The Indian Removal Act: A Legal Deception

By

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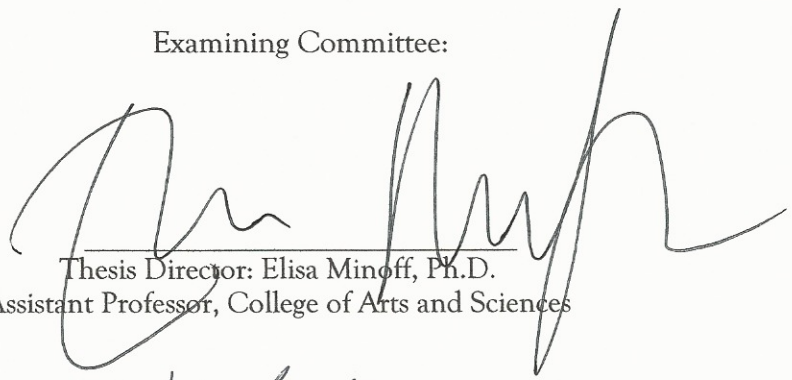

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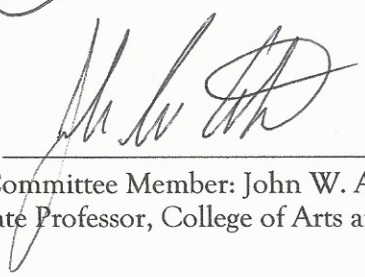

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I. Introduction

The election of President Andrew Jackson in 1828 signaled a new era for the early United States. For many Americans, it would be a period of unprecedented democracy in what had typically been a republic reserved for elites.[1] With the advent of the Jackson administration many of his opponents were now struck with apprehension. There was a fear that the United States was "sinking down into despotism, under the disguise of a democratic government."[2] For the Native American tribes of the southern United States, this fear was fully manifest. The tribal sovereignty that they had enjoyed up until this point had suddenly come under threat. Their political survival became uncertain. The governments of the Southern states had become intrepid in dealing with the tribes which they viewed as obstacles to expansion. President Jackson's ascension would instigate a tumultuous time for the tribal nations. Jackson's popularity was partially derived from his unwavering stance in support of rapid Indian Removal.[3] His election was greeted with expectation that a solution to the "Indian Question" would finally be constructed. With the introduction of his Indian Removal Act, of which he was instrumental in its drafting, these expectations were met.[4] The bill itself could not singlehandedly force the tribes to emigrate, however. Indian Removal was instead accomplished through a combination of unlawful state legislation and the act itself. The Indian Removal Act would sour an already strained relationship between the Native American tribes and the United States, as Jackson and his supporters defied federal law to remove the Five Civilized Tribes to west of the Mississippi. With open disregard

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[1] Arthur Schlesinger, *The Age of Jackson*, (Little, Brown and Company, 1945), 47.
[2] Arthur Schlesinger, *The Age of Jackson*, 323.
[3] Daniel W. Howe, *What Hath God Wrought: The Transformation of America*, 1815-1848. (Oxford: Oxford University Press, 2007), 342.
[4] Daniel Howe, *What Hath God Wrought*, 347.

for the law, the forces of Jackson's Democratic Party succeeded in winning a major victory for the white supremacists, populists, and expansionists that made up the core of Jackson's support.

The Indian Removal process was profoundly influenced by President Jackson's own perspective on the tribes. He was well-known for having a favorable opinion towards Indian Removal when he entered office. To him, treatymaking was no longer a valid solution to the issues plaguing the Southern states.[5] Jackson would ensure the plans to relocate the tribes would be carried out if it came from Congress or from executive authority.[6] To push his Indian Removal agenda, Jackson appointed pro-Removal politicians to various governmental boards and organizations.[7] Senator Hugh White and Congressman John Bell drafted the initial Indian Removal Act to fulfill the plans Jackson had espoused.[8] President Jackson often claimed Removal was an act of mercy towards the Indian tribes. According to him, the Indian Removal Act had saved the tribes from life under state rule.[9] In the long history between the Native Americans and the American colonies, several tribes had been nearly eradicated. Jackson believed that the Southern tribes would soon go extinct as well if they remained in the Southern United States.[10] He was aware of the land-hungry whites that threatened the continued existence of the Five Civilized Tribes. The only way to protect the tribes from invading Southerners would be by military force. As he was averse to the idea of shedding the blood of Americans for the sake of defending Indian rights, he continued to promote Indian Removal.

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[5] Michael Morris, "Georgia and the Conversation over Indian Removal," *The Georgia Historical Quarterly* 91, no. 4 (2007): 405.
[6] Michael Morris, "Georgia and the Conversation over Indian Removal," 404.
[7] Ibid., 406.
[8] Ibid., 411.
[9] Pitchlynn, John, and Andrew Jackson, *Andrew Jackson to John Pitchlynn, August 5, 1830,* August 5, 1830.
[10] N. Bruce Duthu, *American Indians and the Law*, (New York: Viking Press, 2008), 9.

The Five Civilized Tribes, as they would come to be known as, were the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Indian tribes that inhabited the Southern United States. Many of these tribes had drawn the ire of the American colonies after siding with the British during the American Revolutionary War.[11] Once the war was over, peace between the United States and the tribes was established in 1777. In the following decades, the tribes would begin to thrive from their progressed agricultural societies. After the Indian Removal Act had evicted these Native Americans from their lands in 1830, they were marched Westward to new Indian territory in present-day Oklahoma. Once situated in their new homes, the tribes came to be subsequently known as the Five Civilized Tribes to Americans both in recognition of their adoption of Western cultural values and as a label to differentiate them from tribes indigenous to the Great Plains region.[12] Their communities were like those of their white neighbors; they practiced agriculture, owned slaves, worshipped the Christian God, and drafted their own constitutions.[13] The tribes acculturated themselves as an attempt to assuage the whites who had made a mission of civilizing the Indians and also to show that, as a people, they were capable of taking care of themselves.[14] They had, for generations, exercised a level of independence from the United States and still observed their own customs. Federal treaties protected the tribes in their rights to their lands and to their self-government. However, the sanctity of these treaties would soon come under question by those Americans who advocated their brisk Removal.

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[11] Stephen Breyer, "The Cherokee Indians and the Supreme Court," *The Georgia Historical Quarterly* 87, no. 3/4 (2003), 409.
[12] Angie Debo, *And Still the Water Runs: The Betrayal of the Five Civilized Tribes*, (Princeton: Princeton University Press, 1940), 5.
[13] Debo, *And Still the Water Runs*, 3.
[14] Sundquist, Matthew L, "WORCESTER V. GEORGIA: A BREAKDOWN IN THE SEPARATION OF POWERS," *American Indian Law Review* 35, no. 1 (2010), 244.

The Southern states that were directly involved in the Indian Removal process were Georgia, Tennessee, Alabama, and Mississippi with the addition of the Florida Territory. White Americans from these states had a larger stake in Indian Removal because of their proximity to these tribes. Indian relocation was sought for a variety of reasons. Racism against nonwhites was one of these reasons. The rise of white nationalism, populism, and expansionism during Jackson's presidency had made the prospect of seizing lands from the Native Americans both desirable and acceptable.[15] Potential moral qualms could be set aside if a white southerner could delude himself with the comforting idea that the Indian was an inferior savage unworthy of his own land. Indeed, many would decry the moral integrity of the tribal societies and their people and paint them as barbarians. Envy and spite also fueled the drive to ruin these nations. As the communities of these tribes had come to resemble those of their white neighbors, they had also made improvements in education and commerce. Missionary schools were commonly available to many Indian children. Success amongst these people was unwelcomed since it both cemented them to their lands and presumably because it also disproved stereotypes of Native Americans being incompetent. Many of the greedier Southern white settlers and looters were ravenous for lands and riches that would become available if the tribes left. Still, others believed that a well-organized and sovereign state in the form of a Native American tribe in such proximity posed a significant threat to national security. They remembered wars fought with the tribes in the past and thought that the new constitutions made by these tribal nations were tantamount to open declarations of rebellion. Removing the tribes westward would mitigate this problem. Others argued for Removal based on their own, imaginary or not, humanitarian concerns. For some, the

[15] Daniel Howe, *What Hath God Wrought*, 423.

wellbeing of the Native Americans could only be ensured by relocating them away from white societies full of racists and expansionists. This explained why those sympathetic to the Indian cause sometimes supported Indian Removal.

One of the more particular justifications for Removal brought up by Georgia state officials was the matter of the Compact of 1802. The compact stipulated a land cession from Georgia to the federal government. The land ceded by this agreement formed the new states of Alabama and Mississippi. In return, the federal government made a vow to eventually gain all remaining Native American lands within the Georgia's boundaries for the state's use.[16] Decades passed without the federal government fully accomplishing this promise. State officials were particularly irate because of this lack of headway into obtaining Cherokee lands. With the election of the pro-Removal President Jackson spurring them on, state officials took initiative in seizing Indian lands they interpreted under the Compact of 1802 as rightfully belonging to Georgia. The state legislature began drafting laws which placed the Cherokee tribe under Georgia's jurisdiction. Despite this move being unprecedented in the state's history with the tribes, Georgia's leadership proceeded with the plan. Cherokees were distraught by Georgia's confidence in being able to achieve its goal regardless of its illegality. Plans of state enacted Removal had been unfeasible before Jackson's presidency. Federally recognized treaties had acknowledged that these Native American nations owned an unquestioned right to their lands. The tribes had made land cessions to the states in return for monetary compensation in the past

[16] Robert S, Davis, "State v. George Tassel: States' Rights and the Cherokee Court Cases, 1827-1830," *Journal of Southern Legal History* 12, no. 1/2 (2004), 41.

but they would not part with the entirety of their lands. This idea of the tribes maintaining a relatively separate political existence rapidly faded away in the 1820s.

The Creek tribe was the first of these tribes to fall prey to the ambition of the Southern states. The nation was forced to cede its lands by the Treaty of Indian Springs made on February 12, 1825.[17] The treaty was fraudulently made by the governor of Georgia, George Troup, with the assistance of his cousin, William McIntosh, who coincidentally happened to be a chief of the Creek Nation. President John Quincy Adams initially ratified the treaty but suspended the treaty soon after. The go-ahead had already been given, however, and Governor Troup proceeded to forcibly remove the Creeks from their lands over the course of a few years. The tribesmen of the Creek Nation were understandably outraged at this treaty which was done in secret. Chief McIntosh's agreement to the treaty would later result in the execution of him and his followers at the hands of the Creek Council for the crime of treason. The debacle had made the remaining four nations of the Five Civilized Tribes cautious in their dealings with the states and protective of their lands.

The wariness of the remaining tribes would prove well founded as the Southern states began claiming their dominion over the tribes at the turn of 1830s. Legislation was passed to invalidate tribal protections and tribesmen were expected to submit to laws which made them second-class citizens. The separate political existence of the tribes was being ignored by states which had become impatient for Indian Removal. Amidst this controversy, President Jackson

[17] Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln,* (New York: W.W. Norton & Company, 2005) 262.

made moves to initiate his Indian Removal plan. A bill was drafted and submitted to the United States Senate. There, a heated battle would determine the fate of the Five Civilized Tribes.

II. The Passage of the Indian Removal Act in Congress

"The Indian here makes his last appeal. All other sources of protection have failed. It remains with us whether he shall return in joy and hope, or in sorrow and despair. Will we listen to his appeal? If we do not, then is their sun about to set, it may be in blood and in tears. Then, indeed, will all human means have failed, and they must be abandoned -- abandoned, O God! to thy sovereign mercy."[18] Representative George Evans' speech before the House of Representatives would be prophetic of the ensuing calamities that faced the Five Civilized Tribes, the most infamous of these tragedies being the Trail of Tears. Evans, a congressman from the Northern state of Maine, which was overwhelmingly against Jackson during the election, was appalled by the Indian Removal Act. He deeply feared for the survival of the tribes. When Jackson's Indian Removal Bill was submitted to Congress, the men of the national legislature held the fate of these people in their hands. It was right of Representative Evans to be anxious. With President Jackson and Congress in support of the act, little existed to shield the tribes from the upcoming tribulations.

The Indian Removal Act was a partisan loyalty issue in Congress. Politicians were expected to vote for the bill with their party and the interests of their voter base in mind.[19] These two things were usually synonymous, however. Those elected in the overwhelmingly

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[18] Representative Evans, speaking on S. 102, on May 18, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 1049.
[19] Daniel W. Howe, *What Hath God Wrought: The Transformation of America, 1815-1848*. (Oxford: Oxford University Press, 2007), 352.

Democratic Southern states typically voted for the bill. To a lesser extent, those elected in the Northern states, where the National Republican Party was more popular, were more likely to vote against the bill. Though the political interests of the North and South differed, President Jackson had been immensely popular during the election. Maine, New York, and Maryland had a portion of their electoral votes counted towards Andrew Jackson.[20] He had won the vote of most states minus New Hampshire, Massachusetts, Rhode Island, Connecticut, Vermont, New Jersey, and Delaware. The North and South divide was coupled with a divide between those who believed the state governments supreme and those who held the federal government to be the supreme. The Indian Removal Act empowered the Southern states to claim tribal lands which had traditionally been federally protected. As dedicated states' rights advocates, Democrats supported the bill on this ground as well. Coinciding with this North and South antagonism were issues of race with prejudice against the Native Americans being at the forefront and slavery having a profound effect, though it was not as directly addressed. Though the Five Civilized Tribes had become so like their Southern neighbors that they too practiced chattel slavery, Southerners had still taken issue with them for occasionally granting refuge to runaway slaves.[21] Additionally, the lands belonging to the tribes were desired for their potential as cotton plantations which would expand the slave industry. Native Americans were more generally resented for being nonwhite. Those sympathetic to the slaves out of religious and humanitarian beliefs were likewise generally opposed to Indian Removal and were more likely to see a common humanness with the tribesmen. Abolitionist sentiment was strongest in the North where

[20] "Counting of Electoral Votes,"20th Cong., 2nd sess. *Register of Debates in Congress*, 350.
[21] Daniel W. Howe, *What Hath God Wrought,* 342.

slavery was not as prevalent and lucrative as it was in the South. None of these generalizations were universally true, however. The Indian Removal Act was so large of a controversy that even Southern and Democratic politicians would boldly vote against it. The direness of the Indian's situation elicited sympathy. Jacksonian representatives from districts with high concentrations of religious folk, for example, were more inclined to vote against the bill to fulfill the wishes of their constituents. In the final vote of the House of Representatives, twenty-four Jacksonian representatives would vote against the bill and twelve would abstain.

The Indian Removal Act was introduced just as conspicuously as any other bill would have been. It was not known by the moniker of "Indian Removal Act." It was more complicatedly referred to as "a bill to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their Removal West of the Mississippi." Senator Hugh White, who was a member of the Senate's Committee on Indian Affairs, reported on a proposed bill which would later come to be known as the Indian Removal Act.[22] The bill detailed a plan which would exchange lands west of the Mississippi for the entirety of the lands currently inhabited by the Five Civilized Tribes. Section One of the bill granted the President the power to create districts west of the Mississippi to which the Native Americans could choose to move to. On the surface, this made the bill appear voluntary. The circumstances surrounding the bill made sure this was not the case. Section Two of the document allowed the President to exchange lands with tribes (of which the United States had established treaties) existing within the territories of states. This section made the bill applicable to the Five Civilized Tribes which were technically

[22] S. 102, 21st Cong. (1830).

surrounded by states and had agreed to many treaties with the United States. Section Three provided a guaranty that if tribes and tribesmen made the exchange, their new lands located in present-day Oklahoma would forever belong to their people. The exception to this rule was that should "the Indians become extinct, or abandon the same" the land would return to the possession of the United States. This dissuaded the emigrants from leaving since. In addition to providing for a potential scenario in which the indigenous people of North America would die out, it ensured the United States would retake their lands after they did go extinct. The President was granted the power to give "aid and assistance" "as may be necessary and proper" and to protect the relocated tribes "against all interruption and disturbance" from whomever it should come from by Sections Five and Six of the bill respectively. Of course, these protections would have to rely on the goodwill of a President who was adamant on the rapid Removal of the Indians and lax in his enforcement of the existing rights the tribes had. Section Seven placed the Indians who removed forever under the "superintendence" of the President. This suggests that Jackson wished to have a greater legitimized degree of control over these people. The tribes would now have to answer to the president. Section Four of the initial draft allowed Indians to be compensated for the improvements they made to their lands, which usually referred to infrastructure such as homes, farms, mines, and the like. As Removal came into effect, this compensation was usually paltry and often property would be violently seized from the tribesmen under the prerogative of the state or simply by a common criminal. Section Eight outlined a cash sum to be utilized in the enactment of the bill's policies; the amount which would be put towards Removal would be decided later by Congress.

The very same Senator White submitted a report from the Senate Committee on Indian Affairs which served as an overview of the Indian Removal Act and of the Five Civilized Tribes. It was designed to educate Senators who were perhaps not as familiar or invested in the history of these tribes or the issues facing them at the present. Of course, it should be noted that Senator White represented Tennessee, a Southern state which bordered Cherokee territory, and was proud a Jacksonian Democrat. It was this man that was the chief author of this first impression for the Senate. The report was crafted to bolster Jackson's plan. In support of the state of Georgia's supposed authority over the Cherokees, the report dismissed the Cherokee Nation's right to form its own civil society. The committee claimed that "the Cherokees cannot be recognized as a separate state."[23] Already, tribal sovereignty was being denied in Congress. The report gave the Senate the impression that by the Compact of 1802, tribal members living throughout the states of Georgia and North Carolina were violating the partition of land. The current situation, as White described it, was that the states had decided to exercise their laws and jurisdiction over the tribe and that President Jackson affirmed that he had no power as president to intervene. It was after this explanation that White brought attention to what he called "the only remedy suggested by any." This "remedy" was, in fact, the Removal of the Native Americans to "a country West of the Mississippi."[24] To put the bill in the best light, the report explained that supposedly "one third to one half of the whole" of the Cherokee had already migrated to a suitable plot west of the Mississippi as if to say the rest of the population would not be so hard to

[23] U.S. Congress, Senate, Committee on Indian Affairs, (to Accompany S. 102), 21st Cong., 1st sess., 1830, S. Doc. 61, 92.
[24] U.S. Congress, Senate, Committee on Indian Affairs, (to Accompany S. 102), 21st Cong., 1st sess., 1830, S. Doc. 61, 93.

convince into joining them. White also expounded upon the poor and miserable condition of the Cherokee Nation. The Cherokees, as White claimed, were "without industry, without information, unlettered, and subsisting chiefly on what they can beg." This Removal plan would help them, he argued.

Beyond appealing to the sympathy of the Senate, the report dismissed the right of occupancy which the Cherokee Nation claimed. The concept of the right of discovery was introduced in this report to support the idea that the tribes did not own their lands. Essentially, the right of discovery as used in this context referred to the principle that whoever should discover land would become the owner of said land. The committee stated that "when the country was discovered, they were savages."[25] Because of their status as barbarians, "it conferred upon the nation of discoverer and settler, the right to acquire the usufructuary interest which the natives had." European explorers who had first encountered the indigenous peoples of the American continents during the Age of Exploration had a rightful claim to their land under this assumption. The European Empires which sponsored these early explorers gained possession of tribal lands because of the self-serving idea that as a more civilized and advanced entity, it deserved these lands. This concept would be extensively evaluated in the debates. Senator White gave more proof to the Senate that the Indians did not own their lands. The Cherokees had purportedly already signed away their independence in their treaties with Great Britain since they had become a protectorate to the more powerful empire. The Committee on Indian Affairs made the further connection that the United States had inherited the role of protector from Great

[25] U.S. Congress, Senate, Committee on Indian Affairs, (to Accompany S. 102), 21st Cong., 1st sess., 1830, S. Doc. 61, 94.

Britain after the Revolutionary War and apparently retained the same land rights to these tribal lands. Regarding the claims made by the supporters of tribal sovereignty that the several treaties made between the United States and the tribes were a recognition of their sovereignty, the committee suggested instead that the land cessions made in these treaties were proof of the tribe's capitulation to the United States.[26] Senator White declared that there was no alternative to the Indian Removal Act. The United States owed compensation to the Cherokee in the Indian Removal fiasco and arguments made by those who stated otherwise "could not, in the opinion of the Committee, take anything from that character for integrity and good faith to which they are so justly entitled."[27] However, if the Cherokee did decide to remain in their territory "the consequences which must inevitably ensue, are such as the humane and benevolent cannot reflect upon without feelings of the deepest sorrow and distress." The only path for the survival of the Native American nations was to empower Congress and the president to be able to send them elsewhere. Indian Removal provided an option to President Jackson that did not require him to use his executive authority to intervene between the states and the tribes. White's claim that Removal was the only option available to them dodged the issue of Jackson's obstinacy in performing the role prescribed to him by federal treaties.

Numerous amendments were proposed for the newly drafted bill. Some were intended to solely benefit the United States. Representative Jonas Earll, a Jacksonian representing New York, proposed an amendment which barred the United States from paying for any of the

[26] U.S. Congress, Senate, Committee on Indian Affairs, (to Accompany S. 102), 21st Cong., 1st sess., 1830, S. Doc. 61, 95.
[27] U.S. Congress, Senate, Committee on Indian Affairs, (to Accompany S. 102), 21st Cong., 1st sess., 1830, S. Doc. 61, 97.

expenses that would result from the "extinguishing of titles, or paying for the improvements of the lands, or of the Removal, or of the first year's residence of the Indians." Other amendments were pushed forth to aid the tribes. Senator Theodore Frelinghuysen, who was a National Republican and a prominent anti-Removal speaker in the congressional debates, feared that the bill would enable the President to organize a forced mass exodus of Native Americans. Frelinghuysen proposed two new sections to be included in the bill. The hypothetical Section Nine held that "until the said tribes or nations shall choose to remove" that they would be protected in their possessions and land rights without interruption. Section Ten made it so that prior to Removal or any land exchange, "the rights of any such tribes or nations in the premises, shall be stipulated for, secured, and guarantied, by treaty or treaties, as heretofore made." What Frelinghuysen was attempting to accomplish was to ensure that Removal would be a voluntary process. The amendment was a safeguard to protect the tribes from exploitative state legislatures.

After the introduction of the bill was out of the way, the debates in Congress began in earnest in the Senate. The pro-Removal camp had the support of the Southern states as well as the president. Democrats outnumbered their opponents in both houses of Congress. The Senate Committee on Indian Affairs, being supposed experts of the Indian situation, had wholeheartedly endorsed the Indian Removal Act. It looked as if everything was stacked in the favor of the Indian Removal Act. Though the issue would largely be decided by party, some senators felt it necessary to explain their positions and to attempt to justify the Indian Removal Act as White did. One of the obstacles facing the proponents of the bill was the sovereignty claimed by the Native American tribes. Indian sovereignty needed to be delegitimized, otherwise the Indian Removal Act would be considered a violation of this sovereignty. This was one issue which the

initial report had quickly addressed, but was expanded upon in the following debates. Senator John Forsyth was eminent amongst those in the pro-Removal group. Forsyth had served previous terms in Congress, both in the House of Representatives and in the Senate. More notably, he was the governor of Georgia from 1827 to 1829. During this period, he was one of the state's key engineers of Indian Removal. As such he was greatly in favor of the bill. During the debates, many supporters of Removal, including Forsyth, attacked the treaties which their anti-Removal opponents relied upon to make their case. Doing so was an attempt to undermine the history of legal tradition that their opposition held against them. To counter those who would have argued that the treaties made with the tribes were proof of their sovereignty, he insisted that treaties were not universally made between independent nations and therefore were not sufficient proof that the tribes were independent.[28] Forsyth referenced the Treaty of Galphinton of November 12, 1785, interpreting the document as placing tribes within Georgia's boundaries as belonging to its political jurisdiction. The treaty was made between warriors of the Creek Nation and Georgia. As part of the treaty, the Creek Nation was to return slaves, horses, and other property to the state. The first article of the treaty went as far as to state that all Indians existing in Georgia belonged to the state. Forsyth also referred to the Treaty of Dewitt's Corner made on May 16, 1777. This treaty brokered peace between the Cherokee Nation and South Carolina after a conflict between the Indians and state militias. The same treaty required the tribe to cede a portion of its lands to the state, which further implied an unequal relationship.[29] This treaty was apparently evidence

[28] Senator Forsyth, speaking on S. 102, on April 15, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 326.
[29] Senator Forsyth, speaking on S. 102, on April 15, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 326.

that the Cherokees acknowledged South Carolina as a conqueror. To top off all the supposed treaties of conquest Forsyth pointed to, he at last made mention of the Treaty of Hopewell, which he too believed was an implicit agreement between a conqueror and the conquered. The Treaty of Hopewell was made between the Cherokee Nation and the federal government to both establish peace between the two entities and place the tribe under the protection of the United States. As per the ninth article of the treaty, the federal government held legislative power over the tribe in managing their affairs. Forsyth took this as meaning total dominance. In a further attempt to justify Georgia's recent attempts to legislate against the Indian tribes, he argued that by the Compact of 1802, Congress somehow ceded its exclusive rights to regulate Indian affairs to Georgia. By his logic, Georgia had an irrefutable right to enact its policies on the tribes. Forsyth's many radical claims would be refuted as the debates went on in Congress. He had to reason how treaties, which had been used to prove some recognition of tribal sovereignty, were indicative that tribal sovereignty did not exist. Senator Robert Huntington Adams from Mississippi, a fellow Democrat, also defended the Indian Removal Act in his speech made on April 20, 1830. The purpose of the bill, as he laid out, was to simply enable the President to be able to exchange land West of the Mississippi for the lands of the Indian tribes of the southern United States. Of course, his political opponents in the Senate already knew of the states' attacks on these communities. Adams insisted there was no potential danger in such a bill since it only empowered the President to make an exchange with those "who are willing to make it."[30] He found no contradiction between the Compact of 1802 and the current Indian Removal bill since

[30] Senator Adams, speaking on S. 102, on April 20, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 359.

both maintained the voluntary element of the land exchange.[31] The amendment proposed by Frelinghuysen would be pointless since an additional a guaranty of protection would be redundant given that past treaties had already established this protection.[32] Adams portrayed the Indian Removal Act as an innocuous bill for voluntary land exchange and nothing else. His was an attempt to ease the fears of those who might have thought that the bill was bending the law. He defended those supporting the bill, assuring the opposition that neither were they advocating forced emigration of the Indians nor were they intentionally besmirching the honor of their great country. Forsyth and Adams wanted the same thing, of course. Adams' distaste for Frelinghuysen's extra protective measures was most likely because he understood these amendments would have hindered the efficacy of the bill in removing the tribes.

The staunch Jacksonians of the Senate were not weighed down by only resorting to legal justifications. Senator Forsyth took to making attacks on the character of those who were against Removal. He was extremely hostile to Senator Frelinghuysen. He mocked him, stating that his expectation that Georgia would back down was unrealistic and his attempt at persuading the executive branch fruitless.[33] He also went as far as to say that Frelinghuysen advocated the killing of white men in pursuit of his goals due to previous remarks he had made in his speech. To diminish Frelinghuysen further, Forsyth boldly claimed that no convincing could be done to change the minds of the administration and of the American public that the Indians were not in a "deplorable" condition. Congress had been receiving petitions made by advocates of Indian

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[31] Senator Adams, speaking on S. 102, on April 20, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 360.
[32] Senator Sprague, speaking on S. 102, on April 20, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 361.
[33] Senator Forsyth, speaking on S. 102, on April 15, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 325.

rights scattered throughout country. Forsyth claimed these petitioners could not dissuade "the people" from their vision of the archetypal Indian. He went to great lengths to vilify Frelinghuysen and the petitioners which had spoken out at against the Indian Removal Bill as delusional religious fanatics who wished to call down "the thunders of Divine wrath" against Georgia. Not only were the Native Americans themselves "deplorable" but their laws were repugnant and backwards.[34] To Forsyth, the punishments for criminal acts were, case by case, either too severe or too lenient. Forsyth used slander to delegitimize the position of the ant-Removal members of Congress. The hostility of those in Jackson's camp towards those who opposed them was quite apparent.

The approach taken by the opponents of the Indian Removal Act relied on interpreting existing federal law as granting protections and rights to the tribes. They had federally recognized treaties to refer to and could build a much more reasonable case on these sources since they had dictated relations between the Five Civilized Tribes and the United States government for years. On April 9, 1830, Senator Theodore Frelinghuysen, explained the purposes of his amendments before the Senate. Frelinghuysen was a highly religious man from New Jersey and was characteristically against Jackson and his bill. According to Frelinghuysen, his amendments were intended to continue the "public duties, in relation to the Indian nations" and to establish a plan for "future negotiations, by the mode of treaties" as was the norm in Indian policies.[35] He argued that though the bill put on a harmless façade, its true purpose was

[34] Senator Forsyth, speaking on S. 102, on April 15, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 339.
[35] Senator Frelinghuysen, speaking on S. 102, on April 9, 1830, 21st Cong., 1st sess., Register of Debates in Congress 309.

push upon the Native Americans a terrible choice between Removal or life under state laws. His claim would invariably be true. He called upon the Senate to recognize that President George Washington had made a mission of honoring the boundaries between the states and the territories belonging to the Native Americans and to protect them. He made a guaranty to protect the Creek tribe in his address to the Senate on August 22, 1789. He also wrote to the Senate on August 11, 1790 stating that in addition to honoring the commitment the United States had made in protecting the Creek tribe's rights to its remaining lands, "the treaties which have been entered into with the other tribes in that quarter, must be faithfully performed on our part." Congress had condemned the actions of trespassers into Indian territories and demanded their Removal back in 1788. Frelinghuysen questioned why the men of Congress were disregarding the policies of their predecessors. Washington's plan on putting the Treaty of Hopewell into effect made it so that the treaty would remain valid unless the Cherokees made land cessions to accommodate the new intruders on their lands. If they did cede lands, which they had done in several treaties up until 1819, they would be compensated and the remaining lands under their possession would be guaranteed to them. It was not as the Committee on Indian Affairs had assumed that the tribes had somehow relinquished their land rights and sovereignty when they made land cessions. The very idea of a land cession implied that the United States did not own the lands which they bought from the tribes.

Frelinghuysen attempted to make it clear to the Senate that President Jackson should not, for the preservation of the government, be able to singlehandedly nullify the commitments the United States had made with the Indians. With disregard for the advice and counsel of other branches of the federal government, Jackson's bill, which redefined years of Indian treaties, was

hastily pushed through the ratification process. The senator found the whole ordeal to be an especially cruel betrayal to the tribes which had previously looked to the United States as their "political father." These same tribes were now to fend for themselves against the encroaching threat of the neighboring states. Frelinghuysen made a point of demonstrating the true intent behind the Indian Removal Act and how it would be performed. Frelinghuysen made an example out of instructions from the United States Department of War given to Generals Carroll and Coffee. These instructions provided insight into the scheming tactics behind Indian emigration. The document stated that "there is no doubt, however, but the mass of people would be glad to emigrate" and the only people standing in their way were the "chiefs and other interested and influential men." The plan of turning these chiefs to the cause of Indian Removal, as outlined in the instructions, was to approach them individually as they would less likely be persuaded while in a general council.[36] It was an underhanded methodology which relied on fear tactics and bribery, as Frelinghuysen warned. Indeed, Frelinghuysen was correct, as the Creek tribe had fallen prey to such tactics before with the Treaty of Indian Springs. The tribe was already being forcibly removed from its lands in Georgia as the treaty bound it to do. The remaining tribes would suffer similar trickery from state and federal agents.

Frelinghuysen maintained that the Indians had a preeminent right to their lands, a right that preceded that of the British crown colonies. Nothing had been enacted to the effect of delegitimizing the Indians in their land rights which they had enjoyed since time immemorial. He addressed the justifications which his adversaries used to rationalize the crimes committed

[36] Senator Frelinghuysen, speaking on S. 102, on April 9, 1830, 21st Cong., 1st sess., Register of Debates in Congress 311.

against the Indian tribes, justifications which he called a "system of artificial reasoning." Any laws and principles which might have enabled Europeans to claim Indian lands in the past were entirely self-invented and for self-gain with no input from the natives they affected. Admittedly, his reasoning was more coherent than Senator White's convenient, arbitrary excuse-making. Frelinghuysen insisted that if the United States desired Indian lands, an exchange would have to be done voluntarily and with compensation as their treaties dictated. He argued that nonwhites deserved the same justice afforded to whites. He rightly insinuated that racial prejudice played at least some role in the Jacksonian dismissal of Indian rights. Historically, these rights had been observed. The Cherokees only received protection as per their treaties, and did not surrender their land rights. Land titles of the natives had been recognized from the first interaction between European explorers and Indians and the right of discovery had not been brought up then. Furthermore, the British did not lay claim to lands owned by the Native Americans. Their policy was to let tribesmen enjoy their remaining lands not purchased by the crown.[37] Frelinghuysen extrapolated that the same policy applied in the United States' relationship with the tribes much as Senator White had claimed. Though in Frelinghuysen's model of history, the tribes maintained sovereignty. Since 1775, the Committee on Indian Affairs had approached tribes as independent nations and conducted diplomacy to maintain friendship. He highlighted that Congress had made a commitment to foster religion, morality, and knowledge within the Indian tribes and to secure them in their lands.[38] Despite the danger posed by the Indian Removal Act,

[37] Senator Frelinghuysen, speaking on S. 102, on April 9, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 313.
[38] Senator Frelinghuysen, speaking on S. 102, on April 9, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 316.

he expressed confidence that the people of the United States would never allow the bill to pass. He exclaimed in a romantically grandiose tone that the people will say "our word has been given, and we should live and die by our word." The claim that "the Removal of the Indian tribes to the west of the Mississippi is demanded by the dictates of humanity" was no more than a sham to Frelinghuysen.[39] This assertion only came from whites who wanted to claim their tribal lands for themselves. The same individuals also claimed that Indians could not coexist with whites, an assumption that Frelinghuysen detested. The natives were open and cordial to the whites. The real issue was that the white Jacksonians were not open to the natives.

In Senator Peleg Sprague's speech before the Senate on April 17, 1830, he addressed the claims of the proponents of the bill directly. Sprague was a fellow National Republican from Maine. The issue he had taken with Forsyth's use of the Treaty of Dewitt's Corner was that the land cession described by it had already been fulfilled.[40] The treaty had no bearing on the remaining lands of the Cherokee Nation and whatever imaginary claim Georgia might have had to them. He argued that the Treaty of Hopewell and the Compact of 1802 also could not have been reasonably construed as transferring the regulatory powers of Congress to Georgia as Forsyth had claimed. Sprague clarified that this power was, in the first place, "strictly personal and fiduciary" and only exercised for the benefit of the Indians as well as on the good judgment of Congress. The Treaty of Holston made in 1791, of which Forsyth ignored, stated that "the

[39] Senator Frelinghuysen, speaking on S. 102, on April 9, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 318.
[40] Senator Sprague, speaking on S. 102, on April 17, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 344.

United States solemnly guarantee to the Cherokee all their lands not here ceded."[41] The Compact of 1802 only reaffirmed the legitimate land titles the Indians possessed and provided that if the United States desired to acquire these titles they would have to do so "peaceably" and on "reasonable terms." Georgia had accepted the Treaty of Holston as law when they ratified the Constitution.[42] The state had no right to ignore treaties made between the United States and the tribes just because they found them inconvenient.

Senator Asher Robbins, also in the Anti-Jacksonian camp had taken to the Senate floor to analyze the competency of the Indian tribes in making treaties with the United States. In his speech made on April 21, 1830 he explained how the British Empire laid claim to the lands inhabited by the Indian tribes as part of its right of discovery and that this right was subsequently passed on to the United States. The tribes existing within the jurisdiction of the country were, however, "exempt from that jurisdiction, and subject only to their own."[43] According to Robbins, the British never laid claim to the tribesmen as royal subjects. Likewise, the Indians were never considered part of population of the states, demonstrated by their absence in state censuses. Their "savage" status, which Senator White's report placed undue emphasis on, was irrelevant in determining the Indian right to their lands. With their original right proven, he rejected claims circulating at the time that the Indians forfeited their tribal rights by adopting a constitution. Their decision to change their form of government had not nullified their rights as they had the

[41] Senator Sprague, speaking on S. 102, on April 17, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 345.
[42] Senator Sprague, speaking on S. 102, on April 17, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 346.
[43] Senator Robbins, speaking on S. 102, on April 21, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 376.

solemn right to form such a government. Though he was sure of righteousness of their cause, Robbins expressed much less confidence than Frelinghuysen did on the future of the Five Civilized Tribes. The bill's proponents would simply not recognize the rights of the Native Americans. Though he believed the Indian tribes were sovereign and had always been, Georgia would have its way. Unfortunately, his lack of faith was predictive of the outcome of the debates.

On April 24, 1830, after two months, the Indian Removal Bill was passed in the Senate by a vote of 28 to 19. It seemed that the speeches of the anti-Jacksonians were not enough to persuade others to cross party lines. Senator Sprague's proviso to protect the Indian tribes in the possession of their lands until they should choose to remove was dropped.[44] Likewise, Senator Frelinghuysen's proviso which made it so that the act itself did not negate any previous commitments established by agreements with the tribes was also dropped. Frelinghuysen's second provision to create a party of three people chosen by the President to survey the lands of the Indian tribes and report on the arability of the land and, more importantly, on the inclination of the Native Americans on Removal was denied. The provisions that were accepted ensured the Removal process would be irreversible. Senator McKinley's proviso that improvements to the land paid for by the United States "shall not afterwards be permitted to any of the same tribe" was adopted. Senator Forsyth's provision in extinguishing Indian land claims to lands owned by the United States also passed. Senator White amended Section Eight of the bill, specifying the amount to be granted in enforcing the act would be $500,000. The valiant attempts of Frelinghuysen, Sprague, and other members of the nineteen who voted against the bill in

[44] "Proceedings April 24, 1830," *Register of Debates in Congress*, Senate, 21st Cong., 1st sess., 383.

impeding its progress and persuading others to see its injustice ultimately failed within the Senate. Already, the situation for the Five Civilized Tribes seemed dire as the Senate, though divided, had passed a bill which would endanger their survival. The Indian Removal Bill was then submitted to the House of Representatives for its approval.

The situation within the House of Representatives was more complex than in the Senate. Besides being an overall closer battle between the political actors, more Democrats decided to vote against their president out of either moral or political concerns. Nevertheless, the same arguments used in the Senate would be echoed within the House. In the House of Representatives, those who were in favor of the bill were significantly less vocal (scarcely had they taken to the floor to argue in favor of the Indian Removal Act.) Congressman Wilson Lumpkin from Georgia was one such Democrat who presented the case of the bill before the House. On May 17, 1830, Representative Lumpkin spoke in favor of the Bill, coloring it as a moral issue like the Senate Committee on Indian Affairs had. He envisioned the act as the last saving grace for the Indians and that if they would remain where they were they would surely be eradicated.[45] Georgia would destroy the tribe's political community and threaten the lives of its people. He pretentiously expressed that he had an "ardent desire to better the condition of these remnant tribes."[46] The Cherokees had wanted to emigrate as they had been begun leaving in the early 1800's. He believed that the Chickasaw, Choctaw, and Seminole were all eager to leave

[45] Representative Lumpkin, speaking on S. 102, on May 17, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 1016.
[46] Representative Lumpkin, speaking on S. 102, on May 17, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 1017.

their lands to move West and join the Creek Indians who had already removed.[47] He made attacks against the moral character of the statesmen of the Cherokee Nation, insinuating that they were thriving at the expense of their own downtrodden people.[48] Since in his vision, it would be the optimal outcome for the natives, he demanded that the opponents of the bill give up and grant these tribes a permanent home.[49] The earnestness of Lumpkin's concerns was doubted by another congressman. A Mr. Ellsworth of the house, promptly responded to Lumpkin's speech sharing his doubt that the plan would be carried out in "good faith."[50] Lumpkin's overly paternalistic and pretentious rhetoric fell flat.

Those who were against the Indian Removal Act were much larger in number in the House of Representatives. Their platform dominated the debates during the short time they had to decide on the Indian Removal Act. The Jacksonians did not speak in defense of their act, no doubt since the bill would ultimately be decided by their superior numbers, as it was in the Senate. Representative Storrs, an anti-Jacksonian, spoke against the bill on May 15,1830, stating that if he had honestly believed that the purpose of the bill was only to provide land west of the Mississippi for the Indians to emigrate if they so choose to, he would have given his full support to the bill.[51] Extenuating circumstances however, had led the congressman to believe that the act was intended to aid states of the South in taking away tribal lands. He drew an unflattering

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[47] Representative Lumpkin, speaking on S. 102, on May 17, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 1018.
[48] Representative Lumpkin, speaking on S. 102, on May 17, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 1022.
[49] Representative Lumpkin, speaking on S. 102, on May 17, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 1026.
[50] Representative Ellsworth, speaking on S. 102, on May 17, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 1026.
[51] Representative Storrs, speaking on S. 102, on May 15, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 994.

comparison between the Indian Removal Act and the articles of Indian Springs made in 1825 which forced the Creek tribe to cede its lands.[52] The aftermath of the treaty was explained before the House of Representatives. The events of Chief McIntosh's grisly execution for his betrayal and the forceful coercion the Creeks were put through were to give up their remaining lands. This debacle had made the other tribes wary in further negotiations with the United States of which he informed his fellow congressmen. Similar events were bound to occur because of the Indian Removal Act and because of the conduct of the states. Storrs feared the threat of Jacksonian despotism over American politics exclaiming that "the President has assumed the power to dispose to dispose of the whole question, and the message proposes to us little more than to register this executive decree."[53] His claim would gain new credence when Indian Removal progressed after the Supreme Court had decried it. His inaction was largely to blame for the current circumstances the tribes found themselves in. White trespassers had recklessly begun invading upon Cherokee lands, spurred on by the "laxity of opinion prevailing in regard to Indian rights." Cherokee lives were being lost because of the more violent rogues. The terms of the treaties protecting the Indians were absolute and the president violated these terms.[54] Jackson was attempting to stretch his executive power and should he have succeeded, he would have been capable of annulling all treaties the country entered into. Storrs appealed to his colleagues

[52] Representative Storrs, speaking on S. 102, on May 15, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 995.
[53] Representative Storrs, speaking on S. 102, on May 15, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 997.
[54] Representative Storrs, speaking on S. 102, on May 15, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 999.

to uphold the commitments of their country as well as their honor.[55] His appeal fell on the deaf ears of the Jacksonian congressmen.

Representative Evans made his speech on May 18, 1830. In this speech, he insisted that the United States had made a commitment with the Southern tribes to respect their "rights of soil and jurisdiction."[56] He argued that the United States had not attempted to drive the tribes from their lands in the past and that there had been no intent in their treaties to deceive the Indians.[57] This was a claim which went against the claim of Jacksonians like Forsyth that strangely implied that treaties were no more than proofs of conquest. Once again, the true purpose of the Indian Removal Act was alluded to. Evans claimed that no one in Congress would surely oppose the voluntary emigration of these tribes. Those against the bill were only against coerced Removal. He explained that "though this bill professes in itself nothing hostile, yet, if its effect will be to leave the Indians in circumstances where they can make but one choice."[58] The choice to them was either to flee their homelands or to suffer degradation under the laws of Georgia. The bill was not merciful to the Indians, as Lumpkin had alleged.[59] Those Native Americans who had been moved west of the Mississippi were now in worse shape because of it. As an eyewitness account stated, "the condition of many tribes west of the Mississippi is the most pitiable to be imagined." Evans thought the bill would only compound the troubles of the Five Civilized Tribes

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[55] Representative Storrs, speaking on S. 102, on May 15, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 1015.
[56] Representative Evans, speaking on S. 102, on May 18, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 1037.
[57] Representative Evans, speaking on S. 102, on May 18, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 1038.
[58] Representative Evans, speaking on S. 102, on May 18, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 1039.
[59] Representative Evans, speaking on S. 102, on May 18, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 1047.

rather than save them from it. The Indian Removal Act did not represent salvation for the tribes. It instead represented a departure from self-rule as they knew it.

Near the end of the long debate over the Indian Removal Act, on May 19, 1830, Mr. Bates of the House of Representatives attacked Georgia state laws as underhanded tactics meant to force the Indian tribes into negotiations.[60] In his speech, he brought to the attention of the House that Indians were not afforded the rights of white men under Georgia state law. As he explained, one of Georgia's laws made it a criminal offense for a Cherokee "to 'endeavor' to prevent one of his tribe from emigrating."[61] The testimony of Indians or descendants of Indians in a court of law in the State of Georgia was inadmissible. These Georgia laws would also make all laws drafted and enacted by the Cherokee declared null. Bates' claims were true. Rights were not offered to Indians under Georgia state laws. This had made them powerless in fighting the state's claims on their territory from the inside. Georgia legislation made it clear that the only choice available to the Indians was Removal and not assimilation.

On May 24, 1830, the House of Representatives launched into the final stages of its ratification of the Indian Removal Bill. Only seventy-eight members of the house had voiced the approval of the bill in its then present form. Short exchanges between representatives were held over proposed amendments to the bill. Representative Bell voiced his thoughts that the bill required no further guaranty for protecting Indian rights perhaps since it would have foiled his

[60] Representative Bates, speaking on S. 102, on May 19, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 1049.
[61] Representative Bates, speaking on S. 102, on May 19, 1830, 21st Cong., 1st sess., *Register of Debates in Congress* 1050.

goals as a Jackson Democrat.[62] Storrs would argue that the amendment contained a provision nonexistent in any of the treaties and was thus necessary in guaranteeing Indian rights. Proponents of the bill still held fast to their assertion that the Cherokees were legally within the jurisdiction of Georgia, that treaties were not in fact being violated, and that those in opposition were doing so for political party reasons. Much of the House's proceedings echoed that of the Senate's proceedings; Representative Hemphill proposed a similar plan to Senator Frelinghuysen's to send three surveyors into Indian lands to gauge their inclination for emigration.[63] Hemphill argued for more information to be obtained and more time for reflection so that the House of Representatives could make a better decision. His plan was rejected as Frelinghuysen's was in the Senate. On the final vote, the bill had been passed by a relatively thin margin of 102 for the bill and 97 against.

After the bill was approved by the House of Representatives, it was returned to the Senate with its amendments and promptly validated in that house too. President Jackson would sign the Indian Removal Act into law on May 28, 1830. Little of the original bill had changed despite the months of debate and proposed amendments. Section Four was amended to prevent tribes from getting back their lands after the United States had apprised and paid for any improvements made on it.[64] Section Seven's amendment came as a small victory to those who had impeded the bill since it was first introduced in Congress. The new provision was "*Provided*, That nothing in this act contained shall be construed as authorizing or directing the violation of any existing

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[62] "Proceedings May 24, 1830," *Register of Debates in Congress*, House of Representatives, 21st Cong., 1st sess., 1122.
[63] "Proceedings May 24, 1830," *Register of Debates in Congress*, House of Representatives, 21st Cong., 1st sess., 1133.
[64] S. 102, 21st Cong. (1830).

treaty between the United States and any of the Indian tribes." This amendment would fail in protecting the southern tribes from Removal. Section Eight's change specified an appropriation of 500,000 dollars which would be put towards enacting the Indian Removal Act. Thus, the answer to the "Indian Question" was settled in the District of Columbia, by President Jackson and his supporters in Congress. The entire process was far removed from the tribes that would be disastrously affected by the act. The Native Americans, who had no voice within the capital of the United States, would simply have to adhere to the many laws that were now thrust upon them by their white neighbors. Tribal response to the Indian Removal Act was volatile since they understood it as a forced Removal plan. Many would openly resist the enactment of laws which would compel them to leave their homes. Others would use platforms of public discourse to speak out against what they saw as tyrannical encroachments on their rights.

II. The *Cherokee Phoenix* and the Response to the Indian Removal Act

"There are many true friends to the Indians in different parts of the Union, who will rejoice to see this feeble effort of the Cherokees to rise from their ashes, like the fabled phoenix. On such friends must principally depend the support of our paper."[65] The grandeur of the language employed in the prospectus of the *Cherokee Phoenix* downplayed the earnest hope it embodied. The Five Civilized Tribes were largely removed from the political process in Washington but this did not mean they were unaware or taken aback by the Indian Removal Act. They had formulated their own opinions and responses to what they no doubt viewed as a diplomatic travesty. There existed few venues for Native Americans to have their voices heard.

[65] Elias Boudinott, "Prospectus," *Cherokee Phoenix*, February 28, 1828.

Official statements made by the councils could be sent to the capital to attempt to dissuade the federal government from pursuing a policy of Removal. The average tribesmen had no outlet for political discourse. To attempt to represent the voices of unheard Cherokees and to guide these people to civilization, the *Cherokee Phoenix* came into existence. Its editor, Elias Boudinot, intended the paper to "state the feelings of the majority of our people" and exist as proof that "Indians can be reclaimed from a savage state." As a state-sponsored paper, there is little doubt that it expressed the general feelings of the Cherokee leadership. It still came to represent the common man of the tribe.

The *Cherokee Phoenix* was an exceptional development of 1828, being the first Native American operated newspaper to be published. Elias Boudinot, a member of a prominent family of the Cherokee Nation, was approached by the General Council and asked to collect donations to establish a paper in the tribe's capital located in northwestern Georgia, New Echota.[66] After years of searching for white patrons interested in supporting the progress of the Cherokee Nation and the Native Americans more generally, Boudinot had finally published the first issue on Feb 21, 1828. Articles included in the newspaper were both written in English and in Cherokee. The fact that the paper was written in both languages ensured that it would be readable by a larger audience. Cherokees and white sponsors of the paper could obtain the same information. In the *Cherokee Phoenix*'s prospectus, it declared that the paper would generally contain laws and public documents of the Cherokee Nation. Additionally, accounts of the manners, customs, and progress of the Native Americans would also be published. If the information was readily

[66] Theda Perdue, "Rising from the Ashes: The Cherokee Phoenix as an Ethnohistorical Source," *Ethnohistory* 24, no. 3 (1977): 207.

available, the paper would include "miscellaneous articles, calculated to promote Literature, Civilization, and Religion among the Cherokees." For all it wished to accomplish, the paper held lofty ideals for the Cherokee Nation. Despite its noble intentions, the *Cherokee Phoenix* was rudimentary compared to American newspapers. The survival of the publication relied heavily on articles published in American newspapers and articles contributed by local tribesmen. News would typically be published weeks and sometimes months after events had transpired. As a non-profit newspaper, it still relied on monetary contributions from white patrons. The paper would often struggle from the scarcity of donations.[67] The *Cherokee Phoenix* managed to stay afloat throughout its early yearws.

When Boudinot wrote of progress and civilization in the *Cherokee Phoenix,* it was in the same sense that the United States and European civilization had interpreted it. The paper was an instrument of cultural acclimatization which was already a burgeoning trend within the nation. It was not an instrument of full assimilation, however. Full assimilation would imply that the tribes wished to become indistinguishable from their white neighbors. The Cherokee Nation had adopted many of the cultural values of their white neighbors but it still maintained its own traditions. The assimilation of the tribes was only to the extent they deemed beneficial. The *Cherokee Phoenix* was established as a newspaper specifically for the Cherokee Nation to "benefit" the people within the tribe. It disclosed the constitution of the Cherokee Nation to the public both to affirm the tribe as its own sovereign entity with its own set of laws and government as well as to put the constitution in a place that the people of the nation could access

[67] "Constitution of the Cherokee Nation," *Cherokee Phoenix*, February 21, 1828.

it. Though the tribe adopted American cultural values, its tribesmen held no desire in becoming citizens of the United States. Such an action meant to nullify the tribal protections and rights possessed by these people. Under the laws of Georgia, for example, they would be severely disadvantaged compared to a white citizen of Georgia. The progress of the Cherokee people that the publication wished to foster and demonstrate was not to prepare the Nation for statehood or incorporation into the Union. Its celebration of "Literature, Civilization, and Religion" was partially to show their white neighbors that the Cherokee Nation was self-sufficient and civilized. Boudinot hoped that by becoming more like their white neighbors, the Cherokees would ensure their own survival.

The looming threat of Indian Removal was already rooted deeply in the consciousness of the tribesmen years before the Indian Removal Act was ever submitted to Congress. The first issue of the *Cherokee Phoenix* reported on plans for a mass emigration of Native Americans to the West of the Mississippi. Colonel Thomas McKenney, superintendent of Indian Affairs, insisted that the federal government of the United States intervene "as a parent" in the matter of the Native Americans and that the natives would even be grateful for it.[68] The multipart plan proposed by McKenney was that "a suitable (and none other would be offered to them) and last home" would have to found. Next, these people would have to be transported to this location whilst ostensibly "taking them kindly but firmly by the hand and telling they must go and enjoy it." Finally, as part of his grand plan, no outside force would be allowed to interfere. McKenney's plan was a forced Removal plan. Just as bothersome was his statement on the Five

[68] "Indian Emigration," *Cherokee Phoenix*, February 21, 1828.

Civilized Tribes that “they ought not to be encouraged in forming a constitution and government…” Instead, they should have just accepted life under the paternal judgment of the states and the federal government. McKenney was speaking about a conglomerate of people and their wishes as if he known them himself. His condescending plan implied that the Indians could not do what was best for their own good without a figure of authority guiding them. Elias Boudinot wrote a response to McKenney’s letter, understandably irate about its content. He claimed that the colonel erroneously believed that a great number of Cherokee would embark on this emigration to some unknown location. Boudinot expressed that “we are confident that this belief is founded upon no evidence whatever.” As he made clear, “the Cherokee (I think unanimously) are adverse to remove.” McKenney, by his own admission, claimed that he did not personally observe the Cherokee people. The complaint of the editor was that as Colonel McKenney never paid the Cherokee Nation a visit he could not truly know the sentiment of the people. McKenney had taken agency away from the tribes and developed a plan without first consulting them. Worse still was that this plan seemed, by its rhetoric, to imply forced Removal. Boudinot stated that “coercive measures,” if employed, would necessarily work against the benefit of the Cherokee Nation. The tribe had been regulating itself and creating its own laws for decades, so McKenney’s sudden interest came across as peculiar to the editor. More confusing was that he discouraged the civilizing process that former Presidents George Washington and Thomas Jefferson so desired the Native Americans to experience. McKenney’s plan was built upon a regurgitation of several commonly held beliefs amongst Democrats at the time. The myth of the Indians’ willingness to emigrate was a political ploy to ease the concerns of those on the fence. McKenney’s advice against Indian self-improvement was only to make the tribes less

attached to their lands. His entire plan was riddled with strange assumptions that many Native Americans would find insulting. The *Cherokee Phoenix* would soon after encounter many similar reports which Boudinot responded to with similar criticism.

Misinformation was rampant during the Removal process with McKenney's report only being one of many examples. Conspiracy theories were abounding on why the Native Americans were refusing to emigrate despite the supposedly obvious benefit of it. On December 29, 1828, an official report was published in the paper which stated that the Cherokees wished to emigrate but were being halted from doing so by "cunning white, and half breeds, for their own purposes."[69] This idea appalled Boudinot who corrected the claim writing that no one was stopping the Indians from leaving; they simply did not wish to leave. "The fact is," the editor clarified, "every citizen of this Nation is cunning." Despite the tribes being urged to move by public officials, Indian emigration was rare before coercive measures were employed. On January 28, 1829, two families had embarked on their journey west of the Mississippi. As Boudinot explained, these were the only families who had chosen to go he was aware of.[70] On March 18, 1829, Colonel McKenney made another report to the Secretary of War that the chiefs of the Southern Indian tribes were threatening tribesmen willing to emigrate.[71] Boudinot interpreted the report as McKenney once again being taken in by false statements made by those in favor of emigration. The report owed nothing to fact. The chiefs were uninvolved with these nonexistent threats. A year later, on March 10, 1830, Colonel McKenney made a report that

[69] "Cherokees and Georgia," *Cherokee Phoenix*, December 29, 1828.
[70] "Emigrating Families," *Cherokee Phoenix*, January 28, 1829.
[71] "Col. McKenney's Threat," *Cherokee Phoenix*, March 18, 1829.

upwards of 600 Cherokee had emigrated.[72] This surprised Boudinot who had heard of no such mass emigration. Though it was false, it was difficult to disprove claims like these as Cherokees were not competent witnesses in the state Georgia and did not have a platform to speak to the American masses from. Paranoia had taken hold of Southerners in some cases. Fears of an Indian rebellion were rising. On April 7, 1830, A false story was being spread by Southerners that the Creek Nation was preparing for war.[73] This story came at a time when Southern news outlets such as the Columbus Enquirer were advocating war against the tribes.[74] Tensions between the tribes and states were only rising as time went on.

The bickering over the fate of the Native American tribes East of the Mississippi was the Cherokee people. The *Cherokee Phoenix* frequently included articles showing the Cherokees were quite aware and pressured by the constant discussion of Removal that Georgia state officials and federal officials both endorsed. For a publication that had been initially presented as one which covered a variety of topics, there was one constant subject discussed and reported. Stories detailing threats to tribal sovereignty were consistently published. Articles detailing Indian Removal plans, whisperings of Georgia making attempts extending its laws over the tribe, and incidents involving white intruders were consistently included in the newspaper. The prospectus itself disclosed an anxiety of the Cherokee fading into obscurity as many other Native American tribes had in the past.[75] This fear stemmed from plans of "removing and concentrating Indians" that were already well-known by the first issue of the *Cherokee Phoenix*. At first, it

[72] "Cherokee Removal," *Cherokee Phoenix*, March 10, 1830.
[73] "Press Misrepresentions Abouts Indians," *Cherokee Phoenix*, April 7, 1830.
[74] "War Against Indians," *Cherokee Phoenix*, April 7, 1830.
[75] "Prospectus," *Cherokee Phoenix*, February 28, 1828.

appeared that negotiations between the polities were still going strong. On February 29, 1828, a letter was disclosed in the paper detailing a land dispute between the Creek tribe and the state of Georgia being resolved.[76] Notably, Colonel McKenney paid a council of Creek Indians gathered there a sum of $47,491 for lands that supposedly were within the state borders of Georgia. In the same issue, the Choctaw reportedly had their own share of land disputes with Georgia. In an article containing an excerpt from a letter written by Chief David Folsom from the Choctaw tribe, he confidently asserted that "the Choctaw people are determined to hold on to their land."[77] He also boasted of the success of his people in the fields of modernization and education. He acknowledged, however, that many were against them in their mission. These enemies of Native American progress would soon change the chief's pride to grief. On July 9, 1828, a report was published in the paper on a new treaty which was established with a group of Cherokees living West of the Mississippi.[78] The treaty would place them further west in unspoiled territory. The drafter of the treaty expressed the hope that Cherokees remaining within Georgia might soon follow suit and join their brethren westward. This notion was not fondly received by Boudinot. Those living west could test this emigration experiment; those living east of the Mississippi thought it to be a fruitless effort. On August 27, 1828 Colonel Hugh Montgomery, an agent of the United States, was sent to gather Cherokees for emigration despite the protests of Cherokee Nation.[79] Federal officials would come to aid the states in removing their Indian problems. On September 10, 1828, a report from the *Western Carolinian* was released that new land exchange

[76] "Creek Indians," *Cherokee Phoenix*, February 28, 1828.
[77] "Choctaws," *Cherokee Phoenix*, February 28, 1828.
[78] "A Cherokee Treaty," *Cherokee Phoenix*, July 9, 1828.
[79] "Hugh Montgomery," *Cherokee Phoenix*, August 27, 1828.

prices were to be proposed to the General Assembly of the Cherokee Nation.[80] It was assumed that the plan would be accepted. The same issue, however, had an article from the *Pensacola Argus* which detailed that Creek tribesmen who had agreed to move according to an emigration agreement were dissatisfied from it.[81] A regiment was sent to put down Indians and whites within the Creek Nation who were creating an uproar against emigration. Although Removal deals were being negotiated with the tribes, the Creek tribe had already been forced to leave at gunpoint. It was likely that the other nations would be forced to follow suit. Pretenses of cordiality between the tribes and the Union were giving way to animosity. Another report came in that citizens of Montgomery County Alabama had met on August 9 to discuss the topic of Creek lands.[82] Mosely Baker, editor of the *Alabama Journal* made a speech in which he argued that the Indians lacked good judgment, so much so that they could not see how Removal would obviously benefit them. They were "bound down by the iron mask of ignorance and savageness." This talk of Removal would set the stage for things to come. Eventually the overwhelming pro-Removal sentiment of the Southern states would reach its boiling point.

The issue of Indian Removal was reported on more frequently as more information rushed in on what exactly the states were planning to do about their Indian problem. A contributor to the *Cherokee Phoenix* gave his opinion on Removal on September 17, 1828. He saw the fate of the Cherokees who had emigrated to Arkansas in a previous Removal plan befalling those who would emigrate westward.[83] Those Cherokees who had moved to Arkansas

[80] "Cherokee Lands," *Cherokee Phoenix*, September 10, 1828.
[81] "Creek Indians," *Cherokee Phoenix*, September 10, 1828.
[82] "Acquiring Creek Lands in Alabama," *Cherokee Phoenix*, September 10, 1828.
[83] "Arkansas Cherokees," *Cherokee Phoenix*, September 17, 1828.

had little means of supporting themselves besides hunting. The writer feared losing his homeland and the progress of his nation and entreated the United States to uphold and protect the land rights of the tribe. His cries would go unanswered. On November 26, 1828 Georgia's patience with the Indian tribes was quickly growing thin.[84] The Compact of 1802 had gone unfulfilled and this was infuriating for state officials. The agreement bound the United States to obtain, for the use of the state of Georgia, Indian lands. The reluctance of the tribes to consent to land cessions had exasperated the state government. The new constitutional government set up by the Cherokee was branded as an act of rebellion against the United States by these disgruntled statesmen. The solution to this perceived threat was to extend Georgia laws over these Indians and to forcibly incorporate their territory within the state's jurisdiction to extinguish their defiance. Either the Indians would become second-class citizens of Georgia or they would abandon their lands and move elsewhere. In any case, Georgia would victoriously seize these lands. In response Georgia's claim regarding the Compact of 1802, a contributor to the *Cherokee Phoenix* submitted an article on December 10, 1828 which recounted a treaty made with the Cherokees simultaneously with the Compact of 1802.[85] The treaty guaranteed all lands to the Cherokee "not hereby ceded." It also pledged that the Cherokees would be "led to a greater degree of civilization" and that the United States would "furnish gratuitously" to accomplish this. In spite of these high-minded goals, the Committee of Georgia on the State of the Republic on December 5, 1827 suspected that improving the lives of the Cherokee would only attach them more firmly to their lands and advised against this. These Georgia officials insisted that Georgia

[84] "Georgia and the Cherokees," *Cherokee Phoenix*, November 26, 1828.
[85] "Cherokees and Georgia," *Cherokee Phoenix*, December 10, 1828.

needed these lands and would get them. The writer found the actions of these state officials to be contemptible and unlike the Christian civilized demeanor they projected. Another letter from a Cherokee reader of the paper was published on February 4, 1829, with the author expressing surprise that President Jackson was pressuring Congress into accepting an Indian Removal plan.[86] He also confided his sorrow that the general government had betrayed the traditionally friendly relationship it had with the Indian tribes in the past. From the perspective of this Cherokee, the United States had always been desirous of Indian lands, with its pledges of protection only existing to veil this want. Once it had become clear that the Cherokee Nation would not cede further land voluntarily, the general government had changed strategies. On, March 4, 1829, plans were announced to include Cherokee territory into Georgia by the then acting Governor Forsyth. [87] These lands were extended from Georgia's original claim to Creek lands which had been ceded earlier. This resulted from a controversy over where Creek and Cherokee lands intersected. The federal government and the government of the states were both acting to undermine Indian land rights even before the momentous Indian Removal Act was passed.

When the tribes were being faced with the looming Indian Removal Act which was quickly being pushed through Congress, the *Cherokee Phoenix* provided articles to keep readers up to date and informed on how adverse it would be for the tribes. To combat the prevalent belief that the Indian Removal Act was more innocent than it was, the paper set out on a mission of exposing it as the heavy-handed means of dealing with the Five Civilized Tribes that it was. On

[86] "United States and Cherokees," *Cherokee Phoenix*, February 4, 1829.
[87] "Georgia Claims on Cherokee Land," *Cherokee Phoenix*, March 4, 1829.

March 31, 1830, the paper issued a heated response to the report made by the Committee on Indian Affairs.[88] The report was wholly dismissed as a petty justification for Removal. The Cherokee people had made their intention to stay where they were blatant with the Cherokee Constitution. The committee no doubt conjured their information from thin air and had by "political fraud" passed it off as fact. Boudinot found the report's opinion of missionaries living within the Indian territories especially loathsome. He professed the dedication and sacrifice that the missionaries went through to defend and help the Indians which often made them branded as traitors in their own country. Under the new and very real threat of the Indian Removal Act, which had been submitted to the Senate, the future existence of the Five Civilized Tribes became questionable. The tribes were putting up a strong front maintaining that they would not back down and emigrate by compulsion. On April 7, 1830 Chief of the Choctaw Nation, David Folsom once again avowed his unwillingness to relocate to federal officials.[89] He refuted the common misconception of the bill's advocates that whites within tribal lands were influencing the decision-making of the tribes. He expressed regret that the President Jackson had been trusting these false reports made on the tribes. Folsom maintained that the lands they stood on had always belonged to them and that even as white settlers descend upon their nation, they would go nowhere else. No good could come of moving west of the Mississippi away from the country they had improved over generations. With the resolution of the tribes to remain a given, all they could reasonably do was wait for their sentencing from Congress.

[88] "Remarks on the House Committee on Indian Affairs Report," *Cherokee Phoenix*, March 31, 1830.
[89] "Opinions and Feelings of the Choctaws With Regard to Removal," *Cherokee Phoenix*, April 7, 1830.

As the debates in Congress proceeded, the fears of the Cherokees were not easily alleviated. On June 12, 1830, The *Cherokee Phoenix* reported that the House of Representatives had voted in favor of an amendment to the bill that "the faith of treaties with the Indians shall not be violated."[90] The provision was a poor comfort a people which day in and day out witnessed these very treaties being violated by predatory state officials. Boudinot took the opportunity to address the assumption made in Congress that the Indians would go extinct where they were now in the Southern United States. Such an assumption was misguided as, Boudinot explained since the population of the Cherokees was growing swiftly within their territory. On June 19, 1830, Boudinot included an update on the proceedings of Congress.[91] He had received news that the Senate had approved of the bill after it was sent back to them by the House of Representatives. The Indian Removal Act was nearly set to go into effect. Boudinot no doubt already expected President Jackson to have ratified the bill. He explained how dangerous the bill was to readers still unconvinced of its apparent danger. To his knowledge, a majority of Congress, especially those in favor of the bill, openly believed the Indian treaties to be unconstitutional. Additionally, every amendment which was shot down served to protect the Indians further suggesting there was a plot against them.

On June 26, 1830, a report came from a Cherokee community which declared its unwavering resistance to Removal.[92] A decision made by Congress could not persuade these people to leave their homeland. The author of the report stated that the Cherokees who elected to remain were eagerly awaiting successful litigation against Georgia. The people of this

[90] "House Votes to Uphold Indian Treaties," *Cherokee Phoenix*, June 12, 1830.
[91] "Senate Passes Indian Removal Bill" *Cherokee Phoenix*, June 19, 1830.
[92] "Gov. Gilmer of Georgia Claims Jurisdiction Over Cherokees" *Cherokee Phoenix*, June 26, 1830.

community would have to hold out until a case finally reached the Supreme Court though. In the meantime, a proclamation was handed down by Governor Gilmer that Georgia's jurisdiction had been extended to the Cherokee Nation. Additionally, all Indian laws had been abolished. It was made a criminal offense to prevent Indians from emigrating or preventing land cessions to Georgia. Georgia completely dismantled their hope for survival where they currently resided. They were being forced out of their lands under the powers of these sweeping pieces of legislation. Their government was delegitimized by state law. The outrage of the Cherokees was amplified now that the state had gone as far as to attack the foundation of their civil society. Not only had the governor implied that the Cherokees were always within Georgia's jurisdiction but he had made criminals out of their leaders. Boudinot argued that Georgia had no such right to accomplish any of this since from the dawn of the tribe it had always had a right to a government of its own choosing. Now it was suddenly being taken away.

The injustices the Native Americans faced because of the Indian Removal Act were numerous and in the following months, the already distressing situation become more troubling. On July 3, 1830, an article brought to light a fact that as part of a previous treaty established two years prior, Native Americans were promised a sum of $50,000 upon emigrating.[93] It had been recently discovered that the federal government had never made this payment in this incident. Without compensation, the treaty acted more as an act of deception and robbery than as an agreement. The author lamented the fate of the remaining natives who would now be forcibly moved from their homes, perhaps without compensation. By the end of the year, desperation had

[93] "Government Fails to Compensate Emigrating Indians," *Cherokee Phoenix*, July 3, 1830.

taken hold of the tribes. Whether the tribes stayed or left, they would lose far too much and compensation was not guaranteed. Many were adamantly averse to Removal, so much so that they urgently looked for some way to have President Jackson intervene and protect. September 4, 1830, A letter from the Choctaw Council addressed to President Jackson was published in the *Cherokee Phoenix*.[94] Colonel David Folsom chief of the Choctaw Nation, had called upon the learned people of his tribe to write to the president and Congress on behalf of the tribe. As he stated, he "thought it better to bow before the oppressor." The letter was a result of this popular idea of appeasement. The document itself expressed the confusion of the Choctaw that their "Father" President Jackson would plainly tell them to submit to the laws of Mississippi or leave. Jackson was asked for an explanation for this horrible decision laid before them. "Father, is not the country in which we live, ours?" the council pleaded. The nation had done nothing to forfeit their land rights, it did not make sense to them that they were now expected recognize the authority of Mississippi. No consent had been given to the United States for it to incorporate the Choctaw Nation into Mississippi. Notwithstanding their belief in their own righteousness, the council told Jackson "we shall submit to whatever fate awaits us, with calmness and resignation." Additionally, the Choctaw exclaimed "if we have mistaken our ancient rights, if we have misunderstood treaties, if we have built our hopes on sand, when we thought they were founded on a rock, then we must yield." These statements had little real effect as Mississippi was already determined to take the tribe's lands even if it did not acknowledge its authority. Appealing to President Jackson's reason to see the legitimacy of their rights was futile. More useless was to appeal to his sympathy. With their final statement "our earnest and last request is,

[94] "Choctaw Address to Pres. Jackson Never Delivered" *Cherokee Phoenix*, June 26, 1830.

that you would not forsake us," the Choctaw Council threw itself at the mercy of President Jackson. Ultimately this plea would not be delivered to Jackson. It is doubtful if it would have elicited his compassion regardless.

The *Cherokee Phoenix* could provide perspectives on issues from outside the Cherokee Nation as well. Its reliance on American newspapers as sources provided a window into the minds of Americans. Over the years, Boudinot would publish many tracts that displayed sympathy for the Cherokees. An article originally published in the *New York Observer* was included in the issue of the *Phoenix* released on December 30, 1829.[95] The passage sung the praises of the Five Civilized Tribes for being extraordinarily civilized compared to other Indian tribes. They possessed a "regular government, a written language, and a considerably advanced state of civilization among Indians." The article detailed that the whites of the neighboring Southern states, instead of aiding and training the tribes to emulate higher degrees of civilization, struggled to remove the tribes and send them back into a savage state. Despite a forced Removal plan being needlessly destructive of the tribes, the article expected such plans to be attempted through Congress. This assumption was proven true. These types of articles would be published in the paper perhaps because it would be comforting to the average Cherokee reader that there existed allies within the country which threatened to seize everything from them. In any case, these articles would be continuously submitted to the paper. An article from the *Massachusetts Journal* included on March 3, 1830, explained that tribes even more sparse and rudimentary than the Five Civilized Tribes still enjoyed tribal sovereignty.[96] Massachusetts had not extended its

[95] "Indians" *Cherokee Phoenix*, December 30, 1829.
[96] "Independence of Indian Communities" *Cherokee Phoenix*, March 3, 1830.

laws over these tribes unless as prescribed by voluntary compacts, as was the case with the Southern tribes but until recently. What this story proved was that there was no universal principle that decided if tribes were within a state's jurisdiction or not. The exampled begged for comparison with the jurisdictional controversy of the Cherokee Nation with Georgia. Boudinot used such accounts to reinforce the rights that the Cherokee Nation laid claim to.

These articles from outside publications were in no short supply especially during the time when the Indian Removal Act became a nationwide talking point. In the issue of the *Cherokee Phoenix* published on May 22, 1830, the newspaper ran a passage from another publication which admonished the Senate for passing the act as well as for presumably expecting the act to go unchallenged as an affront to the wellbeing of the tribe.[97] The author stated that the American public would not stand for what was effectively a forced emigration plan for these people. The Indian Removal Act was a betrayal of historic treaties between the United States and Native American tribes. The author acknowledged that the President George Washington made and honored these treaties with the Native American tribes which spoke further to the severity of Jackson's disdain for Indian precedent. He was turning his back on a Founding Father which was tantamount to sacrilege for the writer. The author of a separate piece described the Indian Removal Act as "artfully contrived." A further complaint was made that it was a small majority of the Senate that had repeatedly rejected attempts to guard Native Americans from possible exploitation. A fact which greatly annoyed the contributor.

[97] "Senate Indian Removal Bill Violates US-Indian Treaties," *Cherokee Phoenix*, May 22, 1830.

On May 29, 1830, the day after the bill had been signed by President Jackson, an article which was run in the *Cherokee Phoenix* stated that the vote in the Senate for the Indian Bill was plainly shocking.[98] The fact that such an act could be passed demonstrated how far public sentiment had fallen to "political depravity." In the words of the author, "the proposition to expel the Indians from their native soil would have been spurned with indignation." The sudden turnaround of U.S.-Indian relations had instilled a fear in Americans that the country was morally degrading. Still others clung to the faint hope that the people would band together to cease this Indian Removal nonsense. Another publication declared its faith that the American public would not be tricked by the deception of the Indian Bill. The federal government had refused to fulfill their treaties with the Indian tribes even though they were the supreme law of the land by passing the bill. The article exclaimed that the guardian of the Native Americans, the United States, "has avowed his intention to shoot his ward." When given a choice between losing self-government to the state of Georgia or emigrating westward, the tribes would inevitably be forced to choose the latter. The Indian Removal bill was presented to Congress as only affecting tribes that would choose to remove though this was a falsity. The people would not be taken in by this cheap ploy, however. The author had hoped that they would rise above the lies. Many American newspapers had expressed frustration and pity for how the Five Civilized Tribes were being taken advantage of. They evinced that a portion of the American public were on the side of the tribes in the Removal controversy. Hope had not yet been lost for these nations as it seemed

[98] "House to Decide Indian Removal Bill" *Cherokee Phoenix*, May 29, 1830.

the people would rise against the foul play of President Jackson, Congress, and the governments of the states.

As news of the bill's passage began coming in from all over the Union, opinion pieces on the Indian Removal Act began being published in the *Phoenix*. On June 26, 1830, a writer from the *Hudson Republican* vented his frustration at how not just such a morally reprehensible but awfully costly bill could be passed.[99] The estimate he provided was a range of "fifteen to twenty millions of dollars," a price which seemed too great for the people of America to shoulder. A separate publication stated that the cost of enactment would not fall short of "twenty-four millions of dollars." At any case, it would be an extremely expensive bill especially for the standards of 1830. Taxpayer money would go towards the widescale uprooting of indigenous people from their homes. Articles form other publications also received news of the Indian Removal Act with much alarm. One writer claimed that now Congress along with the president had made their intentions exceedingly clear to turn their backs against legal tradition. They had also betrayed the trust the Indians had placed in the federal government. The federal government had "trampled under foot the most solemn obligations imposed by treaties repeated and renewed with all the formalities and sanctions of law." An article from the *Norwich Courier* explained that the approval process in Congress was rushed by the Jacksonians.[100] The author suggested that those in favor of Removal "seemed to fear, as well they might, an exposition of the subject." Those in favor of the bill avoided discussion and shot down amendments. The bill had pushed its way through ratification not by persuasion but through sheer force of number. The writer

[99] "Press Reaction to Indian Removal Bill" *Cherokee Phoenix*, June 26, 1830.
[100] "Indian Removal Bill Abrogates Indian Treaties" *Cherokee Phoenix*, June 26, 1830.

suggested that it was plain to see the Indian Removal Bill was designed for forced Removal by language and intent. The *Philadelphia Sun* expressed similar distrust and outrage at the Indian Removal Bill stating that it was a "national disgrace." More concern was raised that the United States was betraying the trust the Indian tribes had placed in it to nurture and protect their communities. On July 17, 1830, a writer from the *Arkansas Gazette* expressed dismay that the United States pledged to protect the Indian tribes and bolster their "civilization, intelligence, and morality" but was now defrauding them.[101] Tribes were forced to look towards the federal government for its goodwill; they had to prostrate themselves before a nation which had disobeyed its contracts with the remnants of these once proud peoples. The Removal plan pushed by Georgia had no regard for what human suffering it would bring. Now tragedy once again faced the Native Americans and justice from a human source seemed improbable.

The Native Americans would have to constantly deal with the Southern states which had a newfound prerogative to exert their dominion over the tribes and their people. Even in the context of its time, the Indian Removal Act was understood as a colossal shift from what had previously been a relationship built on the rule of law and a rhetoric of friendship. Despite the pretenses of President Jackson and his supporters, the bill was a predatory act which gave the Southern states greater leeway to exercise dominion over the homelands of the Five Civilized Tribes. Now that the tribes were considered part of the territories of the states, claims the Indians made of trespassers on their lands were ignored. Intrusions into the Cherokee Nation from outsiders had been a common occurrence even before tribal protections had been lifted. The

[101] "Press Reaction to Indian Removal" *Cherokee Phoenix*, July 17, 1830.

Cherokee Phoenix reported one such incident on February 4, 1829.[102] Settlers from Georgia had taken it upon themselves to move onto Cherokee lands and seize these lands as their own. Though such a situation would have been typically resolved with the Removal of the trespassers, as the law dictated, Boudinot expressed uncertainty as to whether Jackson would intervene and remove the intruders. It was his hope that since the Cherokees had not broken their treaties with the United States by taking the matter into their own hands, the federal government would send a military detachment to expel these invaders.

The squatter problem would be amplified in the following year. With the Indian Removal Act as well as the state laws of Georgia in effect, the possibility of intruders being properly dealt with vanished. The discovery of gold and precious minerals within Cherokee territory made trespassing more worthwhile for these criminals. Gold would shake the foundation of the Cherokee Nation as Georgia now scrambled urgently to obtain these riches. On April 7, 1830, intruders into a gold mine had returned twofold, failing to be punished after an initial incident when a federal agent had detained them.[103] Boudinot found it to be not surprising in the least as he suspected federal agents of encouraging rogues into entering Indian lands. They were rallying them onwards to cause mayhem within the nation, stooping to murder in some circumstances. To Boudinot's understanding, forced Removal would be accomplished not by "open force," but "they will wear them out by permitting, yea, encouraging intruders to come in their midst, and by harassing them in other innumerable ways."

[102] "Settlers on Cherokee Lands" *Cherokee Phoenix*, February 4, 1829.
[103] "Intruders" *Cherokee Phoenix*, April 7, 1830.

State governments began enacting their plans to seize Indian property shortly before the Indian Removal Act was passed. On June 26, 1830, a proclamation from Governor George Gilmer was included in the *Cherokee Phoenix.*[104] Within the tract, Gilmer addressed that gold had been discovered within Cherokee territory. The precious minerals being harvested within the territory were declared to be the public property of the state of Georgia. Gilmer reaffirmed that the Cherokee were within the jurisdiction of the state of Georgia and that these miners were now effectively criminals. Essentially the proclamation declared that these mines would be commandeered from their Cherokee owners. Now that the state seemed intent on circumventing Indian rights including property rights, it was unclear as to what Georgia could not do. Sure enough, on July 3, 1830, it was announced in the paper that Georgia had fully enacted its law to remove Cherokee tribesmen from their gold mines.[105] It was expected that President Jackson would at least uphold the property rights as he originally promised. Now it was apparent that Georgia could get away with ignoring any claim the tribe had and Jackson would deliberately overlook the affair. The report elucidated that the Indian Removal Act's true purpose was to coordinate with Georgia laws in exploiting the Native Americans. Treaties made with the United States in the past might as well have been nonexistent.

A report from a Cherokee goldminer made on June 24, 1830 described that an assembly of federal troops had stationed itself at a goldmine after an incident in which nine miners from Georgia had intruded into the Cherokee mine. The men who had been arrested a few days prior had been released from jail without facing charges. Instead, the writer of the report and his group

[104] "Gov. Gilmer Claims Gold and Silver on Cherokee Land for Georgia" *Cherokee Phoenix*, June 26, 1830.
[105] "US Troops to Aid Georgia in Oppression of Cherokees" *Cherokee Phoenix*, July 3, 1830.

of miners were arrested by a group of "about thirty or forty men" on the charge of stealing Georgia's gold. The writer claimed that he was "working the lands of my forefathers." His captors were subsequently intercepted and taken in by federal troops. Unfortunately, for the author and his fellow miners, the federal troops settled the conflict by allowing the state officials of Georgia to continue to exercise law enforcement over the Cherokees. The Georgia officer threatened to arrest the miner and his men sometime in the following days. His second letter written on June 27 recounted the details of when he was set upon by a colossal force of a hundred men while again mining for gold. These men then began destroying the machinery the miners had been using to mine for gold. The writer revealed that an arrangement had been entered in which the federal soldiers, which had in the past served to protect the Native Americans in their rights, were cooperating with the state of Georgia in enforcing jurisdiction over the tribe. Tribesmen of the nation were outraged by the treatment they were receiving from the country they had previously hailed as their protector. On July 10, 1830, an individual publishing his opinion in the paper under the moniker "Socrates" accused Jackson of irresponsibility.[106] Socrates had taken issue with Jackson's disregard for the laws which compelled him to expel trespassers from Cherokee lands. All the while, the president claimed that he was blameless in the matter. More insulting was the fact that after what seemed to be a historically amicable relationship between nations, Jackson stated that it would be better for the Cherokee to be "without any hope that he will interfere" and act accordingly. He understood the

[106] "Anonymous Letter on Indian Removal and Violation of Treaties" *Cherokee Phoenix*, July 10, 1830.

tribes were facing a crisis. President Jackson simply did not want to intervene on behalf of the tribes.

With the president refusing to perform the duties of his office, the Cherokee people had to look elsewhere for aid. Outrage was already turning to action. On the same day, the *Cherokee Phoenix* ran an article detailing that tribesmen were currently working towards bringing their controversies with Georgia to the Supreme Court.[107] If successful, it was supposed that the Judicial Branch could cease the mishandling of federal law the president and Congress were perpetrating. The president would be forced into action to intervene and remove the trespassers from the Cherokee Nation. If Georgia state laws were ruled wholly unconstitutional, it would free the tribe from its grip. The federal government would be obligated to "afford them protection against injustice, oppression, and lawless violence." Success in a trial could prove to be the salvation of the Five Civilized Tribes. Jackson's Indian Removal plans could be struck down as unconstitutional. With conditions swiftly deteriorating within the Cherokee Nation, the Cherokee Nation would eventually bring lawsuits to the "Highest Court in the Land." These appeals would become part of a last-ditch effort to maintain Cherokee civilization it had existed since time immemorial.

IV. The Supreme Court and the Cherokee Cases

With the Indian Removal Act in effect, the remainder of the Five Civilized Tribes had little means to fight back against what was now the supreme law of the land. As their sovereignty and their homelands were at stake, the Cherokee Nation and its tribesmen attempted to protect

[107] "Press Reaction to the Indian Removal Bill" *Cherokee Phoenix*, July 10, 1830.

their rights by appealing their controversies to the Highest Court of the Land. The Supreme Court was the last source of relief available to the tribes as it appeared the sun was about to set on their civilization. If Jackson and Georgia would be defeated, it would have to be by Chief Justice Marshall's court. Marshall's predilections towards federal supremacy and the "conservatism" of the Anti-Jacksonians were well known.[108] The old Federalist party leanings of the Court put it at odds with an otherwise predominantly Democratic government. This had created friction between the Judicial branch and the Executive. As the founder of the Democratic Party, Jackson advocated greater state sovereignty even if it came at the expense of the rule of law, as the Indian Removal process had demonstrated. Marshall had been wholly responsible for developing the power of judicial review in *Marbury* v. *Madison*. This power allowed the Supreme Court to strike down laws which contradicted the Constitution and laws made in the same spirit.[109] Marshall had also established in the case of *Fletcher* v. *Peck* that the Supreme Court had the power to strike down state laws.[110] It seemed possible that Marshall would rule against Georgia and provide relief for the Cherokee tribe. Surely the Court would hold the laws of Georgia unconstitutional and invalid since they disregarded federal treaties. This was the hope of the plaintiffs who placed the destiny of the nation in the hands of these Supreme Court justices. It was unclear what the Court's position on tribal sovereignty would be.

The Cherokee Cases, as they have come to be known as, arose from conflicts stemming from the Georgia state legislature and its exertion of its authority over the Cherokee Nation. The beginning of this set of lawsuits was a controversy involving a Cherokee man who had been

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[108] Arthur Schlesinger, *The Age of Jackson*, (Little, Brown and Company, 1945), 322.
[109] *Marbury* v. *Madison*, 5 U.S. 1 Cranch 137 137 (1803).
[110] *Fletcher* v. *Peck*, 10 U.S. 6 Cranch 87 87 (1810).

convicted of murdering another Cherokee in 1830. George "Corn" Tassel, had been tried for murder not in the Cherokee Nation but in the state of Georgia.[111] Since the state officials had chosen to process the criminal under state law instead of leaving it up to the Cherokee Nation to handle its own affairs, concerns over tribal sovereignty inevitably developed amongst the tribesmen. Tassel's representation appealed to a convention of state judges, making the argument that the trial should be held in Cherokee Nation since crimes occurring within the tribal boundaries were outside the jurisdiction of Georgia. The judges disagreed, and avowed that the power to manage Indian nations that Great Britain had exercised during America's colonial days passed on to the individual states.[112] Tassel appealed for a writ of error from the Supreme Court, hoping to reverse his sentence there. Chief Justice Marshall had granted the writ on December 12, 1830 and it seemed that the case would be heard.[113] Unfortunately, the case was nullified before it could be presented to the Supreme Court. Once the news had reached the statesmen of Georgia on December 22, 1830, they scrambled to execute Tassel on December 24, two days later. George Tassel was briskly hanged by the state of Georgia, removing the plaintiff in the controversy thus making it void and unpresentable to the Supreme Court. Although the case was dismissed, it was significant in developing the political maelstrom that the Cherokee Cases were born from. Georgia had made its intentions to skirt federal law clear. It was neither the first nor last time Georgia would subdue the Cherokee through force. The incident would, however, lead

[111] Stephen Breyer, "The Cherokee Indians and the Supreme Court," 413.
[112] Robert S. Davis, "State v. George Tassel: States' Rights and the Cherokee Court Cases, 1827-1830," *Journal of Southern Legal History* 12, no. 1/2 (2004), 51.
[113] Robert S. Davis, "State v. George Tassel: States' Rights and the Cherokee Court Cases, 1827-1830," 56.

to the major Supreme Court case of *Cherokee Nation* v. *Georgia* as Tassel's execution would be one of several issues the nation's leadership had taken up with Georgia.[114]

In the aftermath of the Tassel case, William Wirt, the former United States attorney general and attorney for Tassel, chose to represent the Cherokee Nation in a lawsuit against Georgia.[115] He intended to sue the state and obtain an injunction from the Supreme Court to prevent state officials from enforcing Georgia's laws within Cherokee territory. The case of *The Cherokee Nation* v. *The State of Georgia* began in the January of 1831. The complaint filed by Wirt was regarding various state laws with one such law criminalizing the self-governance exercised by the Cherokee Nation. The laws specified in the complaint would, as Wirt had argued, "annihilate the Cherokees as a political society." These new laws which sprouted from Georgia's unwavering mission to extend its sovereignty over the lands of the Indians, had continuously met with much resistance from the Cherokee Nation. Wirt had denied the validity of the laws on the basis that the Cherokee Nation was a foreign nation. As a foreign nation, Georgia could not legislate for it. Wirt made the claim in their case that "from time immemorial, the Cherokee Nation have composed a sovereign and independent State." The several treaties that had been made in up until 1819 including the Treaty of Hopewell made in 1785 and the Treaty of Holston made in 1791 all recognized this fact. "All of which treaties and conventions were duly ratified and confirmed by the Senate of the United States" and were the supreme law of the land. It was by these treaties that the Cherokee Nation made its case for its own self-sovereignty and independence from the jurisdiction of the Georgia state legislature.

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[114] Robert S, Davis, "State v. George Tassel: States' Rights and the Cherokee Court Cases, 1827-1830," 57.
[115] Stephen Breyer, "The Cherokee Indians and the Supreme Court," 414.

Chief Justice Marshall delivered the majority opinion of the Supreme Court. The subject of consideration were the laws which the requested injunction would essentially abolish. The laws in question "which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force."[116] The Court understood the severity of such an outcome and did not seek to downplay the concerns the Cherokees had. Marshall lamented the fate of the Cherokee, averring that "if courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined." Despite any pity the Court felt for the Cherokee tribe, it would decide the case based on a literalistic interpretation of federal law. The true focus of *Cherokee Nation* v. *Georgia* was whether or not the case was within the original jurisdiction of the Supreme Court as outlined by the Constitution. If the Court had found the case beyond its own jurisdiction, it would disqualify Court from being the arbiter of the controversy. Article III of the Constitution established the Supreme Court and outlined its powers. In the Court's deliberation, Section 2 of Article III of the Constitution was meticulously referred to. The section stated that the Supreme Court possessed original jurisdiction in "controversies between a State or the citizens thereof and foreign states, citizens or subjects." This single phrase would decide the result of the trial. According to the criteria set by Article III, the state of Georgia was summarily considered a valid party to the controversy as it was a state of the Union. Marshall then took to examining the Cherokee Nation and its status in in relation to the article. The question the Court considered was "is the Cherokee

[116] *Cherokee Nation* v. *Georgia*, 30 U.S. 5 Pet. 1 1 (1831).

nation a foreign state in the sense in which that term is used in the constitution?" The Court established that the tribe was indeed a state and that the Cherokees "have been uniformly treated as a State since the settlement of our country." Further elaboration was given to the legitimacy of the Cherokee Nation being a state as "the numerous treaties made with them by the United States recognise them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community." Marshall viewed the Cherokees as a sovereign and competent people which went against what their detractors in Congress attempted to argue. Marshall's statement additionally established that the laws and treaties of the United States had always been built on an admission of Indian sovereignty, to a degree. These treaties were also indeed valid. Native Americans tribes were not bands of conquered peoples. Tribes were entities with which the United States would conduct negotiations with and could not arbitrarily dispose of as they pleased. The Court further declared that the tribes "have an unquestionable, and heretofore an unquestioned, right to the lands they occupy until that right shall be extinguished by a voluntary cession to our Government." This came as reaffirmation that the rights claimed by the Cherokee from the numerous treaties they held with the United States were indeed lawful. With the Supreme Court partial to the Cherokee cause, appeared that they would grant the injunction after all.

It was decided, however, that the Cherokee Nation did not qualify as a foreign state. The Court explained that the Cherokee Nation was instead one of several "denominated domestic dependent nations" existing in "a state of pupilage" to the United States. The relationship of the Native American tribes and the United States as described by Chief Justice Marshall was like

“that of a ward to its guardian.” Although the Supreme Court in this case believed the Cherokee Nation possessed rights as a state, it declined to arbitrate the case since as a “domestic dependent nation” it was an entity outside the scope of the Court’s power. The Supreme Court did not accept the argument that as a sovereign entity with some degree of separation from the Union, the Cherokees were, in fact, a foreign state. The justices of the Court alleged that the many grey areas in their relations with the United States prevented the Cherokee tribe from being recognized as truly independent. The lands belonging to Native American tribes were understood as part of the United States, appearing on maps and in laws. The United States had the sole right to engage in commerce with the tribes; foreign nations could not negotiate with them. Treaties had placed the Cherokees under the protection of the United States, an idea which the Indians had consented to in the past. The treaty of Hopewell, which predated the United States Constitution allowed the Cherokee “to send a deputy of their choice, whenever they think fit, to congress" implying an ingrained political connection between the two states. These factors led the Court to come to its perplexing conclusion. In the Court’s opinion, the Cherokee had the sole legitimate right to their lands “until that right shall be extinguished by a voluntary cession to our government.” Georgia had clearly overstepped its boundaries and had undermined this right. But, since the United States acted as its sovereign and guardian and possessed a preeminent right to its lands if they became available, Indian tribes could not reasonably fall under the definition of “foreign nation.” Marshall insinuated from the Constitution that the framers never intended Indian tribes to be parties in a court of the United States. Albeit condescendingly, Marshall makes the assertion that utilizing the court system for remedy “had perhaps never entered the mind of an Indian or of his tribe” at the time of the Constitution’s drafting. Thus, the Supreme

Court maintained the idea that, for whatever reason, Indian tribes were intentionally excluded from the justice system. The Commerce Clause in its establishment of Congress as the major regulator of commercial affairs, used the specific term "Indian tribes" suggesting a difference between tribes and "foreign nations" which are mentioned in the same clause. The Supreme Court refused to rule "on the laws making it criminal to exercise the usual powers of self government in their own country by the Cherokee nation." There was an additional concern that the injunction requested by the Cherokee Nation would require "too much of the exercise of political power to be within the proper province of the Judicial Department." Though the statement effectively mattered little since it was already a null case, it demonstrated that the Supreme Court was inclined to exercise judicial restraint. What had been typically a Court which was diametrically opposed to the Jackson administration was wary of interfering in its affairs. Marshall did not wish to intervene in the affairs of the states if the interference would drastically affect its public officials and lawmaking process. In its appeal to the Supreme Court, the Cherokee Nation had been invalidated by the institution it had envisioned as its last hope. The issue of these Georgia state laws would have to be settled by another case with valid parties.

A few of Marshall's colleagues gave their own concurring opinions on the case. The opinions of Justices Johnson and Baldwin were scathingly unsympathetic to the Cherokee Nations' predicament. The opinion by Justice Johnson dismantled the case of the Cherokee Nation by attacking its status as a state. He expressed disgust at the idea of considering Indian tribes to be their own states as they were comprised of "people so low in the grade of organized society." The Cherokee Nation, being part of this general collection of Indian tribes could never be a state based on principle. Johnson also denied the sovereignty claimed by the Indian tribes

over their lands and instead insisted that the right of discovery espoused by European explorers in early colonial years was the same right from which the United States had derived rights to Native American lands. He questioned what evidence the treaties discussed by Wirt provided that the Indian tribes were indeed sovereign states. No other nation saw the tribes as states, as Johnson contended. He insisted that the line between what constitutes a state and what does not must be firmly sustained. Justice Baldwin in his opinion also denied the Indian tribes the status of foreign nations pointing to the separation of the office of Foreign Affairs and Indian Affairs as ample proof of this disparity. He made a point that the terms used to describe the Native Americans in treaties had been "nations, tribes, hordes, savages." The absence of terms such as "prince, state, sovereignty" seemed cause enough to Baldwin to completely discredit the Cherokee Nation as a state. Ordinances made in the past had also disregarded the Indian's sacred right to his lands, suggesting that these rights were not as consistently upheld as the Cherokee believed. The prospect of future success in an appeal to the Supreme Court seemed quite grim for the Cherokee Nation. Disheartening enough was that Marshall, an apparent anti-Jacksonian champion, had refused to adjudicate at all. Worse though was that there were justices who saw them as feral primitives with no rights.

As it would otherwise appear the entire Court was unwilling to intervene and the odds were stacked against the Cherokee Nation, Justice Thompson provided an exceptional opinion which demonstrated his full belief in the righteousness of the Indian cause. His perspective on the case would be astonishingly influential as the other justices of the Court would adopt many of his principles in another case fought in the subsequent year. His argument was that *Cherokee Nation* v. *Georgia* was well within the jurisdiction of the Supreme Court and that relief was

possible for the tribe. Thompson conceded that "relief to the full extent prayed by the bill may be beyond the reach of this court," however. He also saw the injunction as a political issue as much as his colleagues did and that the solution would ultimately have to be carried down by the executive branch.

He maintained that the Cherokee Nation constituted a state. He countered Baldwin's complaint that tribes had not been referred to specifically as states in the past by explaining that "the terms state and nation are used in the law of nations, as well as in common parlance, as importing the same thing." As Thompson contended, a state reserved the right to manage its own affairs and create its own laws. The Cherokees were a people "governed solely and exclusively by their own laws, usages, and customs within their own territory" and were thus a state. When the Cherokees yielded their lands to the United States, it was done with treaties and with compensation. The Cherokee Nation, though it may have been in an unequal alliance, was an independent state if it did not relinquish its power of self-governance. It had always been treated as a state even before the Constitution was ratified. This state had always been essentially foreign. The Native American tribes were independent entities well before the formation of the United States and the discovery of America; this would necessitate that they were originally foreign states. Thompson posed the question "when or how have they lost that character, and ceased to be a distinct people, and become incorporated with any other community?" He denied the supposition that the United States effectively conquered these Indian tribes seeing as how the tribes retained the right to self-government. The tribes, which had established rights and distinct communities which were uncharacteristic of a conquered people. The United States, if it was truly a conqueror, had neglected to act out as one. To further prove his point that the they were

sovereign, Thompson indicated that treatymaking with European Nations and treatymaking with the Cherokees were the same process. He supported this sameness by referring to the law of nations which described a treaty as "an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme power of the respective parties." He claimed that by this aspect of their relationship the tribes were not part of the Union. Furthermore, the rights guaranteed to the Indians were earned after, as part of their contracts with the United States, a consideration of land was paid to enforce the contract. It would be baffling if the United States could have chosen to simply not fulfill its obligations as per the treaty. Thompson argued that evaluating the legality of Georgia state laws in conjunction with Cherokee treaties was a wholly judiciable issue for the Supreme Court as "the constitution expressly gives to the court jurisdiction in all cases of law and equity arising under treaties made with the United States." In response to those who believed that the Cherokee Nation emulated American society too closely to be considered a separate entity, he argued instead that the strides the Cherokees had been making in improving their civilization did not nullify their separation from the United States. As Thompson stated, the nation "retains its usages and customs and self-government, greatly improved by the civilization which it has been the policy of the United States to encourage and foster among them." The Treaty of Hopewell and the Treaty of Holston acknowledged the separate criminal justice jurisdiction of the tribe. The Commerce Clause's regulation of "the Indian tribes" did not exclude them from being foreign nations. What else could they be but foreign? The Cherokees were never considered citizens of the United States or of any of the states. Multiple treaties had provided pathways to citizenship for tribesmen, attesting to their otherness. The Treaty of Hopewell guaranteed the

Cherokees rights to their property. The fifth article provided for the Removal and punishment of trespassers on Cherokee lands. President George Washington had, upon violation of this treaty, renewed his oath to honor the boundaries of the Cherokee Nation and had removed intruders into their lands.

Though the Five Civilized Tribes had made land cessions in the past, they expressed a strong desire to remain where they had lived for centuries with each exchange. Georgia laws were “directly repugnant” to the numerous treaties made between the tribes and the United States. The boundary line had been violated. The Indian Removal Act itself stated “nothing in this act contained shall be construed as authorising or directing the violation of any existing treaty between the United States and any Indian tribes.” The Compact of 1802, referred to at great length by the officials of Georgia, did provide that the United States would attain Indian lands within its boundaries for the state’s use. Although, this would only happen “as soon as it can be done peaceably and upon reasonable terms." The issue the state of Georgia may have had with the United States’ unfulfillment of this agreement had little to do with the Cherokee Indians and their rights. An act of congress made in 1802 which outlawed surveying of Cherokee lands delegitimized the actions Georgia was enacting to bring Cherokee lands into the state. Of course, Justice Thompson was alone in his opinion with none of his fellow justices agreeing with him on the foreign nation or on the relief issue. He declined to explore what sorts of relief would be possible on the part of the Court for the Cherokee tribe. To expatiate on the matter would be useless since the case had already been invalidated. He only suggested that partial relief was possible within the powers of the Supreme Court. In the matter of property rights, the Court could have intervened to provide relief. The trespassing issue of the Cherokees could have been

quickly resolved. The assertion with which the state of Georgia made over the gold and silver mines within Cherokee territory could have been nullified. There existed an abundance of precedent which showed how Georgia was acting out of line. The state officials were attempting to destroy the rights of the Cherokee Indians and Thompson understood this. He concluded that the Cherokee were a foreign state and a valid party to the controversy, the subject matter of the case was valid for judicial review, and that the injunction was a writ of which the Supreme Court can issue. The Cherokee Nation would have to bring a separate controversy to the Court in the future. For a time, the states would be allowed to further exploit and dominate the tribes.

In 1832, a case involving Georgia's claim of sovereignty over the Cherokee Nation would once again be brought to the attention of the Supreme Court. This time, as mentioned in the decision of *Cherokee Nation* v. *Georgia*, it would be a "proper case with proper parties." *Worcester* v. *Georgia* would be the culmination of previous legal battles fought over the Indian Removal Act. Once again, the issue of Native American sovereignty was brought to the Court, an issue that remained contentious even after the passing of the Indian Removal Act. The case which was presented to the Supreme Court was an appeal for a writ of error for Samuel Worcester, the plaintiff, who was convicted under one of Georgia's new laws which required whites living on Cherokee lands to register with the state of Georgia and receive a license. Failure to obtain a license, as prescribed by the law, "shall be punished by confinement to the penitentiary at hard labour for a term not less than four years."[117] Worcester was a missionary from Vermont who had been staying and operating within the Cherokee Nation with the approval

[117] Edwin A. Miles, "After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis," *The Journal of Southern History* 39, no. 4 (1973), 521.

of both the tribe itself and President Jackson. Worcester had been a major contributor to the *Cherokee Phoenix* as well.[118]He did not have a license from the state of Georgia and had been, along with several other missionaries, compelled by state officials to leave. Georgia had given him a grace period during which he could receive a license or choose to remove. Either choice would have been an acknowledgement of Georgia's proclaimed right to legislate for the Cherokee Nation, so in an act of protest, Worcester and his associates chose to remain. William Wirt, the attorney from the previous cases, was hired once again to bring his case to the Supreme Court. The initial plea that Worcester made in the Gwinnett county court in which he was tried was that "several treaties had been entered into by the United States with the Cherokee Nation by which that Nation was acknowledged to be a sovereign nation, and by which the territory occupied by them was guaranteed to them by the United States." This was the same argument that the Cherokee and their allies had made so many times before to appeal to the reason of their American "guardian." Eventually the case reached the Supreme Court. The European right of discovery angle was discussed once again, this time the Court evaluated that this right to land did not affect the land rights of the Native Americans. Following the precedent of the British monarchy, no evidence of any interference with the internal affairs of the Indian tribes was apparent to the Supreme Court. The Treaty of Hopewell it was true the Cherokee Indians under the protection of the United States and "of no other power." However, they "perceived in this protection only what was beneficial to themselves." This meaning that the alliance of protection between the tribes and the British monarchy and subsequently the United States was only that, an agreement that their protector would protect them. There was an understanding in all their

[118] Edwin A. Miles, "After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis," 520.

treaties that the monarchy had "practically no claim to their lands, no dominion over their persons."

In *Worcester* v. *Georgia*, Chief Justice Marshall delivered the majority opinion for the case as he did before in *Cherokee Nation* v. *Georgia*.[119] Marshall deemed that the case had been presented to the Court according to proper procedure and then evaluates it based on whether it is a valid case for the Supreme Court to rule on. The charges facing Mr. Worcester were "residing within the limits of the Cherokee nation without a license," and "without having taken the oath to support and defend the constitution and laws of the state of Georgia." Samuel Worcester's defense made the assertion that as a resident of the Cherokee Nation whose supposed crimes were conducted in New Echota, the state of Georgia had no jurisdiction. He was authorized by the "American Board of Commissioners for Foreign Missions" to conduct his missionary work in the Cherokee Nation. He was admitted also with the permission of the President of the United States and this permission had not been rescinded even after his arrest. Not only had Worcester been preaching and translating religious texts with the permission of the tribe, he had been carrying out what had supposedly been the American goal of nurturing religiosity and progress within the Indian tribes. It seemed unreasonable for Georgia to force its hand in removing him. Worcester's representative made the point that the many treaties the United States had made with the Cherokee tribe from 1785 to 1819 had cemented their status as a sovereign state and that they had an inalienable right to govern themselves without the interference from the states. The treaties to which the Senate had approved were the supreme law of the land and Georgia's laws

[119] *Worcester v. Georgia*, 31 U.S. 6 Pet. 515 515 (1832).

which placed gold and silver mines under the state's possession and laws requiring whites living within the nation to obtain a license were "repugnant to the aforesaid treaties." Worcester's argument was that the Georgia laws were unconstitutional and that the Congress of the United States had the sole right to conduct intercourse with the Indian tribes as laid out in the Commerce Clause of Article I. The states had no such power.

In the majority opinion, the Court sought to address the validity of these treaties to which Worcester's case referred to as well as to assess the legality of the statute he was prosecuted under. In studying the law in question, the Court came to interpret the licensing law as an unabashed claim over the lands belonging to the Cherokee Nation. On the matter of the right of discovery, the Court rejected the idea of it being transferable by force. Marshall mused that "it is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied." In a statement which seemed to echo the argument made by Justice Thompson a year prior, the fact that the Indian tribes were originally a collection of independent self-governing nations with their own laws and customs made them eternally a separate entity. Marshall proposed "that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession." Such was the generally accepted belief amongst the empires of the era as a way avoiding constant disputes amongst themselves. It was a simpler way to divvy up the new continents which were now open to them. The Court denied that this right of discovery, established by the Europeans, gave them right to the lands they discovered should the tribes existing there be unwilling to part with them. The same rights that belonged to Great Britain

belonged to the United States, meaning the same limitations exists. Marshall found it an "extravagant and absurd idea" that the original crown settlements laid claim over the entirety of the American continent when they had to contend with much more numerous and powerful tribes who were "equally willing and able to defend their possessions." Invasions in that time were only sanctioned if they were retaliatory and on "just cause." "The power of war was given only for defence, not for conquest." Besides this fact, a policy of extermination would be incompatible with the goals of the original settlers which was to convert the Indians to Christianity. The various European Empires at that time made gifts to these tribes to gain their favor and the tribes indulged in aiding their benefactors "so long as their actual independence was untouched, and their right to self-government acknowledged." True to its commitments, the British Royal Crown, aside from barring negotiations with foreign nations, never interfered with their self-governance. Indian lands were always purchased and never seized if the tribal leadership was unwilling to sell. A Mr. Stuart, a superintendent of Indian Affairs for the British Empire, made a speech in 1763 in which he avowed that "it is the king's order to all his governors and subjects, to treat Indians with justice and humanity, and to forbear all encroachments on the territories allotted to them." The king himself made a proclamation in the same year in which he ordered that settlers living on tribal lands not yet purchased by Great Britain should hastily "remove themselves from such settlements." What all this established was that in their history with Great Britain, the Indian tribes were sovereign nations which the empire made binding treaties with which they mutually obeyed. Violations of these treaties were grave issues responded with immediate action. The United States was certainly not following the

precedent left behind for them by the British Empire. It was unclear what had changed over the decades.

When the Revolutionary War had first sparked, the colonies had made a mission of "securing and preserving the friendship of the Indian nations." Marshall saw the establishment of three Indian departments by Congress at that time as a sign that the Union was scrambling to maintain cordial relations with the tribes. A treaty made with the Delaware tribe in 1778 stipulated amnesty, peace, and friendship. The Union negotiated using treaties similar to those made between European powers, suggesting the treaties were done in earnest and not just as a formality. The Court also addressed the Treaty of Hopewell, one of the more important pieces of legislation discussed in the ongoing debate of tribal sovereignty. If the popular interpretation of the treaty was one of a conqueror to the conquered, the Cherokee tribe did not understand it as such. The peace established by the treaty was mutual. Prisoners were restored to their respective nations. The protection established by the treaty was merely a vow made on the part of the United States to repel invasions into Indian territories and did not signify something greater. "The Indians," as the Court expresses, "perceived in this protection only what was beneficial to themselves — an engagement to punish aggressions on them." This did not imply a "surrender of their national character." As the law of nations provided, "a weaker power does not surrender its independence…by associating with a stronger, and taking its protection." To make it further clear as to what this relationship allowed, Marshall stated that "protection does not imply the destruction of the protected." The treaty also drew the boundaries of the Cherokee Nation, giving no reason to believe that it gave the protector claim to their lands. Squatters from the United States, should they choose to remain on tribal lands for a period of six months would be punished

according to Hopewell, which was now being conveniently ignored. The Commerce Clause authorized that Congress had "the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper." The stipulation of this power was that regulation must be "for the benefit and comfort of the Indians." Once again, the Court affirmed that by this article the tribes had not surrendered their autonomy. Such an assumption would be incoherent with the subsequent treaties made with the tribes. The Treaty of Holston, made in 1791, formed a more perfect peace with the tribes. The protection offered to the Cherokee was reaffirmed. This treaty rewrote the boundaries between the two nations once again. Holston also changed the powers of regulation possessed by the United States to management of trade, no further powers were stated. Holston guaranteed all lands not yet ceded to belong to the Cherokee Nation. United States citizens who chose to enter the Cherokee Nation would have to do so with a passport. Thus, the Court interpreted this treaty as solidifying the Cherokee right to self-government. Acts passed by Congress had routinely acknowledged the sovereignty and rights of the Indians and had been constructed to avoid infringing on the protection promised to them by their treaties. In 1819, Congress, in pursuit of bettering the lives of the Indians, passed an act "for the purpose of providing against the further decline and final extinction of the Indian tribes" authorizing the president to appoint people to civilize and aid the Indians in matters of education and agriculture. Samuel Worcester, as a missionary could be seen as one such individual mentioned in this act. The Court took this as meaning that in the federal government's mission to preserve these tribes, they intended for the tribes to remain where they were. The land belonging to the tribes had always been contemplated as separate from the states and that the federal government alone may legislate for the tribes. Congress had been responsible

for maintaining war and peace with the tribes even during the Confederation. The states had relinquished any powers they might have had in maintaining diplomacy with Indian tribes. Federal treaties were inviolable by the states.

Georgia had accepted these federal treaties in the past. The cession they had made in the Compact of 1802 was proof enough to Marshall that they had recognized the right the Cherokee had to their lands. Georgia statesmen had formerly recognized the federal government's sole right in regulation as well as that the Cherokee Nation occupied a territory separate from their jurisdiction. The laws legislating against the Cherokees established by Georgia in 1828 violated these past agreements. Because of this blatant violation, the Supreme Court declared that the state of Georgia had no jurisdiction over the Cherokee and that citizens of the state could only enter with the permission of the tribe. Any license issued by Georgia would be meaningless. The conviction of Worcester was consequently void. The laws of Georgia violated the supreme law of the land as was established by the "constitution, laws, and treaties of the United States." The judgment of the lower court was reversed and negated.

With the constitutionality of Georgia state laws disproved by the Supreme Court, the decision looked to be a victory for tribal sovereignty. There no longer existed any legal coercive method to have the remaining tribal members move westward. No longer did the tribes face the quandary of whether to stay and lose sovereignty or to leave and retain their tribal rights. At least this is what was expected. The ruling of *Worcester* v. *Georgia* surprisingly mattered little. Georgia would simply not obey the judgment of the Supreme Court. As President Jackson

described it, the decision of the Court came out "still born."[120] Nothing could be done to force the President's hand to intervene until the following year. While Cherokees had celebrated their initial victory, doubts had grown that Jackson would or could be made to enforce the Supreme Court's judgment.[121] After Jackson's re-election, beating out his competition for the presidency which included William Wirt, the fate of the *Worcester* decision became more unclear.[122] The newly appointed Governor Lumpkin of Georgia had repealed the law that had convicted Worcester and his fellow missionaries on December 22, 1832. The governor was pressured by politicians within the Vice President Martin Van Buren's inner circle to pardon the missionaries and be free of the issue.[123] Worcester and his compatriots, who had remained in shackles for all this time, had become uncertain as to the gain they were providing the Cherokee tribe in maintaining their stance in the controversy.[124] Eventually their long incarceration broke their fortitude down. The missionaries appealed to the governor for release, stating that they would not pursue the lawsuit any further and submitted themselves to the "magnanimity of the State." With their release, *Worcester* v. *Georgia* became an event of obscurity. Jackson would not be entreated upon to liberate men who were already free. The Cherokee Nation and its allies were gravely disheartened by this; Removal became an inevitability in their minds. Senator Frelinghuysen, a champion of Native American rights, now hoped the tribes would peaceably agree to remove westward.[125] Justice McLean who wrote a concurring opinion to the decision in *Worcester* told a delegation of Cherokee to accept Removal as unavoidable. The possibility of

[120] Edwin A. Miles, "After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis," 528.
[121] Ibid., 533.
[122] Ibid., 535.
[123] Ibid., 538.
[124] Ibid., 540.
[125] Ibid., 529.

the federal government rescuing them from their demise at the hands of a land-hungry Georgia crumbled away. Jackson's Indian Removal plans were going into effect and nations would eventually be pushed westward.

V. Conclusion

Despite its illegality, forced Indian Removal would inexorably be carried out during the 1830s. The Cherokee, Choctaw, Chickasaw, and Seminole Nations would meet the same fate of the Creek Nation. President Jackson's plan was remarkably shortsighted for how prodigious of an issue Indian emigration had been for the past years. Tribal lands were bought at a horribly depreciated value during the exchange. The funds allocated to removing the Native Americans were miserable which led to dour complications to those who made the trek. Nations eventually ceded their lands one after another, not wishing to risk losing their sovereignty to the states. Just as the Creek Nation had been coerced by a false treaty, so did the Cherokee Nation with the Treaty of New Echota made in 1835.[126] Though it contained multiple false signatures, it bound the Cherokees to relocate in 1838. After nearly resisting for a decade, the Cherokee Nation would be forced by militia to embark on what would come to be known as the Trail of Tears. Thousands of Cherokee lives were lost on this journey to the newly districted lands west of the Mississippi.[127] This tragedy would mark the fulfillment of the Indian Removal Act and the promise of the Compact of 1802. However, the impact of the process would reverberate forever after the act had completed its purpose. Removal had irreversibly altered the lives of the people

[126] William L. Anderson, "The Trail of Tears through Fictional Reminiscence," *The Georgia Historical Quarterly* 73, no. 3 (1989): 616.
[127] Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln,* (New York: W.W. Norton & Company, 2005), 327.

who suffered through it and moved entire civilizations far from the lands that served as their cradles.

The Indian Removal Act had been highly controversial amongst Americans. Over one million Americans had petitioned Congress, asking their representatives to vote against the bill.[128] Christian missionaries across the country condemned the bill as well.[129] The American Board of Commissioners for Foreign Missions disapproved of the Jackson administration's Removal policy. Despite this outcry against the Indian Removal Act, the Jackson administration was popular enough to sidestep away from the controversy. Jackson's re-election in 1832 was a landslide victory, demonstrating that the anti-Jacksonians were a minority in the United States.[130] President Jackson would leave office content with the support shown to him by the American public during his presidency. Having enacted Indian Removal, he claimed that the tribes were now saved from extinction.[131] The tribes could enjoy their civilization far away from the states though they now existed under the superintendence of the president.

President Jackson and his party accomplished their goal of Indian Removal through unscrupulous means. The Indian Removal Act had no legitimate power to force the tribes to relocate to the new Indian territory. At its core, it only authorized land exchanges with the tribes which provided territory west of the Mississippi to which they could relocate. Attempts made by the southern states to incorporate the tribes within their boundaries were unconstitutional as determined in *Worcester v. Georgia*. Federal treaties should have been enough to guarantee the

[128] N. Bruce Duthu, *American Indians and the Law*, 10.
[129] Michael Morris, "Georgia and the Conversation over Indian Removal," 404.
[130] Ibid., 421.
[131] Ibid., 422.

tribes their rights to their lands. Forced Removal should have been a legal impossibility as it violated the supreme law of the land. Despite this, the tribes were compelled to abandon their lands. Due to conniving political actions and sheer force of numbers, President Jackson and fellow Removal enthusiasts could accomplish Removal without punishment. The power Jackson and his party held over the federal government had ensured the success of Removal. Forced emigration of the Five Civilized Tribes was committed through illegal means and forever changed the relationship between the tribes and the United States.

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