4-23-2019

Reservation About Reservations: A Political History of Congress' Regulation of the Native Tribes of Oklahoma

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April 15, 2019

Abstract

Congress did not correctly disestablish the Native American reservations in what is now the State of Oklahoma at the time of its rise to statehood according to the test created by the Supreme Court in *Solem v. Bartlett* (1984). This test requires that the Legislature include specific cession language in its enactments. This paper will examine the laws on the Oklahoma reservations. This examination will be used to argue that although Congress' management of the First Nation peoples living in these enclaves may appear destructive by modern interpretations, none of the legislation formally terminated this area's reservation status according to Supreme Court precedent.

Introduction

In governments with codified laws, citizens of that authority are required to adhere to these edicts. If one breaks a decree, such as the prohibition against murder, society expects a government with the correct jurisdiction to enact justice. Administrations without authority either due to location, crime or the characteristics of the accused should not be granted these powers. If a murder is committed within the borders of the State of Oklahoma, it is reasonable for one to assume that the state would hold inherent jurisdiction to perform a trial and punish the defendant if they are found guilty. One case in Oklahoma challenges this notion. The Sooner State may face considerable jurisdictional implications from the Supreme Court case *Carpenter v. Murphy* (2019). Patrick Murphy admitted to and was convicted for the murder of George Jacobs, but later claimed that the state of Oklahoma did not hold jurisdiction in this case. Murphy is a member of the Muskogee Nation, and the crime occurred within the former boundaries of the Muskogee reservation. Under Federal law, if the accused are Native Americans in Indian territory, federal courts have jurisdiction. The State of Oklahoma claims that Congress dissolved

the reservations in Oklahoma before its statehood which would give them authority in this case. The crux of these arguments rest on different interpretations of the acts of Congress.

For one to determine which argument is the most compelling, an examination of the legislation enacted by Congress about the several tribes in the present state of Oklahoma in the time before its statehood is necessary. During this period, Congress placed severe restrictions on the native nations residing in Oklahoma, but it did not expressly close their reservations. Congress did force Native American's away from their lawfully granted territory through allotment and by allowing homesteaders to swarm around them. It also took away vast amounts of tribal authority by giving it to the Federal Government. In performing these changes, Congress did not meet the requirement of disestablishing the reservations as required by previous Supreme Court rulings.

The Degradation of Tribal Land Rights

In the time before European explorers embarked on dangerous journeys to the yet rediscovered New World in search of riches, lucrative trade routes, and lands to claim for their nations across the sea, the native populations of North America settled in every corner of the vast continent. European communities slowly pushed the First Nations away from their former territory west. The most notorious of these confiscations was the Indian Removal Act of 1830. This act granted the President, who was Andrew Jackson, the power to create districts west of the Mississippi which would be settled by Native Americans removed from within any State or Territory.[1] This legislation was highly contested and barely passed in the House of Representatives. A notable member of this body, David Crockett, vehemently opposed the

[1] U.S. Congress, *Acts of the Twenty-First Congress of the United States*. 21st Cong., 1st sess. Cong. 148, Washington, DC, 1830. 411-13. Accessed March 20, 2019. https://memory.loc.gov/cgi-bin/ampage.

legislation's passage on the grounds that it gave too much power to the executive and ensured the demise of Native Americans.[2] While there were those in opposition, a large portion of the population supported the removal of Native Americans especially in Georgia, beginning in December of 1827, where state legislatures enacted laws that stripped the Cherokee of land rights and allowed for White settlement in a bid to push the Cherokee out of Georgia.[3] Particular to this case, Georgia had forbidden white persons to settle in Cherokee territory without a permit, which led to the arrest of Samuel Worcester.[4] Worcester was a missionary to the Cherokee and the co-founder of the *Cherokee Phoenix*, the first Native American newspaper, with Elias Boudinot, whose son will be the topic of later discussion. Samuel Worcester, as well as others, practiced civil disobedience against this law and were arrested.[5] These pieces of legislation led to the Supreme Court case *Worcester v. Georgia* (1832) in which the court ruled that only the Federal Government could legislate Indian affairs.[6] These rulings were ignored, and the Cherokee were forced to leave. Various tribes were also removed by treaties such as the *Treaty of Dancing Rabbit Creek* and the *Treaty of New Echota*, although these treaties were not followed peacefully.[7] Various tribes were removed after their refusal to vacate resulted in wars

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[2] Evarts, Jeremiah. *Speeches on the Passage of the Bill for the Removal of the Indians*. Boston: Perkins and Marvin, 1830.
[3] Swindler, William F. "Politics as Law: The Cherokee Cases," *American Indian Law Review* 3, no. 1 (1975): 11-12. doi:10.2307/20067867.
[4] Indictment for Samuel Worcester, Elizur Butler, and Other Defendants (Gwinnett County, Georgia September, 1831).
[5] Anderson, Gerald H. "Worcester, Samuel Austin (1798-1859)," Worcester, Samuel Austin (1798-1859) | History of Missiology, Accessed March 19, 2019, http://www.bu.edu/missiology/missionary-biography/w-x-y-z/worcester-samuel-austin-1798-1859/.
[6] Samuel A. Worcester, Plaintiff in Error v. The State of Georgia, 31 515.
[7] "The Treaty of Dancing Rabbit Creek Treaty with The Choctaw," Opened for signature September 27, 1830, https://www.choctawnation.com/sites/default/files/2015/09/29/1830_Treaty_of_Dancing_Rabbit_Creek_original.pdf .
"Articles of a Treaty, Concluded at New Echota in the State of Georgia," Opened for signature December 29, 1835 https://cherokee.org/About-The-Nation/History/Trail-of-Tears/Treaty-of-New-Echota.

such as that between the State and the Seminoles.[8] Native Americans were forcibly removed westward to Indian Territory. As new territories were carved out of the remaining Native American land, the area that would become Oklahoma remained one of the few unorganized territories open for their settlement. The Indian Removal Act and its resulting treaties were the beginning of the reservations of Oklahoma, but it was far from the end of land removal for the tribes relocated to this territory. The reservations would be formally constituted in the *Indian Appropriations Act* of 1851.[9] The land associated with these reservations and the additional properties owned by the tribes in what is now western Oklahoma would be gradually withered away as Congress, in the following acts to be explored, allowed further incursions by settlers and incorporated these lands into the Territory of Oklahoma and the future state.

There were several instances in which Congress reduced Native American rights to land during the passage of Indian appropriations acts which funded the operations of the Bureau of Indian Affairs and made payments for other matters of the tribes. As already mentioned, the *Indian Appropriations Act* of 1851 established the areas reserved for the tribes to settle after being removed due to expanding white settlement. This expansion westward grew as a result of the *Homestead Act* of 1862. The act granted settlers 160 acres of land which they would receive ownership of after residing there for five years.[10] At the time of its passing, the Indian Territory was bound on its northern border by the recently admitted State of Kansas, the State of Texas to the south and Arkansas to the east, which was rebelling against the United States for the

[8] "Indian Treaties and the Removal Act of 1830," Office of the Historian, Accessed March 17, 2019, https://history.state.gov/milestones/1830-1860/indian-treaties.
[9] U.S. Congress. 31st Cong., 2d sess. Cong. Res. 586-87, Accessed March 17, 2019, https://www.loc.gov/law/help/statutes-at-large/31st-congress/session-2/c31s2ch14.pdf.
[10]U.S. Congress. 48th Cong., 2d sess. Cong. Doc. 337, Accessed February 5, 2019, https://www.loc.gov/law/help/statutes-at-large/48th-congress/Session 2/c48s2ch338.pdf.

continuation of slavery, as well as Missouri.[11] It would not be long until the populations of these states yearned to settle in the Indian Territory. Settlers would gain this wish in the *Indian Appropriations Act* of 1885. This Act was passed mostly as a concession to what would be called the Boomer movement. Boomers were settlers who attempted to settle into western Oklahoma by claiming that the *Homestead Act* permitted them to settle in unoccupied lands of the Indian Territory.[12] *The Treaty of 1866* created the unoccupied lands. This treaty forbade slavery within the reservation of the Choctaw & Chickasaw Nation, in addition to ceding the territory that would be considered unoccupied in present central Oklahoma to the Federal Government as punishment for the tribes' involvement in the Civil War.[13] While earlier attempts had been made to live in this area, the movement later gained its popularity as a result of Elias C. Boudinot's campaign. Boudinot was the son of Elias Boudinot who changed his name to honor the patriot of the same name. The elder Boudinot was Cherokee and a signatory of the Treaty of New Echota which was signed in his home and for which he was murdered in 1821.[14] The younger Boudinot was well educated and became a teacher in Vermont in 1851. He would move to live with the Cherokee in 1853 and became a successful lawyer. During the civil war, Boudinot, as well as many other Cherokee, sided with the Confederacy and became a delegate for the Cherokee to the Congress of the Confederate States of America. In 1869, Boudinot's campaign for the settlement of the Indian Territory began. After losing a legal battle over whether his tobacco factory in

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[11] U.S. Congress. House, By Grow. 36th Cong., 1st sess. H. Rept. 255, Accessed March 17, 2019. https://www.archives.gov/legislative/features/kansas/kansas-bill.html;
"Declaration of Causes: February 2, 1861 A Declaration of the Causes Which Impel the State of Texas to Secede from the Federal Union, " Accessed March 17, 2019;
"Ordinances of Secession," Constitution Society, Accessed March 17, 2019, https://www.constitution.org/csa/ordinances_secession.htm#Arkansas.

[12] Rister, Carl Coke. *Land Hunger: David L. Payne and the Oklahoma Boomers*, New York: Arno Press, 1975,

[13] "Treaty of 1866." African Native American. Accessed March 18, 2019. http://www.african-nativeamerican.com/treaty66.htm.

[14] Henderson, R. James, "Will the Real Elias Boudinot Please Stand Up?," *The Journal of Presbyterian History (1997-)* 82, no. 1 (2004): 52-53. http://0-www.jstor.org.library.cedarville.edu/stable/23336328.

Indian Territory was taxable under the new treaties signed in 1866 after the pre-war agreements were declared void for Native American participation in the rebellion, he concluded that the only means of protecting the rights of Native Americans was for them to become citizens of the United States.[15] To achieve this goal, Boudinot wrote letters and newspaper articles, appeared before congressional committees and joined a lecture circuit in to persuade lawmakers and pioneers to open the land to settlement. His work would inspire David L. Payne who became a leader in the Boomer movement. Payne was a former Civil War soldier from Kansas. Payne organized and led numerous journeys to settle the unassigned lands of Indian Territory, but none were successful because the United States military prevented them from becoming established. Their continuous testing of the Federal Government, combined with lobbying from the railroad and cattle industries, persuaded Congress to make amendments in the *Indian Appropriations Act* of 1885.[16] *The Indian Appropriations Act* of 1885 granted the native tribes the right to negotiate the sale of unoccupied land.[17] The Boomers that came to settle this land wanted to take ownership of it under the Homestead Act, and the excursions into the unassigned lands continued even after the Death of Payne under the new leadership of William Couch.[18] Their demands would not be satiated until the passing of the *Indian Appropriations Act* of 1889. This act provided payment for the land ceded in the previously mentioned *Treaty of 1866* totaling $1,912,942.02. It also opened settlement of this land per the *Homestead Act* upon the discretion

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[15] Colbert, Thomas Burnell, "Elias Cornelius Boudinot, "The Indian Orator and Lecturer"," *American Indian Quarterly* 13, no. 3 (1989): 249-59. doi:10.2307/1184436;
Cherokee Tobacco, The, 78 U.S. (11 Wall.) 616 (1871).

[16] Hightower, Michael J, *1889: The Boomer Movement, The Land Run, and Early Oklahoma City*, Norman, OK: University of Oklahoma Press, 2018.

[17] U.S. Congress, *Public Acts of the Forty-Eighth Congress of the United States*, 48th Cong., 2d sess. Cong. Res. 341, 384, Accessed March 18, 2019, https://www.loc.gov/law/help/statutes-at-large/48th-congress/Session 2/c48s2ch341.pdf.

[18] Hightower, Michael J., *1889: The Boomer Movement, The Land Run, and Early Oklahoma City*, Norman, OK: University of Oklahoma Press, 2018.

of the President.[19] This final stipulation is where the term Sooner arrives. Settlers who went into the territory before the President officially opened it were named Sooners.[20] The settlers that moved into the Unoccupied Territory were the first settlers in what would become the Oklahoma Territory. This was the beginning of the takeover of land that was intended by Congress to be reserved for the Native Tribes. In a relatively short period, white people would dominate the territories that became Oklahoma and what remained of the Indian Reservations would be surrounded.

The land open to homesteaders under *the Indian Appropriations Act* of 1889 was the unoccupied territory. The majority of the Indian Territory was still claimed by the various tribes who resided there. This claimed land would not be safeguarded as, and instead, the reservations would be eroded under the *Dawes Act*. The *Dawes Act* of 1887 was named after Henry L. Dawes who was a Republican member of Congress from Massachusetts who sponsored the Act. Dawes was born in Cunnington, Massachusetts, October 30, 1816, and died in Pittsfield, Massachusetts, February 15, 1903; only a short time before Oklahoma would become a state. He would attend Yale, become a teacher, then a lawyer and held several public offices.[21] Dawes would become best known for the Act and commission which bear his name. His views on the question of how best to supervise the native tribes can be summarized in a speech he gave at the third annual meeting of the Lake Mohonk Conference in 1885. In this speech, Dawes said, regarding Native Americans, “we have got to take them by the hand like little children and bring them up out of

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[19] U.S. Congress, Public Acts of the Fiftieth Congress of the United States, 50th Cong., 2d sess. Cong. Res. 412, 1004-006, Accessed March 18, 2019, https://www.loc.gov/law/help/statutes-at-large/50th-congress/session-2/c50s2ch412.pdf.

[20]Mary Ann Blochowiak, "Sooner," The Encyclopedia of Oklahoma History and Culture, https://www.okhistory.org/publications/enc/entry.php?entry=SO010.

[21] "Dawes, Henry Laurens - Biographical Information," Biographical Directory of the United States Congress, Accessed March 18, 2019, http://bioguide.congress.gov/scripts/biodisplay.pl?index=d000148.

this ignorance."[22] Here, we see Dawes' hierarchical views on relations between the majority white United States and the Native Americans. He viewed the indigenous tribes as inferior to the more advanced society of white America. While this position should be seen as discriminatory, especially in light of modern perceptions and biblical teachings, one must remember the historical context of Dawes' ideology. Native American society had been in decline from a time before the founding of the United States.[23] Over time, this decline led to the dominance of European settlers over Native Americans which affected their perception of the tribes. One can see this imbalance making its way into the Proclamation of 1763 where the government of Great Britain declared that Native Americans were "under our Protection."[24] The United States would receive this responsibility upon the success of its revolution, which was the foundation for all American Indian relations. The government, which Dawes was a member of, saw itself in a paternalistic role above the Native Americans. Dawes was also a member of a culture that viewed native tribes as lesser people, as exemplified by its depictions of native savagery.[25] In this light, one should only expect his policies to be the outcomes of this perception. It must also be acknowledged that Dawes saw this act as a means for the advancement of Native Americans. The law was initially intended to promote assimilation of Native Americans into society by encouraging self-reliance.[26] The Act called for the President to order the surveying and dividing of tribal land into allotments to be given to individual Native Americans for 25 years after which

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[22] Dawes, Henry, Speech, Lake Mohonk Conference, New York, October 1885, In *Proceedings of the Annual Meeting of the Lake Mohonk Conference of Friends of the Indian*. Philadelphia: Sherman &, 1886,
[23] Wisniewski, Mark, "The Decline of Native Culture in America: Causes and Effects," *Ashford Humanities Review*, September 5, 2016, Accessed April 14, 2019, http://ahr-ashford.com/the-decline-of-native-culture-in-america-causes-and-effects-by-mark-wisniewski/.
[24] King George III, "The Royal Proclamation of October 7, 1763."
[25] "Stereotypes," Indians of the Midwest, Accessed April 14, 2019, http://publications.newberry.org/indiansofthemidwest/indian-imagery/stereotypes/.
[26] "Dawes Act (1887)," Our Documents. Accessed March 18, 2019, https://www.ourdocuments.gov/doc.php?flash=true&doc=50.

the allotment could be sold. Property that was not allotted would be sold to white settlers. The *Dawes Act* did not initially affect the Five Tribes (Cherokee, Chickasaw, Choctaw, Creek, and Seminole), but changed with the passage of the Curtis Act. [27]

The *Curtis Act* of 1898 extended the Dawes allotment process to the native tribes whose membership rolls, created under the *Dawes Act*, were complete.[28] Since the reservations associated with the Five tribes were the largest, this amendment placed a substantial amount of the Indian Territory in the possession of white settlers.[29] At the time of Oklahoma's statehood, there were approximately nine times the amount of white people than Native Americans.[30] The most significant setback that the *Dawes Act* and its amendments brought to the Native Americans of Oklahoma was to their ability to produce food. In a letter to Henry Dawes, John Frippo Brown, who was governor of the Seminoles at the time of his writing in 1894, warned Dawes, who was chairman of the Dawes Commission, that the largest allotments were too small to provide for the tribal members adequately, and that many of the allotments were located in areas with unusable land.[31] As earlier stated, Dawes saw the United States government as a parental figure toward Native American tribes, which certainly prevented these concerns from dissuading him from pursuing the allotment process as he thought he knew best how to bring about the

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[27] "Dawes Act," 2017, *Dawes Severalty Act of 1887*, August, 1, https://cedarville.ohionet.org/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=f5h&AN=21212255&site=eds-live.

[28] U.S. Congress, *Public Acts of the Fifty-Fifth Congress of the United States*, 55th Cong., 2d sess. Cong. Res. 517, Vol. 30. 498-99, Accessed March 18, 2019, https://www.loc.gov/law/help/statutes-at-large/55th-congress/session-2/c55s2ch517.pdf.

[29] "Map of the Indian and Oklahoma Territories," The Library of Congress, Accessed March 18, 2019, https://www.loc.gov/resource/g4021e.ct000224/?r=-0.397,0.04,1.715,0.682,0.

[30] United States of America, Department of Commerce and Labor, Bureau of the Census, *Population of Oklahoma and Indian Territory*, Washington, DC, 1907, 8, Accessed March 18, 2019, https://www2.census.gov/prod2/decennial/documents/1907pop_OK-IndianTerritory.pdf.

[31] "Letter of J. F. Brown to Henry L. Dawes," John Frippo Brown to Henry L. Dawes, May 31, 1894, In University Libraries, Accessed March 18, 2019, https://digital.libraries.ou.edu/cdm/compoundobject/collection/brown/id/260; May, Jon D, "Brown, John Frippo," The Encyclopedia of Oklahoma History and Culture, Accessed March 18, 2019 https://www.okhistory.org/publications/enc/entry.php?entry=BR025.

equality of Native Americans with other citizens. The stated intent of the Dawes act to stimulate Native American assimilation into the broader American society, but its consequences brought more harm than good. The well-meaning, at least in part, intentions of Congress would soon bring further ruin to the reservations in the *Burke Act*.

The *Burke Act* of 1906 was named after Charles Henry Burke, its sponsor. Burke was born in 1861, in Batavia, New York. In 1882, he moved to the Dakota Territory where he practiced law. Later he won a seat in the United States House of Representatives for South Dakota. It was in this position that Burke sponsored the act that carries his name. He later became a Senator and, in the 1920's, the Commissioner of Indian Affairs.[32] The *Burke Act* amended the *Dawes Act* to include a means of granting citizenship to Native Americans who received fee-simple loans on their allotments after twenty-five years or after they had established themselves outside the reservation at the discretion of the Secretary of the Interior.[33] While this Act may appear to be to the benefit of Native Americans, since they had, at last, gained a path to citizenship, which had been longed for by leaders such as Elias C. Boudinot, it also harmed the tribes' ability to hold on to the lands they had been promised. After the period in which the government held the land, Individual tribal members had the right, as full citizens, to sell or take loans with the property as collateral. Doing so would relinquish exclusive Native American right to the land. As a result, due to the allotment process in the *Dawes Act*, the already restricted land was allowed to fall out of the hands of tribal members.[34]

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[32] "Burke, Charles Henry," Biographical Directory of the United States Congress, Accessed April 15, 2019, http://bioguide.congress.gov/scripts/biodisplay.pl?index=b001087.

[33] *An Act to Amend Section Six of an Act Approved February Eighth, Eighteen Hundred and Eighty-Seven (Burke Act), Statutes at Large* 34, 182-83, NADP Document A1906, https://public.csusm.edu/nadp/a1906.htm

[34] Tatro, M. Kaye, "Burke Act (1906)," The Encyclopedia of Oklahoma History and Culture, Accessed April 15, 2019, https://www.okhistory.org/publications/enc/entry.php?entry=BU010.

In the time between the first white settlement attempts in Oklahoma by the Boomers and 1890, white settlers had become dominant in both the Oklahoma and Indian Territories but especially the former. In 1890, white peoples made up 79% of the population in the Oklahoma Territory as compared to 61% in the Indian Territory.[35] That became an important year in the History of Oklahoma, because that was the year that the *Oklahoma Organic Act* was passed. This Act created the Oklahoma Territory out of the western lands of the original Indian Territory.[36] It was a symbolic blow that the land Congress guaranteed them was now not their own. More importantly, the Act created new mechanisms for Native Americans to be separated from their property. The law codified the process for homesteaders to acquire any remaining Native American lands within the territory at the cost of an additional $1.25 per acre as well as opened the Public Strip, now known as the Oklahoma Panhandle to settlement upon the approval of the President.[37] This Act also granted the President the power to cede the Cherokee Outlet in north-central Oklahoma.[38] Native Americans now had no say in the affairs of half of their former territory.

With little land left for Native Americans to call their own, one could conclude that the reservations were on the brink of death. However, Supreme Court precedent states that the ownership of land is not necessary for the continuation of a reservation. In *Solem v. Bartlett*

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[35]United States of America, Department of Commerce and Labor, Bureau of the Census, *Population of Oklahoma and Indian Territory*, Washington, DC, 1907, 8, Accessed March 18, 2019, https://www2.census.gov/prod2/decennial/documents/1907pop_OK-IndianTerritory.pdf.

[36] U.S. Congress, *Public Acts of the Fifty-First Congress of the United States*, 51st Cong., 1st sess. Cong. Res. 50, Vol. 30, 81, Accessed March 18, 2019, https://www.loc.gov/law/help/statutes-at-large/51st-congress/session-1/c51s1ch182.pdf.

[37] U.S. Congress, *Public Acts of the Fifty-First Congress of the United States*, 51st Cong., 1st sess. Cong. Res. 50, Vol. 30, 82,90, Accessed March 18, 2019, https://www.loc.gov/law/help/statutes-at-large/51st-congress/session-1/c51s1ch182.pdf.

[38] U.S. Congress, *Public Acts of the Fifty-First Congress of the United States*, 51st Cong., 1st sess. Cong. Res. 50, Vol. 30, 82,90, Accessed March 18, 2019, https://www.loc.gov/law/help/statutes-at-large/51st-congress/session-1/c51s1ch182.pdf.

(1984), the court held that "an Act of Congress or the circumstances of the Act's passage must demonstrate a Congressional purpose to reduce the size of an Indian reservation before we find that the legislation diminished Indian lands."[39] None of the acts included edicts that specifically reduced the size of the reservations. Congress' selling of land to and the homesteading of white settlers in what would become Oklahoma does not indicate an intention to destroy the reservations. The opposite can be concluded from passages in the Oklahoma Organic Act such as, "That nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements, and treaties of the United States, or to impair the rights of person or property pertaining to said Indians."[40] The Supreme Court will not take the selling of Native land into consideration when forming an opinion in *Carpenter v. Murphy* (2019) as it had previously decided that the ownership of property is not required for a reservation to exist. There are other acts of Congress concerning tribal rights and governance that the court will review.

Acts on Tribal Government

The reservations of the Indian Territory were intended, in part, to provide an area to which the Tribes removed from the States and Territories could inhabit separate from the land-hungry masses. They were also locations where Tribes could practice a limited form of self-rule. The degree to which the Federal Government permitted autonomy to the Native Tribes diminished from the ratification of the Constitution until Oklahoma's rise to statehood. At the beginning of this period, the Federal Government regarded the Tribes as foreign nations that

[39] "Solem v. Bartlett Opinion Announcement - February 22, 1984," Oyez, Accessed March 19, 2019, https://apps.oyez.org/player/#/burger8/opinion_announcement_audio/18791.
[40] U.S. Congress, *Public Acts of the Fifty-First Congress of the United States*, 51st Cong., 1st sess. Cong. Res. 50, Vol. 30, 82, Accessed March 18, 2019, https://www.loc.gov/law/help/statutes-at-large/51st-congress/session-1/c51s1ch182.pdf.

were nevertheless subordinate to the United States. The creation of such a framework of relations can be seen in the early treaties with the indigenous tribes. In the Treaty with the Creeks in 1790, the Creeks agreed to trade transactions with the United States, that diplomacy would solely occur between the Creeks and the Federal Government, and that United States' citizens who traveled to the territory of the Creek would be subject to the laws of the United States while Creeks who went to the United States would also be subject to these laws.[41] The United States in this treaty asserted their dominance over the Creeks, while also granting the Creeks the respect of the standard treaty process for foreign nations, whereby the President constructs treaties and the Senate approves. One can perceive another standard procedure for United States diplomacy with foreign countries in the Creek's agreement to exclusively form compacts with the Federal Government. The Constitution of the United States grants the power to make treaties with foreign powers solely to the Federal Government.[42] Although these treaties severely limited the powers of Creek Government and positioned the Creek as inferior to the United States, they demonstrated that the Federal Government handled diplomacy with the native tribes as if they were foreign nations in form. The exact nature of the United States perception of these treaties in the period leading to the forced removal under the Indian Removal Act would be displayed in two Supreme Court cases. In *Cherokee Nation v. Georgia* (1831), as already mentioned previously, the State of Georgia enacted a series of harsh laws in the hopes of pushing the Cherokee to vacate. The Cherokee Nation brought the case before the Supreme Court, but the Court declined to hear the case on merits. The Court ruled that "The Cherokee nation is not a foreign state, in the sense in which the term "foreign state" is used in the Constitution of the

[41] "Treaty with the Creeks," conclusion date: August 7, 1790, Indian Affairs: Laws and Treaties Vol. 2, https://americanindian.si.edu/static/nationtonation/pdf/Muscogee-Treaty-1790.pdf
[42] U.S. Constitution, art. 2, sec. 2, cl. 2;
U.S. Constitution, amend. 10.

United States." Since they were not a foreign nation, the court ruled that they did not have original jurisdiction over this case. Also, the Native American nations were described as being domestic dependent states.[43] Their diplomatic standing was further explained by *Worcester v. Georgia*, in which the court ruled that, in regards to the early treaties between the United States and the native nations, "managing all their affairs' into a surrender of self-government would be a perversion of their necessary meaning," and that these nations were to be viewed as wards of the United States.[44] Therefore, the Native American tribes were to be viewed as separate states under the protection of the United States. The United States and these nations entered treaties with each other in the form similar to other countries until 1871 when Congress altered this relationship.

Until 1871, treaties between the United States and indigenous nations were made by the president and then voted upon by the Senate. This procedure changed due to the *Indian Appropriations Act* of 1871. The Act stated, "That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." [45] The Native American Nations were no longer to be given the respect of foreign nations. The removal of the treaty process meant that it was not necessary for Indian Affairs laws to have du jure consent of the native governments. Without the necessity for approval, whether in actuality or by coercion, the United States had the power to destroy the reservations. The Federal Government, nevertheless, allowed the reservations to persist and also sought approval in some circumstances, including the

[43] The Cherokee Nation v. The State of Georgia, 5 (January, 1831).
[44] Samuel A. Worcester, Plaintiff in Error v. The State of Georgia, 31 518.
[45] U.S. Congress, *Public Acts of the Forty-First Congress of the United States*, 41st Cong., 3d sess. Cong. Res. 2079, 1878, 566, Accessed March 19, 2019, http://uscode.house.gov/statviewer.htm?volume=16&page=566#.

case of the creation of the Dawes Commission in the *Indian Appropriations Act* of 1893 to persuade the Five Tribes to consent to the allotment of their lands.[46]

The *Dawes Act* assisted the acceleration of white settlers into Indian Territory that the Indian Appropriations Act of 1885 first allowed. The increase in population prompted Congress to pass the *Oklahoma Organic Act* in 1890. As previously stated, this act created the Oklahoma Territory, which encompassed nearly half of the former Indian Territory and with a white population that dwarfed the number of Native American inhabitants. This Act also broadened the reach of the United States court system into the remaining Indian Territory. It was achieved by giving jurisdiction to the Western Arkansas District Court in Fort Smith, Arkansas, and the Eastern District Court of Texas in Paris, Texas.[47] Oklahoma District Courts were given jurisdiction over cases involving a member of a tribe and a non-member and two members of different tribes within Oklahoma Territory.[48] This extension of the United States Federal Court's jurisdiction over matters involving Native Americans further cemented the dominance of the Federal Government over the tribes. United States District Courts were taking cases that would have initially been heard by tribal courts under the former Indian Territory boundary by members of their tribe. These courts' role in judging cases in the territories became more critical in a later Act to be examined. The *Oklahoma Organic Act* brought harm to both Native American wellbeing and the sovereignty of their affairs. It also provided evidence that Congress intended

[46] U.S. Congress, *Public Acts of the Fifty-Second Congress of the United States*, 52nd Cong., 2d sess. Cong. Res. 645-46, Accessed March 19, 2019, https://www.loc.gov/law/help/statutes-at-large/52nd-congress/session-2/c52s2ch209.pdf.
[47] U.S. Congress, *Public Acts of the Fifty-First Congress of the United States*, 51st Cong., 1st sess. Cong. Res. 50, Vol. 30. 89, Accessed March 18, 2019, https://www.loc.gov/law/help/statutes-at-large/51st-congress/session-1/c51s1ch182.pdf.
[48] U.S. Congress, *Public Acts of the Fifty-First Congress of the United States*, 51st Cong., 1st sess. Cong. Res. 50, Vol. 30, 88, Accessed March 18, 2019, https://www.loc.gov/law/help/statutes-at-large/51st-congress/session-1/c51s1ch182.pdf.

the reservations to continue in full force. At the conclusion of section 1, this Act states that "nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements, and treaties of the United States."[49] Even though the United States was asserting further control over Native Americans, the government still stated that the rights held by the tribes would continue and, therefore, the reservations were still in effect.

This continuation would be significantly challenged as Congress stripped native governing powers in an amendment to the *Dawes Act* named the *Curtis Act*. In part, Congresses intention in enacting the Dawes Act was to allow excess lands owned by several tribes to be sold to white settlers. This Act, however, was not forced upon the Five Tribes at its passing, and only applied to the tribes holding minor claims in the Indian and Oklahoma Territories as the Act states in the eighth section, "That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory."[50] To amend this exemption, Congress passed the *Curtis Act* in 1898. The *Curtis Act* was named after Charles Curtis who was a part Native American member of Congress from Kansas.[51] He would later become Vice-President under Herbert Hoover. As a child, he lived on fee land reserved for those of partial American Indian heritage as his mother was one-fourth Kaw and a descendant of Chief White Plume. As a

[49] U.S. Congress, *Public Acts of the Fifty-First Congress of the United States*, 51st Cong., 1st sess. Cong. Res. 50, Vol. 30, 82, Accessed March 18, 2019, https://www.loc.gov/law/help/statutes-at-large/51st-congress/session-1/c51s1ch182.pdf

[50] "Dawes Act (1887)," Our Documents, Accessed March 18, 2019, https://www.ourdocuments.gov/doc.php?flash=true&doc=50.

[51] Tatro, M. Kaye, "Curtis Act (1898)," The Encyclopedia of Oklahoma History and Culture, Accessed March 20, 2019, https://www.okhistory.org/publications/enc/entry.php?entry=CU006.

member of the Kaw nation, Curtis was personally affected by this legislation.[52] It is unlikely that he would have written the legislation if he did not believe it was to the benefit of Native Americans and himself. This Act extended the allotment process into the lands of the Five Tribes and also included sections that negatively impacted Native American self-determination and the sovereignty of their government. Their self-determination was harmed in the process of making tribal rolls. These roles were populated with persons belonging to the tribe so that they could be given allotments. This act tasked the Dawes Commission with determining who would be placed on these rolls.[53] Tribal leaders could not determine who belonged to their nation. This was not the only diminishment of tribal governmental powers in this Act. The *Curtis Act* also abolished the judiciary and forbade the legislature to make new laws without the approval of the president.[54] The governments of the native tribes had little say in the laws to which they were forced to comply. To supplant the tribal courts, the *Curtis Act* called for federal courts to have jurisdiction over Indian Territory. Specifically, the District Court of West Arkansas or the Eastern District of Texas would hear cases and ensure that the laws of the United States ruled in the territory.[55] Without self-determination in the creation and judgment of the laws placed upon them nor the right to determine who was a member of their tribe, Native Americans and their governments in the Indian Territory were left in a weakened state by Congress.

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[52] "Charles Curtis, 31st Vice President (1929-1933)," January 12, 2017, Accessed April 14, 2019, https://www.senate.gov/artandhistory/history/common/generic/VP_Charles_Curtis.htm.
[53] U.S. Congress, *Public Acts of the Fifty-Fifth Congress of the United States*, 55th Cong., 2d sess. Cong. Res. 502-03, Accessed March 19, 2019, https://www.loc.gov/law/help/statutes-at-large/55th-congress/session-2/c55s2ch517.pdf.
[54] U.S. Congress, *Public Acts of the Fifty-Fifth Congress of the United States*, 55th Cong., 2d sess. Cong. Res. 511-512, Accessed March 19, 2019, https://www.loc.gov/law/help/statutes-at-large/55th-congress/session-2/c55s2ch517.pdf.
[55] U.S. Congress, *Public Acts of the Fifty-Fifth Congress of the United States*, 55th Cong., 2d sess. Cong. Res. 511, Accessed March 19, 2019, https://www.loc.gov/law/help/statutes-at-large/55th-congress/session-2/c55s2ch517.pdf.

The Dawes Act and its several amendments, including the Curtis Act and Burke Act, called for the allotment of land to tribal members. Membership in a tribe was signified by the name of such person being placed on that tribe's roll. In the *Dawes Act*, the Federal Government gave itself the power to determine tribal membership and to determined who was on the tribal rolls by which allotments would be distributed. Congress again diminished the sovereignty of the tribes by closing admittance to the rolls in the *Five Civilized Tribes Act of 1906*. This Act ordered that no application to the roll would be accepted after December 1, 1905.[56] Of note is that the cutoff date for roll application was before the passage of this law. An individual who applied after this date and before the bill's passage and potentially before coming to the knowledge that they would be denied would be excluded from the allotment process. This not only was an attack on the sovereignty of the tribes, but also hindered the continued holding of tribal land by Native Americans. The *Five Civilized Tribes Act* also diminished the powers of the tribal government by forcing the tribes to relinquish government property and buildings such as schools to the control of the Secretary of the Interior.[57] In asserting their supremacy over the tribes, the Federal Government took the properties expected of a functioning government and yet did not entirely disband the tribal government. The executive of the tribes, whether that be a chief or governor, still retained powers unlike that of the ineffective council or the now abolished judiciary. But the *Five Civilized Tribes Act* did prescribe the process for settling affairs after the tribal governments were extinguished. Section 18 of this act says, "the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choc-taw,

[56] U.S. Congress, *Public Acts of the Fifty-Ninth Congress of the United States*, 59th Cong., 1st sess. Cong. Res. 129,137, Accessed March 20, 2019, https://www.loc.gov/law/help/statutes-at-large/59th-congress/session-1/c59s1ch1876.pdf.
[57] U.S. Congress, *Public Acts of the Fifty-Ninth Congress of the United States*, 59th Cong., 1st sess. Cong. Res. 129, 143. Accessed March 20, 2019. https://www.loc.gov/law/help/statutes-at-large/59th-congress/session-1/c59s1ch1876.pdf.

Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments."[58] Congress made arrangements for the end of the tribal government, and one would assume the reservations. However, the tribal governments were not abolished, and this Act did not call for the dissolution of the reservations. While Congress may have intended for both the native administrations and the reservations to come to an end, as evidenced by their plans after such became real, they did not state this intention in this act or any other including the *Oklahoma Enabling Act*.

The *Oklahoma Enabling Act* allowed the Oklahoma territory and the Indian territory to draft a constitution that would form the basis of the state of Oklahoma in 1906.[59] Due to the previously mentioned disparity between the white population and the native population in both territories, the new State would leave them with little say in matters of state. In response to the impending statehood and due to the governmental restrictions of the Curtis Act coming into effect in 1906, a convention was held to create a government that would be more representative of the Native tribes. At this convention, a constitution was drafted for the proposed state of Sequoyah, but Congress did not consent as this state would have a Democratic majority while Congress had a Republican majority. The constitution for Oklahoma was accepted, and Oklahoma became a state in 1907.[60] In addition to enacting the process for Oklahoma's statehood, it also repeatedly calls for the protection of the rights and properties of Native Americans. An example of this occurs in the first section which states that "nothing contained in

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[58] U.S. Congress, *Public Acts of the Fifty-Ninth Congress of the United States*, 59th Cong., 1st sess. Cong. Res. 144, 143, Accessed March 20, 2019, https://www.loc.gov/law/help/statutes-at-large/59th-congress/session-1/c59s1ch1876.pdf.
[59] U.S. Congress, *Public Acts of the Fifty-Ninth Congress of the United States*, 59th Cong., 1st sess. Cong. Res. 243, 267, Accessed March 20, 2019, https://www.loc.gov/law/help/statutes-at-large/59th-congress/session-1/c59s1ch3335.pdf.
[60] Mize, Richard, "Sequoyah Convention," The Encyclopedia of Oklahoma History and Culture, Accessed March 20, 2019, https://www.okhistory.org/publications/enc/entry.php?entry=SE021.

the said constitution shall be construed to limit or impair the rights of person or property of the Indians of said Territories (so long as such rights shall remain unextinguished)."[61] Congress had not declared the reservations to be abolished by combining the Indian territory with Oklahoma territory. As such, these reservations extended past the time of statehood.

Since the decision in *Worcester v. Georgia*, the Native American tribes were not able to exercise equal diplomatic standing with the United States. Though the formality of creating treaties was extended until the passage of the Indian Appropriations Act put an end to the era of treaties, from the very beginning, the Federal Government had a policy of increasing their dominance and oversite of the various tribes within its borders. This took the form of extending jurisdiction of United States District Courts into Native territories, determining who belonged to the tribes without consent from tribal leaders, dismantling the powers of the tribal legislature and eliminating tribal courts. Although the native governments became only a visage of their former selves by the time of Oklahoma's statehood, what was left persisted. The tribal government never ceased to exist because the Chiefs remained in power and the councils could pass recommendations to be enacted by the President. Also, none of the laws about the governance of the Native tribes as enacted by Congress explicitly called for the reservations to be destroyed. There are several instances of provisions for what would be necessary after this occurred, but a final action never took place. Congress had the power to end the reservations in a single Act but instead chose to use the allotment process to slowly dwindle the reservations and coax Native Americans into assimilating into the broader American society. Since Congress never clearly stated that the termination of these reservations, the precedent explained in *Solem v. Bartlett* for

[61] U.S. Congress, *Public Acts of the Fifty-Ninth Congress of the United States*, 59th Cong., 1st sess. Cong. Res. 243, 267, Accessed March 20, 2019, https://www.loc.gov/law/help/statutes-at-large/59th-congress/session-1/c59s1ch3335.pdf.

testing whether a reservation remains is not satisfied. If the Court follows the precedent in *Carpenter v. Murphy*, then the borders of the original reservations in what was Indian territory are intact.

Conclusion

During the period between the Civil War and Oklahoma's statehood in 1907, Congress accrued a long train of offenses against Native Americans living in the territory. Whether by malevolent land grabs to provide new opportunities for homesteaders or by misguided attempts to assimilate Native Americans into American society, the policies of the legislature severely diminished their promised reservations. What Congress did not do is disestablish these reservations. The loss of land through the allotment process did not revoke the status of the reservations as decided in *Nebraska v. Parker* (2016). Neither did the Federal Government's usurpation of control over the tribes. The Supreme Court agreed in *Solem v. Bartlett* that Congress must clearly dissolve a reservation for it not to exist. The legislation from this era does not include any such language. Several of these pieces of legislation specifically ensure the continued existence of the tribes and their associated rights. One must conclude that the historical facts surrounding this case when tested by the precedent set by Solem v. Bartlett point to a still existing tribe and reservations in Oklahoma.

Since Congress did not explicitly call for the end of the reservations, one asks why there is still reservation about the continued existence of the Oklahoma reservations? While Congress did not satisfy the test for termination used in *Solem v. Bartlett*, there are other factors at play that may lead the court to side with the State of Oklahoma. Oklahoma has asserted their jurisdiction in cases involving Native Americans since ascending to statehood. The long-standing practices of the justice system within Oklahoma would become disorganized and unintuitive.

Likewise, the State's tax collection would be dramatically altered, since half the state is within the boundaries of the reservations where state taxation of Native Americans is forbidden. The Court may find the custom of the State asserting jurisdiction acceptable or it may instruct Congress to make these customs lawful due to long standing precedent in Oklahoma.

An essential aspect of this discussion for historians is the necessity of not tainting the historical record with the values and concerns of the present. Currently, the public is mainly pro-Native American. When discussing this topic, the historian's desire for justice for Native American's may influence their description of events. Undisciplined historians may argue against the continuation of the reservations due to their fear of the consequences of disrupting the status quo. When emotions run high, a proper historian must do his/her best to distance one's own bias one's historical interpretation. In the account of how Congress oversaw the Native Americans of the United States, many Americans genuinely believed that they were bringing about the advancement of the Native tribes. The Boudinots, Worcester, Dawes, and Curtis thought that they were helping Native Americans even though modern perspectives may condemn their actions as being fueled by ideas of Native American inferiority. One must also recognize that not all Native Americans opposed the acts mentioned in this history. For example, Dr. Charles A. Eastman, a Sioux Nation member, in a New York Times interview gave his full support for the Burke Act.[62] It would also be remiss of this author not also to mention that Native Americans like Eastman and Curtis who had been more assimilated into American culture were more likely to accept these measures. The people behind the Acts of Congress that adversely affected the tribes in Oklahoma had reason to push for these pieces of legislation. A historian does not have to agree with their approach, but he/she should seek to empathize. Proper historicism demands

[62]"Indian Wants Citizenship for His People," *New York Times*, April 01, 1906.

that an understanding is nurtured, not a judgmental argumentation. Thus, a modern observer may judge Payne's attempts to settle the unoccupied territory as selfish and destructive to the wellbeing of indigenous people, one should not harbor hate against him. A Christian historian must be especially vigilant against tainting this history with judgmental attitudes. Christians must remember that all people are sinful and to observe selfish actions in the historical record should not come as a surprise. Christian historians should pursue excellence in their field in service to God by practicing Rankean Historicism to produce the most accurate accounts possible.

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