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Article Summary: From the early 1800s the federal government granted citizenship to individual Indians and to some tribes, but their citizenship did not necessarily include the right to vote. In 1880 John Elk, a Winnebago Indian who lived in Omaha, Nebraska, unsuccessfully attempted to register to vote. The case brought on his behalf eventually went all the way to the Supreme Court, which decided against Elk. Not until 1924 were all American Indians granted federal citizenship and even after that a few states refused until the middle of the twentieth century to allow Indians to vote.

Cataloging Information:

Names: Andrew Jackson, John Marshall, Roger Taney, John Elk, Charles Wilkins, Andrew J Popleton, John Lee Webster, T H Tibbles, Horace Gray, John Harlan

Place Names: Omaha, Nebraska

Court Decisions: *Cherokee Nation v Georgia*, *Worcester v Georgia*, *Dred Scott v Sandford*, *Standing Bear v Crook*, *Elk v Wilkins*, *Ex Parte Crow Dog*, *United States v Kagama*

Keywords: American Indians, Cherokee tribe, Civil Rights Act (1866), Fourteenth Amendment, Fifteenth Amendment, Indian Appropriations Act (1871), Winnebago tribe, 'Ponca Committee,' Major Crimes Act (1885), General Allotment Act (1887)

Photographs / Images: federal office building, Omaha, Nebraska, where *Elk v Wilkins* was heard; Andrew J Popleton and John Lee Webster, who brought suit on behalf of John Elk; G M Lambertson, who represented Wilkins; US District Court Judge Elmer S Dundy, who presided over the Omaha trial

"Can An Indian Vote?" Elk v. Wilkins, A Setback for Indian Citizenship

By Stephen D. Bodayla

The legal and political status of American Indians was a matter of contention from the earliest days of the new nation. Initially the United States followed the European precedent and entered into treaties with the tribes as though they were foreign nations. Yet unlike all other nations with whom the United States entreatied, Indians lived within the borders of this country.[1]

During President Andrew Jackson's first term, the status of Indian tribes was "clarified" in two decisions of the Supreme Court written by Chief Justice John Marshall. Both cases arose out of the presence of the Cherokee tribe within the boundaries of the state of Georgia. Although the Cherokee had adopted white man's ways as evidenced by their farms and plantations, slave ownership, written language, newspapers, and schools, Georgians found the presence of the Cherokee nation within their borders to be objectionable.[2]

In *Cherokee Nation v. Georgia,* decided in 1831, Marshall refused to rule on the Georgia legislature's nullification of Cherokee law since "an Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution and cannot maintain an action in the courts of the United States," Indian tribes, he maintained, could be more accurately classified as "domestic dependent nations."[3]

A year later, in *Worcester v. Georgia,* Marshall argued that the Cherokee nation was "a distinct community occupying its own territory. . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees" or as allowed by treaties or Congressional legislation.[4] Andrew Jackson and the state of Georgia clearly felt differently, and soon the Cherokee were removed from the state.

A generation later, in the infamous Dred Scott decision, Chief Justice Roger Taney sought to distinguish between the legal status of blacks and Indians. In doing so Taney offered the opinion that Indians, unlike blacks, could be naturalized by an act of Congress and that individual Indians who separated themselves from their tribes and settled among whites would be entitled to all the rights and privileges any foreign immigrant

would enjoy. Presumably this would include the right to vote once naturalized.[5]

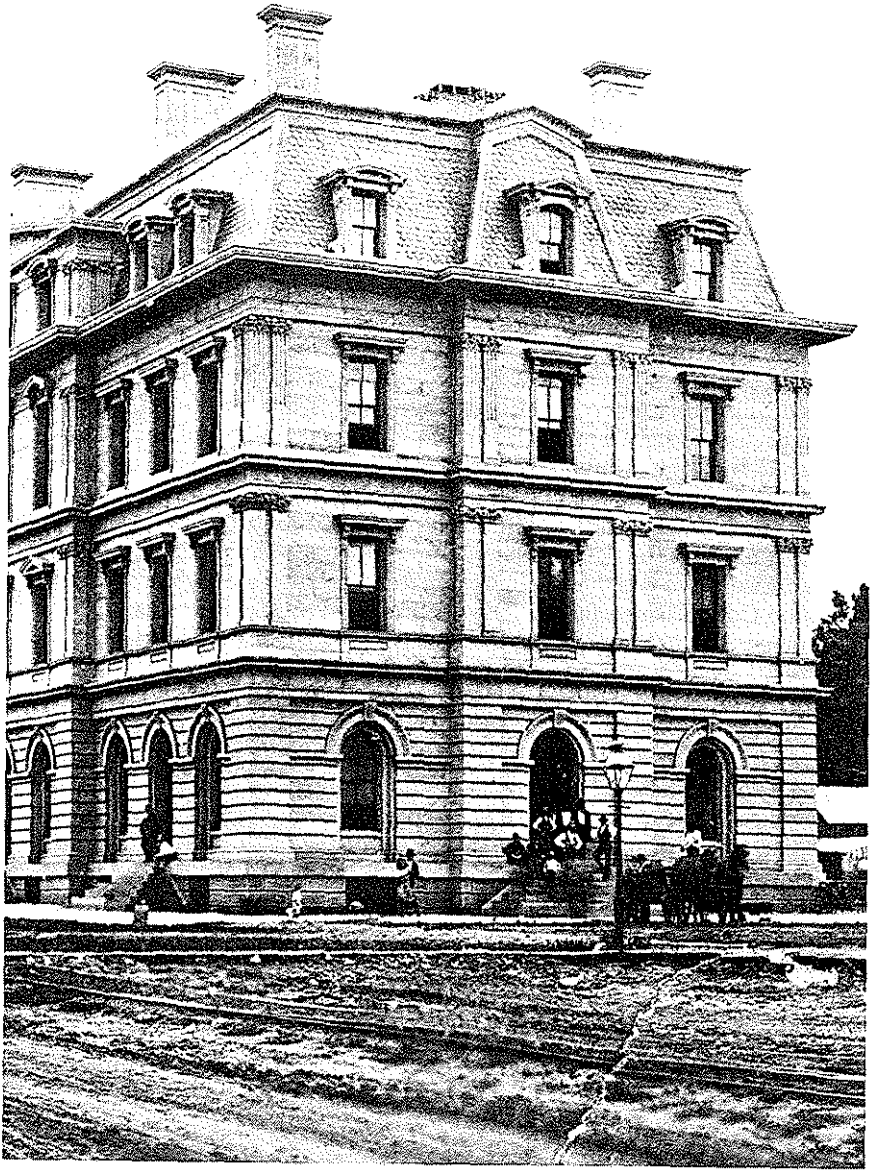
The question of Indian citizenship arose anew during the debate over the Civil Rights Act of 1866. In its final form the bill stated "that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."

The phrase regarding Indians was added as an amendment to the proposed bill when some Congressmen expressed concern that without it all Indians would be granted citizenship. This ignited a prolonged and heated debate during which the bill's author argued that "domesticated" and taxed Indians should be citizens and other tribal Indians would not be covered since the United States had always treated them as "foreigners, as separate nations." Others argued that all Indians not under tribal authority, whether taxed or untaxed, should be naturalized. They could still be denied suffrage by the states and hence use federal courts to obtain their rights. One Congressman feared that the troublesome, renegade Indians who had cut themselves off from tribal control might be enfranchised by the act. In the end the bill was enacted without further clarification of the issue.[6]

During the 1868 debate over the Fourteenth Amendment, the question was raised as to whether Indians were to be included among the citizenry. Some Congressmen feared that the proposed amendment would make Indians citizens and suggested adding the phrase "excluding Indians not taxed." The Senate rejected the addition by a 30-10 vote, with the majority apparently believing it was superfluous since Indians, with their tribal ties, could not be considered "subject to the jurisdiction" of the United States.[7]

The legal status of Indians was still murky in 1871 when Congress attached to the annual Indian Appropriations Act a statement that "no Indian tribe shall be acknowledged as an independent nation with whom the United States may contract by treaty."[8] The expansion of the railroad, improved weaponry resulting from the Civil War, and a larger and better trained army rendered Congress unwilling to negotiate further with the tribes as independent nations. Indians found themselves no longer able to protect their rights through treaties with the United States and, not being citizens, ineligible to redress grievances through the courts or via the ballot box. The federal government had since the early 1800s granted citizenship by treaties and statutes to individual Indians and occasionally to entire tribes, but citizenship for Indians did not necessarily include the right to vote. To a large degree that privilege was left up to the whim of local officials.[9]

In 1880 John Elk sought to assert the right of Indians to vote. Elk was a Winnebago Indian who had resided among whites in Omaha, Nebraska, for more than a year. On April 5, 1880, he attempted to register to vote.



The Elk v. Wilkins *case was heard in this federal office building, photographed in 1872. From the Bostwick-Frohardt Collection, owned by KMTV and on permanent loan to Western Heritage Museum, Omaha, Nebraska.*

On April 23, 1880, the *Omaha Weekly Republican* reported under the headline "Can An Indian Vote?" that the law firm of Andrew J. Poppleton and John L. Webster had brought suit on behalf of "Mr. John Elk" in which it was alleged that Elk was a United States citizen by virtue of the Fourteenth Amendment and that under the Fifteenth Amendment he should not be rejected by the registrar nor restrained from voting on account of his race or color. Elk sought $6,000 in damages.[10]

It appears probable that the so-called "Ponca Committee," formed in 1879 by T.H. Tibbles (editor of the *Omaha Herald*) to oppose the forced removal of the Ponca Indians from their reservation in Dakota to the Indian Territory, provided financial assistance and advice for Elk's suit. The law firm which represented Elk had earlier been involved in the Ponca case, *Standing Bear v. Crook.*[11]

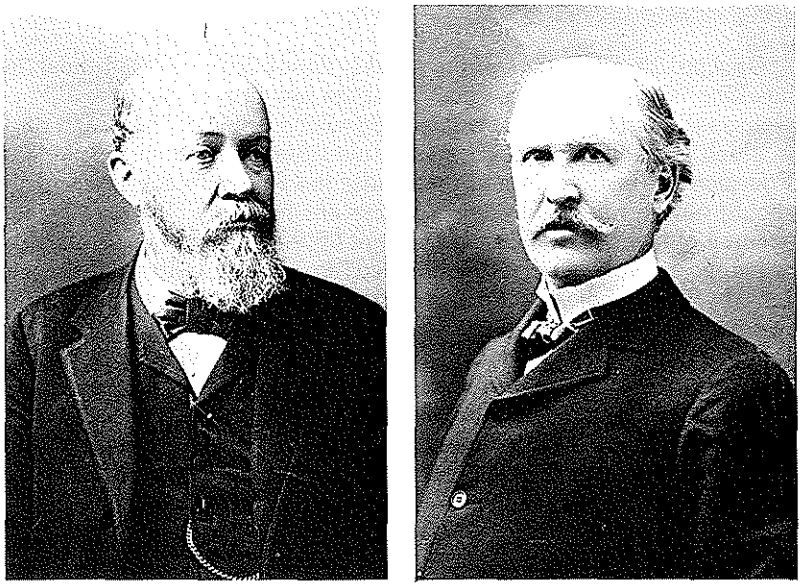
Attorneys for Elk maintained that he was a citizen under the Fourteenth Amendment since he had been born in the United States, had severed his tribal relationship, and had fully and completely surrendered himself to the jurisdiction of the United States and that he was a *bona fide* resident of both the city of Omaha and the state of Nebraska.[12]

More than four years later, on November 3, 1884, the United States Supreme Court rendered a decision in the case brought before it on a writ of error. Upholding an earlier federal circuit court judgment, the Supreme Court found against Elk in a seven-two decision, with Justice Horace Gray writing what the *Omaha Daily Republican* called a "long and elaborate" majority opinion.

In *Elk v. Wilkins* the court ruled that the Fourteenth Amendment did not bestow citizenship on Indians. Since Elk was an Indian he could not be a citizen without a positive recognition of his citizenship by the United States government. While Elk claimed that he had surrendered himself to the jurisdiction of the United States, the federal government had not accepted his surrender nor taxed him nor otherwise treated Elk as a citizen of the United States or of the state of Nebraska. Also, he had not been made a citizen by any statute or treaty.[13]

Justice Gray further maintained that the Fourteenth Amendment requires for citizenship that a person be born in the United States and be subject to the jurisdiction thereof (which Indians by virtue of their tribal relationship are not) or be naturalized, which Elk had not been.[14]

Gray modified once more the status of Indian tribes. He contended that the tribes were not foreign states but were "alien nations" with whom the United States had dealt through treaties or acts of Congress. Members of the tribes, he held, "owed immediate allegiance to several tribes and were not part of the people of the United States." Although alien nations, the tribes were dependent upon the United States. This alien and dependent condition could not be "put off at their own will" without the "action and assent" of the United States, which had not occurred with regard to Elk.[15]



A.J. Poppleton (left) and John Lee Webster brought suit on behalf of John Elk.

Justice John Harlan wrote the dissenting opinion with Justice William Woods concurring. Harlan maintained that Elk was a citizen. He had the obligations of a citizen. He was subject to Nebraska taxes even if those taxes had not actually been exacted from him. In effect, he was an "Indian taxed." The constitutional provision excluding "Indians not taxed" from the number of citizens used to determine apportionment of representatives and direct taxes implies that there were Indians who were taxed and were not covered by that provision. Elk was among these and as an Indian taxed, he was entitled to all the same privileges under the Constitution and the Fourteenth Amendment as other citizens who were taxed, including the right to vote. Thus to deny him the right to vote violated that constitutional clause which only excluded "Indians not taxed" and the Fourteenth and Fifteenth Amendments, which granted him citizenship in the United States and his state, respectively.[16]

As further evidence of Elk's citizenship, Harlan pointed out that Elk had become part of the mass of Nebraska residents (and thus a potential member of its militia) and that he was counted in every apportionment of representation in the legislature. No one attempted to exclude him from Nebraska citizenship for those purposes. Why should he arbitrarily be denied the right to vote, which was another aspect of citizenship?[17]

Harlan closed by suggesting that if Elk had not achieved citizenship by severing his tribal connections and subjecting himself to the jurisdiction of the United States, then the Fourteenth Amendment had failed to

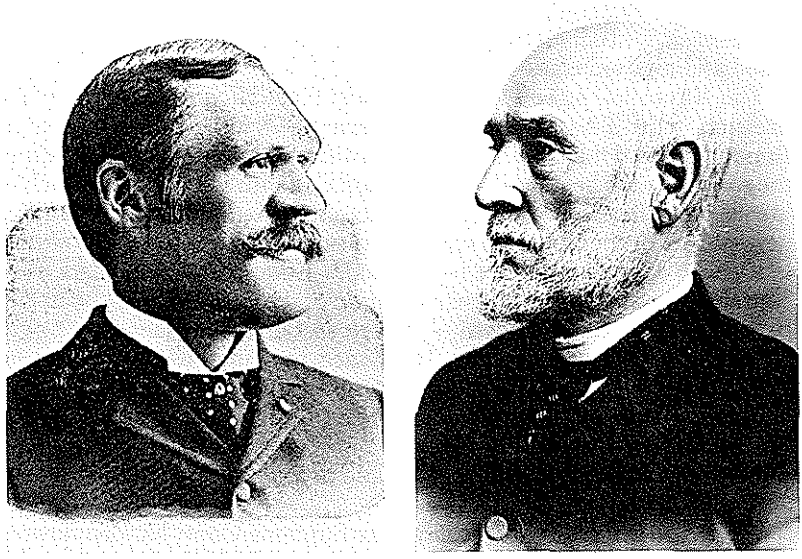
accomplish, for Indians, what was intended by it, and they remain a "despised and rejected class of persons."[18]

The November 4, 1884, *Omaha Daily Republican* reported the Elk decision under a headline reading "Several Very Important Decisions Rendered," and the *Omaha Daily Herald* of the same date highlighted the story with the heading "An Important Constitutional Case From Nebraska Decided Yesterday."[19] Editorially, the several Omaha newspapers of the day were virtually silent on a decision whose importance they appeared to have recognized.[20] Editors and publishers were distracted from an editorial consideration of the case by what seemed to be a more important concern — the close Benjamin Harrison-Grover Cleveland presidential election. By chance, the Supreme Court decision in *Elk v. Wilkins* was handed down the Monday before the national election. For many days speculation and returns trickled in from the far reaches of the nation. Editors were preoccupied with national political events and with the sharing and debunking of election rumors. John Elk was lost in the shuffle.[21]

While the Elk case was pending, the Supreme Court handed down a controversial decision in *Ex Parte Crow Dog* (1883). Crow Dog, an Oglala Sioux chief, had murdered another Sioux chief. The case had been decided by a tribal court, but Crow Dog was also tried in the District Court of Dakota Territory, sitting with the authority of a Circuit Court of the United States. He was convicted of murder and sentenced to death. Crow Dog's petition to the Supreme Court argued that he had violated no laws of the United States and hence the court had no jurisdiction over him. The Supreme Court held that the district court had jurisdiction on reservations in the case of some crimes involving disputes between Indians and whites but that the murder of one Indian by another fell under tribal jurisdiction only. The court therefore ordered that Crow Dog be freed.[22]

There was widespread public outrage at the freeing of an admitted killer. In 1885 an angry Congress reacted to *Ex Parte Crow Dog* by passing the Major Crimes Act. This bill placed all Indians (reservation or not) who committed the "major" crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny under the jurisdiction of federal and territorial courts.[23]

In 1886 the Supreme Court referred, in *United States v. Kagama,* to Indian tribes as "wards of the nation" and "communities dependent on the United States" but failed to clarify further the citizenship question.[24] Yet the enfranchisement of blacks after the Civil War rendered the continued exclusion of Indians from citizenship a subject of heated debate. Some in Congress felt it inconsistent and illogical to deny citizenship to red men while allowing black men to vote. Others, primarily southerners and westerners, argued that the granting of citizenship to blacks was a grave error that need not be compounded by enfranchising Indians too.



Attorney G.M. Lambertson (left) represented Charles Wilkins in the Elk v. Wilkins *trial presided over by U.S. District Judge Elmer S. Dundy (right).*

Unquestionably, both racism and sincere concern in some quarters about the lack of political awareness of many Indians were factors inflaming the debate, but a decision on the subject could not be postponed much longer.

In 1887 the controversial General Allotment Act (Dawes Act) became law. It offered citizenship to those Indians who accepted allotment or who voluntarily took up residence apart from their tribes in any state or territory. John Elk would have been granted citizenship under this act, although the Five Civilized tribes, certain other tribes in the Indian Territory, the Seneca of New York, and the Sioux of Nebraska were specifically excluded from the provisions of the General Allotment Act as part of the political tradeoffs made to insure passage of the legislation. The law was amended in 1901 to allow tribes in the Indian Territory to participate.[25]

During World War I nearly 9,000 Indians served in the armed services, sustaining many casualties in defense of a nation which still denied some of them the right to participate in the political process. Indian supporters argued effectively that if one could die for one's country, one certainly should be eligible to vote. In 1919 Congress enacted legislation granting citizenship to Indian veterans who were not yet citizens. In 1924, simultaneous with the revision of American immigration policy, the American Indians were granted federal citizenship. By this time two-thirds of all Indians had become citizens. The legacy of progressivism, appreciation for Indians' war contributions, intensive lob-

bying by friends of the Indians, and aggressive agitation by an embryonic pan-Indian movement undoubtedly all combined to convince Congress that the time had come to recognize the political and legal equality of Indians.[26]

Although Congress had made Indians citizens, not all states were prepared to acknowledge that this necessarily gave them the right to vote. Western states particularly employed a wide variety of legal ruses to deny Indians the ballot. Some resorted to the old argument that the Constitution specifically excluded Indians not taxed from among the electorate. Since reservation Indians were not taxed by the states, they could not vote. Others cited the previously used legal terms "persons under guardianship" and "Indians living in tribal relations" as their justification for refusing to allow Indians to vote, since most Indians in several western states resided on reservations in tribal relationships and under a form of federal guardianship. It was not until almost the middle of this century that the last two states, Arizona and New Mexico, finally granted the franchise to the Indians of their states.[27]

The quest of American Indians for full citizenship is not atypical of the struggles in modern times of many groups to benefit from participatory government. In the middle of the nineteenth century a relatively liberal British Parliament, responding to decades of agitation on the part of organized labor, loosened the property requirement for voting so as to increase the electorate from three percent to five percent of the population. Black men, of course, could not vote in America until after the Civil War; black and white women could not until 1920. In this political environment, it is little wonder that Charles Wilkins and the Supreme Court's majority found John Elk's desire to vote rather presumptuous.

NOTES

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[1]The early Indian policy of the United States is dealt with in Lyman S. Tyler, *A History of Indian Policy* (Washington, D.C. 1973) and Wilcomb E. Washburn, *Red Man's Land/White Man's Law* (New York, 1971).

[2]A fine study of the Cherokee experience in the early 19th century is Samuel Carter, *Cherokee Sunset, A Nation Betrayed* (Garden City, N.Y., 1976).

[3]See *Cherokee Nation v. Georgia* in Wilcomb E. Washburn, ed., *The American Indian and the United States: A Documentary History* (New York, 1973), vol. 4, 2558.

[4]See *Worcester v. Georgia,* ibid., 2622.

[5]See *Dred Scott v. Sandford* (1857).

[6]The Civil Rights debate in Congress is discussed at length in R. Alton Lee, "Indian Citizenship and the Fourteenth Amendment," *South Dakota History* (Spring 1974), 198-221.

[7]It is not known specifically how many of the thirty senators voted against the proposal because they believed it unnecessary and how many hoped to gain citizenship for Indians by avoiding their specific exclusion. Lee (ibid.) concludes that many of those instrumental in

the passage of the amendment intended that citizenship be granted to non-tribal Indians like John Elk.

[8]Washburn, *The American Indian and the U.S.,* vol. 3, 2183.

[9]Washburn, *Red Man's Land,* 62-63, 139-40.

[10]The *Omaha Daily Herald* and the *Omaha Evening News* made no mention of the case. The *New York Times* recognized its significance and reported the suit on May 2, 1880.

[11]Lee, "Indian Citizenship," 215 and Robert W. Mardock, *The Reformers and the American Indian* (Columbia, Mo., 1971), 217-18, contend that the Ponca Committee inspired Elk's suit. Stanley Clark in his detailed study of the Ponca group's earlier activities, "Ponca Publicity," *Mississippi Valley Historical Review* 29 (March 1943), 495-516, makes no mention of any relationship between the Ponca Committee and Elk.

[12]*Omaha Weekly Republican,* April 23, 1880.

[13]*Elk v. Wilkins* in Washburn, *The American Indian and the United States,* vol. 4, 2668, 2675-76.

[14]Ibid., 2671.

[15]Ibid., 2669.

[16]Ibid., 2677-78.

[17]Ibid., 2677.

[18]Ibid., 2685.

[19]The *Omaha Evening Dispatch* did not mention the decision. The *New York Times* gave it page three importance on November 4, 1884.

[20]The November 4, 1884, *Omaha Daily Bee* offered but one sentence of opinion: "We should infer from this decision that Mr. John Elk can become a citizen by taking out naturalization papers."

[21]The highly partisan *Omaha Daily Republican* and the equally biased Democratic mouthpiece, the *Omaha Daily Herald,* for example, competed in "out rumoring" one another throughout the first two weeks of November 1884.

[22]See *Ex Parte Crow Dog,* in Washburn, *The American Indian and the United States,* vol. 4, 2655-66.

[23]Ibid., vol. 3, 2186-87.

[24]See *United States v. Kagama,* ibid., vol. 4, 2692.

[25]Washburn, *Red Man's Land,* 145-46, 164.

[26]See Indian Citizenship Act, Washburn, *The American Indian and the U.S.,* vol. 3, 2209.

[27]Washburn, *Red Man's Land,* 164-65. It is perhaps ironic that some Indians responded to the Indian Citizenship Act by denying the right of the government to impose citizenship on them against their will.