Elimination. The rationale for eliminating Indians grew out of a belief that Indian resistance was equivalent to a declaration of war against the US. Using such a rationale, in the late 1800s the US Army declared war upon several tribes, began eliminating resisters, and sought to absolutely subjugate any survivors. The war waged against the *Sioux* provides a tragic example of this governmental policy.

In the late eighteenth century, white men first appeared in Sioux territory - in the area known as the Black Hills, an isolated ridge, roughly 40 by 120 miles, of pine-dark peaks that rise from the dry plains at the border areas of present-day Wyoming and South Dakota. In 1851, the federal government and the Sioux entered into a treaty whereby the US promised not to encroach upon Sioux territory and, in return, the Sioux promised to provide all pioneers with safe passage through their land. Shortly thereafter, in defiance of the treaty, the government erected several fortified trading posts in Sioux territory. During formal negotiations in 1866, the leader of the largest, most powerful band of the Sioux, *Red Cloud of the Oglala*, walked out of the meeting declaring, "I will go - now! - and I will fight you! As long as I live I will fight you for the last hunting grounds of my people."

After two years of war, the forts were abandoned to allow a US peace commission to meet with Red Cloud. On Nov. 6, 1868, the *Fort Laramie Treaty* was signed guaranteeing the Sioux,

...absolute and undisturbed use of the Great Sioux Reservation...No persons...shall ever be permitted to pass over, settle upon, or reside in territory described in this article, or without consent of the Indians...No treaty for the cession of any portion or part of the reservation herein described...shall be of any validity or force...unless executed and signed by at least three-fourth of all adult male Indians, occupying or interested in the same.

Within a few years, thousands of miners began to pass through the Black Hills without the Indians' consent. The new settlers, as well as many other Americans, demanded that the Black Hills be bought from the Indians, with or without their consent. The Sioux, however, refused any attempts to purchase their land. Thus, in direct contravention of the Fort Laramie Treaty, in June 1876, President Grant sent

troops into the Great Sioux Reservation in which over 20,000 men, women, and children lived. In the *Battle of Little Bighorn*, the Seventh Cavalry led by General *George Armstrong Custer*, attacked a Sioux camp on the Little Bighorn River. Subsequently, Custer and all of his men were killed.

Two weeks later, the US government declared that, due to the Indians' warlike behavior, the Fort Laramie Treaty was invalid and the Sioux were expected to relinquish all claim to the Black Hills. They were then rounded up and confined to army forts where their ponies and rifles were confiscated. In September, the Sioux were presented with a document giving the US all of the Black Hills and 22.8 million acres of surrounding territory, granting rights-of-way across what was left of the Great Sioux Reservation, and ending all hunting rights outside the reservation. If the documents were not signed immediately, federal officers told Red Cloud and the other Sioux chiefs, food and other essential supplies would be delayed indefinitely. Perceiving they had no other choice, they signed.

In 1889, the Sioux people were again approached by the US government with a proposal to turn over 9 million acres of their remaining land. They refused. President Benjamin Harrison then passed an act dismantling the Great Sioux Reservation and creating the seven reservations that exist today. The Oglala received the dry rolling hill country which is now known as Pine Ridge Reservation consisting of approximately 2,722,000 acres. The remainder of Sioux land was turned over to the newly created states of North and South Dakota.

In November 1890, a large contingent of infantry and cavalry arrived at and occupied the Pine Ridge Reservation with orders to quell the "hostile," traditional Sioux who increasingly were involved in the *Ghost Dance*, a spiritual ritual that gave the Indians hope that their traditional culture and lifestyles could survive. To the US Army, however, the dance symbolized resistance and the possibility of an Indian rebellion.

On December 29, 1890, Chief Big Foot met four cavalry units under orders to capture him. After the Sioux raised a white flag to signal their promise not to fight, they were taken to an army camp at *Wounded Knee* Creek and ordered to give up their weapons. A medicine man started the Ghost Dance, urging his tribesmen to join him by chanting in Sioux, "The bullets will not go toward you." When one young Indian refused to give up his rifle, confusion ensued during which several braves pulled rifles from their blankets, and the soldiers opened fire. At least 150 Indian men, women, and children died; as many as 300 may have perished after the wounded died.

Elimination had indeed been successful. By the turn of the Twentieth Century, only about 250,000 American Indians still survived in the United States. All of them had been dispossessed of their land and most had been reduced to membership within a domestic dependent semi-sovereign nation under the paternalistic tutelage of the US government.

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In summary, the signing of treaties, the rendering of Supreme Court decisions, and the passing of policies and laws gradually eroded the sovereignty of American Indian nations by seeking to achieve at least two specific goals:

- eliminating the Indian threat to peaceful westward expansion; and
- attempting to destroy Indian cultural, spiritual, economic, and political traditions by assimilating Indians into American life.

However, many American Indians refused to be assimilated and victimized by their historical experiences with the federal government. As the Twentieth Century progressed, Indian nations gradually were revitalized as they continued their resistance to becoming Americanized and losing their essential "Indianness." Indeed, by 1990, the federal census found that almost 2 million American citizens reported that they were of Indian ancestry.

Note: *This saga of Twentieth Century federal relationships with the American Indian is anticipated to be*

expanded toward the end of 1999.

¹ Some of the northeastern tribes had already been involved in the removal process. For instance, the Delaware Indians were first removed from their home in Delaware in 1700. Between 1700 and 1867, they were removed six more times before being settled in **Indian Territory** - the land reserved for Indians which now comprises the state of Oklahoma

² Not until the Snyder Act of 1924 were all Native Americans granted the rights of citizenship.

³ The allotment provisions of the Dawes Act were repealed by the Indian Reorganization Act of 1934. This act also pledged that the government would return to tribes all lands that had once been within Indian reservations but had not yet been sold to whites. It also authorized a \$2 million annual fund to purchase additional lands for individuals and tribes. Allowed tribes the right to organized for the purposes of limited self-government and economic development, and promised that qualified Indians would be given preference for position in the BIA and that \$250,000 would be appropriated annually for educational loans to Indian students