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After Removal: Searching for an Alternative

Political Opposition to Andrew Jackson and Tribal Removal.

In December of 1831, Alexis de Tocqueville stood on deck as a U.S. military escort herded sixty Choctaws on board the Mississippi riverboat *Louisville*. First came the men who

carried on their arms; then the women carrying their children attached to their backs or wrapped in the blankets they wore; they were, besides, burdened down with loads containing their whole wealth. Finally the old people were led on. Among them was a woman 110 years old. I have never seen a more appalling shape. She was naked save for a covering which left visible, at a thousand places, the most emaciated figure imaginable. She was escorted by two or three generations of grandchildren. To leave one's country at that age to seek one's fortune in a foreign land, what misery! Among the old people there was a young girl who had broken her arm a week before; for want of care the arm had been frozen below the fracture. Yet she had to follow the common journey.... In the whole scene there was an air of ruin and destruction, something which betrayed a final and irrevocable adieu; one couldn't watch without feeling one's heart wrung.¹

This winter expulsion from their homelands occurred at an early stage of President Jackson's Removal program. As Jackson's Presidency approached its end, far larger parties would be driven west in even grimmer circumstances.

In extenuation of President Jackson's decision to violate federal treaty commitments to the southeastern tribes, it must be conceded that his predecessors had left him with no good choice. The 1802 Georgia Compact approved by President Jefferson raised Georgia's expectations so high that concerted efforts by President Monroe and Secretary of War Calhoun to

¹ George Wilson Pierson, *Tocqueville and Beaumont in America*, New York: Oxford University Press, 597-98.

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secure even small fee title parcels of Georgia land for tribes proved unavailing. All President Jackson did was to stop supposing that coercion of either southeastern states or southeastern tribes could be avoided.

Having chosen to coerce southeastern tribes, President Jackson could nonetheless have implemented their Removal with more concern for their survival. Foreigners such as Tocqueville were not the only ones who discerned the potentially genocidal consequences of Jackson's brutality. Protests by tribal leaders and U.S. citizens failed to deter Old Hickory, but in 1840 a new political party formed by a coalition of anti-Jackson forces won the Presidency, and federal promotion of Removal was finally terminated.

Tribal Removal had once had some logic, and was even advocated by a few chiefs as a way to enhance the prospects of their tribes. But tribal resistance to Removal hardened as members of eastern tribes that had moved west returned with horror stories of federal mismanagement and broken promises. By the 1840s, Removal was history.

What would follow remained unclear, but the promises of pre-Jackson administrations, especially those embodied in treaties, were not forgotten by tribal leaders. The U.S. federal system also helped re-establish balance. Before Jackson attained the Presidency, he was a state leader hostile to tribes, and to federal efforts to protect tribes. As President, Jackson remained hostile to tribes. But Jackson's hold on the federal executive was not translated into control of every state government, and anti-Jackson political forces unable to capture the Presidency held or gained power at the state level, and there endeavored to assist tribes.

New Yorker Martin Van Buren, who had served Jackson as Secretary of State and Vice President and then been elected President himself in 1836, was defeated for re-election in 1840

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by the Whig Party candidate, William Henry Harrison. Two years earlier, anticipating Van Buren's national defeat, the Whig William Seward had been elected Governor of New York. Seward (later U.S. Secretary of State under Presidents Lincoln and Johnson) introduced sweeping reforms in a number of State policies, including treatment of tribes. Indicative of how strongly New York Whigs felt about justice for tribes was Seward's insistence that every last cent realized from the State's sale of Oneida reservation lands must be awarded to the emigrating Oneidas. As "trustees of the weaker party" and "guardians of the interests of the Indians within the State," argued Seward, New York had "a trust and responsibility which it ought, on all occasions to discharge with the most scrupulous care and integrity" in order to "render ample and open handed justice to the feeble remnant of a once powerful, though savage people."² Not even Chancellor Kent had spoken more emphatically.

Seward's 1838 election consolidated a new alignment of New York political forces. The State's original division between Hamiltonian Federalists and Jeffersonian Republicans had been gradually replaced in the 1820s and 1830s by a division defined by Jackson. New York defenders of Jackson, led by Van Buren and others associated with his "Albany Regency," were resisted by a coalition of old Federalists, who had even less use for Jackson than they had had for Jefferson, and old Jeffersonians who could not stomach Jackson.

Among this latter group was Kent's old rival Ambrose Spencer. Spencer's 1822 Opinion as New York Supreme Court Chief Judge, declaring all members of New York tribes to be

² *Report of the minority of the committee on Indian affairs, on the petition of the chiefs of the Orchard party of the Oneida Indians, residing in Wisconsin*, March 26, 1838, Assembly #289. These remarks were made six months prior to Seward's election as Governor.

citizens, had been a triumph of Jeffersonian theorizing.³ Based on this Opinion, one would scarcely have predicted for Spencer a future career as a champion of tribal interests. But in 1830 as a Member of Congress, Spencer tried hard to defeat Jackson's Removal Act. He failed, but in 1842 served as Federal Treaty Commissioner at the second federal Treaty of Buffalo Creek, which saved the Senecas from eviction from New York State, by reversing the worst consequences of the 1838 Treaty of Buffalo Creek.

John C. Spencer and Red Jacket.

Ambrose Spencer's views on tribal issues were influenced negatively by Jackson and positively by his own son, John C. Spencer, who settled in western New York and soon became involved in Seneca affairs. While the younger Spencer was serving as District Attorney for western New York from 1815-17, a Seneca man was accused of murdering a New York citizen. Spencer prosecuted the accused murderer, who was tried before a jury of New York citizens. Red Jacket defended his Seneca "brother" before this jury, who found him not guilty. Speaking through an interpreter before a jury of New York citizens, Red Jacket secured the acquittal of an accused Seneca. Afterwards, Red Jacket approached the young District Attorney and "with much show of simplicity" remarked, "This man must have done you some great injury."

No, answered Spencer, "before this murder I didn't know the man existed."

"Now I understand," replied Red Jacket. "The murdered man was your brother and you were out to avenge his death."

No, answered Spencer, he was just doing his job as District Attorney.

³ See above, page 408.

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“You were paid to do this?” When Spencer acknowledged as much, Red Jacket “feigning vivid indignation” exclaimed, “So! Not only did you want to kill my brother who never did you harm, but you sold his blood in advance!” Spencer was dumbfounded, and Red Jacket departed with a second victory. Years later, Spencer maintained he had never encountered anyone whose eloquence was more natural and spirited, or who was more skilled in the use of irony than the great Seneca advocate.⁴

The experience of prosecuting a Seneca man for murder, only to lose in court to Red Jacket, may have been a transformative experience for District Attorney Spencer. Several years later, in 1821, the throat of a Seneca woman named Kau-qua-tau was slit by a Seneca chief named Soonongize, also known as Tommy-Jemmy. Though he had been carrying out a formal Seneca death sentence for witchcraft, Soonongize was arrested and brought to trial for murder in Buffalo. Serving as attorney for the defense was former District Attorney John C. Spencer, advised by Red Jacket. During the trial, Red Jacket reminded the jury that witches had been sentenced to death by white people in seventeenth century Salem, and argued that the Senecas had done nothing more, nothing less. For his part, Spencer contended that the alleged crime had been committed on Seneca national territory and was therefore outside the jurisdiction of New York State. The jury agreed.⁵

4 Spencer told this story to Alexis de Tocqueville on July 18, 1831, when Tocqueville visited Spencer’s Canandaigua home. Alexis de Tocqueville, *Oeuvres Completes*, Paris: Gallimard 5:222. My translation.

5 Christopher Densmore, *Red Jacket*, Syracuse: Syracuse University Press, 1999, 95-97. This acquittal led to passage on April 22, 1822, of an Act extending State jurisdiction over all crimes committed on tribal reservations.

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From 1827 to 1829, John C. Spencer served on a three-member commission to revise all New York statutes, focusing his personal efforts on criminal statutes. From 1839 to 1841, he served as New York's Secretary of State in the Whig administration of Governor Seward. From 1841 to 1843, he was Secretary of War in the administration of President John Tyler. While Secretary of War, Spencer ended the shameful Seminole War, and called a nationwide halt to all further efforts to encourage Removal, urging that eastern tribes "be suffered to rest in peace."⁶ Individuals continued to move back and forth amongst the now dispersed tribal communities that had once lived in the eastern United States, but coerced Removal had been halted. From 1843 to 1844, Spencer served as Secretary of the Treasury, and in 1844 was nominated to the Supreme Court, but was not confirmed because of Senate hostility to President Tyler.

Governor Seward applauded Spencer's desire to head off Seneca expulsion from New York State. In his Annual Message to the Legislature of January 4, 1842, Seward expressed strong sympathy for the "allegation of the survivors of that heroic and unfortunate people, that the late treaty by which they surrendered the remnant of their lands, under the sanction of the Government of the United States, was procured by circumvention and fraud." Later that year, Secretary of War Spencer appointed his father as Federal Treaty Commissioner for the Senecas. The resulting 1842 Treaty of Buffalo Creek marked the beginning of the post-Removal era in both the nation and New York State. Private owners of fee title to aboriginal tribal land would no longer drive the federal government's agenda.

A full solution required repudiation of the very idea that "Indian Title" could coexist with saleable fee title in other hands. But this legally established right, upheld by the Supreme Court

⁶ *American National Biography*, "Spencer, John Canfield," 450.

in 1810 (*Fletcher vs. Peck*), had to be legally abolished. For this reason, an 1857 federal treaty negotiated with the Tonawanda Band of Senecas arranged for a buy-out of the private investors who held fee title to “the entire Tonawanda reservation.” The 1857 Treaty further provided that

The land so purchased shall be taken by deed of conveyance to the Secretary of the Interior of the United States, and his successors in office, in fee, to be held by him in trust for the said Tonawanda band of Indians and their exclusive use, occupation, and enjoyment, until the legislature of the State of New York shall pass an act designating some persons, or public officer of that State, to take and hold said land upon a similar trust for said Indians; whereupon they shall be granted by the said Secretary to such persons or public officer.⁷

By terms of this 1857 Treaty, the federal government was to perform a temporary function, after which the State of New York would exercise full trusteeship control. The Treaty provided that New York State would then stand in a trust relationship to this tribe “similar” to that formerly held by the federal government. On April 17, 1860, the New York Legislature did its part, passing an Act that terminated all non-tribal rights and claims and declared the Tonawanda Seneca reservation tax-exempt land held collectively by the Tonawanda Senecas under State regulation.⁸ This 1857 federal treaty and 1860 State law coordinated a process for the Tonawanda Band of Senecas that had been gone through by the Oneidas, Onondagas, Cayugas in 1788-89, under different circumstances and using different procedures. In each case, aboriginal “Indian Title” land claims of disputed value had been formally extinguished, and these tribes ended up holding fully valued land rights regulated by New York State. After decades of direct federal involvement ultimately traceable to the 1786 Hartford Compact, by which New York State had relinquished fee title ownership of Seneca lands to Massachusetts and thereby invited

⁷ Kappler 2:767-71.

⁸ *Laws of New York*, Chapter 491 of 1860.

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U.S. government regulation, the Tonawanda Senecas had also finally become a tribe holding State-secured full-value land rights in their homelands.

New Yorker John C. Spencer deserves great credit as the federal official who formally ended federal support for Removal. But Spencer's mentor Red Jacket deserves public recognition not only for resisting Removal when resistance seemed futile but also for articulating the two basic requirements of tribes in the post-Removal United States. From 1790 until his death in 1830, Red Jacket fought for fully valued aboriginal land rights and meaningful tribal political independence. To change the tribal policy of the early republic, the skills needed were not those of an armed insurrectionary such as Tecumseh. Needed were Red Jacket's flexibility, subtlety and force of logic. U.S. Presidents from George Washington to John Quincy Adams discovered what it was like to be subjected to Red Jacket's penetrating gaze and scathing sarcasm. Decade after decade, New York officials and federal treaty commissioners also learned not to underestimate this antagonist.

In 1829, soon after Chief Justice Marshall administered the oath of office to President Jackson, Red Jacket spoke in Albany to an audience including members of the New York Legislature. A rumor spread that the celebrated Seneca chief would compare President Jackson to President Washington, and numerous supporters of Jackson attended. But when Red Jacket began to compare Jackson to Washington *unfavorably*, "The applause with which the orator was greeted on his first appearance, was changed into rude manifestations of displeasure, and the audience rapidly grew thin by the departure of those who had been the most eager to come."⁹

⁹ William Leete Stone, *The Life and Times of Red-Jacket*, New York: Wiley and Putnam, 1841, 390.

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Should the United States now choose to honor Red Jacket, installing his image on the twenty dollar bill might be a good place to start.