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The Case of Standing Bear: Establishing Personhood under the Law

Joe Starita
University of Nebraska - Lincoln, jstarita2@unl.edu

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Establishing Personhood under the Law

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At ten o'clock on the morning of May 1, 1879, in Omaha, Nebraska, U.S. District Court Judge Elmer Dundy's gavel smacked against a wooden bench and the trial of *Ma-chu-nah-zha v. George Crook*[1] was officially underway. Delayed by heavy spring rains and widespread flooding, the judge had just arrived from Lincoln the night before, but now he was settled at the bench and he asked the attorneys representing Standing Bear to call their first witness.

Willie W. Hamilton, the son of the missionary on the Omaha Reservation, approached the stand. Hamilton, 22, had lived on the reservation for 12 years, working at the agency store for the past six. He spoke both Omaha and Ponca fluently and had first met the prisoners when they arrived on Omaha Reservation land two months earlier. The younger of Standing Bear's two attorneys, John Lee Webster, began the questioning, asking the witness to describe the condition of the prisoners.

When the prisoners first arrived on the morning of March 4, Hamilton testified, they were in bad shape. Those who had them wore white man's clothes. They lived as families, as man and wife, with their children – two of whom were orphans.

What did they do after they arrived? Attorney Webster asked.

All the healthy ones began to break ground and sow crops, mostly wheat, the witness replied.

Did any of the prisoners put in a crop for themselves?

Buffalo Chip had put in four or five acres of wheat on land the Omaha gave him.

On that Sunday, the attorney asked, were the prisoners resting on the Sabbath or working?

The judge: "Is that necessary?"

The attorney: "The theory of this government is to Christianize these Indians, I believe."

The witness: "It is about the same as it is with white men, some do, and some do not."

When his opponent finished, Genio Lambertson had some questions for the witness on behalf of the government and his client, General Crook. Young and brash, Lambertson was trying his first case as the newly minted district attorney.

When the prisoners were on the Omaha Reservation, Lambertson asked, who was their chief?

Standing Bear was the head chief, the witness replied.

"Did they obey his orders?"

"Yes, sir."

The district attorney asked if they depended on the government for their wagons, clothes and blankets.

Yes, for the most part, the witness said.

The young agency store clerk left the stand and Lieutenant Carpenter, the arresting officer, was sworn in as the second witness. Standing Bear's attorney again focused on dress and work habits.

When you arrested the prisoners, he asked, were they wearing citizens' clothing?

The lieutenant said the majority of the men were – only two wore blankets and leggings. And two of the sick Indians had recently said they wanted to go to work.

The general's lawyer approached, focusing again on loyalty to the chiefs.

"How many chiefs are there?" Lambertson asked.

The judge: "Why is that material?"

The district attorney: "To show that these Indians have their chiefs, to whom they profess allegiance."

With that, the trial recessed for lunch, resuming again at 2 p.m. When the plaintiffs announced the name of their third witness, the government lawyer jumped to his feet.

"Does this court think an Indian is a competent witness?" Lambertson asked.

"They are competent for every purpose in both civil and criminal courts," the judge replied. "The law makes no distinction on account of race, color, or previous condition."

Standing Bear approached the bench. He took the oath and the store clerk, Hamilton, was sworn in as interpreter. Webster asked the questions and, sentence by sentence, the store clerk translated the testimony from Ponca to English.

How had things been for them on their old reservation on the Niobrara? Webster asked.

"We lived well," Standing Bear said. "I had my own land, and raised enough so I could get along nicely. My children were going to school, we had a good school, and everything going nicely."

Were they becoming civilized up on the Niobrara?

"He says he wants to work, and become like a white man, and that he has tried his best."

How were things in the Warm Country?

"I couldn't plow, I couldn't sow any wheat, and we all got sick, and couldn't do anything….Instead of our tribe becoming prosperous, they died off every day during the time. From the time I went down there until I left, 158 of us died."

The witness looked up at the judge.

"I thought to myself, God wants me to live, and I think if I come back to my old reservation he will let me live. I got as far

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Footnotes

1. United States *ex rel.* Standing Bear v. Crook, 25 F.Cas. 695 (C.C.D.Neb. 1879) (No. 14,891).

as the Omahas, and they brought me down here," he said, his voice getting louder and stronger. "What I have done? I am brought here, but what have I done? I don't know."

Standing Bear got up from his chair and began to gesture, speaking louder to the faces staring back from the sides, the back and the benches. "It seems as though I haven't a place in the world, no place to go, and no home to go to, but when I see your faces here, I think some of you are trying to help me, so that I can get a place sometime to live in, and when it comes my time to die, to die peacefully and happy."

The judge told the interpreter to tell the witness not to get too excited, to stay calm. Standing Bear sat back down. His lawyer turned to the interpreter.

"Ask him how many of his children died in the Indian Territory before he came away?"

"He says two died down there. He says his son could talk English and write, and was a great help to him…and whenever he thinks of it, it makes him feel bad."

Does he still consider himself the chief of his people?

"He says he didn't consider himself a chief…He says he felt himself to be as poor as the rest of them."

The general's lawyer approached the witness. He told the interpreter to ask if he was the chief of those Ponca now in the north or any of those in the Territory?

"He says, I was not the head man; I don't consider myself any better than they are."

The district attorney wanted to know if the government furnished them with wagons and farming tools.

"He says they got some wagons and some mowing machines."

Did they escape from the Territory in government-issued wagons?

Two were government-issued. The third – a light spring wagon – he bought himself.

The district attorney wanted to know why he left the Indian Territory.

"He says he wanted to go on his own land, that had always been his own land…that his son when he died made him promise if ever he went back there that he would take his bones there and bury him, and that he has got his bones in a box, and that if ever he goes there he will bury his bones there; that there is where he wants to live the rest of his life, and that there is where he wants to be buried."

Does he want to go back to the Niobrara and live as he did before?

"He says he might go there and work until he was blind, but that would not change his color; that he would be an Indian in color, but he wants to go and work and become a citizen."

When Standing Bear finished, his lawyers rested their case. The government offered no witnesses and no testimony and though it had been a long day, the judge instructed the lawyers to begin their closing arguments. Webster started to summarize the important points on behalf of Standing Bear and the Ponca, but he soon informed the judge he was too sick to continue and so the closings were postponed until ten the next morning.

As the first day's testimony ended, as the boisterous throng began to file out of the courthouse, it was clear to legal observers that the complexities of the case had winnowed down to one essential issue: Had the Ponca prisoners genuinely expatriated themselves from their tribal past and become firmly lodged on civilization's path? If so, then they were entitled to the protection of the Fourteenth Amendment and the government had no business trying to deprive them of life, liberty and property. If not, then they were government wards who had illegally left their reservation and it was the military's duty to return them to the Indian Territory.

[H]is son when he died made him promise... he would take his bones there and bury him, and that he has got his bones in a box, and... he will bury his bones there....

Promptly at ten the next morning, the younger lawyer, Webster, still a bit under the weather, began to lay out his case in support of the Indian prisoners. First of all, he told the judge, the Omaha legally owned their reservation and, as such, had every right to share the land with their Ponca friends and relatives. Standing Bear and the Ponca did not want the government's help. They simply wanted their own land and the chance to work it and become self-supporting. They cannot, he stressed, be moved "at the whim and pleasure of the commissioner at Washington" who does not have "the power to move the Indians when and where he pleases." In fact, the government's behavior in this case, he told the judge, openly defies the philosophy of the nation's third President, who, in a letter to an Indian chief in 1803, had said, "these lands can never go from you but when you wish to sell." Thomas Jefferson also was emphatic in believing Indian nations were "entirely independent and the government could in no way interfere with their internal relations." So how could the government now interfere with business between the Omaha and Ponca? Although these tribes are often called barbarous, the Omaha and Ponca "are not savages or wanderers. They cultivate the soil, live in houses, and support themselves."

For three and half hours, Webster roamed far and wide across the oratorical landscape, alternately quoting William Cullen Bryant, Alexis de Tocqueville and Frederick Douglass to underscore his legal arguments. After a rugged winter march of 60 days, he told the court, the prisoners had finally arrived at the home of the "savage" Omaha. And why had they endured such a harsh journey? Because they had been dumped in a place where malaria was "floating like a cloud over the land," where, in less than two years, their numbers had dropped from 780 to 580 – a greater mortality rate than that of Union soldiers during the Civil War, greater than the death rate at the infamous Andersonville prison.

But, mostly, Webster began to bear down on the issue that had now taken center stage. If Standing Bear and the Ponca had broken away from the rest of the tribe, he argued, if they had declared their independence and commitment to a new way of life, then they had come out from under the government's yoke. Then they had the right to return to the lands they owned, or to share the Omaha land, and the government had no legal right to restrain, detain or return them. After all,

To support his main argument – that only American citizens had access to U.S. courts – the district attorney relied [on the Dred Scott decision].

wasn't that the point of the Fourteenth Amendment – to promote and protect individual rights and liberties? That the Indian prisoners qualified for its protection, he told the judge, there could be no doubt. As proof, he cited an 1870 U.S. Senate report specifically stating that when tribal relations are dissolved, the Fourteenth Amendment applies. And when the amendment applies, it made "an Indian who was born in this country and who did not owe allegiance to any other form of government, a citizen beyond all dispute."

To drive home his point, Webster quoted directly from the amendment: all persons born or naturalized in the United States are citizens of the United States and cannot be deprived of life, liberty or property without due process of law. And so if these prisoners, born on American soil, were not citizens, then what were they? "Are they wild animals, deer to be chased by every hound?"

In the end, he said, it came down to a matter of fundamental civil rights, of basic human liberties, and the prisoners were now asking for the court's help. It was like the slave Douglass had once said: "A man belongs to himself. His hands are his own, his feet are his own, his body is his own, and they will remain his until you storm the citadel of heaven and wrest from the bosom of God man's title deed to himself."

Webster spoke until three o'clock and after he finished, the young district attorney approached the bench on behalf of the defendant, General Crook. He began with an appreciative tribute to his opponents, Webster and A.J. Poppleton, thanking them for "their generosity in coming to the assistance of these poor people, prisoners and friendless in a strange land." And then, for the next three hours, Lambertson laid out the case for the government of the United States, offering a variety of reasons and legal arguments underscoring why Standing Bear and the Ponca ended up in the barracks at Fort Omaha and why they should be returned to their reservation in Indian Territory. The 1871 federal law forbidding any more treaties with Indian tribes, he told the judge, absolved the government from needing Ponca consent to move them from their Niobrara homeland to the Territory. He also suggested U.S. laws did not apply to Indian tribes. To be included, Indians had to be either foreign subjects or citizens – and the Ponca were neither. Nor were these tribes independent nations. They were dependent communities, government wards relying upon the United States for their survival. Nowhere in the law of the land, he said, could he find any legal precedent allowing an Indian to file suit in a federal court. And he recounted the history of Indian atrocities against innocent white citizens, implying they were a people too savage to be given legal rights.

But mostly, again and again, his arguments circled back to one central theme, the foundation of his case: The Indian – as far as the law was concerned – was neither a citizen nor a person, and so he could not bring a suit of any kind against the government of the United States. As a result, the court had grievously erred in granting Standing Bear a hearing for a writ of habeas corpus and then awarding him the legal opportunity to sue an Army general**.** Lambertson maintained this was a legal right available only to American citizens. And since he was not a citizen, the court had no right to issue the writ. Furthermore, he argued, the Ponca had never abandoned their traditional ways. They retained tribal ties, an allegiance to their chief and depended on the government for their survival. So, clearly, they were not entitled to Fourteenth Amendment protection.

To support his main argument – that only American citizens had access to U.S. courts – the district attorney relied a good deal on a decision the nation's highest court had reached 22 years earlier, a case involving a black man who had also wanted his freedom.[2]

Dred Scott, born a slave in Virginia around 1800, had bounced around as the property of several white masters, traveling from the slave states of Virginia, Alabama and Missouri to the free state of Illinois and the free federal territory of Wisconsin. Back in St. Louis in 1843, after his master's widow hired him out to an Army captain, Scott decided he wanted a different way of life. So he offered the widow $300 for his and his wife's freedom. When she refused, he eventually asked the courts, with the help of anti-slavery lawyers, to set him free – a test case his lawyers and supporters hoped would lead to the freedom of all slaves.

In 1857, after a decade of appeals and court reversals, his case finally landed in the United States Supreme Court. In a 7-2 vote on March 6, the high court settled the matter: Anyone of African ancestry – slaves and those set free by their masters – could never become a U.S. citizen and therefore they could not sue in federal court. Since Scott was black, he was not a citizen and so he could not sue for his freedom – or anything else – in federal court. Slaves were the private property of their owners, the majority ruled, and the court could not deprive owners of their property. To do so would violate the Fifth Amendment guarantee against the government seizing property from an owner "without due process of the law."

So, according to the court, Scott would remain a slave. The sons of his first master had been his friends since childhood, and they helped pay Scott's legal bills throughout the long court fight. Not long after the Supreme Court decision, Scott and his wife were returned to his boyhood friends, who bought them and then set them free. About a year later, Dred Scott died of tuberculosis.

Although each justice had written a separate opinion in the case, Chief Justice Roger B. Taney issued the court's majority opinion. A loyal advocate of slavery, he said a Negro was not entitled to the legal rights of a U.S. citizen and cited the right to sue in federal court as an example. Furthermore, Taney concluded, Negroes had "no rights which the white man was bound to respect."[3]

In the spring of 1879, on the third floor of the federal courthouse, District Attorney Lambertson did not want the present

2. Dred Scott v. Sandford, 60 U.S. 393 (1857).

3. *Id.* at 407.

court to forget its past. In this case, he said in his concluding remarks, Judge Taney's decision remained the guiding legal principle upon which a decision must now be based: So if a Negro did not have access to federal court, he told the judge, then surely an Indian didn't either. When the district attorney finished at six o'clock, the judge ordered a dinner recess. The last summary would begin in an hour.

All along, he had been scheduled to have the final say, and so on the warm, early May evening after the dinner break, the dean of the state's legal community made his way to the front of the courtroom. For the next three hours, Andrew Jackson Poppleton fused history and philosophy, religion and politics, humanity, literature and the law – isolating each of the district attorney's arguments with a focused rebuttal.

No Ponca consent needed?

The district attorney, he told the court, had cited the 1871 resolution banning further treaties as the government's justification for removing the Ponca without their permission. But he neglected to mention that the law was not retroactive. In other words, the language of the original treaty still applied – the government had needed Ponca consent.

U.S. laws don't extend to Indian tribes?

Then why, Poppleton asked, had the government entered into numerous treaties with the Indian people – treaties ratified by Congress obligating the government to honor Indian lands, protect them and provide food, clothing and shelter. The government, he told the judge, can't have it both ways. "When a great nation of forty millions of people, wielding the purse and the sword, and possessing all the arts of civilization, breaks faith with the feeble remnants of humanity which all its life has had the sunlight of civilization excluded from its view, it is simply infamous."

The Indian – as neither citizen nor foreign subject – has no rights?

If the government no longer sees them as tribes or Indian nations, he asked, then what are they? What is their status? "Are we to say that the Ethiopian, the Malay, the Chinaman, the Frenchman and every nationality upon the globe without regard to race, color or creed, may come here and become a part of this great government, while the primitive possessors of this soil…are alone barred from the right to become citizens?"

He did not believe, he said, that this government – his government – would do such a thing. "I have been accustomed to believe that I lived under a beneficent government. I have believed it to be my duty to thank God I was born under the shield and protection of this North America Republic – which has solved so many problems and which in God's good time we hope will solve so many more – but is it possible that this great government, standing here dealing with this feeble remnant of a once powerful nation, claims the right to place them in a condition which is to them worse than slaves, without a syllable of law; without a syllable of contract or treaty? I don't believe, if your honor please, that the courts will allow this; that they will agree to the proposition that these people are wild beasts; that they have no status in the courts. If it be true that these Indians have no souls to save, the churches had better leave them alone; had better not try to induce them to lead a civilized life if they have no rights, not even the right to that salvation which has been proclaimed as free to all."

He wondered aloud about the term "savages"?

"Because we cannot civilize these Indians in a single generation we conclude that we cannot civilize them at all…Because these Indians in 200 years have not reached the degree of civilization which it required us 2,000 years to attain, we lift up our hands in holy horror and call them savages."

So there was really but one question, and one question only, before the court: Was Standing Bear a person?

And were they really dependent government wards?

The prisoners, he told the court, had established families and communities throughout their Niobrara homeland. They had become skilled farmers and peaceful neighbors who went to church and sent their children to school. And just as they were well on the way down civilization's path, he said, the government illegally pulled them from lands they legally owned and shipped them to strange, barren ones where they died in droves. Now, they had severed their tribal ties and ancient allegiances and once again wanted to take up a civilized life. "I am lacking in the power to show to this court what, to me," Poppleton said, "is as clear as the daylight – that is, to show that if these Indians are honestly desirous of adopting the ways of civilization and becoming civilized men; of pursuing the habits and industries characteristic of the civilization of the present age, there is no power, human or divine, that has a right to interpose a barrier between them and the goal to which they seek to march."

Poppleton had spoken for close to three hours, and as he began to wind down, after he had confronted each of the government's arguments, he slowly began to drive a legal wedge between the slave of yesterday and the Indian who sat before them. Dred Scott, he said, was strictly a citizenship issue. The only question the case resolved was that since Scott was not a citizen of Missouri, he could not sue in federal court. It had also confirmed, the lawyer noted, that a slave at that time in American history had no civil rights. But in his haste to justify slavery, Chief Justice Taney had strayed far from the legal question at hand and now – twenty-two years later – his ruling was out of date. In the spring of 1879, there were no slaves. The Fourteenth Amendment had seen to that. Hence this case now before the court was not specifically about citizenship at all. It was simply about *who* had a legal right to a writ of habeas corpus – a straightforward request compelling the government to justify why it had arrested and detained the prisoners. And the law on this particular point, he told the judge, was quite clear. It said nothing about being a citizen. It said only that "*any person or party*" had the legal right to apply for a writ.

So there was really but one question, and one question only, before the court: Was Standing Bear a person? To deny his legal right to the writ, he said, the court would have to conclude that he and the other Ponca prisoners were not people. They were not human beings.

"And who will undertake that?" Poppleton asked. "Why, I think the most touching thing I have heard in courts of justice or elsewhere for years was the story this old man told on the stand yesterday of the son who had gone with him to the

If you pierce your hand, you also feel pain. The blood that will flow from mine will be of the same color as yours. I am a man. The same God made us both.

Indian Territory, whose education he had care for; whom he had nurtured through the years of boyhood and sent to school in the belief that that boy would be a link between him and that civilization to which he aspired; that he would protect him from the wiles of agents; that there would be one person on the wide earth, the issue of his own loins, who would stand between him and the whites, whom he knew from experience were trying to over-reach him – he said to that boy as his eyes were closing in death in a foreign country that he would take his bones to his old home on the Running Water, and bury him there, where he was born."

The lawyer paused and turned, glancing at Standing Bear.

"That man not a human being? Who of us all would have done it? Look around this city and State and find, if you can, the man who has gathered up the ashes of his dead, wandered for sixty days through a strange country without guide or compass, aided by the sun and stars only, that the bones of that kindred may be buried in the land of their birth. No! It is a libel upon religion; it is a libel upon missionaries who sacrifice so much and risk their lives in order to take to these Indians that gospel which Christ proclaimed to all the wide earth, to say that these are not human beings."

It was well after nine o'clock, almost twelve hours since the day's session began. The three lawyers had spoken for more than nine hours and the large crowd of prominent citizens, of clergy and church faithful, judges and lawyers and newsmen, the general's large staff decked in military uniforms and their wives milled about after Poppleton finished his closing argument, heading for the door.

Before the crowd began to file out, the judge made an announcement. Although the trial now had officially ended and the legal proceedings were finished, one last speaker, he said, had asked permission to address the court. He supposed it was the first time in the nation's history such a request had been made, but he had decided to grant it and he had earlier informed all the lawyers of his intention to do so. The crowd settled back down and turned its attention to the front of the courtroom.

They saw him rising slowly from his seat, and they could see the eagle feather in the braided hair wrapped in otter fur, the bold blue shirt trimmed in red cloth, the blue flannel leggings and deer-skin moccasins, the red and blue blanket, the Thomas Jefferson medallion, the necklace of bear claws. When he got to the front, he stopped and faced the audience and extended his right hand, holding it still for a long time. After a while, it is said, he turned to the bench and began to speak in a low voice, his words conveyed to the judge and the large crowd by the interpreter.

"That hand is not the color of yours, but if I pierce it, I shall feel pain. If you pierce your hand, you also feel pain. The blood that will flow from mine will be of the same color as yours. I am a man. The same God made us both."

Then he turned and faced the audience, pausing for a moment, staring in silence out a courtroom window, describing after a time what he saw when he looked outside.

"I seem to stand on the bank of a river. My wife and little girl are beside me. In front the river is wide and impassable." He sees there are steep cliffs all around, the waters rapidly rising. In desperation, he scans the cliffs and finally spots a steep, rocky path to safety. "I turn to my wife and child with a shout that we are saved. We will return to the Swift Running Water that pours down between the green islands. There are the graves of my fathers."

So they hurriedly climb the path, getting closer and closer to safety, the waters rushing in behind them. "But a man bars the passage…If he says that I cannot pass, I cannot. The long struggle will have been in vain. My wife and child and I must return and sink beneath the flood. We are weak and faint and sick. I cannot fight." He stopped and turned, facing the judge, speaking softly.

"You are that man."

In the crowded courtroom, no one spoke or moved for several moments. After a while, a few women could be heard crying in the back and some of the people up closer could see that the frontier judge had temporarily lost his composure and that the general, too, was leaning forward on the table, his hands covering his face. Soon, some people began to clap and a number of others started cheering and then the general got up from his chair and went over and shook Standing Bear's hand and before long, a number of others did the same.

The bailiffs asked for order and when it finally grew quiet again, the judge said he would take the case under advisement and issue his decision in a few days. Then he adjourned the court shortly after ten o'clock on a warm spring evening on the second of May, 1879.

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In his office in the building that dominated the corner of Fifteenth and Dodge streets, one floor below the large courtroom, the judge would have much to ponder in the days ahead. He was aware that he was now in a position to bring some clarity to the long-muddled picture of exactly where the American Indian stood upon the nation's legal landscape. He also knew that the location had eluded several generations of his judicial colleagues and that neither the country's legislative nor its executive branch had been much help. And he knew, too, that he would be harshly criticized – from anxious white settlers and a powerful military on one side to newspapers, clergy and a burgeoning East Coast Indian Reform movement on the other – no matter which way he ruled. Still, he knew the legal issues that had landed on his desk were long overdue, and he intended to take his time in sorting through the important questions they raised.

Were these Indian prisoners, as the young district attorney maintained, still loyal to their tribe and chief? Were they dependent government wards who had illegally fled their assigned reservation and must now be returned – as the law required – to the Indian Territory? Were they neither citizens nor foreign subjects in the eyes of the law and therefore ineli-

gible to file a suit of any kind against the government? Were these Indians then, by definition, not entitled to the same constitutional protection, civil rights and legal privileges enjoyed by all other American citizens?

Or were they, as the dean of the state's legal profession contended, a group of people who had broken from their past and genuinely sought a civilized future for themselves and their children? Indians who farmed, went to church, sent their children to school and, much like Dred Scott had once done, were now asking the court to set them free. Indians whom the government had no legal right to arrest and detain and return to the Territory. Indians who were people – human beings within the meaning of the law – who had a legal right to sue the government and were entitled to the full protection and provisions of the Fourteenth Amendment.

So, sitting in his office in the federal courthouse, the judge knew the case had its share of complex questions and broad legal issues to sort through – not the least of which was a meticulous examination of the relevancy of the Fourteenth Amendment. Eleven years earlier, when Congress passed the landmark legislation, debate by and large had focused on slaves becoming free men and women, citizens who would now join the ranks of those born or naturalized in the United States. At one point, the Congressional debate shifted to whether Indians who had abandoned tribal life, were taxed and had set off on a domestic course should also be considered citizens. By a 30 to 10 vote, however, the Senate killed an amendment that would have included citizenship rights for those Indians.

But what did that now mean for the twenty-six Ponca prisoners holed up in Fort Omaha during the spring of 1879? Did the government still have the legal right to tell them when to move? Where to live? How to live? And what if they didn't want to? What if they wanted to find a better way? And if the government tried to stop them, had they been illegally deprived of life, liberty and property? In the early part of May, it was not unusual to see the lights burning late into the night in the office on the second floor of the large building on the corner of Fifteenth and Dodge.

On the morning of May 12, 1879, ten days after hearing about the rising flood waters and the path to safety, about the color of blood, Judge Elmer Dundy delivered his decision in a lengthy written opinion to the Indian prisoners, the Army general and their lawyers.

"During the 15 years in which I have been engaged in administering the laws of my country," he began, "I have never been called upon to hear or decide a case that appealed so strongly to my sympathy as the one now under consideration. On the one side we have a few of the remnants of a once numerous and powerful, but now weak, insignificant, unlettered and generally despised race. On the other, we have the representative of one of the most powerful, most enlightened, and most Christianized nations of modern times. On the one side we have the representatives of this wasted race coming into this national tribunal of ours asking for justice and liberty to enable them to adopt our boasted civilization and to pursue the arts of peace, which have made us great and happy as a nation.

"On the other side," he continued, "we have this magnificent, if not magnanimous, government, resisting this application with the determination of sending these people back to the country which is to them less desirable than perpetual imprisonment in their own native land. But I think it is creditable to the heart and mind of the brave and distinguished officer who is made respondent herein, to say that he has no sort of sympathy in the business in which he is forced by his position to bear a part so conspicuous."

[Judge] Dundy next addressed the question of who could legally apply for the writ. Throughout the trial, the government had steadfastly argued that only citizens could do so.

If sympathy were the only issue before the court, the judge said, the prisoners would have been freed the moment closing arguments ended. But in a nation where law determines liberty, sympathy alone cannot guide the courts. Instead, fundamental legal principles must decide this case. And if it cannot be determined that the prisoners are entitled to constitutional protection, they must be returned to Indian Territory, which they left without government consent.

The judge then broke down each of the government's legal arguments and addressed them one by one.

First of all, the government had argued, there was the problem of jurisdiction. Put simply, the court had overstepped its legal boundaries in allowing this case to see the light of day. The judge, in other words, had no legal right to compel the government to justify its arrest of the Indian prisoners because an Indian has no legal right to sue in federal court. Furthermore, since no Indian had ever been allowed to sue for a federal writ of habeas corpus, there was no legal precedent to let the case proceed.

In his written opinion, Judge Dundy labeled this argument a "non sequitur."[4] Conceding he didn't know of a similar case, Dundy said it was nevertheless illogical to assume that just because no Indian had ever sought a writ of habeas corpus before that he could never seek one. The court also had jurisdiction in this specific case, the judge noted, because Standing Bear and the Ponca had been restrained of their liberty in violation of an earlier treaty provision. When that occurs, it is the federal courts – and only the federal courts – that can determine if the prisoners' constitutional rights have been violated. It would be "a sad commentary on the justice and impartiality of our laws, to hold that Indians, though natives of our own country, cannot test the validity of an alleged illegal imprisonment," the judge wrote.

Dundy next addressed the question of who could legally apply for the writ. Throughout the trial, the government had steadfastly argued that only citizens could do so. And since Indians were not citizens, they could not sue and thus the

4. *Standing Bear*, 25 F.Cas. at 697.

First, [Judge Dundy] concluded, "an Indian is a PERSON within the meaning of the laws of the United States, and has therefore the right to sue out a writ of habeas corpus...."

court had grievously erred in granting Standing Bar and the Ponca that legal privilege.

But the law, Judge Dundy said, clearly states "persons" or "parties" can do this – it says nothing about citizens or citizenship being a requirement. And the most natural and reasonable way to define a "person," the judge wrote, is simply to consult a dictionary. "Webster describes a person as 'a living soul; a self conscious being; a moral agent; especially a living human being; a man, woman or child; an individual of the human race.'"[5] This, he said, "is comprehensive enough, it would seem, to include even an Indian."[6]

Having resolved the question of jurisdiction, the judge then turned to the trial's key issue: Did Standing Bear and the Ponca have the right to expatriate themselves from the tribe, sever their tribal allegiance and pursue a more independent and civilized life? To answer that question, the judge began by reviewing the events and forces that had set in motion the Ponca's long flight north from the Warm Country.

"The love of home and native land was strong enough in the minds of these people to induce them to brave every peril to return and live and die where they had been reared. The bones of the dead son of Standing Bear were not to repose in the land they hoped to be leaving forever, but were carefully preserved and protected, and formed a part of what was to them a melancholy procession homeward. Such instances of parental affection, and such love of home and native land may be *heathen* in origin, but it seems to me that they are not unlike *Christian* in principle."[7]

This, the judge noted, demonstrated Standing Bear and the Ponca had done all they could to terminate their tribal allegiance and underscored their desire to become independent farmers intent on adopting the ways of civilization. So did the Ponca prisoners detained at Fort Omaha have a legal right to expatriate themselves? Although there had been decades of heated discussions on the right of expatriation, those arguments had been silenced for eleven years now, the judge said. They were silenced on July 27, 1868, when a Congressional act declared "the right of expatriation is a natural and inherent right of all people, indisputable to the enjoyment of the rights of life, liberty, and the pursuit of happiness."[8] It was a short step then for the judge to render his decision: An Indian "possesses the clear and God-given right to withdraw from his tribe and forever live away from it, as though it had no further existence."[9]

Finally, there was the matter of whether the government had the legal right to remove Standing Bear and the Ponca from the Omaha Reservation and send them back to Indian Territory. A careful reading of the law, Dundy wrote, shows no such power exists. The government could not arbitrarily round up Indians who had severed their tribal ties and simply move them whenever and wherever it wanted. He did note the government could legally remove the Ponca from the Omaha Reservation if they were deemed "detrimental to the peace and welfare" of the reservation.[10] But in such cases, the law required they must be turned over to civilian – not military – authorities. And that had not happened in the Ponca case. The judge said he had looked, and looked carefully, but had found no congressional act or treaty provision that gave the government the power to send the Ponca "back to the Indian Territory to remain and die in that country against their will."[11]

Judge Dundy wrapped up his lengthy written opinion with a five-point summary that concisely pulled together the essential decisions he had reached. First, he concluded, "an *Indian* is a PERSON within the meaning of the laws of the United States, and has therefore the right to sue out a writ of habeas corpus in a federal court."[12] Second, Gen. Crook had illegally detained the Ponca prisoners. Third, the military has no legal authority to forcibly remove the Ponca to Indian Territory. Fourth, "Indians possess the inherent right of expatriation as well as the more fortunate white race, and have the inalienable right to 'life, liberty and the pursuit of happiness.…'"[13] And fifth, since they have been illegally detained in violation of their constitutional rights, the Ponca "must be discharged from custody, and it is so ordered."[14]

For 10 long days and nights, the judge who had been lured in from the wilderness had sat in his office below the courtroom, poring over federal statutes and constitutional amendments, case law and congressional acts, testimony and trial records, trying to chart a course through the legal swamp of U.S.-Indian relations. For more than a century, those relations had been largely overwhelmed by successive waves of broken promises, broken treaties, land grabs, greed, graft, corruption, cultural ignorance, incompetence, indifference and military might. For much of the past decade, it had gotten to the point where government programs and private agencies were often aligned in contradictory orbits, where some federal agents and Army officers increasingly were ordered to implement polices they abhorred. But on the afternoon of May 12, 1879, something else began to emerge from the legal swamp, something beyond the unfocused, uncharted landscape – the first inkling that there might be a better way.

With a stroke of his pen, Judge Dundy had done something unprecedented: He had not only granted the hearing, but had declared for the first time in the nation's history that an Indian was a person within the meaning of U.S. law. That the country's Native inhabitants were a people who, if they obeyed the law, now had legal rights whites were bound to respect. People

5. *Id.*
6. *Id.*
7. *Id.* at 698-99.
8. *Id.* at 699.
9. *Id.* at 701.
10. *Id.* at 699.
11. *Id.* at 700.
12. *Id.* (emphasis added).
13. *Id.* at 701.
14. *Id*

who, having dissolved their tribal allegiance, now had the protection of the Fourteenth Amendment and were as entitled to life, liberty and the pursuit of happiness as white citizens. People who were something more than cattle – powerless dependents the government could round up at will and herd to whatever part of the country suited its interests. People who now had the right of expatriation and who, in time of peace, could not be arbitrarily moved about the country without their consent. And if the government violated their constitutional rights, they could now, for the first time as a matter of law, sue the government in federal court.

Joe Starita is a professor in the University of Nebraska's College of Journalism. Previously, he spent 14 years at the Miami Herald *– four years as the newspaper's New York Bureau chief and many years on its Investigations Team, where he specialized in investigating the questionable practices of doctors, lawyers, and judges. One of his stories was a finalist for the Pulitzer Prize in local reporting. Interested since his youth in Native American history and culture, he returned to his native Nebraska in 1992 and began work on a three-year writing project examining five generations of a Lakota-Northern Cheyenne family.* The Dull Knifes of Pine Ridge – A Lakota Odyssey, *published in 1995 by G.P. Putnam Sons (New York), won the Mountain and Plains Booksellers Award, was nominated for a Pulitzer Prize in history and has been translated into six languages. Starita's book on which this article is taken –* "I Am A Man" – Chief Standing Bear's Journey for Justice *– was published in January 2009 by St. Martin's Press (New York). It tells the story of a middle-aged chief who attempted to keep a death-bed promise to his only son by walking more than 500 miles in the dead of winter to return the boy's remains to the soil of their native homeland. En route, the father unwittingly ends up in the cross-hairs of a groundbreaking legal decision that declares for the first time in the nation's 103-year history that an Indian "is a person" within the meaning of the law and entitled to some of the same constitutional protections as white citizens.*