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Endorsers’ List in formation, 9 February 2018

Respecting Tribal Sovereignty

A Statement of History and Principles

If there is to be meaningful repentance on the part of the American people for our ongoing unethical conduct toward the Indian nations, it must begin with a determination to keep our word to the tribes as we have given it in the treaties we have made with them. This means respecting tribal sovereignty. It means recognizing that under the Constitution as the framers intended it, as well as under international law, the tribes have all the rights of foreign states, including the right to sue states of the United States in the Supreme Court for violations of their treaty rights. It means reopening a treaty-making process with the native peoples, governing our relations with them in accordance with treaties, and ceasing any attempt to rule over them as if they were in any way our subjects or subject to our jurisdiction.

We must overturn the Supreme Court’s mistaken decision in *Cherokee Nation v. Georgia* in 1831—the decision that paved the way for the American version of “ethnic cleansing” that became known as the Trail of Tears and Death, and for countless subsequent injustices and brutalities. The American people must understand and repudiate this decision if we are to move toward respect for the rule of law in our relations with the native peoples.

For the framers of our Constitution, treaties with the Indian tribes were the same as treaties with any other foreign power. In the words of Article 6 of the Constitution, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” James Wilson—who had served on the committee of detail in the constitutional convention—defended this language in the Pennsylvania ratifying convention in 1787: “This clause, sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different states do what they may.”

The opponents of American “ethnic cleansing” in the 1830s noted the reasons why the sovereignty of the native peoples should be respected. Dismissing any claim that their rights could be denied because the Indians were “savages,” Rhode Island Senator Asher Robbins asked in 1830: “Is the Indian right less a right because the Indian is a savage? Or does our civilization give us a title to his right? A right which he inherits equally with us, from the gift of nature and of nature’s God. The Indian is a man, and has all the rights of man. The same God who made us made him, and endowed him with the same rights; for ‘of one blood hath he made all the men who dwell upon the earth.’” Or as the activist Jeremiah Evarts argued in 1830: “The people of the United States are bound to regard the Cherokees and other Indians, as *men;* as human beings, entitled to receive the same treatment as Englishmen, Frenchmen, or ourselves, would be entitled to receive in the same circumstances. Here is the only weak place in their cause. They are not treated as men; and if they are finally ejected from their patrimonial inheritance by arbitrary and unrighteous power, the people of the United States will be impeached and condemned for treating the Indians, not as men, but as animals.” To this day, the native peoples’ right to equality under the law has yet to be respected.

“And where is the authority, either in the constitution or in the practice of the government,” as Supreme Court Associate Justices Smith Thompson and Joseph Story argued in their dissenting opinion in *Cherokee Nation v. Georgia* in 1831, “for making any distinction between treaties made with the Indian nations and any other foreign power?”

That the Cherokees constituted a foreign state, with treaty rights that the United States was obliged to respect, was a position eloquently maintained by the opponents of “removal,” such as Congressman Henry Storrs of New York in 1830, who argued that the good faith behind generations of treaties was at stake. The bad faith of the advocates of “removal” was similarly on display. Thus, according to Georgia’s Senator John Forsyth in 1830, “a contract made with a petty dependent tribe of half starved Indians” could not “be properly dignified with the name, and claim the imposing character of, a treaty.” The contrast between Forsyth’s position, and that of the American government to that time, is striking. That all a “foreign state” was to the framers of the Constitution was another state possessing dominion—and that the Indian tribes qualified as such—is clear from George Washington’s successful appeal to the Senate of the United States in 1789 to establish the practice of ratifying treaties made with the Indian nations: “It doubtless is important that all treaties and compacts formed by the United States with other nations, whether civilized or not, should be made with caution and executed with fidelity.”

In the late 1820s, acting on contempt for the native peoples, greed for their land, and a fanatic belief in “states’ rights,” the legislature of Georgia illegally sought to extend its jurisdiction over the Cherokee Nation. “And be it further enacted,” one Georgia law of 1829 read, “That after the first day of June next, all laws, ordinances, orders and regulations of any kind whatever, made, passed, or enacted by the Cherokee Indians, either in general council or in any way whatever, or by any authority whatever of said tribe, be, and the same are hereby declared to be null and void and of no effect, as if the same had never existed.”

As late as 25 March 1825, the governor of Georgia had issued a proclamation warning that state’s citizens from trespassing on Indian lands as the obligations of treaties that were the “supreme law” prohibited such trespass. Four years later, these Georgians managed to convince themselves that an imagined “discovery” centuries earlier, and a nonexistent “conquest,” were somehow superior to the Cherokee Nation’s treaty rights because Georgia was allegedly “sovereign,” with “states’ rights” that the Constitution supposedly could not supersede.

Ignoring the Treaty of Holston of 1791 when the issue reached the Supreme Court—a treaty in which the United States pledged to “solemnly guarantee to the Cherokee nation all their lands”—Chief Justice John Marshall conflated the geographical with the political meaning of the word “foreign” in his opinion. Marshall argued that the Indian tribes, although certainly states, were not “foreign” to the United States, and hence not “foreign states,” but were, instead, “domestic dependent nations” and so did not have standing to sue the state of Georgia for its violations of their treaty rights. This is the heart of Marshall’s mistaken position: “We perceive plainly that the constitution in this article does not comprehend Indian tribes in the general term ‘foreign nations;’ not we presume because a tribe may not be a nation, but because it is not foreign to the United States.”

Marshall claimed, in *Cherokee Nation v. Georgia*, that when “the term ‘foreign state’ is introduced [in the Constitution], we cannot impute to the [constitutional] convention the intention … to comprehend Indian tribes within it unless the context force that construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it.” In fact, a moment’s reflection on why the framers granted foreign states the right to sue states of the United States will suffice to force precisely that construction. The intention was to improve the faith and credit that foreign nations could place in the United States to keep its word. It was a matter of virtue, honor, and a self-interest centering on the establishment of a new mechanism with which to contribute to prosperity, and to the maintenance of peace, by upholding established agreements and resolving international controversies through the American judiciary. For the framers, *all* of the treaties the United States made were part of “the supreme law of the land.” The framers had no reason to doubt that the Indian tribes were foreign nations, with whom the United States had entered into legally binding treaties, and would never have sought to escape their obligations with the novel and deceptive phrase: “domestic dependent nations.”

Deprived of the protection of the law by Marshall’s sleight of hand with the word “foreign,” the Cherokee Nation was coerced into a fraudulent treaty in 1835 that former president John Quincy Adams called an “eternal disgrace upon the country.” The overwhelming majority of the Cherokee people were then coerced onto a forced march, as most of their native American neighbors already had been, to what would eventually become Oklahoma. The departure of 13,149 Cherokees was noted by the Cherokee principal chief in the fall of 1838. Arrivals in Indian Territory, as counted by an American official there, came to 11,504. The difference—the lower end estimate of 1,645 who did not survive the journey—does not include those who died in American internment camps in the summer of 1838 or those who died among the groups removed earlier by the army. Those who survived among the groups that left earlier may even be included in the 11,504. This horror took place because of the Supreme Court’s failure to uphold the law. It was the prelude to many subsequent horrors from the theft of the Black Hills to the Dawes Act to the “termination” policy of the mid-twentieth century.

It is remarkable that American conduct can be met with the compassionate attitude conveyed in the following comment from the Cherokee jurist Steve Russell, who, after noting that an almost bottomless well of collective guilt “keeps the modern beneficiaries of genocide from finishing the job,” later writes: “We know the colonists could not now go home if they were so disposed. Our lot is intertwined with the colonists as black South Africans are with the British and the Dutch. They have nowhere to go. While they have not historically been the best of neighbors, they are still our neighbors and we must do our best to civilize them.”

The Supreme Court’s mistaken decision in *Cherokee Nation v. Georgia* must be overturned either by recognition on the part of the Supreme Court that it was mistaken or by constitutional amendment.[[1]](#footnote-1) There is no other way to respect the rights of the tribes to equality under the law. The Supreme Court’s partial acknowledgement of its mistake, in *Worcester v. Georgia* in 1832, is important, but inadequate. To go from the language of: “If it be true that the Cherokee Nation have rights…” in 1831 to an explicit recognition of their right to tribal sovereignty in 1832 was progress, but it was marred by the ongoing delusion that the native peoples were somehow “wards” of the United States—“domestic dependent nations,” a legal status to which they never agreed. A constitutional amendment to correct this might read as follows: “The Indian tribes are sovereign nations with the right of foreign states to sue states of the United States, and the United States itself, in the Supreme Court for any violation of their treaty rights.  The United States shall govern its relations with the Indian tribes in accordance with the treaties it has made or will make with them.  The Supreme Court, in seeking to adjudicate disputes, will do so in accordance with these treaties.  The United States shall keep open a treaty making process with the Indian tribes, and with any confederation of these tribes, for as long as the tribes so desire.”

There is no better way to begin to address the foundations of the extreme injustice that has marked relations with the native peoples especially since 1831, but even before. As recently as 1978, in *United States v. Wheeler*, the Supreme Court went so far as to claim that “the sovereignty that the Indian tribes retain … exists only at the sufferance of Congress, and is subject to complete defeasance.” This absurd and obscene position, which is completely dependent on the Supreme Court’s mistaken decision in *Cherokee Nation v. Georgia*, must be repudiated.

Any small “d” democrat repudiates the Supreme Court’s decision in *Dred Scott v. Sandford*, in 1857, holding that “A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a ‘citizen’ within the meaning of the Constitution of the United States.” The same repudiation should be directed toward the Supreme Court’s decision in *Cherokee Nation v. Georgia* holding that “The Cherokee Nation is not a foreign state in the sense in which the term ‘foreign state’ is used in the Constitution of the United States.” And this for much the same reason: both decisions violate basic notions of equality and fairness that are intrinsic to America’s deepest understanding of the country’s Constitution and purposes. In both decisions, there was an attempt to change the meaning of a previously more inclusive term—“foreign state” or “citizen”—and on spurious grounds deny its applicability to those deemed inferior in an effort to deprive them of their constitutional rights.

The Supreme Court’s failure to respect the sovereign equality of the Indian nations runs through every decision the court has made since 1831 on what the American Bar Association refers to as “Federal Indian Law.” But some decisions are obviously worse than others. Steve Russell, in his book—*Sequoyah Rising*—lists many cases that require no more than common sense and an instinct for right and wrong to believe should be reversed and which might easily be corrected by the Congress. In 1978, in *Oliphant v. Squamish Indian Tribe*, the court took away the right of tribal courts to hear misdemeanors involving white people who have come to Indian land. In 1989, in *Cotton Petroleum Corporation v. New Mexico*, the Supreme Court allowed states to tax what little the tribes have left by imposing a state severance tax to be added to a tribal severance tax on minerals removed from tribal land. In 2005, in *City of Sherrill v. Oneida Indian Nation*, the Supreme Court held that Indian tribes cannot regain sovereignty over lands they once owned by purchasing those lands on the open market. All of these decisions should be corrected.

The American people are meant to be what James Wilson called “sovereigns without subjects.” Just as we must prevent the 1% from making subjects of the rest of us, we—the American people—must cease attempting to rule over the native peoples as if they were in any way our subjects or subject to our jurisdiction. We must pursue equality under the law for all the citizens of our country and respect the sovereign equality of every nation in the world under what Senator Asher Robbins called “the gift of nature and of nature’s God.”

The struggle for justice for the native peoples is at the heart of the struggle for democracy for all Americans—the heart of the struggle to more fully live into the ideals of the American Revolution and of the international moral and legal order under which every people, and ultimately every individual, claims their rights—the struggle to be genuinely self-governing.

1. Supreme Court Justice Stephen Breyer, in a 2003 article on the subject for the Georgia Historical Society, recognized at least one of the fundamental mistakes in the reasoning in *Cherokee Nation v. Georgia*: “Strangely absent from Chief Justice Marshall’s opinion is an explicit discussion of a related (but different) jurisdictional claim that one of the Cherokee’s lawyers had made. The first paragraph of art. 3 says the ‘judicial power of the United States’ also shall extend to cases ‘arising under… Treaties.’ The Cherokees had argued that their case ‘arises under a treaty.’ Consequently paragraph one, they said, extended the federal judicial power to the case; paragraph two provides original jurisdiction in the Supreme Court. Chief Justice Marshall did not describe the flaw, if any, in this jurisdictional logic.” Stephen Breyer, *The Cherokee Indians and the Supreme Court*, 87 *The Georgia Historical Quarterly*, No. 3/4 (Fall/Winter 2003), 408, 416. [↑](#footnote-ref-1)