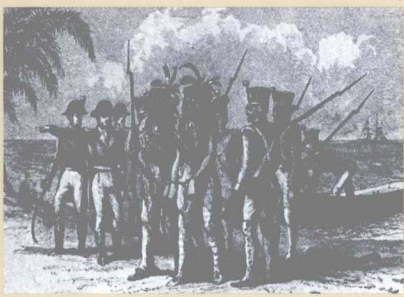


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DEBORAH A. ROSEN



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Border Law

The First Seminole War
and American Nationhood

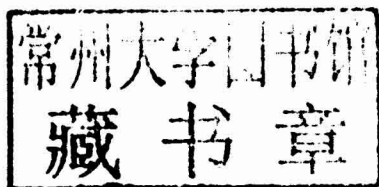
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Border Law

The First Seminole War and American Nationhood

Deborah A. Rosen



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For Susan

Border Law

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Introduction

DURING THE FLORIDA campaigns of 1816–1818, U.S. troops led by General Andrew Jackson crossed the southeastern border into Spanish territory, seized forts, destroyed towns, and occupied Pensacola, the main seat of Spanish government in West Florida. They summarily hanged two prominent Creek prisoners, executed two British allies of the Seminoles, and killed or captured numerous Seminoles, Creeks, and African-descended people, carrying some into slavery in the United States.¹

Americans vigorously debated whether the United States was legally justified in entering territory claimed by a European sovereign, destroying property on foreign soil, and implementing its legal presumptions extraterritorially. They discussed who qualified as a prisoner of war, what rights and protections wartime prisoners legally held, and whether the law of nations applied to non-Europeans and their European allies. This book analyzes those debates and evaluates their implications for American nation-building.²

The Florida expeditions, known at the time as the “Seminole War,” played an important role in American political development.³ In the Republic’s first few decades, foreign nations questioned the United States’ ability to fulfill its international obligations and Americans themselves were unsure whether their newly declared nation could survive. The forcefulness, decisiveness, and assertiveness of the Florida incursions demonstrated American determination to both domestic and foreign audiences. Even more important than military accomplishments on the ground was the United States’ aggressive legal, political, and diplomatic defense of its armed hostilities against Spaniards, Creeks

and Seminoles, African-heritage people, and Britons. In the wake of the war, the United States boldly asserted its new status in the world.

Crucial to the new American national identity at home and abroad were its borders of law and nationhood. The requirements for “nationhood” were unsettled in this era. Therefore, when making their case to other nations, Americans focused on elements of nationhood that were most important to them: They constituted a people distinct from and independent of—yet equal to—the British. Moreover, their government exercised supreme and exclusive authority over a defined territory and had the right to rule the inhabitants and defend the borders of that territory as it saw fit.⁴ In the Seminole War debates, the United States used a legal framework to declare that vision in four ways: first, it expanded the boundaries of the European family of nations to include the United States; second, it demarcated a line of differentiation between the New World and the Old; third, it defined the borders of the American polity and the limits of legal protection along racial and cultural lines; and fourth, it changed the rules for acting across territorial borders in order to secure its interests beyond the nation’s spatial boundaries. To advance these goals, supporters of the Florida campaigns articulated a fresh approach to the sources, the applicability, and the substance of law.

First, the United States insisted that it was a full-fledged member of the European diplomatic and legal community. The United States redrew the line defining the “civilized” international community, contending that the community’s border did not stop at the edges of Europe but included European-heritage nations as well. The United States claimed that it not only was a fully “sovereign” nation—that is, a politically independent state that governed itself without interference from outside authorities—but was equal to any European country.

The U.S. relationship with European states helped define the United States as a nation. In fact, the realm of foreign affairs was a crucial locus, perhaps even the most important locus, for defining American national identity in the early Republic. Projecting a collective identity in foreign relations was essential, even at a time when, on the domestic front, Americans were still developing a cohesive sense of being a single nation. Diplomats, military officers, and government officials who focused on the United States’ relations with other nations played an important role in creating American nationhood. One of the principal purposes of the Constitutional Convention had been to convey to an international audience a more unified American national policy than was evident under the Articles of Confederation and, especially, to reassure skeptical Europeans of American capacity to act as a nation. The framers designed a number of constitutional provisions to assure other nations in the Atlantic world that they could safely and confidently engage in

diplomacy and commerce with the United States. In this regard, the Constitution was only partially successful: at the end of the 1780s, Europeans understood that the Constitution created a more cohesive nation, but they still did not regard the United States as equal to European countries.⁵

In the early 1790s, the United States remained weak, and many Americans and foreigners alike remained uncertain about its ability to survive. Britain refused to remove its troops from forts in the Northwest Territory or to open the West Indies to American trade, Spain closed the Mississippi River and the port at New Orleans to American ships, and both countries supplied arms to Indians who were in conflict with Americans. Gradually, though, the United States fortified its position on the continent by negotiating a treaty in which Britain agreed to vacate the western forts (1795), a treaty with Spain that gave Americans access to the Mississippi River and a right of deposit in New Orleans (1795), and an agreement with France that secured the Louisiana Territory (1803).⁶ Moreover, during the first decade of the nineteenth century the U.S. government tacitly, secretly, or overtly supported a number of filibuster missions against territories in the Spanish domain, not only in Florida but in South America as well. For example, the participation of prominent Americans in outfitting Francisco de Miranda's 1806 expedition to overthrow Spanish rule in Venezuela, the Jefferson administration's reputed behind-the-scenes support for the venture, the federal court's refusal to punish the filibusters, and the popular support they enjoyed indicate that the United States was moving in the direction of a more assertive national presence, prepared to project its ideals outward. The U.S. declaration of war against Britain in 1812 was another step toward asserting national independence. Though the Treaty of Ghent essentially restored the *status quo ante bellum*, Americans celebrated the war as a second American Revolution, and nationalistic pride surged after Andrew Jackson led U.S. troops to a major victory in the Battle of New Orleans in January 1815.⁷

Close on the heels of the War of 1812, the Seminole War provided an opportunity for the United States to flex its muscle and assert American strength and authority. "It is alone by a just and a bold course of conduct that we can expect to obtain and ensure respect from Europe, and not by a timid, temporizing policy," General Andrew Jackson wrote to the secretary of war in the summer of 1818; "the first commands admiration and esteem, the latter contempt."⁸ Most Americans agreed. They were confident that the Florida campaigns reinforced U.S. power by ensuring that the young nation would be viewed from abroad with respect and admiration. Less than a year after the war, Spain ceded Florida to the United States and consented to a boundary line extending to the Pacific Ocean. Britain finally agreed to a treaty that resolved boundary issues, secured American fishing rights, and extended

U.S.-U.K. commercial regulations. Victory in the Seminole War heralded a new world in which the United States took its place as a nation that Europeans had to take seriously.

Just as important, on the domestic front, too, U.S. armed hostilities between 1816 and 1818 strengthened the national image of military prowess. Fostering strong national pride and cohesiveness was particularly important in a relatively new republic, whose citizens had reason to harbor insecurities about their nation's fragility. For Americans, Jackson's campaigns in Florida were just the kind of decisive, forceful action that proved the country was strong. U.S. sovereignty seemed more secure as a result of Jackson's feats.

The United States asserted its sovereignty and equality with European nation-states by vigorously defending the security of its borders and the safety of its citizens, taking a strong position against foreign interference, and participating in the shaping of rules governing international relations. The United States demanded expansion of the boundaries of the civilized family of nations, claiming for itself membership in that family.

Second, the United States differentiated between the Old World and the New World. Although Americans needed the respect, powers, and rights that a recognized sovereign member of the European diplomatic community enjoyed, they also wanted European recognition that, in certain regards, Americans inhabited a separate and distinct cultural, political, legal space. As will be shown, Americans asserted this position during the Seminole War and the subsequent debate in four interconnected ways: They refused, on principle, to allow a European country to mediate the territorial dispute about Florida on the ground that it was American turf. They insisted that the United States was the natural dominant power in the Americas and that European nations and European agents had no right to interfere with U.S. interests or policies there. They claimed that they were entitled to have different rules with regard to slavery and territorial dispossession than Europeans followed within Europe. And, in what seems today like a contradiction, they maintained that the New World was a place of liberty and republicanism, a refuge from Old World oppression and tyranny. Thus, Americans expressed their presumption of American exceptionalism—the notion that the United States had a unique history, a unique destiny, and unique qualities—and reinforced the concept of American continentalism—Americans' vision of a continent-wide domain. Even before the term “manifest destiny” was coined, Americans believed such an extended territory was their political and providential destiny.⁹

Americans' belief that they constituted a unique nation that was fated to hold continental or even hemispheric hegemony provided a rationale for demarcating the Western and Eastern Hemispheres as distinct spheres. In

the 1810s, that conception was gaining traction. Just a few years before the Seminole War, Thomas Jefferson had asserted in a private letter that “America has a hemisphere to itself.”¹⁰ Yet the idea had never before been exposed to such a full public debate nor been so significantly justified in terms of law. Just a few years after the United States successfully swept the Spanish out of Florida, the Monroe Doctrine would formalize the conviction that the United States had natural primacy in the Americas and could demand that Europeans desist from further colonization there. Yet the idea was inconsistent with the notion of a universal global order because it identified a particular geographic region with its own rules. It also introduced a new element to Europeans’ view of their own legal and diplomatic community—that a member of the community could not only enact its own national laws relating to internal matters but also set international rules that would be applicable within a particular extra-European region.

Third, the United States openly rejected the prevailing theory that nations had an obligation to provide the protections of fundamental law universally. The Seminole War took place at a time when universalist natural law language still dominated legal thought. In principle, natural law was eternal, unchanging law that applied universally to all. Medieval theologians attributed natural law to divine will, while ancient Roman and Enlightenment-era jurists were more likely to emphasize secular origins in nature or in human reason. Whatever the source, in the early modern period natural law doctrine presented an ideal that all human beings were entitled to certain fundamental protections.¹¹

During the revolutionary era, natural law had been popular in the United States. In fact, it was an essential foundation of the American Revolution. For Americans of the 1760s and 1770s, the natural law argument was particularly compelling because it provided a way of challenging imperial legislation at a time when the British regarded Parliament’s decisions as the highest law. Most prominently, the Declaration of Independence relied heavily on natural law as a source of Americans’ rights. Addressing the colonies’ collective rights, the Declaration proclaimed the necessity of the United States’ assuming “the separate and equal station to which the Laws of Nature and of Nature’s God entitle them.” The Declaration also addressed natural law on an individual level. Perhaps the document’s most famous sentence is based squarely on natural or divine law expressed in broad, universalist language: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”¹²

On the international front, transcendent natural law principles also dominated the law of nations, which was the law governing relations among

nations in peacetime and wartime. In the early nineteenth century, there were no official documents definitively laying out either the broad law of nations or its component part that focused on the laws of war. The United States and other nations had never formally agreed on a set of principles to govern military behavior. Although there were some bilateral international agreements in the eighteenth century, multilateral treaties that codified broadly applicable international legal principles would only appear much later in the nineteenth century. At the time of the Seminole War, the laws of war were based primarily on jurists' treatises and unwritten customary practices. Natural law provided a foundation for the legal thought of most early modern jurists and theologians who wrote about law, including Thomas Aquinas, Francisco de Vitoria, Hugo Grotius, Samuel von Pufendorf, Jean Jacques Burlamaqui, and Emer de Vattel.¹³

Yet, in an apparent contradiction, in the Seminole War the United States distanced itself from universalist natural law doctrine in order to establish itself as a lawful nation among civilized nations. Rather than extending equal rights to everyone, Americans preferred to limit rights to selected categories of people. The line they drew between people with or without rights was inconsistent with idealized theories of natural law but was an important step in creating national identity.

In the wake of the Seminole War, Americans took the lead in openly asserting a selectively applicable international law that bound only European and European-descended nations in their relationships with each other. Though not in conformity with universalistic theories that formally dominated European literature on the law of nations, some aspects of that American version of the laws of war had roots in Renaissance and early modern European discourse and were consistent with actual practice in North America, especially with the style of warfare commonly employed in conflicts with Indians. Although there was considerable precedent in customary usages, however, neither military nor political leaders had previously explained the legal basis for such practices, and jurisprudential writings had not yet fully incorporated them. Moreover, although European legal treatises left open the possibility for exceptions to universalism in special circumstances, Americans went far beyond European jurists when they formalized vast legal distinctions based on race and culture. The American articulation of those principles in the 1810s, which Henry Wheaton later incorporated into the first American treatise on international law, constituted a significant shift that had long-term influence.

The United States' blatant legal line-drawing based on race and culture helped solidify an exclusionary vision that would firmly displace universalism

in European thought by the end of the nineteenth century. By 1900, the old concept of universal international law would give way to a growing popular belief in the existence of a sharp racially inflected line between “savage” and “civilized” people, in the superiority of European over non-European civilizations, in the propriety of having different rules to govern relations with “barbarians” than with “civilized” nations, and in the necessity to apply different political standards to indigenous populations in the colonies than were applied to Europeans.¹⁴ In their Seminole War discourse, Americans anticipated—and helped forge—that shift.

In parallel fashion, the United States made manifest its internal lines of law and nationhood during the Florida expeditions. As the nation increasingly emphasized popular sovereignty, it reframed domestic natural law discourse. The United States rejected the notion that law applied equally to all groups within the nation. Derived from the will of the people expressed through their representatives, rather than from God or nature, law was particular, not universal. U.S. law fully protected only European-descended people, not people of other ancestries, yet all inhabitants of the United States were subject to American law. These ideas, which Americans asserted in the Seminole War, presaged doctrines of legal modernism that firmly took hold in the United States in the late nineteenth and early twentieth centuries.¹⁵

Fourth, the United States proposed a new approach to the application of law across territorial borders. The nation’s extraterritorial armed hostilities were a way of both claiming membership in the European family of sovereign nations and making clear the legal ramifications of the distinction between “civilized” and “savage” people. The reverse was also true: the United States used the distinctions between European- and non-European-heritage nations, between sovereign and nonsovereign polities, and between civilized and savage people to justify its extraterritorial activities.

Americans believed that their extraterritorial activity in pursuit of geographic expansion was justified by their right to conquer territory inhabited by “uncivilized” people, because such conquest would make the land more productive and would spread American values of liberty and republican government. Accordingly, a profound influence on the U.S. approach to Florida in the 1810s was the commitment to American exceptionalism and American continentalism. The United States’ justifications for its extraterritorial military actions, as well as its rationale for extraterritorial application of U.S. law and racial status designations, were based on a complex understanding of the United States’ own mission as a nation. Despite the particularity and distinctiveness of the Americans’ exceptionalist notions of continentalism and manifest destiny, some of the fundamental legal ideas underlying those concepts

later bolstered American and European overseas expansion. In the mid-to-late nineteenth century, European and European-heritage nations continued their adherence to a law of nations that guaranteed their own territorial sovereignty and right of self-determination while nonetheless finding room in international law for conquest of other lands in the name of a civilizing mission. Thus, the American explanation of circumstances in which the law of nations permitted a nation to act outside of its own borders, as articulated in connection with the Seminole War, proved useful for empire-building ventures around the world later in the century.

Thus, in justifying the Florida campaigns, the United States deployed law to advance several interrelated goals: asserting itself as a formidable sovereign nation, claiming its position as the hegemonic continental power, defining itself as a white/European-heritage nation, and claiming the right to act extraterritorially to further its national interests. Successful achievement of these goals served both domestic and international purposes. The United States craved European respect and acceptance as a member of the civilized community of nations. Americans believed they would earn respect through forceful extraterritorial military action and would gain acceptance by demonstrating that they were a European-heritage community. Their exclusionary legal borders conveyed that neither Native Americans nor African-descended people were equal members of the American civic community, thus establishing the nation's European credentials. Yet the United States asserted dominion over both of those groups and demanded their adherence to American laws, imposing the nation's authority over all people in (or near) its territory. The United States claimed that within its sovereign territory and along its border areas it had the right to deal with different categories of inhabitants as it saw fit. Domestically, U.S. military actions against Europeans, Indians, and African-heritage people helped define it as a nation. In fact, white Americans constructed their nation in relation to all three groups. The Seminole War advanced European Americans' vision of a racially and culturally defined national identity. Americans believed that legal line-drawing between Europeans and non-Europeans not only reinforced American nationhood but also rationalized slavery, Indian removal, and territorial expansion—practices that would be crucial for future growth of the Republic.

The American understanding of the laws of war in the 1810s was not created by the Seminole War. Rather, the war was an outgrowth of ideas and presumptions that had been percolating for some time but had not previously been presented as official doctrine. The timing and circumstances of the war provided an opportunity for Americans to articulate and defend those ideas openly and vigorously in public forums. The end of the War of 1812 and the

Napoleonic Wars gave the United States an auspicious occasion for affirming their nationhood in an assertive way. Placing at stake relationships with the Spanish, Creek and Seminole Indians, African-descended people, and the British, the Seminole War of 1816–1818 offered the United States a valuable opportunity to refashion law in order to accomplish short- and long-term objectives.

This book is a case study of how the early Republic implemented doctrines of law in practice. It shows where the government's position stood in relation to the evolution of domestic constitutional law and the law of nations as described by Europeans. It analyzes how law shaped military conduct and how the United States used doctrines of law to rationalize actions that the government deemed to be in the national interest. The book shows how the United States established in the late 1810s that it was a member of the law-abiding community of nations while at the same time successfully contending that law did not restrain its conduct in Florida.

Because the goal of the book is to examine how the United States used the occasion of the Seminole War to advance its own vision of its national identity and approach to law, the focus is on official rationales and public debate in the United States. Unfortunately, following the final invasion of 1818, there was scarcely any public commentary on the topic by African-descended, Seminole, Creek, or other American Indian contemporaries. Where their perspectives entered the public realm, they are included in this book because they would have been part of the debate that consolidated an American approach to the borders of law. The situation is different with regard to Spanish and British people of the time, who left a written record of commentary on topics relating to the Florida campaigns. Their perspectives, too, are included only to the extent that they were available to Americans at the time and therefore might have played a role in the American debate about legal borders.¹⁶

Occurring at the midpoint between Thomas Jefferson's and Andrew Jackson's presidencies—a decade after Jefferson left office, and a decade before Jackson became president—the Seminole War came at an important moment in political, legal, and social developments of the early national period. The debate about the war, which provided an opportunity to express core American values, marked an important stage in the transition from revolutionary to Jacksonian America. The defense of U.S. conduct presaged later Jacksonian Democratic positions on constitutional powers, state sovereignty, blacks and slavery, Indians, rule of law, military power, and nationhood. Moreover, on some issues the debate evinces the early emergence of important ideals that are normally associated with the end of the nineteenth century. The discourse of the time shows that the transition to a late nineteenth-century paradigm of

constitutional and international law doctrine—ideas that would buttress the United States' imperial ventures overseas—was already under way in the 1810s. Most important, the debate about the Florida campaigns reveals the role of law in defining the boundaries of nationhood during the decades between the American Revolution and the Civil War.