The American Indian in Urban Society

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The Little, Brown Series in Anthropology

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Little, Brown and Company
Boston

LIBRARY OF CONGRESS CATALOG CARD NO. 78-155318

FIRST PRINTING

Published simultaneously in Canada
by Little, Brown & Company (Canada) Limited

PRINTED IN THE UNITED STATES OF AMERICA

CHAPTER 1

the american indian and federal policy

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PRE-REVOLUTIONARY POLICY

Among the legacies which the young government of the United States inherited from the British was the problem of what to do about the native inhabitants of the thirteen original colonies. Although relatively few in number, the natives were far too conspicuous to be ignored, especially in the frontier areas. In developing a policy for dealing with the Indians, the colonists relied heavily upon the experience they had previously gained while subjects of the British Crown. Thus, American Indian policy was modeled on that of the British and many concepts underlying this policy have endured to the present day.

The British had early accepted two basic principles to guide their relations with Indians. The first was that, even though they

lacked formal title documents, Indians had a compensable interest in the lands they occupied and used. The second was that, being unsophisticated in the ways of Europeans, the Indians required the protection of the colonial governments. In 1633, the General Court of Massachusetts outlawed direct purchase of Indian land by individuals except with the court's permission. Virginia adopted a similar policy in 1655, and, later, most of the other colonies followed suit.

By the middle of the nineteenth century, the British Crown itself had begun to take an interest in the relations between Indians and the American colonists. In 1756, shortly after the outbreak of the French and Indian Wars, King George III appointed two representatives (whom he called superintendents) to regulate trade with the Indian tribes and to negotiate with them for the purchase of lands. In 1761, he acted upon a recommendation of the British Lords of Trade and decreed that all further applications for the purchase of Indian land would be processed through the British Lords of Trade, rather than by the colonial governments, and forwarded to him personally for approval. Two years later, he forbade all private purchase of land from the Indians and established the policy of licensing Indian traders through the crown, rather than through the legislative bodies of the various colonies.

At least two factors were responsible for King George's decision to centralize the administration of Indian affairs. First, in spite of laws passed by the colonies to protect the Indians from exploitation, colonial administrators often looked the other way and permitted abuses which harmed and angered the Indians. Second, such loose administration played into the hands of the French who were more successful in winning Indian allies than were the British.

The King's decision was not received with favor in some of the colonies, and in 1768 he felt obliged to return the authority for licensing traders to the colonial administrators. However, the crown-appointed superintendents remained (Kinney 1937:6–26).

INDIAN POLICY AFTER INDEPENDENCE

Following independence, colonial leaders found themselves confronted with the same problems which the British had previously faced: regulating trade with Indian tribes, acquiring land from

them, and determining which level of government should be responsible for administering Indian affairs. The Articles of Confederation squarely placed the last responsibility in the hands of the federal government. The Constitution which followed was less specific in this regard, although it did confer upon Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Later, powers deriving from other portions of the Constitution were used to develop legislation for the implementation of federal Indian policy. Among these were the powers to make expenditures for the general welfare, to control the property of the United States, and to make treaties. Also important were the powers of Congress to admit new states and to prescribe the terms of their admission, to make war, to establish post roads, to create tribunals inferior to the Supreme Court, and to promulgate "a uniform rule of naturalization" (USDI 1958:21–22).

In negotiating with the Indians, the British colonies and the crown itself acknowledged certain rights of tribal sovereignty and, during the latter years of English rule, entered into treaties with the tribes. The fledgling United States government continued this policy. The first Indian treaty following American independence was concluded with the Delawares in 1778, eleven years before the adoption of the Constitution. Other treaties with the New York tribes, the Wyandots, Chippewas, Ottawas, Shawnees, Cherokees, Choctaws, and Chickasaws also preceded the Constitution.

Some of the states negotiated their own treaties with Indian tribes at this time, despite the fact that the Articles of Confederation clearly stated that Congress alone had the power to control the Indian trade and "all affairs with the Indians" (a doctrine restated in the Ordinance of 1786). Georgia, for example, signed a treaty with the Creeks at Shoulderbone in 1786, attempting thereby to acquire large acreages of Creek land west of the Oconee River (Prucha 1962:27). This was the first in a long series of incidents involving relations between Indians and the state of Georgia which culminated in the passage of an Indian Removal Act in 1830, and the practice of isolating Indian tribes which prevailed for more than a quarter of a century thereafter.

Indian administration in the United States, in the period be-

tween the Articles of Confederation and the adoption of the Constitution, was in the hands of three commissioners, each of whom headed a *Department* of Indian Affairs (Northern, Southern, and Middle). That these offices were considered important is demonstrated by the fact that the first three persons chosen to fill them were Benjamin Franklin, Patrick Henry, and James Wilson (Prucha 1962:28). Their duties did not differ in any significant way from those of the two Indian superintendents who had served previously under British rule.

In 1786, the Congress of the Confederation eliminated the Middle Department and, returning to the English precedent, changed the title of each department head to superintendent. Three years later, in 1789, the newly formed Congress of the United States established the War Department and, in line with the actions of its predecessor body, placed the responsibility for Indian affairs with the head of that department. The following year, Congress passed the first of the so-called "Trade and Intercourse Acts" relating to the conduct of Indian affairs. The first appropriation for Indian affairs as such was made in 1791; the amount was slightly over $39,000. Over the subsequent forty years, many pieces of legislation were to be enacted under the same rubric.

INDIAN TRADE

The problem of Indian trade was a major one in the early years of American history. Not only was it economically important, but the kind of relations prevailing between Indians and traders often affected the Indians' relations with others. When Indians were badly treated or plied with intoxicants, they frequently took to the warpath against the white settlers in their territory. Also, when displeased with American traders, they turned to those of other nations, an experience with which the British had become familiar in an earlier period.

So long as the British in the north and the Spanish to the south were considered threats to the sovereignty of the United States, leaders of the young nation felt it necessary to maintain Indian allies, and this meant assuring friendly relations with them. Since many of the social contacts between Indians and whites related to trading, this activity assumed great importance. Between 1796 and 1822, the United States government maintained trading

houses where the Indians were guaranteed fair prices for the goods they had to sell and those they wished to buy. The first federal official with basic responsibilities in Indian administration was the Superintendent of Indian Trade, whose office was established in 1806.

The significance of trade with the Indians declined markedly after the War of 1812. With the British and Spanish threats no longer a problem, the federal government relaxed its previous careful regulation of Indian trade. The last of the trading houses was closed in 1822, the same year in which the position of Superintendent of Indian Trade was abolished.

THE REMOVAL POLICY

Emerging as dominant policy themes in Indian affairs after the war of 1812 were the twin ones of territorial acquisition and Indian isolation. The roots of this combined policy can be found in some of the treaties negotiated before 1800, but its real foundation was laid in 1802 when Georgia ceded to the United States the area which later was included within the states of Alabama and Mississippi. In return for this cession, the federal government promised to "peaceably obtain, on reasonable terms" the Indian title to certain lands within this area and to *all* the land inside the state of Georgia itself. President Jefferson saw an opportunity to comply with this promise in 1803, when the Louisiana Territory was purchased from France. In July of that year, he proposed removing the Indians from Georgia and other areas to the newly acquired lands west of the Mississippi River. Some of the Lower Cherokees living in Georgia, who were much harassed by the whites there, seemed amenable to this idea, but it had widespread opposition from the other Indians in Georgia, Alabama, North Carolina, and Tennessee. Later in 1803, Congress considered a bill to carry out Jefferson's plan, but while it passed in the Senate, it failed in the House of Representatives. The following year, Congress did authorize the president to work out exchanges of eastern lands for those in the west, provided the Indians would continue allegiance to the United States.

By the terms of treaties concluded in 1805 and 1806, the Cherokees ceded certain lands in Kentucky, Tennessee, and Alabama, but did not agree to removal. Removal was discussed with the Chickasaws in 1805, and with the Choctaws and Cherokees

in 1808. In 1809, President Jefferson authorized a delegation of Lower Cherokees to visit Louisiana Territory at government expense. Many of those who accepted this offer reported favorably on what they saw, but the Upper Cherokees remained unconvinced.

Indian opposition to removal had become substantial by the time President Madison assumed office in 1809. Certain small groups of Indians who had previously gone west (including some Shawnees and Delawares who had settled near Cape Girardeau, Missouri, in 1793, and Cherokees who had moved west in 1795) had not liked living in the new area. Knowledge of their dissatisfaction was widely circulated among the other tribes (Kinney 1937:27–38). As the approaching war with Great Britain began to concern federal officials, the question of Indian removal was put aside temporarily. However, it was hastily revived at the end of the War of 1812.

President Monroe, in 1817, named John C. Calhoun as his Secretary of War. Calhoun was dedicated to the idea of Indian removal and he shared this dedication with General Andrew Jackson and with Lewis Cass, governor of the Northwest Territory. Together, they urged the acquisition of all Indian lands east of the Mississippi River and the transfer of all Indians wishing to continue to live in tribal status to the western part of the country. While they did not manage at this time to persuade Congress to pass a general act for Indian removal, Calhoun and Cass were in a position to proceed on their own in accordance with the authority granted President Jefferson in 1804. Cass centered his attention on the territory over which he presided, and as a result, concluded a number of removal treaties between 1817 and 1825. Calhoun, with Jackson's enthusiastic support, made certain the policy was applied to tribes in the southeast.

The first treaty contemplating Cherokee removal was signed in 1817. Another followed two years later. In 1820, the Choctaws agreed to be moved west of the Mississippi, and the following year, the Creeks ceded much of their land and promised to submit to removal. Among the Creeks and the Cherokees, however, the question of abandoning their territory was bitterly debated, and by no means all of these Indians were seriously considering a move to the west, in spite of the treaties.

In January, 1825, just before leaving office, President Monroe delivered a message calling for removal as the only means of settling the Indian problem. Secretary Calhoun backed him with a report stating the dimensions of the removal problem. In this report, he advocated removing more than 90,000 Indians to western areas, and recommended an appropriation of $95,000 for this purpose (Kinney 1937:41–44).

Not all those who served under Calhoun shared his enthusiasm for removal. In 1825, John Crowell, Indian Agent to the Cherokees, protested the way in which the Creek and Cherokee removal treaties had been negotiated. He pointed out that Creek Chief William McIntosh, who had signed the Treaty of 1825, was in danger of being assassinated by fellow tribesmen and requested federal protection for McIntosh. The request was not granted and a short time thereafter, when McIntosh authorized Georgia officials to survey Creek lands, he was hanged by the opponents of removal.

The treaty which the ill-fated McIntosh had signed was one whereby the Creeks agreed to cede all their lands in Georgia in exchange for equal acreages west of the Mississippi River. Early in 1826, a Creek delegation went to Washington to plead with federal officials to have the McIntosh treaty declared null and void. Sobered by the experience of the execution and perhaps by the criticism of such persons as Agent Crowell, administrators in the War Department agreed to seek revocation of the act affirming the Treaty of 1825. However, they insisted upon another treaty of cession, which was signed on the spot. The terms of the latter provided for surrender of certain Creek lands in Georgia in exchange for a perpetual annual annuity of $20,000. The new treaty also provided that a delegation of Creeks would visit the west to examine lands which might be set aside for them. The following year, the Creeks signed another treaty ceding all their Georgia lands. Thus, the violence visited upon Chief McIntosh failed to defer Creek removal for more than a couple of years (Kinney 1937:44–45).

By the time the Creek negotiations of 1825–27 were underway, Indian matters within the War Department were in the hands of the newly created Bureau of Indian Affairs (BIA) which Secretary Calhoun established without Congressional blessing in 1824.

The first head of the bureau was Thomas L. McKenney, who had previously been the Superintendent of Indian Trade. The most difficult problems with which McKenney was obliged to deal involved the relations between the Indians and the state of Georgia. Unhappy with revocation of the Treaty of 1825, the governor declared the Treaty of 1826 unconstitutional and, in this action, was backed by the Georgia legislature. In 1828, President Adams submitted the matter to Congress for its consideration. Sentiment in the House of Representatives was predominantly favorable to the Indians, but the Senate threw its support to Georgia. The full Congress thereupon recommended that the president settle the matter by purchasing the remaining Creek lands in Georgia (Kinney 1937:53).

The Creeks were not the only Indians with whom Georgia was battling at this time. The Cherokees had stubbornly resisted complete removal from their lands in Georgia, Alabama, North Carolina, and Tennessee, although some as a result of treaties in 1817 and 1819 had gone to settle in Arkansas territory. Those still in the east had by 1827 achieved a high degree of unity and were effectively governing themselves under a constitution adopted in that year. Georgians and other southerners maintained that adoption of a Cherokee constitution represented an effort by the Indians to set up a separate nation independent of the state's authority. Late in 1827, the Georgia legislature proclaimed that the Cherokees had no real title to their lands and should be evicted.

In 1828, Congress appropriated $50,000 to discharge the agreement of 1802 with Georgia, providing for the extinguishment of all Indian title in that state. That same year, the Cherokees who had previously relocated to Arkansas Territory signed a treaty agreeing to move farther west. The Cherokees remaining in Georgia and other eastern states refused, however, to be parties to this action. Outraged at their obstinancy, the Georgia legislature began enacting measures extending the state's laws over Indian lands.

Andrew Jackson, ardent advocate of Indian removal, became president in 1829, and quickly let it be known that he would pursue such a policy during his administration. He defended it as the only means of saving the Indians from complete extinction. Jackson's supporters introduced measures in Congress providing

for exchanges of lands with all Indians still residing east of the Mississippi River. On May 28, 1830, a comprehensive act for Indian removal was finally passed.

The Act of 1830, one of the most important pieces of Indian legislation, authorized the president to set up districts within the so-called "Indian territory" (primarily the states of Kansas and Oklahoma today) and to prepare these districts for the reception of the eastern tribes. The act also provided authority for making land exchanges, paying for improvements on the lands being surrendered, assisting the Indians to relocate, and protecting the relocatees in their new habitat. The sum of $500,000 was authorized to carry out the provisions of the act.

By the time the Act of 1830 was passed, Indian removal was well underway in the states or territories of Ohio, Michigan, Indiana, Illinois, Minnesota, and Wisconsin (Harmon 1941:270ff.). Governor Cass had encountered resistance among some tribes in this large area, but in general, this resistance had proved less effective than that of the Cherokees in the southeast. The latter were much better organized than any of the other Indian groups in the country at this time. Although in Illinois, Kennekuk, the Kickapoo prophet, was able between 1827 and 1832 to resist in behalf of his followers the persistent pressure for removal, he capitulated and signed a treaty in 1832 agreeing to resettle on lands in Kansas (Spicer 1969:56).

THE INDIANS AND GEORGIA

During the entire decade of the 1830's, Georgia and adjacent southeastern states continued to provide the locus for the strongest Indian resistance to removal. In two landmark cases reaching the Supreme Court, the Cherokees won what turned out to be hollow victories over the state of Georgia. The first of these, decided in 1831, grew out of a plea by John Ross, Chief of the Cherokee Nation, for relief from the application of certain Georgia laws to the Cherokees. The motion which he filed with the court reviewed the various guarantees contained in the treaties between the Cherokees and the United States and complained that the action of the Georgia legislature was in direct violation of these. While the Supreme Court refused to assume jurisdiction in the matter on the grounds that the Cherokee Nation was not a *foreign state* within the meaning of the Constitution, Chief

Justice Marshall, in his analysis of the facts, asserted that the "acts of our government plainly recognize the Cherokee Nation as a state, and the courts are bound by these acts." Marshall also declared that "the relation of the United States to the Indian tribes within its territorial limits resembles that of a ward to his guardian. . . . They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants, and address the president as their great father. . . ." [1]

Shortly after Marshall's declaration, two missionaries named Worcester and Butler were indicted in the superior court of Gwinnett County, Georgia, for residing among the Cherokees, in violation of an act forbidding the residence of whites there without an oath of allegiance to the state and a license to remain. Worcester pleaded that the United States had, by virtue of its treaties with the Cherokees, recognized the sovereignty of this Indian nation and that, therefore, the laws of the state did not apply within Cherokee territory. He was tried, convicted, and sentenced to four years in prison.

Worcester's case was carried to the Supreme Court on a writ of error. In this instance, the court did assume jurisdiction and in 1832 reversed the decision of the lower court. In his opinion, Chief Justice Marshall stated:

> . . . they (state laws) interfere forcibly with the regulations established between the United States and the Cherokee nation. . . . They are in direct hostility with treaties . . . which mark out the boundary that separates the Cherokee country from Georgia . . . and recognize the pre-existing power of the nation to govern itself. . . .[2]

A number of points which Marshall included in his opinions in these two important cases have guided American Indian policy to the present day. These include the notion of Indians as "wards of the federal government"; the idea that tribes enjoy a sovereignty akin to that of the separate states, but unlike that of foreign nations (and, therefore, subject to the greater sovereignty of the United States government); and the concept that within their own territory Indians are not subject to the jurisdiction of

[1] *Cherokee Nation* v. *Georgia,* 5 Pet. 1 (1831).
[2] *Worcester* v. *Georgia,* 6 Pet. 515 (1832).

the states. Both of Marshall's Cherokee opinions are frequently cited in judicial decisions today.

In spite of the pronouncements of the Supreme Court, President Jackson moved ahead with his efforts to remove the Cherokees. In September, 1831, he sent Benjamin F. Currey of Tennessee into Cherokee country to oversee the task of enrolling the Indians for removal. Still divided on the issue, the Cherokees did not respond to Currey's mission. By persistent efforts, however, the federal government was finally able to conclude a treaty in 1835 calling for cession of all Cherokee lands east of the Mississippi River and removal to the west (Harmon 1941:189–191).

While pressing ahead with the removal program, the president and Congress also undertook to put some order into the administration of Indian matters. In 1832, Congress created the position of Commissioner of Indian Affairs and two years later gave its blessing to the previous action of Secretary Calhoun by passing an act "to provide for the organization of a department of Indian Affairs." The latter is regarded as the organic law of the Bureau of Indian Affairs, although some references still cite 1824 as the year in which the bureau was established. In truth, the Act of 1834 did not in any way alter the power of the Secretary of War or the commissioner, nor did it change the status of the Bureau of Indian Affairs within the War Department.

At least as significant from the standpoint of Indian administration as either of the above acts was the passage of omnibus legislation known as the Trade and Intercourse Act of 1834. In this action, Congress attempted to bring up to date the long series of separate acts going back to 1790, relating to the conduct of trade and the regulation of relations between Indians and whites within "Indian country." This act helped to define the territory within which state laws did not apply; certainly such a definition was necessary in the light of the Supreme Court pronouncements in the two Cherokee cases previously cited.

In spite of the Treaty of 1835, Cherokee removal was not easily accomplished. Three years after the conclusion of the treaty, General Winfield Scott was sent to Georgia with a contingent of troops to forcibly effect the movement of these Indians to the west. The result was the incident in American history well known today as the "trail of tears" (Kinney 1937:71).

Indian removal, by 1840, was well on its way to being an ac-

complished fact. A report published by Congress two years earlier showed that more than 50 treaties had been concluded since January 1, 1830, by the terms of which almost 200,000,000 acres of land had been acquired by the United States, with a probable value of $137,000,000. The total cost of this acquisition, according to the report, was about $70,000,000. The net profit was more than $67,000,000![3]

Final removal operations continued with some of the Great Lakes tribes during the 1840's, and by the end of that decade, there were few Indians remaining in tribal status east of the Mississippi River and few lands west of the river not already occupied by relocated Indians or still hostile indigenous tribes. The day of a new Indian policy was dawning and it emerged in the years immediately preceding the American Civil War.

"CIVILIZING" THE INDIANS

Although the principal emphasis in American Indian policy during the first half of the nineteenth century was on acquiring Indian lands and resettling Indians in areas removed from white settlement, other policy considerations also began to assume importance during this period. These included the need for "civilizing" Indians, the establishment of a distinction between Indians who remained in tribal status and those who did not, and the desirability of giving individual Indians title to their lands, as opposed to permitting them to continue holding such lands communally.

Probably the first public act of a United States official related to promoting the civilization of Indians was the recommendation by Secretary of War Knox in 1789 that missionaries be sent among the tribes and that the Indians be given domestic animals to raise. Three years later, Rufus Putnam, at Knox's direction, went to negotiate with the hostile Indians near Lake Erie. He advised the tribes that "the United States are highly desirous of imparting to all the Indian tribes the blessings of civilization as the only means of perpetuating them on the earth." He went on to point out that the government was willing to undertake the

[3] From the establishment of the federal government in 1789 to 1850, the United States negotiated and ratified 245 treaties with the Indians. In the process, it acquired over 450,000,000 acres of land for less than $90 million. See Harmon 1941:297, 319.

expense of "teaching them to read and write, to plough and to sow, in order to raise their own bread and meat, with certainty, as the white people do" (Harmon 1941:17–18, 157–158).

The first treaty providing for any form of education for Indians was that concluded in 1794 with the Oneidas, Tuscaroras, and Stockbridge – tribes which had fought with the Americans during the Revolution. The terms of this treaty called for the training of some of the young Indian men "in the arts of miller and sawyer." Attempts were made to include similar provisions in the Creek Treaty of 1796, but the Indians objected (Harmon 1941: 158).

In 1802, Congress appropriated the first funds for promoting civilization among the "friendly" Indians. The $15,000 dedicated to this purpose was to be used to furnish domestic animals, implements of husbandry, and goods or money; and to appoint temporary agents to instruct the Indians in the ways of the white man's civilization. Annual appropriations from "the civilization fund" were comingled with other War Department appropriations for Indians in such manner that when President Monroe twenty years later called for an accounting of how the money had been spent, the department could not provide specific answers. Secretary Calhoun answered lamely that the principal use had been among the Cherokee, Creek, Chickasaw, and Choctaw for "spinning wheels, implements of husbandry, looms, and domestic animals" (Harmon 1941:159–162).

Even after the passage of the Act of 1802 establishing the civilization fund, the government continued to include provisions for education in its treaties with Indian tribes. The Kaskaskia Treaty of 1803 called for an annual appropriation of $100 to pay a Roman Catholic priest to "instruct as many of their children as possible in the rudiments of literature." The following year, a treaty with the Delawares provided $300 annually for ten years to be used solely for the purpose of "ameliorating their conditions and promoting their civilization."

Missionary groups by the end of the War of 1812 had assumed a lively interest in working among the Indians, both to convert them to Christianity and to educate them. In 1818, the House Committee on Indian Affairs recommended the establishment of Indian schools with aid from the missionaries. A year later, the full Congress responded by authorizing and appropriating a sum