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## Rhetoric and Strategies of Resistance

IN 1824, Georgia legislators insulted the Cherokees' intelligence. In a letter directed to President James Monroe, the congressional delegation of the state of Georgia accused the Cherokees of employing ghostwriters in their recent communications with the secretary of war protesting the pressure the Cherokee Nation endured to cede additional lands and remove west. The Cherokee response to the Georgians, written by its own lobbying delegation while in Washington, appeared in the *Essex Register* of Salem, Massachusetts, on May 20 of that year. Composed and signed by Cherokee National Council members John Ross, George Lowry, Elijah Hicks, and Major Ridge, the Cherokees employed sharp rhetorical arguments to defend not only the sanctity of their relationship with the federal government, but also the intellectual acumen of their leadership:

Not satisfied with wishing the Executive of the United States violently to rupture the solemn bond of our rights to our land and to put at defiance the pledges which existing treaties contain guarantying to us our lands, it is attempted to take from us the intellect which has directed us in conducting the several negotiations with commissioners appointed to treat with us for our lands, and with the Executive government, by the unfounded charge, that "*the last letter of the Cherokees to the Secretary of War, contains internal evidence that it was never written or dictated by an Indian.*" Whilst we expect to be complimented on the one hand, by this blow at our intelligence, we cannot, in justice, allow it to pass, upon the other, *without a flat contradiction.* That letter, and every other letter, was not only *written*, but dictated by an Indian. We are not so fortunate as to have such help.—The white man seldom comes forward in our defense. Our rights are in our own keeping . . . Our letters are our own; and if



they are thought too refined for "Savages," let the white man take it for proof that, with proper assistance, Indians can think and write for themselves [emphasis in the original].<sup>1</sup>

By the early 1820s, the Cherokees boasted some young adults in a generation that had achieved what their nationalist parents had hoped for: fluency and literacy in English as well as Cherokee. Younger Cherokee leadership consulted in the Cherokee language with their elders on the Council and then translated not only words, but Cherokee notions of rights and obligations into English. In doing so, they frequently used the rhetorical ideals and principles of the United States itself to expose the dubious justifications of its policies and to remind its citizens of their own national values. "In this context of state coercion and federal neglect, Cherokee leaders adopted a style of address and language that would provide the foundation for their political writings for the rest of the century" (Denson 2004, 27).

Two young leaders in particular, John Ridge and Buck Oo-watie (Major Ridge's son and nephew, respectively), had been educated in a New England prep school and had personal experience with the contradictions between rhetoric and actions. Located in Cornwall, Connecticut, the school, established in 1817 by the American Board of Commissioners for Foreign Missions (ABCFM), was designated predominantly for students from regions of American and European colonialist enterprises: Hawaiians, Polynesians, East Indians, Malaysians, Chinese, and Marquesans, as well as American Indians. Oo-watie, who had previously attended the Moravian mission school at Spring Place, Georgia, was one of its first Cherokee students, arriving in 1818. He was soon introduced to an American philanthropist and author named Dr. Elias Boudinot, who pledged annual support to the young man and also bestowed to him the use of his name. Buck Oo-watie, thus known afterward as Elias Boudinot, was joined at the school in 1819 by his cousin John Ridge. Although both were noted as remarkably intelligent and refined young men, Boudinot was regarded as a particular success by the missionaries, evidenced by his piety and devotion to their Christian teachings.

But the two young men ultimately caused the greatest imaginable offense to the good people of Connecticut. In 1824, John Ridge married one of the white daughters of the community, Sarah Northrup. And two years later, Elias Boudinot followed suit when he wed Harriett Gold. Although the families of the Cherokee men were among the more acculturated of the tribe, Christian, and clearly wealthy even by American standards, both



marriages had initially been opposed by the parents of the brides. And although they had relented in the faces of their daughters' insistence, the citizens of Cornwall did not approve. The unrest in the town was palpable when the Ridge-Northrup nuptials occurred, but when Boudinot became engaged to Miss Gold in 1826, Cornwall erupted in violence, burning the two in effigy, the flames lit by her brother. The "incident had taught them that the idealistic North was not so fair-minded and friendly towards the Indians as it pretended to be" (Starkey 1946, 71). Not surprisingly, both couples chose to live in the Cherokee Nation and raise their children as Cherokee citizens.

Ridge and Boudinot had been shaken by what they surely perceived as the insincerity of the Connecticut townspeople, who had professed their admiration and regard for the accomplishments of the two and the virtue of Boudinot in particular. Their mistake had been in assuming they were thus taken as equals to the whites in the town, a mistake their courting of the townswomen brought into sharp focus. In the end, despite their achievements and their piety, they were still Indians, and as their councilors had noted in their protest to the Georgia delegation in the same year, "The white man seldom comes forward in our defense. Our rights are in our own keeping." The year after the Boudinot-Gold marriage, the school closed, ending any looming threats of additional marriages between white women and men of color, but also eliminating educational possibilities for aboriginals who might use their training to defend their rights.

But the townspeople's rage had given Ridge and Boudinot additional incentive to expose the contradictions between American ideals and federal actions. As the 1820s progressed and turned into the critical decade of the 1830s, Ridge acquired the skills of an attorney and Boudinot the skills of an editor. They worked with their elders, both traditionalists and nationalists, to build strategies and create alliances. The Cherokees both inspired and contributed to some of the loftiest rhetoric ever produced in the American nation or their own nation on the subject of rights and moral imperatives. They left no doubt in the minds of many Americans of their time that, "Our letters are our own. . . . Indians can think and write for themselves."

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By the late 1820s, only 12,316 square miles of land remained to the Cherokees after their last cession in 1819. Half of that territory was in northern Georgia and the remainder was in Alabama, Tennessee, and North Carolina.



About 18,000 people, predominantly Cherokees but also about 200 intermarried whites and 1,600 black slaves owned by some Cherokees, occupied that territory. About half were in Georgia and the remainder in the other states.<sup>2</sup> In addition, over 50,000 non-Indians, predominantly whites but also some free blacks, had intruded into the Cherokee Nation's territory in Georgia and were squatting on its land.

Most Cherokees lived in a manner similar to that of frontier whites. They had small cabins and farmed a few acres of land. They raised a few head of livestock and made their own clothes and other household possessions. They supplemented their crops by hunting game and small animals, and they gathered fruits, nuts, and greens. They made their own medicines and had recently begun to import others from Americans as well. Within their people were blacksmiths and gunsmiths, millers and miners, tavern owners and ferrymen, merchants, and plantation operators. As a society, the Cherokees were meeting most of their own basic needs.

But the passage of the Georgia Harassment Laws led to a systematic impoverishment of the Cherokees throughout the early years of the 1830s, as state forces began to strip them of their property and their homes. As the laws went into effect, President Jackson's supporters in Congress introduced the Indian Removal Act in 1830, as southern politicians had long wanted. It also sent a strong message to Cherokees who "had been led by friendly Congressmen to believe that Congress would support them against Georgia. Until Congress had given unmistakable proof that it had no such intention, it was useless, said [Tennessee Governor William] Carroll, to talk to the Cherokees of removal" (Starkey 1946, 122). The act was intended to dispel Cherokee illusions.

The Indian Removal Act was directed at the Five "Civilized" Tribes still located in the southeastern part of the United States—the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles (a group that had split from the Creek Confederacy in the late 1700s and had moved into the Florida swamps, evolving through the years to be regarded as a separate tribe)—since this was one of the last regions of the eastern United States where tribes had not yet been removed to the west. In 1827, one of the Five Tribes, the Creek Confederacy, had already been forcibly ousted from Georgia (although still present in Alabama), largely as a result of what many Creeks regarded as a treasonous betrayal by some of their leaders in signing a removal treaty with the United States against the will of the majority of the Creek Council and people. And in 1830, as the Congress



contemplated the Indian Removal Act, the Choctaws—amidst much internal controversy—had also signed the Treaty of Dancing Rabbit Creek, acquiescing to their removal to the same territory in the west, which was undertaken in 1831–1832.

But even in this legislation, Indian removal was not forced. The act made it clear that a legal *exchange* of lands would take place by treaty—in short, with agreement from the tribes. If the tribes would agree to relinquish their southeastern lands, they would receive lands to the west of the Mississippi River in an exchange. The act required that the titles of other more western tribes must have been legally extinguished before the easterners were moved in, and that the lands not be claimed by an existing territory or state. From the tribal perspective, Section Three of the act was the most important article. It stated

that in the making of any such exchange or exchanges . . . the United States shall secure and guaranty to [the tribe or nation], and to their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same.<sup>3</sup>

This section gave to any tribe making an exchange a “fee simple” patent or private property ownership of their new lands in the Indian Territory, rather than the land being held in a legal trust for them by the United States, as was the “reservation” landholding status of most other tribes throughout the 1800s. Section Four promised compensation to individual tribal members for improvements and possessions left behind, and Section Five promised to pay for the expenses of removal and to provide support for the tribe for one year after its arrival in the west. Section Six promised protection from intrusion into their new lands by outsiders, and Section Seven continued the federal superintendency of tribes through Indian agents, but also validated the continuing existence of tribal treaty rights that had not been annulled.

Many legislators thought it more than a fair offer to the tribes. But tribal response, predictably, was cold. By what right, they demanded, did the United States move a people from their homelands—lands that had been occupied for centuries, if not millennia, before the United States had even come into existence? Although the Creeks and Choctaws had already succumbed to the removal policy, largely due to what many regarded as treacherous betrayals by some of their own leaders, the Cherokees were



determined to fight with all their skills any efforts by the United States to take their remaining lands and remove them to the west.

Regarding the proposed legislation as consenting to aggressive states' rights assertions on the part of Georgia, whose state harassment laws appeared to violate the federal constitution and laws, some legislators rejected the Indian Removal Act on the grounds of defending a strongly federalist position. Although Indian rights were not the primary concern of these Congressmen, the Cherokees nevertheless cultivated alliances with them out of a common goal—the defeat of the legislation—even though the rationales for wanting that defeat differed. Most representatives from the more northern states, particularly in New England, were strong federalists, accurately reflecting the sentiments of their constituents. The Cherokees made alliances with these representatives and lobbied alongside them to persuade the votes of still others.

Although the defense of federalism may have been the primary motivation for many of the Congressmen, some others held genuine concern for justice and the rights of the Indians. In eloquent speeches made during the congressional debates, prominent senators and representatives—such as Peleg Sprague of Maine, who quoted Shakespeare; Theodore Frelinghuysen of New Jersey, who opined for three days; and David Crockett—defended Cherokee interests. Crockett, in particular, as a Tennessean, based his stance in opposition to the bill as a defense of human rights, regarding the act as a cruel and unjust measure. Vocal and sincere in his messages to his colleagues in the Congress, Crockett's call to morality undoubtedly caused discomfort and irritation in those who promoted Indian removal as a benevolent policy. His constituents in Tennessee were especially unforgiving of his integrity and voted him out of office at the next election. Even though they returned him to Congress a few years later, Crockett continued to challenge them to a higher standard, and they removed him again for the last time in 1836, precipitating Crockett's departure to Texas and, ultimately, his demise at the Alamo by the end of that year.

The Cherokee cause was supported on humanitarian grounds by still others. In general, the greater numbers of more politically liberal and reform-minded people in the North opposed the act and directed their representatives to shun it. Additionally, many of the governing boards of the missionaries and their societies who worked among the Cherokees were located in New England. Most prominently, the ABCFM and one of their leaders, Jeremiah Evarts, were strong opponents of the policy and the Indian Removal Act that represented it. Evarts, who wrote a series of anti-Jacksonian essays under the pseudonym of "William Penn," was



particularly vocal in his condemnation of removal policy. He uncompromisingly defined the issue as an abrogation of national morality, stating

Foreign nations should be well aware, that the People of the United States are ready to take the ground of fulfilling their contracts so long only, as they can be overawed by physical force; that we as a nation, are ready to avow, that we can be restrained from justice by fear alone; not the fear of God, which is a most ennobling and purifying principle; not the fear of sacrificing national character, in the estimation of good and wise men in every country, and through all future time; not the fear of present shame and public scorn; but simply, and only, the fear of bayonets and cannon.<sup>4</sup>

But some of the most eloquent opposition came from the Cherokees themselves, especially the editor of the *Cherokee Phoenix*, the newspaper they had established in 1828, and which was becoming one of the Cherokees' most effective tools for lobbying their cause. As editor, Elias Boudinot was powerful and persuasive in articulating the Cherokees' position. In regard to the Indian Removal Act, Boudinot, like Evarts, equated its passage with the violation of national morality, as well as the law itself. Upon its passage by the Senate, he wrote

It has been a matter of doubt with us for some time, whether there would be sufficient virtue and independence in the two houses of Congress, to sustain the plighted fate of the Republic, which has been most palpably sacrificed by the convenience of the Executive. Our doubts are now at an end—the August Senate of the United States of America (tell it not in Gath, publish it not in the streets of Askelon) has followed the heels of the President, and deliberately laid aside their treaties. They have declared they will not be governed by these solemn instruments, made and ratified by their advice and consent.<sup>5</sup>

Some analysts have recognized the Indian Removal Act as one of the most controversial pieces of legislation in the first half of the 1800s, and its debate was punctuated in defense of the Indians by some of the most soaring rhetoric yet known in American politics. Ultimately, it was for naught, but not without a very close call for Jackson and his supporters in Congress. As the commitments were being assessed in the days before the vote, the House of Representatives was evenly split and it appeared the vote was a 99–99 tie, resulting in the overall defeat of the bill. President Jackson, in







bill was passed by a 102–97 vote. Jackson had been successful in pressuring several representatives to change their votes. The Indian Removal Act had passed and federal policy was now federal law. But the vote had also revealed deep divisions within the American society on the questions of not only federal Indian policy, but in particular the tensions between federalism and states' rights. The vote reflected a split that erupted 30 years later into the American Civil War.

Although the bill had passed, the Cherokees and other impacted tribes were not inclined to simply acquiesce to the bill's provisions and its assumptions of the inevitability of their removal. Boudinot's rhetoric was now inspirational to his countrypeople as well.

Let then the Cherokees be *firm* and *united*—Fellow citizens, we have asserted our rights, we have defended them thus far, and we will defend them yet by all lawful and peaceable means.—We will no more beg, pray and implore; but we will *demand* justice, and before we give up and allow ourselves to despondency we will, if we can, have the solemn adjudication of a tribunal, whose province is to interpret the treaties, *the supreme law of the land*. Let us then be *firm* and *united*.<sup>6</sup>

The Cherokees and their allies had conducted a tremendous lobbying campaign to defeat the bill, and despite its passage, the campaigns against the policy continued. Although the lobbying of Congress was pointless for the moment, the maintenance and strengthening of relationships with American supporters was critical to an ongoing resistance. The Cherokees continued to cultivate the support networks and combined that effort with a public opinion campaign. Believing it was vital that the American public be educated to the policy of Indian removal, the Cherokees had for some time employed their resources, both material and human, to that educational process.

The Cherokee approach was two-pronged. First, the young nationalist advocates of the Cherokee Nation, John Ridge and Elias Boudinot, were employed strategically by the National Council and the mission societies. Sent on speaking tours in regions of the country where the Cherokees could expect to receive and build support, Ridge and Boudinot were the featured orators at lectures and town hall meetings throughout New England. They likewise deepened, along with other representatives of the Cherokee government, their relationships with supportive politicians in Washington, D.C. These efforts were extremely productive for the



Cherokees in a number of ways. Not only was their case made in a rhetorical manner that appealed to the politically influential urban middle classes of Americans, the fact that it was delivered by Cherokees who were entirely Indian in their physical appearance while obviously very educated and refined in their dress, vocabulary, and mannerisms served to convince many whites that Indians could not only think and write, but also speak for themselves.

The tactical use of the *Cherokee Phoenix* was also of importance. As a bilingual newspaper, it could reach even wider audiences than the young Cherokee men, and the Cherokees began to produce the paper in increasing quantity. Just as American audiences had been impressed with not only the Cherokees' message, but also the eloquence of its messengers, Ridge and Boudinot, the *Cherokee Phoenix*, the first newspaper ever to be printed by an Indian nation, delivered additional messages about the nature of the Cherokee language and literacy. At a time when Indian languages were believed to be primitive and incapable of complex expressions, the articles and essays in the *Cherokee Phoenix* served to dispel such attitudes. By distributing it in Washington, D.C. and the major population centers of the north, as well as to foreign governments, the Cherokees hoped that others would apply pressure on the United States as well. The strategy worked on many levels. Great Britain, somewhat ironically, protested the policy of the United States in removing Indians from their homelands. And it was a great triumph for editor Boudinot when his editorials began to be reprinted by major newspapers in Boston, Philadelphia, and New York, providing an even greater audience for the critical arguments in support of Indian national sovereignty, who also lobbied their congressional representatives.

But the *Cherokee Phoenix* was primarily distributed, of course, among the Cherokees themselves, since as much as 90 percent of the Cherokee population was by then able to read its articles printed in the Cherokee syllabary. Although "it did not present all of its reading matter in parallel English and Cherokee texts, but only a relatively small percentage of it" (Kilpatrick and Kilpatrick 1968, 3), the *Phoenix* was nevertheless instrumental in keeping the Cherokee citizenry well-informed about the actions of their leadership in Washington, D.C., resulting in a very educated and unified population in resistance to removal and holding full faith and confidence in their leaders to oppose the policy.

The Cherokees conceived still other responses to federal and state actions. Throughout most of the 1820s, they had been considering a possible action in federal court to define their rights. A Supreme Court decision in





Recreation of the interior of the *Cherokee Phoenix* printing office, New Echota Historic Site, Calhoun, Georgia. (Courtesy of the Georgia Department of Natural Resources—State Parks and Historic Sites Division)

1823 in a case called *Johnson v. McIntosh* had been of particular concern. In that decision, Chief Justice John Marshall had upheld the European Doctrine of Discovery, which gave a supremacy of claim to purchase Indian lands to the “discovering” European nation and “had been a convention of intra-European diplomacy that was intended to keep colonial powers from making overlapping land claims” (Norgren 2004, 56), as also applicable to American titles to Indian lands. Ultimately, the court had ruled that, although Indians clearly had long-standing usufruct rights to their lands, which it characterized as “occupancy” rights, since they could not actually produce a deed or document of title, full title or “fee simple” ownership rested with the United States as the only entity who could take possession of Indian lands upon their relinquishment. Although the specifics of the case concerned the transfer of Indian lands to an individual (as was also denied under federal law in the Trade and Intercourse Acts of the 1790s),



the decision strongly implied that no tribe within U.S. boundaries would be regarded as having true land titles.

But as Georgia passed and began to implement its harassment laws, apparently in violation of the Commerce Clause of the Constitution which stated that only Congress could pass regulatory laws regarding affairs with the Indian nations, the Cherokees began to wonder if even their jurisdiction within territory over which they clearly held at least occupancy rights, according to the court's 1823 decision, would be upheld. Yet, the process of entering federal court to test and establish the fullness of their jurisdiction was difficult. First, it would require an action that implied the Cherokees' larger grievance, and that the action and its implication were strong enough to carry through a lengthy court battle. Second, it was expensive, and finding attorneys who were skilled enough and willing to take a case if the plaintiff was unable to pay them accordingly would be difficult. To that date, the Cherokees had found neither the circumstances nor the resources to carry into court.

But in 1829, shortly after Georgia enacted its new laws, a murder occurred in the Cherokee Nation. A Cherokee man named George Tassels, sometimes known also as Corn Tassels or George Corn Tassels, was accused of murdering another Cherokee. The killing had taken place within the boundaries of the Cherokee Nation and the Cherokee Lighthorse, the nation's law enforcement unit, had arrested Corn Tassels. But as they were holding him for trial, the Georgia Guard, the vigilante force recently established under Georgia's Harassment Laws, forcibly kidnapped Corn Tassels from the Cherokees, removed him from Cherokee Nation boundaries, and ultimately placed him on trial in a state court. In 1829, the case was entitled *Georgia v. Corn Tassels*.

As expected, Georgia found Corn Tassels guilty and sentenced him to be hanged. But the Cherokees had managed to engage an attorney, not to defend Corn Tassels, but in anticipation that Georgia would act in a fashion that might give the Cherokees just what they needed to approach the federal court with a strong case. Although funds were a problem, they convinced two attorneys who were sympathetic and interested in the issue to take up the Cherokees' cause. The lead attorney was William Wirt, the former attorney general of the United States under Presidents James Monroe and John Quincy Adams. He was assisted by John Sergeant, a former member of the House of Representatives. Both were strong federalists and anti-Jacksonians.

Upon Corn Tassels's sentencing by the Georgia state court, one of Wirt's first actions was to file a writ of error with the federal court. Contending



that Georgia's prosecution of Corn Tassels was in error as the state had no jurisdiction under federal law, the writ included a request for a stay of execution of Corn Tassels by the federal court. In December 1830, the Supreme Court granted the writ. "But Georgia, to show her contempt for federal interference, in state affairs, ignored the summons and expedited Tassel's execution" (Woodward 1963, 164). Georgia had hoped to render Wirt's effort irrelevant, but the implications of the case were not about Corn Tassels's crime, but about Georgia's lack of jurisdiction within Cherokee territory, and Wirt continued his preparation of the case. In March 1831, it was accepted by the U.S. Supreme Court and is known as *Cherokee Nation v. Georgia*.

Wirt's first challenge was to establish to the court that they had "original jurisdiction," meaning that they were properly the first level of federal court to hear the case. This was difficult as most cases in federal courts work through lower levels of district and appellate courts before ever reaching the Supreme Court. Wirt sought a way to take the case directly to the Supreme Court where there were indications that some justices were sympathetic to hearing the Cherokees' cause. Out of this necessity, Wirt conceived an innovative, but risky, legal strategy. Under the Constitution, certain kinds of cases will bypass lower levels of courts and be heard directly by the Supreme Court, and Wirt sought to establish that the Cherokees' case was one such instance. Focusing on the fact that original jurisdiction to the Supreme Court exists in cases in which a foreign government is suing a state, Wirt's foundational argument was that the Cherokee Nation was a foreign government. Following this argument, Wirt's argument—should the premise that the Cherokee Nation was a foreign government be accepted by the court—went on to detail the actual merits of his case, essentially stating that Georgia's attempts to extend state law over the Cherokee Nation violated the federal Trade and Inter-course Acts, federal treaties between the United States and the Cherokee Nation, and most importantly, the Commerce Clause of the United States Constitution by usurping Congress's exclusive plenary authority when it passed regulatory laws over the tribes within its borders. Wirt's rationale was thus a strong federalist argument.

On the day of opening arguments, Wirt and Sergeant stood alone in front of the Supreme Court of the United States. Not only had Georgia not bothered to seek an attorney of equal caliber to argue their case, they had not deemed it important to appear at all. Taking a strong states' rights position, Georgia refused to dignify by appearing in federal court what would not be allowed in its own state courts under its harassment laws, since Indians



were deemed "incompetent" to testify under Georgia state law. Just as its states' rights assertions had challenged the Congress to find the way to avoid open confrontation between federalist and states' rights advocates, Georgia now posed the same challenge to the federal judiciary.

Congress had avoided the confrontation by passing the Indian Removal Act. The Supreme Court found another method of sidestepping the issue. Although the court could have determined that Georgia was in default by not appearing, Wirt's basic premise—the necessity of first convincing the court that they held original jurisdiction in the case—provided the court with the way to mitigate the potential confrontation over states' rights. In its decision, rendered in January 1831, the Supreme Court determined that

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right is extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United State resembles that of a ward to his guardian.<sup>7</sup>

In this simple paragraph from the majority opinion, authored by Supreme Court Chief Justice John Marshall, the high court struck down Wirt's basic premise that the Cherokee Nation, and by implication all Indian nations, were "foreign" governments. The mainstay of Marshall's argument was that the treaties, by which many tribes had placed themselves as protectorates of the United States, as well as their physical presence within U.S. borders, nullified any claims to being foreign governments. By denying Wirt's assertion of its own original jurisdiction, the court was thus relieved of considering the actual merits of the case, neatly sidestepping the conflicts between federalist and states' rights arguments. Of the six justices who heard the case, "two concluded that the Cherokee Nation was neither a foreign state nor a sovereign nation and that Cherokee individuals were subjects of the state of Georgia. Two argued that that the Cherokee Nation was sovereign, had standing before the Court as a foreign state, and was entitled to protection against the unconstitutional laws of Georgia. And two, including Chief



Justice John Marshall, decided between the two extremes. The Cherokee Nation lacked standing because it was not a foreign state, but it deserved to be recognized and respected, although as what was not altogether clear, despite Marshall's efforts to describe it" (Perdue and Green 2007, 81). In the end, the Cherokees had lost since four justices had voted to deny the Cherokees' claims to being a "foreign" government.

The dissenting opinion—written by one of the judges in the minority, Justice Smith Thompson, with concurrence by Justice Joseph Story—countered the claims of the majority that treaties and its presence within U.S. borders had invalidated to any extent the Cherokees' inherent sovereignty.

It is manifest from these cases, that a foreign state, judicially considered, consists of its being under a different jurisdiction or government, without any reference to its territorial position. . . . So far as these states are subject to the laws of the union, they are not foreign to each other. But so far as they are subject to their own respective state laws and government, they are foreign to each other. And if, as here decided, a separate and distinct jurisdiction or government is the test by which to decide whether a nation be foreign or not; I am unable to perceive any sound and substantial reason why the Cherokee Nation should not be so considered. It is governed by its own laws, usages, and customs: it has no connexion [*sic*] with any other government or jurisdiction, except by way of treaties entered into with like form and ceremony as with other foreign nations.<sup>8</sup>

The argument held that Cherokee sovereignty was "inherent," established as an essential aspect of the Cherokee Nation's existence, and that the fact it had entered into treaties with the United States, as had many other "foreign" governments, did not invalidate its original status as a separate governing entity. But the argument in support of Cherokee, and Indian sovereignty generally, was not accepted by the majority on the court.

However, in the language from Justice Marshall's majority opinion, two important concepts were established that formed the cornerstones of federal Indian law ever after. First, in denominating Indian nations as "domestic dependent nations," Marshall and the court had created a new level of law and jurisdiction in the United States. To that date, the descending levels of jurisdiction had been from federal to state (although still challenged by many southern states in particular) to county to municipality. The court's decision made it clear that there was another level of law and jurisdiction within the country—that held by the Indian tribes. The case had



essentially asked the court to determine whether state law applied over tribes, and although the court acknowledged tribal jurisdiction as existing in the creation of a new category called "domestic dependent nations," it did not make a judgment as to where the level of tribal jurisdiction was located, either above or below *any* other level of jurisdiction in the country. Thus, the category was created but its parameters were left completely undefined, at least in this case. Federal courts continue to refine the meaning of "domestic dependent nations" to the present day.

Additionally, the *Cherokee Nation v. Georgia* case established the federal trusteeship over the Indian nations within its borders. When Chief Justice Marshall stated that the relationship between the tribes and the United States was that of a ward to its guardian, another cornerstone of federal Indian law was created. Defined by federal courts as a "trust responsibility" that the United States holds to the tribes, the guardianship has included special federal assistance to tribes and their citizens in health, education, housing, and many other programs. The trust responsibility exists as an exchange for the taking of their lands and the losses of the means of subsistence and independence that resulted.<sup>9</sup>

The Cherokees had lost their case on a legal technicality, but the central question of the case—whether state laws applied over the tribes within them—had not been considered. There was still a possibility to bring a case to federal court, but it would require a different legal strategy. As the Cherokees and their attorneys began to contemplate a new approach, Georgia again acted on its harassment laws. In sections of the 1830 law, Georgia had required all white citizens of the United States who were working within the Cherokee Nation to swear allegiance to Georgia and to be licensed by the state before beginning their employment among the Cherokees. These sections of the law had been aimed at missionaries in particular, as the state believed some of them were encouraging Cherokee resistance, as indeed they were. Upon the passage of the laws, many missionaries simply moved out of Georgia and into the other three states within which the Cherokee Nation was also located—Alabama, Tennessee, and North Carolina. But the ABCFM and its dozen missionaries who worked within the limits of Georgia instead wrote to their governing board in New England for guidance. Was it the board's desire that the missionaries move their missions out of state, or that they swear the allegiance to Georgia and procure licenses, or that they continue to missionize within Georgia without seeking the licenses now required by the state? The board had little to offer in the way of guidance. Do what you think is best, they replied.

In this moment of delay, as the missionaries sought guidance, Georgia acted. In the spring and summer of 1831, Georgia arrested 11 ABCFM



missionaries and by September, had tried and sentenced them to 4 years at hard labor. At this point, "there was no want of support from the American Board as to the stand its missionaries had taken. Indeed, letters from the Board reveal something of a rejoicing in the fact that events had reached the point of imprisonment. The time was ripe for a martyr to appear" (Bass 1936, 139). Jeremiah Evarts seemed particularly gratified by the missionaries' apparent martyrdom, as he had virtually sought it from one of them in an earlier letter. But much to Georgia's relief, as it now found itself in a national public relations quandary by having arrested and imprisoned men of God, nine of the missionaries also lost their will, sought the licenses, and accepted pardons from the state. But unfortunately for Georgia, two of the missionaries, Reverend Samuel Worcester and Dr. Elizur Butler (who was a physician as well), refused the pardons and forced the state to imprison them, hoping to further the Cherokees' cause by doing so. "The loyal support given by the American Board to the [Cherokee] nation's interests had transformed the previous coolness toward it into warm admiration. Cherokees sent letters to Worcester and [Butler] at the prison, donated money to provide them with comforts, and . . . feelings toward the American Board . . . were now extremely positive. The audacity of the Georgians seemed at last to have played into the hands of their most determined opponents" (McLoughlin 1995, 264).

The Cherokees now had a new case to advance into federal court. Although they would not be a named party to it, since the missionaries would stand as the plaintiffs, the questions were nevertheless the same. Could the state of Georgia assert its own sovereignty and jurisdiction into a tribal nation's territory? Could a state pass regulatory laws over a tribe within its borders? Could a state take territory from a tribe without the intercedence of the United States? The missionaries retained William Wirt and John Sergeant again, who were delighted with their plaintiffs, men with whom Americans would have a great deal of sympathy. In February 1832, *Worcester v. Georgia*, the second of what came to be known as The Cherokee Cases (along with *Cherokee Nation v. Georgia*), was entered with the U.S. Supreme Court.

"The Georgia action against the Cherokees was Wirt's great opportunity to return the Cherokees' case to the Marshall court. Although it was not clearly a property rights question, Marshall used the case of *Worcester v. Georgia* as a pretext to examine all Cherokee treaties, and in a wide-ranging interpretation observed that the Cherokees never had yielded their sovereignty" (Moulton 1978, 46). The court's decision was rendered remarkably quickly, only a few weeks later. In language that provided yet another cornerstone defining the relationships between the tribes, the federal





The Reverend Samuel A. Worcester, American Board of Commissioners for Foreign Missions, and plaintiff in the *Worcester v. Georgia* case. (Courtesy of Houghton Library, Harvard University)

government, and the states, Chief Justice John Marshall, who also voted in the majority in this case, declared in his written opinion:

The very fact of repeated treaties with [the Cherokees] recognises [*sic*] [their title to self-government]; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without



stripping itself of the right of government and ceasing to be a state. Examples of this kind are not wanting in Europe.<sup>10</sup>

In language that was almost identical to that in a section of Justice Thompson's dissenting opinion from the *Cherokee Nation v. Georgia* case, Marshall had seemingly made much the same argument that had been made by Thompson only a year earlier. Without going so far as to state that the Cherokees were a "foreign" government, Marshall and the majority nevertheless agreed that the Cherokees' rights of territorial sovereignty had not been extinguished simply because they had entered into treaties with the United States and placed themselves as protectorates of that government. In fact, Marshall noted, the existence of treaties actually confirmed the tribe's governmental status, and the historic existence of protectorates in Europe provided a model for the relationship of all Indian nations with the United States.

Marshall's opinion continued:

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, 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 Cherokee themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

The act of the state of Georgia, under which the plaintiff in error was prosecuted, is consequently void and the judgment a nullity.<sup>11</sup>

The missionaries, and by extension the Cherokee Nation, had won! Although legal scholars have argued ever since about Marshall's intentions and the reasons for the apparent shift in his, and the majority's, sentiments, the decision established another seminal concept in federal Indian law. Although the *Cherokee Nation v. Georgia* case had created the jurisdictional category of "domestic dependent nations" that included the tribal governments within the United States, it had left the parameters undefined. Were the tribes jurisdictionally above the state or below it? Above the federal government or below it? Above or below any other level of law and jurisdiction? The *Worcester* case had defined one important parameter in unequivocally stating that, within their own territories, the tribes were (and are) above the state and, at that time by the reasoning of the decision, on a par with the federal government.<sup>12</sup> The tenet that



the tribes hold a status higher than that of states has been another fundamental, but widely misunderstood aspect of tribal sovereignty within the context of the United States.

For the Cherokee Nation, the import of the decision was immediately clear. The Georgia Harassment Laws had been struck down by the highest federal court. It perhaps remained unclear as to whether they would still be required to remove, but if they were, it would be under the terms of the federal Indian Removal Act, which required a treaty, rather than by pressure and force resulting from the terrorism of the state of Georgia. Certainly many Cherokees believed that if a treaty was required, there would be no initiative for it forthcoming from their own leadership. The Cherokee citizenry was entirely united in their opposition to relinquishing their homelands. Their position appeared to be settled, and their rights to their remaining territory as secure as they had been for some time.

Certainly the editor of the *Cherokee Phoenix* believed this to be the case. Writing for his countrypeople in effusive language, Elias Boudinot called the decision "a great triumph on the part of the Cherokees so far as the question of their rights were concerned. The question is forever settled as to who is right and who is wrong. . . . It is not now before the great state of Georgia and the poor Cherokees, but between the U.S. and the state of Georgia" (quoted in Wilkins 1986, 235). As word spread throughout the Cherokee Nation in the weeks after the decision, the euphoria was palpable. "In every community, it seemed, the people celebrated with 'Rejoicings Dances and meetings.' As William Williamson, an officer in the Georgia Guard stationed in the Cherokee country, reported to [Georgia] Governor Lumpkin, 'They not only believed that the right of Jurisdiction was restored but that they were Sovereign independent nation & the U.S. bound by Treaty to afford them protection'" (Perdue and Green 2007, 88).

There was a sense of vindication on the part of the Cherokees. Over the past 40 years, their efforts to build a nation, to educate themselves, and to shift their system of law and government to more closely resemble that of the United States while still keeping a sense of cultural tradition and values had not been as much because they desired to be like Americans as because they desired a way to defend one of their strongest cultural values—their relationships with the land that had been theirs for centuries—in ways that Americans would understand and respect. As stated by legal scholar Jill Norgren, "It is the ultimate irony that the Cherokee, only recently described by the *Tassels* court as a people 'incapable of complying with the obligations which the laws of civilized society imposed,' maintained



their faith in the rule of law—even an enemy's law—and its promise of justice" (2004, 98). At this moment, with a great victory in the highest court of the United States, it appeared that faith had at last been rewarded.

### Notes

1. *Essex Register*, Salem, MA, XXIV, no. 41, Thursday, May 20, 1824.
2. These figures can be approximated from the 1835 Cherokee Census, available from the Oklahoma Chapter of the Trail of Tears Association.
3. See Primary Documents, The Indian Removal Act (1830).
4. William Penn [Jeremiah Evarts], *Essays on the Present Crisis in the Condition of the American Indians* (Boston: Perkins & Marvin, 1829), reprinted by Francis Paul Prucha, ed., *Cherokee Removal: The "William Penn" Essays and Other Writings by Jeremiah Evarts* (Knoxville: University of Tennessee Press, 1981), 49–51, and quoted in John A. Andrew III's *From Revivals to Removal, Jeremiah Evarts, the Cherokee Nation, and the Search for the Soul of America* (Athens: University of Georgia Press, 1992), 187.
5. Elias Boudinot, in the *Cherokee Phoenix*, May 15, 1830. Reprinted in Theda Perdue, ed., *Cherokee Editor, the Writings of Elias Boudinot* (Athens: University of Georgia Press, 1996), 117, 118.
6. *Ibid.*, 118.
7. See Primary Documents, *Cherokee Nation v. Georgia*, majority opinion.
8. *Ibid.*, dissenting opinion.
9. However, the trust responsibility also continues federal oversight of tribes, particularly in the economic realm, for it also requires federal permission for the leasing and sale of tribal lands and allotments, as well as federal management of accounts containing the revenues derived from the lease and sale of lands and resources, including permission of Indian lessors to draw on their own accounts. By the late 20th century, it was discovered that billions of dollars of individual tribal monies were unaccounted for, resulting in a major class action lawsuit against the United States and a multimillion dollar settlement with individual Indian claimants.
10. See Primary Documents, *Worcester v. Georgia*.
11. *Ibid.*
12. Subsequent federal court decisions have reduced the tribal level of jurisdiction below that of the federal, but still above the state in all but specific instances.

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