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[Introduction to] American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice

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American Indian Sovereignty and the U.S. Supreme Court

THE MASKING OF JUSTICE

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Preface

> There is nothing in the whole compass of our laws so anomalous, so hard to bring within any precise definition, or any logical and scientific arrangement of principles, as the relation in which the Indians stand toward this [United States] government and those of the states.
>
> —U.S. Attorney General Hugh Swinton Legare[1]

> It is argued, because the Indians seek the courts of Kansas for the preservation of rights and the redress of wrongs, sometimes voluntarily, and in certain specified cases by direction of the Secretary of the Interior, that they submit themselves to all the laws of the State. *But the conduct of Indians is not to be measured by the same standard which we apply to the conduct of other people.* (emphasis mine)
>
> —*The Kansas Indians*[2]

In the fall of 1993, I attended a conference at the National Science Foundation in Washington, D.C. On Saturday, following the conference doings, my friends Rudy Coronado Jr. and John Archuleta and I set out to visit as many of the massive and inspiring architectural structures as possible.

Leaving the National Archives Building, we walked by the Department of Justice. On its west side, high above the street, was inscribed the following passage: "Justice is the great interest of man on earth; wherever her temples stand there is a foundation for social security, general happiness, and the improvement and progress of our race." I was bemused by this statement, particularly the reference to "our race."

When I returned to Boulder, I immediately began making inquiries about the Justice Department's quote. I soon found that the quotation is an abridged version of an eloquent testimonial given by Daniel Webster in honor of Joseph Story, a justice of the Supreme Court who died December 12, 1851. This is Webster's complete statement:

> Justice, sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of *our race.*[3] (emphasis mine)

This unabridged version is certainly more grammatically correct, and knowing its date of origin, 1851, enabled me to better comprehend the meaning behind the phrase "our race." Although Webster would probably have excused himself by saying he was referring to the "human race," the dictionary definition of *race* emphasizes narrowing and classifying, and there is no getting around the fact that his choice of words was unfortunate at best. I pondered why the Justice Department insisted on perpetuating this exclusionary phrase over the many years after it had first been used. Surely the more appropriate language to be used by the Justice Department would have been "the improvement and progress of humanity," since the scales of justice are considered to be color-blind. It is important to ponder the reality of why such an exclusive phrase remains inscribed on the walls of the Department of Justice. I believe every vestige of America's exclusionary past must be stricken from every corridor of government, particularly the department which is about the administration and enforcement of justice for all.

In the study that follows, details are presented in which the United States government and, in particular, the Supreme Court have been unable and, in some cases, almost unwilling to cast away a battery of disparaging and debilitating phrases that have limited or terminated the rights of indigenous peoples as distinctive groups. This is not a comforting thought because of the Supreme Court's unique role as the preeminent institution vested with the authority of deciding the "finality of rational principles."[4] This is so, said Thurmond Arnold, because law concerns the "spiritual welfare of the people" and is preserved in their form of government. And, in spiritual things, said Arnold, "it is essential that men do right according to some final authority."[5] Arnold believed it was faith in a higher law that enabled the Supreme Court to function effectively as the branch of government most responsible for maintaining social stability.[6]

But, as this study reveals, "the law" as developed, articulated, and manipulated by the High Court has actually contributed to the diminution of the sovereign status of tribes and has placed tribes and their citizens/members in a virtually destabilized state. Beginning, most intensely, with

Johnson v. McIntosh in 1823, we will consider fifteen important Indian law decisions, concluding with the 1992 decision, *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation.*

While this book covers a wide span of time, it is not a history per se. The book's already inordinate length precludes an in-depth historical analysis of the nearly two hundred years this study examines. Thus, readers looking for significant historical detail of the many important policies and personalities of the eras these cases arose in are encouraged to consult other accounts which expand on these matters. Several worthwhile books, all of which are given in my reference section, trace the ambivalent attitudes and policies of the U.S. government toward tribal nations—see, for example, Roy Harvey Pearce, *Savagism and Civilization: A Study of the Indian and the American Mind* (1953); Wilcomb E. Washburn, ed., *The American Indian and the United States: A Documentary History*, 4 vols. (1973); Angie Debo, *A History of the Indians of the United States* (1970); Robert Berkhofer Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present* (1978); Francis P. Prucha, *The Great Father: The United States Government and the American Indian*, 2 vols. (1984); Calvin Martin, ed., *The American Indian and the Problem of History* (1987); Robert A. Williams Jr., *The American Indian in Western Legal Thought* (1990); and Albert Hurtado and Peter Iverson, eds., *Major Problems in American Indian History: Documents and Essays* (1994).

Readers interested in specific Indian policy periods have a plethora of quality studies to choose from. For the Indian removal era (early 1800s to 1840s), consult Grant Foreman's two classic studies, *Indian Removal: The Emigration of the Five Civilized Tribes of Indians* (1932) and *The Last Trek of the Indians* (1946), and see Jill Norgren's *The Cherokee Cases: The Confrontation of Law and Politics* (1996).

There are a number of solid treatments of the allotment and assimilation eras (1860s–1920s)—see, for example, Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indian, 1880–1920* (1984); and Janet McDonnell, *The Dispossession of the American Indian: 1887–1934* (1934).

The critically important New Deal era of the 1930s is covered thoroughly in Lawrence C. Kelly's *The Assault on Assimilation: John Collier and the Origins of Indian Policy Reform* (1983); Vine Deloria Jr. and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (1984); and Thomas Biolsi, *Organizing the Lakota: The Political Economy of the New Deal on the Pine Ridge and Rosebud Reservations* (1992).

The 1950s entailed the disastrous termination policy in which the federal government systematically attempted to sever the unique political relationship between itself and various indigenous groups. This policy has been ably examined by Larry W. Burt, *Tribalism in Crisis: Federal Indian Policy, 1953–1961* (1982); and see Nicholas C. Peroff, *Menominee Drums: Tribal Termination and Restoration, 1954–1974* (1982) for a case study of the effects of the policy on a tribal community.

The 1960s to the present have received the focus of a variety of scholars intent on explaining the federal government's shift from termination to self-determination and the eruption of indigenous activism. See Alvin M. Josephy Jr., ed., *Red Power: The American Indians' Fight for Freedom* (1971); D'Arcy McNickle, *Native American Tribalism* (1973); Stephen Cornell, *The Return of the Native: American Indian Political Resurgence* (1988); Joane Nagel, *American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture* (1996); and see the collective works of Vine Deloria Jr., who has written extensively on this period. Among his contributions are *Custer Died for Your Sins: An Indian Manifesto* (1969, repr. 1988); *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (1974, repr. 1985); and *American Indian Policy in the Twentieth Century* (1985).

A comment about terminology. Throughout the book several terms are used interchangeably in referring to indigenous peoples in a collective sense—tribal nations, tribes, Alaskan Natives, indigenous nations, and indigenous peoples. But I use only one when I am referring to individual indigenous persons—Indian or American Indian. Of all the terms I've mentioned, "Indian" is easily the most problematic (though some argue that the term "tribe" is also pejorative and hints strongly of colonialism), and I use it with some hesitation for two reasons: first, because of its obvious geographical inaccuracy and second, because it erroneously generalizes and completely ignores the cultural diversity evident in the hundreds of distinctive indigenous nations present in North America, each with their own name for themselves. One could thus argue that continued usage of the term attests to surviving vestiges of colonialism. Nevertheless, the term *Indian* or *American Indian* is the most common appellation used by many indigenous and nonindigenous persons and by institutions, and so it will be used in the text when no tribe is specified. (Specified tribes will be referred to with the singular collective favored by *Merriam Webster's Collegiate Dictionary* [10th ed.] for tribes as, for example, "the Cherokee.")

I have, moreover, intentionally avoided using the phrase "Native

American" because, as Matthew Snipp notes in *American Indians: The First of This Land* (1991), it "creates even greater confusion than the term it was once proposed to replace—namely, American Indian. American Indians are easily distinguished from Asian Indians by a single locational adjective, but 'Native Americans' include Hawaiian natives and the descendants of immigrants from all nations, along with American Indians, Eskimos, and Aleuts." The expressions "Native Peoples" and "Native Nations" may be less confusing, but these terms and the intriguing phrase "First Nations" are used almost exclusively by Canadian and Alaskan indigenous groups.

Finally, some readers may walk away from this book with a sense that the author is decidedly pro-Indian and anti-Supreme Court. It is certainly true that I am a firm believer in indigenous collective and individual rights; however, I am also well aware that tribal nations are not pristine or idyllic communities. Tribal nations, like all other communities, have produced their share of individuals who sometimes violate laws—both tribal and nontribal. Indian criminality, as one element of the indigenous experience, has, unfortunately, been neglected in the literature, although a few studies are available on the subject.[7]

This study, however, is focused on the U.S. Supreme Court, and while it paints a portrait of the High Court that is far from positive, it is not my intention to depict the court as an evil institution bent on the destruction of indigenous rights. On balance, when one weighs the historical and policy record, the Supreme Court, compared with the Presidency or the Congress, has the better track record of acknowledging tribal sovereignty, upholding Indian treaty rights, and construing the distinctive nature of Indian rights. But, as will be shown, when the Court has chosen to disavow indigenous rights, as it has done in most of the cases examined in this book, it has done so in a manner that has left tribal nations wondering about the actual meaning of democracy, justice, and consent.

In the first chapter and in the conclusion I note that the Court has the potential—which has sometimes been fulfilled—of being the branch of American government most likely to respect the rights of tribal nations because of its power of interpretation, its relative independence from an often-fickle electorate and the electoral process, and its status as a deliberative body. It is my hope that this study will inspire a reexamination of these particularly egregious decisions. It is in that spirit that I write.

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