

The Interrogation of Hummingbird: A Qualitative Overview of Traditional Systems Oppression of the Oklahoma Indians

Robb Elton¹, Arthur Been²

¹ Northcentral University, Humboldt State University

² Hampton Law Office, Enid, Oklahoma

Correspondence: Robb Elton. E-mail: r.elton3368@o365.ncu.edu ; re93@humboldt.edu

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Abstract

Historical analysis of Oklahoma traditions and policies relating to the various tribes reveals a theme of willful malice, organized systematic oppression, theft from, and killing of Indians. This tradition is grounded in racism and greed. Today, this philosophy continues — even after Supreme Court decisions *McGirt v. Oklahoma* (2020) and *Sharp v. Murphy* (2020) elucidated the historical harms and apt legal framework. These cases acknowledged Oklahoma Indian territory had always persisted. Through discussion about these cases, related legislation, historical events, including the U.S. Constitution's Supremacy Clause, this paper connects Oklahoma's law-breaking customs imposed on the Indians to its founding.

Keywords: Indian country, Oklahoma history, Supremacy clause, Genocide, Nenookaasi, Chippewa, McGirt, Intergenerational trauma, Indian Law

1. Introduction

“Social oppression of which racial violence is only one aspect is more than the outcome of the conscious acts of bigoted individuals. It is systematic and structural in nature reflecting a network of norms, assumptions, behaviors, and policies which are connected in such a way as to reproduce the racialized and gendered hierarchies which characterize the society in question” (Perry, 2002, p. 232).

The hummingbird (*Nenookaasi*, in the Ojibwe language) is a messenger; it also represents many sacred ideas for varied Native American Indians (Raven, 2021). Most telling is that the hummingbird exists between worlds — having beautifully colored wings by which it flies — living much of its life in the sky — yet also temporally bound to serve the earth, much like the bee: pollinating flora and commingling close to, and being affected by, human affairs. The hummingbird in Indigenous literature serves as a guide, a healer, and witness who sees from the sky, the earth, and mediates between the gods and humanity. From a hummingbird's perspective, this manuscript chronicles and synthesizes facts surrounding Oklahoma's practices. This paper is an ethnographic narrative by an Ojibwe who has lived amongst the Oklahoma tribes, having interrogated many historical sources. This paper outlines major points in history where interestingly, other Ojibwe (hummingbirds) were noted witnesses, as well. These descriptions uncover an historical tradition of antagonism to the existence of Indian tribes that lived in Oklahoma from before the birth of the state. Understandably, this documentation is not representative of all the injustices, nor is it a negation of the sum of each cooperative victory of quality relations between tribes and the state. Sadly, these victories are not substantive enough.

To be sure, this manuscript could have arguably begun with 'Indian removal' to Indian Territory, though there already exists extensive literature on that perspective. Instead this is a detailed exposition unifying the historical and legal environments as powerful institutional factors, including corporate and state persistence of a weaponized legal tradition against Native Americans. This paper ends with non-exhaustive suggestions for future consideration by tribes and state; a seemingly welcomed aspect to the broader literature.

2. Materials and Methods

This paper presents an historical analysis, a qualitative overview of the primary sources of law binding Oklahoma's behavior as relates to the Indians of the Indian Territories. This research covers over a century of interdisciplinary literature and is integrated into the narrative as opposed to an independent section. This approach provides the greatest contextual impact and highlights evaluation of significant — largely avoided or forgotten — historico-legal sources. At the same

time, the results are situated in a contribution to a deeper honesty and from broader context of Oklahoma history, criminal justice, and federal Indian law. The review opens the varied sources sequentially and providing triangulation where needed (Jonsen & Jen, 2009). Triangulation will assist in data saturation as well as support trustworthiness (Fusch & Ness, 2015). Use of government reports, magazines, and newspapers were incorporated where necessary. A primary contention is that documents surrounding statehood provide insight into lives of Indigenous people then, and how Oklahoma traditions negatively affect them up to the present day.

3. Background

3.1 Oklahoma is Born

In 1907, the territory of Oklahoma and the Indian Territories were somewhat combined geographically to create the state of Oklahoma. Afterwards, “a series of unforeseeable events followed, leaving the tribal governments intact in spite of the newly formed State” (Leeds, 2013, p. 7). There were caveats to its creation: federal and international treaty restrictions upon which Oklahoma’s future citizens had to agree. Additional to that, Oklahoma would be pre-empted from interference with Indian Country — having to comply with both the Indian Country Crimes Act (18 U.S.C. §1152, 1817) and Major Crimes Act (18 U.S.C. §1153, 1885). Many tribal nations that were forced to Indian Territory held treaties that further prohibited Oklahoma’s interference with some Indigenous Nations dating back most recently to the 1866 Treaty with the Creeks.

The Oklahoma Enabling Act framed state behavior with a disclaimer of Oklahoma jurisdiction over Indian reservations (1906). This disclaimer is consistent with the Supremacy Clause of the United States Constitution and treaties with the tribes of Indian territory (see Treaty with the Creeks, 1833), which promised “no portion” of Creek lands would ever be embraced or included within, or annexed to, any Territory or State” (*McGirt v. Oklahoma*, 2020, p.1).

Oklahoma’s enabling act preamble, stated, in part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories so long as such rights shall remain unextinguished or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed (1907).

This act of Congress did nothing “to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed” (*Ex parte Webb*, 1912). This act merely allowed Oklahoma to become a state, wherein the Indian reservations were not disestablished. When Congress intends to abrogate tribal sovereign immunity, it must do so “expressly, with clear and unequivocal language” (*Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 2009); and the caveat “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit” (see *Montana v. Blackfeet Tribe of Indians*, 1985).

Congressional prohibition in the Oklahoma Enabling Act purposely deprived Oklahoma of specific subject-matter jurisdiction; the United States and the Indigenous Nations who share similar treaty provisions maintain formal legal authority over the lands. But even knowing this, Oklahoma has ignored that fundamental fact. States have long been considered a primary enemy of Indigenous Nations (*U.S. v. Kagama*, 1886). The disclaimer was to insulate against bias, and reinforce the United States ‘trust responsibilities to each tribe, too; These preemptive laws did not thwart Oklahoma’s ambitions.

Over the years Oklahoma has tried to give itself jurisdiction over Indians, arguing that district courts in the state have unlimited original jurisdiction over all justiciable matters, but citing to its own Oklahoma Constitution, Article VII, § 7 (1907). However, Oklahoma’s own constitution has a provision that “deprives the state of subject-matter jurisdiction” as certain land remains under the jurisdiction of the United States. Clearly, exclusive jurisdiction over Indian Country was retained by the U.S. upon Oklahoma’s entry into the Union, as was discussed by Leeds (2013, p. 11). It is a mere curiosity that while Oklahoma recognizes its own constitution — it has preferred to ignore the language where it is clear and unmistakable: the unequivocal disclaimer at statehood. This clause was again immortalized in an additional place in that very Oklahoma Constitution, authorized by Congress, where:

The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished

by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. Land belonging to citizens of the United States residing without the limits of the State shall never be taxed at a higher rate than the land belonging to residents thereof. No taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use. (Oklahoma Constitution, 1907, Section I-3, Indian lands).

Having described the circumstances of Oklahoma's birth, and having set forth a legal framework under which the United States, the Tribes, and the people of the would-be state of Oklahoma were bound, the history that came to pass, was a dark one. It is a history built upon criminality; clear, unflinching breaches of the aforementioned laws. But this was the theme throughout the United States where Indian people resided.

Prior to Oklahoma, states like Georgia, North Carolina, and South Dakota also tried exploiting Indigenous Nations in many ways. First, as to the future Oklahoma tribes, Georgia and North Carolina — through defects in the Articles of Confederation tried overrunning the tribes. Roughly 60 years after ratification of the U.S. Constitution, correcting those defects relating to state-tribal political battles tragically ended up in the Trail of Tears removal (Andrews, 2021). A few tumultuous decades after removal, our attention was the ensuing years from statehood. Tragically, and often, Oklahoma had taken its cues from the national government regarding treatment of the Indians; all the while, the hummingbird bore witness to Native land in Oklahoma remains intact: the Indigenous Nations of Oklahoma were distracted and dormant, but still alive.

3.2 1908 into the Great Depression

Around the time of the birth of the United States, Jesuit priests living among the Mohawk Indians recognized the horrors of alcohol which had seemed to devastate Indigenous society unlike anything they could ever conceive (Dickson-Golmore & Woodiwiss, 2008). As if preparing for chemical warfare, Oklahoma's first legislatively referred state constitutional amendment, "State Question 1: sought to authorize state and local agency alcohol sales "for medical and scientific purposes" (Ballotpedia, 2021, n.p.). This measure did not pass, however. That very same evening, Oklahoma's first set of electoral votes neither went to the winner of the 1908 presidential election, William Howard Taft. Why not? Interestingly, before running for President, Taft had been a superior court judge in Ohio, the sixth solicitor general of the United States, the first provisional governor of Cuba, the governor general of the Philippines, and the Secretary of War under Teddy Roosevelt — the exact imperialist President who authorized the Oklahoma territory to collectively become a state in the first place (Pringle, 1939; Crowe, 2007). Notably, Taft would go on to also serve as Chief Justice of the Supreme Court (Jackson & Sterbenz, 2015). 1 November, 1908 capped off a confusing first year for Oklahoma

Native American religious practices were outlawed unless they involved the preferred form of Christianity of the area as the Indian Religious Crimes Code (1883) was in effect. In 1909, for example, the Bureau of Indian Affairs unleashed one of its special agents to settle the "peyote problem" in Oklahoma. The agent subsequently failed to convince federal courts that peyote was a controlled substance so he took it upon himself to raid these sacred peyote meetings. There he destroyed all the peyote button he could find (NAR, 2012).

Charles Haskell, Oklahoma's first state governor from 1907-11, and three men also from Creek Nation Territory were charged for conspiracy to defraud the United States in 1902 for selling town lots in Muskogee, Oklahoma. The tradition of land fraud manifested itself rather instantaneously — despite the land run giveaways of the 1890s — and at the highest levels of government and business. Unfortunately, the charges were dismissed on "statutory grounds" (Krehbiel, 2003, n.p.). Oklahoma corruption ran early and deep.

From 1907-to-1909, petroleum was located primarily in the Creek Nation reservation. It was no surprise that fraud became prevalent and directly correlated to profits from oil discovery. To make sure no blacks benefited from these jobs, Oklahoma's first senate bill, post-statehood, immediately segregated the state (Albright et al, 2021, p. 7).

The years 1910-to-1919 saw an explosion of prospecting and population into not only the Creek Nation, but also into Osage land. Their lands were erroneously referred to as "former" Indian Country by those interested in oil (Brown & Cuberes, 2020). The final wave for oil occurred inside the "former Osage territory and reached for the first time into the former Seminole nation (Seminole County). . . And from 1907-23 Oklahoma became the number one oil producing state" (Brown & Cuberes, 2020, p. 4).

The Osages figured prominently in the coffers of Oklahoma government, politics, and business. As depicted in Grann's (2017) book *Killers of the Flower Moon*, the Osage were at one time the richest per capita people on Earth. Through the first 21 after statehood, dozens (perhaps more) of Osage were systematically murdered for access to "head rights" to oil-rich land. After dozens of strange deaths drew attention to the area, the scheme was discovered. Subsequently, the federal government indicted, convicted, and sentenced William Hale for aiding the orchestration in a few murders in Indian Country. In *United States v. Ramsey* (1926), the sister case of one of Hale's co-conspirators, the Supreme Court held that

the government had the authority to prosecute crimes against Native Americans (Indians) on reservation land that was still designated Indian Country by federal law. While evidence could not corroborate Hale's involvement in others, many knew the truth. Hale was unfortunately later pardoned in 1947 by President Harry Truman, over the objections of the Osage Nation. Interestingly later, Oklahoma Governor, Henry Bellmon pardoned Ernest Burkhart in 1965 for *state* crimes (Beacon, 2013). His convictions should never have occurred in an Oklahoma court.

In terms of legal assertions of authority, since statehood, Oklahoma has tried taxing many tribal activities. In an early case that was thankfully taken up by the Supreme Court in *Choctaw, Oklahoma & Gulf Railroad Company v. Harrison, Sheriff of Pittsburg [sic] County, Oklahoma* (1914), the state tried taxing mining operations within the Choctaw Nation, which the court characterized as an "occupation tax." Such tax amounts to impediment to giving effect to federal policies with the Indians: state overreach. Oklahoma is well known for attempting to pass unconstitutional laws (Forman, 2021; Taylor, 2021).

3.3 World War I

Approximately 22,000 Native Americans served in World War I, 60% of which were soldiers — half of which were conscripted — the remaining Natives (40%) contributed support services for the Red Cross (Smithsonian Institute, 2020). It must be remembered that despite all the absolute evil thrust upon the Native American people since 1492 — they nevertheless fought for a country that did not love them in return. In fact, it would take the servicemen and women, veterans of World War I, to help organize support for the Indian Citizenship Act (1924). Through this act, Native Americans were granted U.S. citizenship in their own land (Berg & Jansen, 2018, p. 604). Though this was not universally supported, particularly by Tuscarora Chief, Clinton Rickard, "This was a violation of our sovereignty. Our citizenship was in our own nations. We had a great attachment to our style of government. We wished to remain treaty Indians and reserve our ancient rights" (Encyclopedia.com, 2021 n.p.). Each tribe was not given the choice.

To complicate matters even further, while soldiers were away, as reported by Wood (1981), American Indians were encouraged to ramp up agricultural production and where infeasible, to forcefully lease their lands to white farmers, a policy of Bureau of Indian Affairs head, Cato Sells. If nothing else, an easy "calculation suggested that among the Five Civilized Tribes alone an estimated 30,000 government wards could be compelled to farm" (p. 249).

After World War I, there were continued attacks against isolated Indian tribal members in rural areas, by Oklahoma actors and individuals, as in the Osage murders. Attacks on many Freedman citizens of the Five Tribes occurred in cities, too. In 1921, a travesty dubbed the Tulsa Race Massacre, was an absolute horror that set the Black-Native population back decades. By this date, over the 14 years since statehood, Oklahoma citizens had lynched 33 blacks (Oklahoma History Center, n.d., p. 6). Whites destroyed 35 city blocks and killed hundreds of blacks, many of whom were citizens of Native American Nations. Thereafter, around 6,000 *blacks* were interned in facilities around the city for days (Messer & Bell, 2008); even insurers refused to pay claims (Council, 2021; Oklahoma Historical Society, 2021, n.p.), and banks refused survivors their money and closed out their accounts. In the aftermath, Oklahoma's lead attorney for the state "used her power to give immunity to any whites who looted homes or murdered African Americans" (Oklahoma Historical Society, 2021, n.p.). A newspaper, still in print today, was quoted:

The Tulsa World newspaper inflamed the tensions between blacks and whites by suggesting that the Ku Klux Klan could "restore order in the community." Since the KKK asserted white superiority with terroristic acts, such as lynchings, the mere suggestion from a mainstream newspaper that the KKK should intervene demonstrates how white supremacy was not only legitimized but also promoted with legal impunity (Messer, 2011, p. 1224).

3.4 The Great Depression and Residential Schools

While many Native children were shipped off to boarding schools — most constructed within Oklahoma — journalism (propaganda) from either side of white or Indian society was not accidentally assimilationist. *The American Indian Magazine* (1926-1931) was designed to promote the fictitious progressive Native American imagery in Oklahoma. The paper was overtly "paternalistic and promoted Indian assimilation into most aspects of European-American society... ignored many... issues facing traditional Indian communities" (Haller, 2002, p. 64).

Despite what is reported or discovered about the victims at these horrible schools — the boarding school era seemingly fit the agenda for pilfering American Indian land to the tune of ninety million acres by 1933 (Child, 2021; Barker, 1997). Oklahoma also led the nation in this area as well, with 81 residential schools specifically to "assimilate" Native Americans. Yet, we must not forget, these were "child abductions," not willful participation by Indigenous Nations (Binder and Reimers, 1982, p. 59). The hummingbird shakes its head.

School administrators changed students' clothes, names, and diets, cut their hair, introduced them to the unfamiliar conceptions of time and space, and achieved obedience through militaristic discipline and regimentation. School authorities prohibited cultural practices and tribal languages, and replace them with Christianity, the English

language (Davis 2001, p. 20).

Immediately after statehood, citizens of the Indian Reservations in eastern Oklahoma spiked enrollment at Chilocco Residential School, according to research by Lomawaima (n.d.). The Cherokee, by 1925, made up the largest single tribal affiliation, whereby around 225 victims were created out of one tribe, in one school alone, to the end of what Ellis (1996) strangely termed a “peaceful war of assimilation” (p. 8). Recognizing the breadth of intergenerational trauma, Pridemore (2004) declared that Indigenous Nations and their people — even to this day — are trying to heal from the forcible taking of children and sending them away from their parents and families (48). This tragic phenomenon continues to reveal itself contemporarily, where in Canada and the United States, bodies of young Natives are being found in areas surrounding these schools, numbering in the thousands (Department of the Interior, 2021, n.p.). Healing and maintaining Indigenous resilience continues. According to the Crime Report (2021) of those who survived the residential school tragedies, 38% of the reported Indigenous children removed from their homes “suffered sexual abuse” (n.p.), and 83% of all Indian children were shipped to these schools, reported Murphy (2021, n.p.). Though, over this period, it is unclear why Judge Murphy did not admit that over a 90 year span *all* Indians will have been children.

As the depression crept over Native America, Angie Debo worked within Oklahoma — and out from the great depression — authoring a few powerful books regarding the subtleties of corruption against the Five Tribes. Her work, *And Still the Waters Run*, harks back to the Creek Treaty language, that the land will persist as Indian Country forever, so long as the grass is green and the waters run. From a 1985 interview she discussed the subject of unknown history in her then manuscript, a subject that caused the publisher more than once to push her to back out of publishing it. She recalled:

difficulties with guardians that some oil-rich Indians were having, and he mentioned the guardianships, but I was thinking about the Osages and everybody knew what had happened to the Osages, but that was in just one county of Oklahoma, and didn't affect the Five [Civilized] Tribes. So his knowledge also was limited as he had been born outside of the state, but had grown up in Tulsa. But [he] had been unaware of the early part of this criminal conspiracy. After statehood, what we call the east half — that is the former Indian Territory — that had been owned and governed by the Five [Civilized] Tribes, dominated state politics, and to a certain extent it dominated the entire economic situation because the oil fields were in the eastern half — and they were spectacular oil fields. (Paragraphs 6-7 from 1985 interview transcript).

What Debo referred to was the illegal practice discovered between 1908 to 1934, where guardianships were a method by which Native people were “adopted,” killed, and defrauded of their lands and royalties (Seielstad, 2021). The knowledge of this practice, of using Oklahoma’s legal system to oppress people is not new nor is it a secret, yet many people know nothing about it. While it does take more than one person to accomplish any guardianship: an applicant guardian and a judge who will grant the petition, this only takes a nod. The hummingbird, during flight is nearly inaudible, too.

3.5 *The Meriam Report*

In 1926, at the behest of the Department of the Interior Secretary, the government began a two-year research project led by the infant Brookings Institution. This research sought to provide better comprehension of the extent of the negative effects of the culmination of hundreds of years of oppression on Indigenous communities. In 1928, one-year before the depression would officially begin, the infamous *Meriam Report* was published. The report was detailed, precise in some areas, yet flawed in tone including a fundamental assumption that Indian people were irresponsible and idle. Indigenous Nations are yet different from whites — even after all the tragedies, it stated, but Natives wanted freedom not that way of life resulting in *de facto* imprisonment to a reserve.

The report assumed that Natives needed to farm their lands for money and subsistence. It also stated that Indians lacked vocational opportunities to be employed by businesses as whites were — never mind Jim Crow. The report indicated that distance from urban areas was an impediment toward Indian modernity, and that Indian traditions lacked marketability.

The inarguable pieces of the report detailed extensive health problems, particularly *trachoma* — a bacterial infection that affects both eyes and without treatment can lead to blindness. This bacteria is the same one that causes chlamydia in sexually transmitted infections and easily transmitted by flies or fluids. Antibiotics on reservations were not commonly available, neither was treated water, or sanitary conditions. These preventable and treatable diseases are now only seen in absolutely destitute countries (Wright, Turner & Taylor, 2007, p. 421) not so much in America.

Two important facts, of particularly contemporary legal relevance is that the report detailed the following recurring themes: “. . . states have attempted to assert this jurisdiction and apply state law, but they have generally withdrawn when their efforts are challenged” (p. 45), and “The affairs of the restricted Indians of the Five Civilized Tribes in Oklahoma require serious attention. It is specifically recommended that the period of restriction which under existing law will expire in 1931 be extended for at least 10 or 15 years” (Meriam Report, p. 48). Oklahoma, of course, was partly a large reservation under federal jurisdiction, but the legal relevance of this fact was not understood by every Native.

The *Merriam Report* provides a plethora of historical citations for any serious historian. What the report did accomplish also, was to inform Congress of the necessity of pursuing alternative policies regarding the Indians. As the depression widened its reach and commodities were rationed, the Native American, just as many other Americans at that time, required a new deal.

3.6 *The Indian Reorganization Act (1934)*

Largely in response to the *Merriam Report*, at a little over five years after its publication and distribution, the 73rd Congress responded by passing the Howard-Wheeler Act (1934) or as it is better known: The Indian Reorganization Act. As with the 1924 Citizenship Act three years before, there was not absolute consensus about how to embrace (or not) support for this act. Some Indigenous organizations sprouted up just to overturn it (Hauptman, 1983, p. 378). In California, 181 tribes (*rancherias*) supported the act, 77 did not (Giago, 2009, n.p.); another source recalled 174 California tribes for it, and 78 against, with a mere 92 tribes or bands actually adopting it (Encyclopedia.com, 2021, n.p.)

Why then were there many tribes unresponsive of the act? The act itself is but 7 pages in length, but covers a lot. Besides defining what an Indian was: starting at “one-half blood quantum” for voting purposes or government participation, other restrictions peculiar to the Oklahoma Indians were also problematic. Section 13, 25 U.S.C. §5118, this Act reads:

Provided, That Sections 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomie, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. (p. 4)

The sections in question that were stricken from Oklahoma tribal access were provisions that: restrict and permit easements and rights-of-way; allow the Secretary of the Interior to expand reservations or restricted lands; authorize creation of these forms of government; and removed Secretary of Interior power to authorize constitutions for tribes in Oklahoma. Why? Oklahomans understood that the land had value, and whites did not want to disturb such energy production (oil and gas). That would have been premature: the hummingbird saw there was oil and lots of it.

3.7 *The Oklahoma Indian Welfare Act (1936)*

The Oklahoma Indian Welfare Act (OIWA) basically brought the tribes who were left out of those five aforementioned provisions of the Indian Reorganization Act into equal status. These tribes were authorized to take loans on their land, have reservations expanded (land into trust), and of course, create constitutions with municipal style government. After everything else failed in colonizing or assimilating the Indians, incentivizing their activities to mirror those of the majority race, seemed to have noticeable effects. It would take over 40 years for all of Oklahoma’s largest tribes to reorganize under OIWA, but after 1979, all Five Tribes’ Nations had fully incorporated.

The most extensive analysis available of the Oklahoma Indian Welfare Act was a doctoral dissertation by Blackman (2009). The scholarly work provided demographic data including insight from an auto-ethnographic purview of an Oklahoma citizen. Blackman agreed with the other two minor analysts who had commented on OIWA: he had mixed feelings about the benefits or negative effects on tribes, thus did not distinguish his study from the others; it was only the recency of Blackman’s scholarship that did so. He accurately concluded: 36,000 acres barely expanded the tribal land base and was marginal agriculture land. Around 10 percent of eligible Indians used OIWA loans. Eighteen Nations reorganized under OIWA, with 13 fully incorporating (Blackman, 2009, p. 212).

It would be during WWII that the termination period of certain Indigenous reservations and tribes began. This lasted up to around 1970. Ironically, the Nazi approach to using concentration camps — while borrowed from the United States’ treatment of Native Americans — caused legislators and citizens unease. It became worse that someone made the connection of tribal self-government as expressing actual-practice Communism. Fighting Fascism and Communism were two of the lesser reasons to join that war, so terminating the Indians during the war became a close reality. Not only were Oklahoma Indians deprived of their lands, children, lifestyles, religion and culture — and ushered at gunpoint to reservations — the government, after WWII, wanted to destroy reservations, federal recognition of tribes, and give Indians bus tickets and send them away into unknown cities (Rosier, 2006, p. 1306).

3.8 *World War II*

Much has been rightfully made about Dinè or Navajo code talkers of World War II, though little is made about the other tribes and their languages. Meadows (2003) provided a cohesive history of Comanche code talkers, including the very same Comanche whose last great Chief, Quanah Parker saved them from self-extinction by surrendering 2 June, 1875 to the United States at Fort Sill, Oklahoma. Oklahoma tribes were prominent in secret code talker service. Among the tribes from Oklahoma were: Cherokee, Choctaw, Muskogee Creek, Seminole, Kiowa, Comanche, and Sac & Fox (p. 283). While fighting for the United States abroad, the hummingbird spoke alongside them (p. 282); at home, in Oklahoma, the

legal system began reinforcing the tradition of exercising jurisdiction over Indian Country and the Indian people. Take the following tragic error, for example: the criminal case of George Wallace.

On 3 February, 1942 a complaint of rape was filed against a Comanche Indian, George Wallace. He was arrested and taken into custody in Cotton County by the state of Oklahoma. Three days later, the district attorney's office of Oklahoma City (OKC) demanded that defendant Wallace be turned over to the Federal government for prosecution, that his crime occurred on what was an allotment inside the "former" Comanche Reservation. The OKC district attorney's request was complied with. It was at this point, the story should have rightfully taken on the narrative we see today in Oklahoma: that prosecution of crimes committed by or against Indians within "Indian Country" fall exclusively to the U.S. Government to prosecute. During this time, the Interior Department and executive branch was mostly antagonistic to concerns and rights of Native Americans.

The moment the federal government took Wallace into custody, his life should have stayed in their hands, and the deliberate legal failures built upon his name would not have occurred – as sole and exclusive jurisdiction of Wallace's offense fell to the United States District Court for the Western District of Oklahoma, not the state (recall the Ramsey, Burkhart, and Hale trials for the Osage murders). Yet, mistakes are bound to happen, or be compounded through years of inaction or feigned ignorance. In 1942, the Federal government wrongfully delivered George Wallace again into the custody of Cotton County, under Oklahoma's jurisdiction because it stated it did not have power to prosecute. In time, there will eventually be thousands of cases like Wallace's, where people are illegally held without appeal, without help.

Time passed, and George Wallace found himself imprisoned by guilty plea. While incarcerated, he filed a Habeas Corpus petition, trying to again correct the executive branch and district court mistakes in the Oklahoma Court of Criminal Appeals (OCCA). The world was celebrating the surrender of Japan that week in September, signaling the end of World War II. George Wallace had his wrongful prosecution in front of the OCCA, his case was decided 9 September 1945 (OK CR 92 | 162 P.2d 205). The opinion acknowledged that he was held illegally, but the errors of the federal government fell to his feet, and not Oklahoma courts. He was wrongfully denied relief and discontinued fighting his case. The issue resolving his Indian Country claim world later fall to Creek Nation citizen, Patrick Murphy and Seminole Nation citizen, Jimcy McGirt sixty-years later.

Rosier (2006) offered an interesting assertion regarding one of the iconic moments of World War II lore. Joe Rosenthal's Iwo Jima flag photo, he noted, while a staged event on 23 February 1945, said that "Ira Hayes was not touching the flagpole" (p. 1304). He also stated that his pose, while unintended, remains a symbol of Native American inability to obtain basic rights even after they returned home after risking their lives. Ira Hayes was a Pima Indian. Rosenthal's photo is part of the National Archives (80-G-413988).

3.9 The Hoover Report

In 1949 the United States had a solution to making government more efficient while additionally proposing to finally assimilate Native Americans into white society. The idea was to move them to cities, disestablish all reservations, and dismantle the Bureau of Indian Affairs (BIA). There were string recommendations that the U.S. eliminate tribal governments, too. These ideas were derived from a commissioned government report published in 1948 called the Hoover Report. Besides the recommendations within the controversial Hoover Report, Congress passed additional sovereignty-stripping legislation in 1953: Public Law 280, Indian Termination Act, and House Concurrent Resolution 108 (HCR).

During 1953-1964, terminations of 100-plus tribes occurred (HCR 108, 1953) and jurisdiction was mandated to six-states and offered to any (P.L.280, 1953). Around 2,500,000 acres of trust land lost restricted status. Oklahoma did not sign onto accept jurisdiction over Indian Country. A companion law, three-years later, to encourage Oklahoma Indians and others away from their lands came The Indian Relocation Act, or Public Law 959 (1956) which dangled vocational training and an initial seed money for 1-months rent and a one-way ticket by bus to one of a handful of select cities (primarily in the West). Many Indians left to the cities.

3.10 Korean War

The Korean conflict has a general beginning in 1950, five-years after WWII. However, directly after World War II, allies including America occupied Korea across a three-year period from Sept., 1945 until Aug. 1948 (Stueck & Yi, 2010, p. 179). As the Cold War began, this three-year unofficial Korean War also started and 10,000 American Indians had enlisted to serve there. Some of the enlisted Natives were veterans from WWII. (Thatcher et al., 2016, n.p.).

Three of these Indigenous veterans would earn the Congressional Medal of Honor, according to a government report (Lindsay et al., 2006, p. 4). Another article recorded the names of seven Natives, four of whom were from Oklahoma Tribes: Captain Raymond Harvey (Chickasaw), Sergeant First Class Tony Burris (Choctaw), Private First Class Charles George (Cherokee), and Pascal Poolaw (Kiowa), Zotigh (2020). While they were fighting, the government and think tanks were coordinating how best to finally extract Indians from their treaty lands and eliminate its trust responsibility.

3.11 Vietnam to *Murphy v. Royal*

Starting in 1944, the government's termination period of Indian affairs began and lasted at least until 1970. Many tribes in fact were terminated from federal oversight, lost land, and sovereignty. This mistreatment, coupled with the Indian Relocation Act (1956) to cities was a double-edged sword. Those Indians who did move away into the cities found colleges, universities, and established like-minded political groups (Burt, 1986, p. 5). The urbanization of the Indian sparked the Red Power movements by the 1960s — following in the steps of such visionaries as Huey P. Newton and Bobby Seale — founders of the Black Panther Party for Self Defense, groups such as American Indian Movement fought for civil rights for the Indian, too.

Wilkes (2003) explained the policy of termination and dispersal of Native Americans post-World War II effectively split the population of Native people in half — one part into cities and the other part on reserves. This further widened the socioeconomic gap with all people. Yet, those who left made the best of the situation. The city was large and many other services could be applied for and organizations to visit if one needed to survive in the short-term.

Vietnam was not the Native American Indian fight either, but there were veterans. Of particular interest in the 1960s was a handful of Supreme Court cases that dealt directly with Oklahoma Indian land. In the most important of these cases, Oklahoma had assumed ownership of the Arkansas River — which flows through Tulsa — traversing Cherokee, Muscogee Creek Nation, and Choctaw lands. Oklahoma oil companies were illegally leasing sites for exploration and drilling and for yet another time in its history, Oklahoma was caught taking minerals from land they had no authority over. The case was *Choctaw v. Oklahoma* (1970). The case is integral as relating to Oklahoma traditional history, not only due to the subject matter and parties involved, but because of the era of justices and the legendary Solicitor, Louis Claiborne. Claiborne was known for his unusual British-Louisianan accent and that his sister was famed clothing designer, Liz Claiborne. The justices in *Choctaw* were very direct, often humorous, despite the fact they realized what they had on their hands was a mineral rights swindle. Justice Black and Claiborne exchanged on day two:

Hugo L. Black

Is anything in the record that indicates that the bed of the stream as such has embodied in it any minerals of any type that make it of a special value?

Louis F. Claiborne

Today, yes Mr. Justice Black.

Hugo L. Black

What is it?

Louis F. Claiborne

It's oil.

Hugo L. Black

Oil.

Louis F. Claiborne

And this controversy arises because very valuable oil deposits have been discovered in the bed of the river and so the matter becomes an important practical dispute.

Hugo L. Black

Is the real pragmatic question then who owns the oil there, the Indians or the State Oklahoma? (1969, n.p.).

The court opinion, by Thurgood Marshall, held against the oil companies and Oklahoma. The Choctaw had won and this signaled to the other tribes they needed to get busy, looking into the Indian Reorganization Act again, and also into their own treaties. *Choctaw* reminded the stakeholders Oklahoma has no authority over Indians, their property, or federally recognized tribal visitors in Indian Country — unless expressly conferred by Congress (*United States v. Kagama*, 1885; *United States v. Pelican*, 1914). Within the Choctaw case, the hummingbird was mentioned fourteen times.

During the 1970s, Native Americans suffered through much more. Although the government's policy positions were becoming harder to maintain because of the press. President Nixon granted tribes the ability to exercise their religion and sacred practices, restoring some of the bent first amendment rights they had lost the previous century.

Another difficult subject to report is that Native women were forcefully sterilized at that same time. The tragic irreparable victimization overshadowed a great victory of religious restoration. Dr. Connie Uri uncovered the systematic, surgical prevention of life — the sterilization in 25% of all Native women; hundreds of forced procedures occurred right in Claremore, Oklahoma, within the Cherokee Reservation boundaries (Uri, 1974). This building houses a medical center to this day, having an enclosed courtyard, where the hummingbird had visited many times.

The larger Oklahoma tribes would fully incorporate in 1979 and incur further attacks on their sovereignty. Such attacks were aimed at water, gaming, and taxation — including some criminal jurisdiction cases. All told, the tribes would collect enough strategic victories and growth with which to set the stage for the two greatest tests against their existence since the Trail of Tears. As stories of perseverance usually begin with tragedy, the history of Patrick Murphy is just that. Murphy, a citizen of Muskogee Creek Nation perpetrated a murder, inherited the chance to finally explain to the Supreme Court, that Oklahoma had illegally tried, convicted, and imprisoned him — like thousands of others before and after him (where some were wrongfully put to death, or killed by gangs in prisons, or disease). As of the time of Murphy's case, Oklahoma led the world in incarcerating Natives (Daniel, 2020).

3.12 *Murphy v. Royal*

The case experienced delays on its way to the Supreme Court. By the time it reached the Tenth Circuit Court of Appeals, *Murphy* had overcome many procedural or jurisdictional barriers just to be able to make the request that his *habeas* petition be heard. *Murphy* was already on an amended *habeas corpus* request, but the existence of the Creek Nation was hanging in the balance, the case had to be handled correctly.

It seemed the Oklahoma Court of Criminal Appeals and the federal district court below were egregiously in error by dismissing *Murphy*'s earlier appeals. Using very careful analysis, the Tenth Circuit's opinion provided meticulous discourse at over 100-pages. However, just as the 1969 Arkansas River case in *Choctaw* brought energy corporations out of the woodwork, this case certainly created anxiety — spawning several *amicus curiae* briefs by oil companies again, including livestock farmers, on one side, and Women's Rights Organizations and other tribes on behalf of *Murphy*'s claim.

The Tenth Circuit ruled in favor of *Murphy*, that the area he committed his crimes was inside the Creek Nation Reservation. However, in its opinion acknowledging it to be a correct decision, the court believed that the case presented an important enough issue to warrant review by the Supreme Court. Thus, Oklahoma appealed, preparing for a redo with special counsel in tow. In Oklahoma's opening brief, it tried to rebound, and present its tradition of genocide and anti-Indian history as proof that all reservations in Oklahoma did not survive statehood.

After briefing and an action-packed oral argument, the court did not issue an opinion with *Murphy* in the 2019 term. Besides asking for additional briefing regarding jurisdiction, it seemed the opinion demanded a full court. Dr. Justice Gorsuch recused himself because he was on the Tenth Circuit Appeals when *Murphy* passed through that court. There was no place to go with eight justices on the case, it seemed. On the last day of the term, the Supreme Court announced that they bound *Murphy* over for another set of oral arguments the following term. Months passed, yet within that term, they took up the case of Jimcy McGirt instead. And because Gorsuch had not recused himself from it, as he had done in *Murphy*, by the close of the 2020 terms, everyone's anxiety about the case might also come to an end through *McGirt v. Oklahoma*.

The King Memorandum (2020) was prepared by the solicitor for the Department of Interior. This *memo* assured the IRA's specific inclusion of the named Oklahoma tribes in Section 13 was nonetheless unambiguous evidence that Congress understood them to be under federal jurisdiction at the time of the IRA's enactment (1936). This memo was written months before the *McGirt* decision. Oklahoma knew it was largely a reservation since 1907, but they pressed on.

3.13 *McGirt v. Oklahoma*

The oral argument for *McGirt* provides great understanding of the issues. Better still, the legendary opinion by Dr. Justice Gorsuch is the greatest source of knowledge on the issues of reservation disestablishment and Indian Country jurisdiction. After two months, Gorsuch delivered the opinion in *McGirt* — 5-4 affirming the Muskogee Creek Nation boundaries, which included Tulsa, Oklahoma. Oklahoma finally understood that they never had jurisdiction. Or did they? That same day, *Murphy* was also finally affirmed by the Supreme Court in a 6-2 opinion *per curiam*, with Alito/Thomas as dissenters. That day, five other reservations in Oklahoma were recognized by The Supreme Court as well. (Jimcy McGirt *pro se certiorari* petition is **Figure 1**, p. 25).

The court's comfort with the subject matter markedly advanced by the date for oral argument in *McGirt*. The court discussed at length the consequences of ruling for either side; however, the case was rather simple, painful, but simple review of a handful of statutes and a few treaties. Then again, there is no other way to minimize that *McGirt* had been accused of sex crimes (now convicted). Within *McGirt* the court acknowledged that they said "nothing new," announcing "no procedural rule," as *Solem v. Bartlett's* (1984) disestablishment framework was long standing and The Creek Treaty

of (1866), and Major Crimes Act (1885) preempted states from exercising authority in federal reservations. Oklahoma's Enabling Act (1907) also held a disclaimer, thus, Oklahoma's only argument was roughly: we have overrun tribes and taken from the Oklahoma Indians for over 100 years, please recognize that, and affirm. The court did not: "we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word" (Gorsuch, *McGirt*, 2020, p. 1).

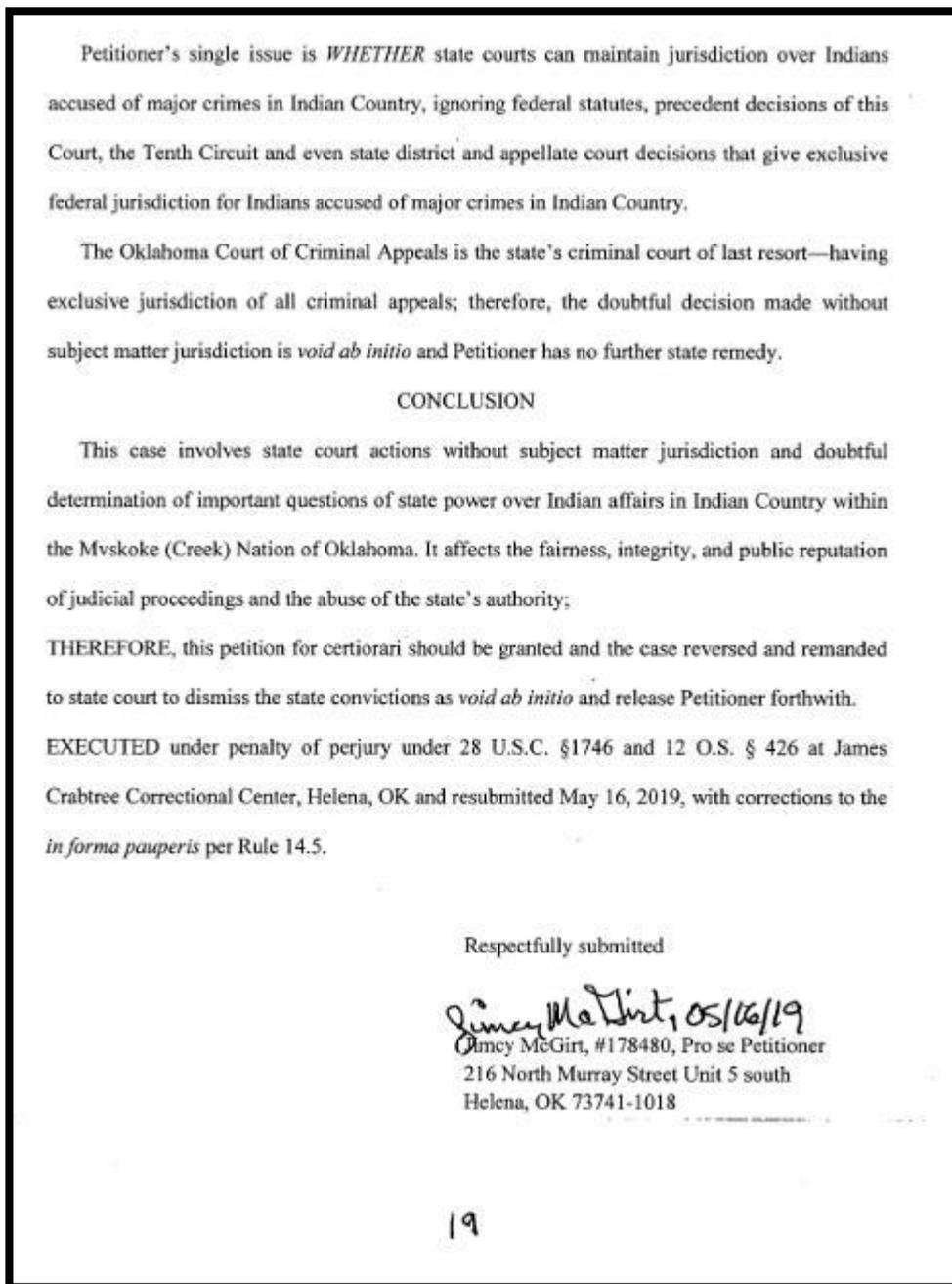


Figure 1. Page 19 Image: Jimcy McGirt, Pro See Petition for Certiorari

Note: image taken by Elton (2021).

4. Discussion

Cases such as *McGirt* reflect a current and historical reality of racialized violence inherent in violations of the United States' trust responsibilities to the tribes. "The very motive and intent of racialized violence is to protect carefully crafted boundaries, in the physical and social sense. It is a purposive process of policing the line between white/not white, between dominant and subordinate" (Perry, 2009, p. 401). These are reasons why we have laws like the Indian Country Crimes Act and The Second Trade and Intercourse Act (1 March 1793), where notably, the act's criminal provisions prohibited "any citizen" from committing "any crime," while in Indian territory, against "any friendly Indian" (Andrews, 2021, p. 208). The Act thus insured a form of 'national security' in that other Americans were prohibited from committing crimes against *friendly Indians*— despite any treaty with the United States. This undoubtedly was enacted to prevent war with Indigenous sovereigns and effectuate its unfolding trust responsibility.

The victory of acknowledgement of the Creek Nation boundaries has resulted in many other tribes in Oklahoma reviving their powers and confidence. From 9 July 2020 until 12 August 2021, the Oklahoma Court of Criminal Appeals had reluctantly issued opinions consistent with *McGirt* and *Murphy*, opinions which had the effect of acknowledging broader Indian Country. Since, Oklahoma has had dozens of petitions for *certiorari* pending through the winter of 2021-22, primarily stemming from Oklahoma Appellate court decisions, all were denied but one, *Oklahoma v. Castro-Huerta*, a case involving the General Crimes Act – non-Indian crimes against Indians are covered under federal law. The arguments were Justice Breyer's last on the court. As in the *McGirt* argument, Oklahoma kept trying to place itself at the table with the tribes and federal government. Most of the Justices realized their hands were tied: they can't legislate. Non-Indian people who harm Indians must be tried in federal courts.

Interestingly, through a recent illegal Oklahoma court case *State Ex Rel Matloff v. Wallace* (2021), the OCCA has since revoked all its previous rulings that they "lacked subject matter jurisdiction" over Indian Country, contrary to Oklahoma legislative authority. Additionally, OCCA has taken a step further in claiming they will not recognize the reservations from its post Civil War form (1866), nor overturn any wrongful conviction. This case is just another example of Oklahoma abusing tribal members, and preventing the federal government to take custody of each of its illegally imprisoned, per self-imposed legal policy powers (Miller, 2021). However, the state again is wrong, as former U.S. Attorney for the Northern District of Oklahoma also realized after reading *Wallace*: "...we know that the floodgates have been closed for the moment, but it remains to be seen whether or not the Supreme Court will overturn that decision and reassert that it does have a retroactive impact," Shores said (Trotter, 2021, n.p.). *McGirt* was no procedural rule; it was a substantive affirmation that federal law has always pre-empted Oklahoma in criminal matters regarding Indian Country. SCOTUS, however denied the petition for *certiorari* in the *Wallace* case and many wrongfully imprisoned Native Americans remain behind bars. Before the close of Supreme Court 2021 term, perhaps *Castro Huerta* will offer hope.

Following the law in *McGirt* could have potentially began repairing families from decades of intergenerational trauma wrought by Oklahoma's colonial policies and racist traditions. Oklahoma could have also corrected their justice system, too, which bounces between number one or three in the world in incarceration. For example, in 2011, "the confinement rate for Native youth was 376 per 100,000, compared to 225 per 100,000 for all youth" (aecf.org, 2013). Wodahl and French (2017) also pointed out to the world that Native Americans were heavily overrepresented in prisons, as Natives are merely 1.5% of the population (p. 163). Evidence further shows that academia (and U.S. states) have known about this fact for decades (Greenfeld & Smith, 1999; Mauer & King, 2007). Reconcile this with Native American and Indigenous Alaskans serving in the military at the highest rate over any ethnicity or race (Holiday et al., 2006). There is much work left to accomplish. Much of it must begin with states reconciling their wrongs with the tribes.

Important economic data across the 20th century exposes deep inequality issues. While limitations imposed on this paper are extensive breadth of records and limited writing space, it must be illustrated that Indians are losing ground as of 2019. In fact, U.S. Census data and other authors have foreshadowed this fact (see Table 1 and Figure 2, of the following pages). Native Americans households average 200% less than non-Indian households, translating to a difference of \$45,000 annually.

Table 1. Native American Income Across 99 years.

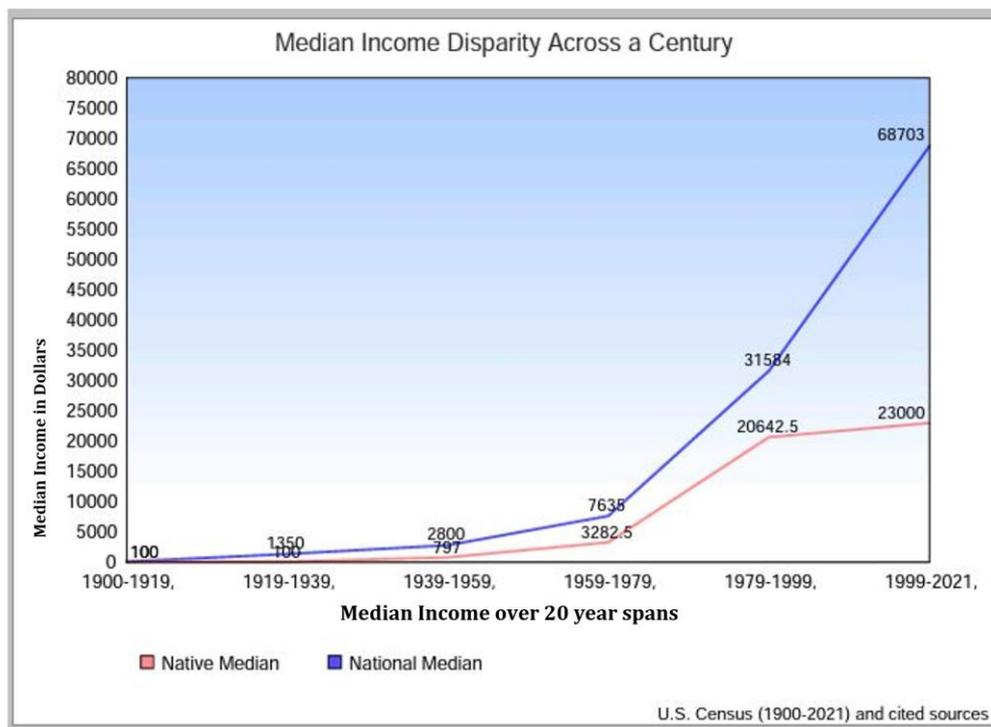
Averages for 19-20 year periods	1920/1939 <i>Male Only</i>	1940/1959 <i>Male Only</i>	1960/1980	1980/2000	2019
Median Income Native Households	\$100 (Meriam Report, 1928).	\$797 (\$500 (Bernstein, 1986)/\$1094, Sorkin, 1974)	\$3282.50 (\$2218 (Sorkin, 1974, p. 34). \$4347 (compare Harvard, 2008)	\$20642.50 (\$14,000 (Paisano, 1993, p. 6). \$27,285 (U.S. Census, compare census 2005).	\$23,000 (Redbird, 2020, n.p.)
Average National Median Income	\$1350 (Meriam Report, 1938)	\$2800 (\$2300, Bernstein, 1986). 3,300 (Census, 1950).	\$7635 (\$5600 (Census.gov)/\$9870 (Census.gov).	\$31584 (\$21020 (Census.gov)/\$42148 (census.gov, 2001)	\$68,703 (Kopestinsky, 2021).

Table 1, Note: No attempt was made by the authors to distinguish reservation from non-Indian country residences. The acknowledgment in 2020 that half of Oklahoma was reservation land since 1866 has affected the integrity of historical data in this area. This table includes all areas in the averages. Where there are two numbers, the second number indicates the annual income at the twentieth year.

5. Conclusion

“There is a trope in federal Indian law under which the Court understands widespread, on-the-ground violations of a particular tribe’s land and sovereignty rights to create a sort of legal precedent for continued violation of those rights” (Tweedy, 2021, p. 764). Though, just as the anti-Indian movement, governments, wars, and legal-criminal justice system has been able to muster a collective voice, to justify weaponization of practices and traditions against them, so too, can Native American communities react strategically on both national and global levels. Demands must include enforcement against hate crimes and for civil rights legislation; demand education against bigotry, and engage in campaigns against the institutions and mythologies that form ethnoviolence at its inception. These issues are integral pieces of this movement toward full Indigenous sovereignty, according to Perry (2002, p. 416). Implementing *McGirt*, however, is a start at reconciling the decades of oppression and it must be done. The recent reauthorization of the Violence Against Women Act (March, 2022), adding concurrent tribal jurisdiction to certain crimes will help with confidence and self-determination. The Indigenous Nations must own their sovereignty, leaving no person behind. It must not be forgotten that only 235,000 Indians were left alive by 1900 (Reyhner, 2006). The mortality rate was dangerously static until after World War I, when it slowly began to recede as the birth rate boosted the population. The Indians of Oklahoma have been resilient, much like all the Indigenous people throughout North America — having similar histories and epistemologies. There is a hopeful and bright future ahead. Higher education and virtual business are promising areas of focus.

It has taken the Supreme Court of the United States 75 years to begin to clear up these injustices depicted in *Ex parte Wallace* (1946) and outlined in *McGirt*. Imprisonment as a vehicle for oppression is historically obvious here (Rolnick, 2016, p. 70). However, with the federal government and tribes in control now, the potential for correcting criminal justice must depict a glass half-full attitude. Oklahoma, on the other hand, wishes the tribes back into their dark places. At the time of this writing, Oklahoma had dozens of petitions for *certiorari* in front of the United States Supreme Court challenging the *McGirt* decision in a variety of forms — all baseless. It will be up to the many wrongful incarcerated petitioners challenging *Ex Rel Wallace* (case of Clifton Parish, *Choctaw*) to convince the Supreme Court to again show the world that Oklahoma refuses to listen. The rules for federal habeas corpus are undeveloped for claims regarding sovereign authority, but someone must force open that door if SCOTUS dares not listen. The tribes rode *Murphy* and *McGirt*, both prisoners all the way to the Supreme Court the first two times, will they avoid these pleas of their people now that their reservations are not at issue? Indigenous leadership was not historically political; one led by example.



Source: from Table 1, Elton and Been (2022)

Figure 2. *Median Income Disparity Across the Century*

Royster (2006) gave memorable forward at the Oklahoma centennial celebration symposium. She confidently cited to Strickland's (1980) work 27 years before, proclaiming confidently how "few whites ever understood the depth of the Indians' agony at the passing of their nationhood" (p.1). From the hummingbird's view, it is evident tragedy at how many Oklahoman's pursue racist error and public expressions of agony in 2022, at the realization that Indian nationhood never actually passed at all.

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