

Black Freedmen and the Cherokee Nation

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Blacks were a significant minority of the Cherokee Nation throughout the nineteenth century, first as slaves and later as freedmen. An 1830s census shows that the Cherokee Nation at that time consisted of: 13,536 Indians; 147 intermarried white males; 73 intermarried white females; and 1,277 slaves.¹ In 1860 there were approximately 23,000 Cherokees and 2,500 blacks in the Cherokee Territory.² And according to the United States Census of 1890 the total population of the Cherokee Nation was 56,309, including 5,127 persons of Negro descent.³

Racial prejudice against blacks existed among the Cherokees as among other Indian tribes. An early example of it was the view expressed in 1793 by a Cherokee Chief, Little Turkey, that the Spanish were not "real white people, and what I have seen of them looked like Mulattoes and I would never have anything to say to them."⁴ A more significant expression was the enslavement of blacks, both before and after the removal of the Cherokees to west of the Mississippi. Article III of the Cherokee Constitution of 1839 shows the extent to which discrimination was explicitly sanctioned by law:

The descendants of Cherokee men by all free women, except of the African race, whose parents may have been living together as man and wife, according to the customs and laws of this Nation, shall be entitled to all the rights and privileges of this Nation as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either by the father's or mother's

¹ Charles C. Royce, *The Cherokee Nation of Indians, Fifth Annual Report, Bureau of Ethnology, 1883-84* (Washington, D.C.: U.S. Govt. Printing Office, 1887), p. 240; Oliver Knight, "History of the Cherokees, 1830-1846," *Chronicles of Oklahoma*, 34 (1956), 159.

² Arthur L. Tolson, *The Black Oklahomans, A History: 1541-1972* (New Orleans, Louisiana: Edwards Printing Company, 1966), pp. 26-27.

³ Department of the Interior, Census office, *Report on Indians Taxed and Indians Not Taxed in the United States at the 11th Census 1870* (Washington, D.C.: U.S. Govt. Printing Office, 1894), pp. 254-55.

⁴ Kaye M. Teall, *Black History in Oklahoma* (Oklahoma City, Oklahoma: Impress Inc., 1971), p. 19.

side, shall be eligible to hold any office of profit, honor or trust, under this government.⁵

The 1866 Treaty between the Cherokee Indians and the United States, following the defeat of the Confederacy, acknowledged the abolition of slavery and defined the new status of those blacks who had been slaves of the Cherokees:

The Cherokee Nation, having, voluntarily, in February 1863, by an act of the national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime. . . . They [the Cherokees] further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all rights of native Cherokees: Provided, that owners of slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for slaves so emancipated.⁶

The treaty was not debated but it is apparent that like other freed slaves who became United States citizens, the former slaves of the Cherokee Nation were to be full Cherokee citizens with all the rights and responsibilities of other Cherokees.

Article III of the Cherokee Constitution was accordingly amended (26 November 1866) in conformity with the new treaty to allow blacks and others entitled to Cherokee citizenship to return to the Cherokee territory. All native born Cherokees, all Indians, and whites legally members of the Nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months from the 19th day of June, 1866, and their descendants, who reside within the limits of the Cherokee Nation, shall be taken, and deemed to be citizens of the Cherokee Nation.⁷

⁵ *1839 Constitution of the Cherokee Nation*; Art. III, s. 5, in *Constitution and Laws of the Cherokee Nation* (St. Louis, Missouri: R. & T. A. Ennis, 1875), p. 11. This provision, which was subsequently deleted from the Cherokee constitution, may not have been solely a product of racial prejudice. It may have been influenced in part by the clan organization of Indian tribes, in which descent was reckoned from maternal ascendants.

⁶ *Treaty with the Cherokee Nation*, Arts. IX, XV, 19 July 1866, 14 Stat. 799 (Washington, D.C.: U.S. Govt. Printing Office, 1866); Jack Gregory and Rennard Strickland, eds., *Starr's History of the Cherokee Indians* (Tahlequah, Oklahoma: Webb Offset Printers, Inc., 1967), pp. 167–77. The treaty was signed 19 July 1866, ratified 27 July 1866, and proclaimed 11 Aug. 1866. This recognition of freedmen was required to provide for the equal treatment of the Cherokee freedmen, but it was also necessary from a jurisdictional standpoint since these blacks would have to be made citizens of some nation.

⁷ *The Constitution and Laws of the Cherokee Nation* (Oklahoma City, Oklahoma: Oklahoma Publishing Co., 1969), p. 263.

Although the Cherokee Nation was plagued with citizenship problems throughout the 1870s, these involved the Cherokee freedmen only tangentially.⁸

The 1866 Treaty had also given the United States the option to purchase Cherokee lands. In 1883 it availed itself of this right regarding Cherokee possessions west of the Arkansas River, and a sale was negotiated and funds for the purpose duly appropriated:

The sum of \$300,000 is hereby appropriated to be paid into the treasury of the Cherokee Nation out of funds due under appraisalment for Cherokee lands west of the Arkansas River, which sum shall be expended as the Acts of the Cherokee legislature direct, this amount to be immediately available.⁹

The sale was unquestionably valid, but the distribution of the money by the Cherokee legislature created a problem since the legislature (19 May 1883) specifically restricted payment to "citizens of the Cherokee Nation by Cherokee blood."¹⁰ The legislation, passed over the veto of the Cherokee principal chief, Dennis B. Bushyhead, directed *per capita* distribution to citizens of Cherokee blood, and the money was duly allotted with all adopted freedmen, Shawnees and Delawares excluded from the apportionment.¹¹

This attempt to discriminate is unlikely to have been based on monetary considerations alone since the increase in *per capita* shares achieved by excluding the freedmen and other Indians was less than two dollars. More probably what lay behind it was the racial prejudice exemplified in the 1839 Constitution and the feeling that blacks and Indians from other tribes simply could not be Cherokees. The Treaty of 1866, which should have prevented the legislature from discriminating against the freedmen and other Indians plainly did not succeed in doing so in this instance.

James Milton Turner descended upon this scene as a *deus ex machina*. He was a black Missouri lawyer who had been born in slavery in 1840, but had gained his freedom in 1844 when his father had purchased the boy and his mother for fifty dollars. He had subsequently worked his way up through the Lovejoy School in Brooklyn and Oberlin College in Ohio. President

⁸ *The Cherokee Constitution and the Laws and Rules Bearing on the Autonomy of the Cherokee Nation* (Muskogee, Indian territory: Phoenix Printing Co., 1894), p. 46; Dale and Wardell, *Stand from Under* (Washington, D.C.: R. A. Walters & Sons, 1885); W. J. Watts, *Cherokee Citizenship and a Brief History of Internal Affairs in the Cherokee Nation* (Muldraw, Indian territory: Register Print, 1893).

⁹ United States Laws, 22 Statutes at Large 623 (Washington, D.C.: U.S. Govt. Printing Office, 1883).

¹⁰ Committee on Indian Affairs, *Cherokee Freedmen and Others*, United States House of Representatives, Report Number 844, 50th Congress, 1st Session (1888), hereinafter cited as Rep No. 844.

¹¹ *Ibid.* .

Grant had appointed him as minister and consul general to Liberia, where he served as America's first black diplomat from 1871 to 1878. Upon his return to the United States he practised law and championed the claims of those who would otherwise have been left without council or representation.¹² In the present instance, his first act was to file suit in the United States Court of Claims for the freedmen; but the suit was dropped before adjudication.¹³ Next, as attorney for the Association of Cherokee freedmen, which he helped organize, he petitioned President Cleveland personally in the name of the freedmen. The petition to Cleveland included several prayers and arguments.

[P]etitioner therefore respectfully represents that said act [excluding freedmen and other Indians from any share of the \$300,000] of said Cherokee council, . . . is illegal and void, as in direct contravention of the provisions of the Treaty entered into between the United States and said Cherokee Nation on the 19th day of July, 1866. . . . Article IX of said Treaty, 'They further agree that all freedmen who have been liberated by voluntary act of their former owners, or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six month, and their descendants, *shall have all the rights of native Cherokees*' and said \$300,000 having been thus distributed to the "*Cherokees by blood only*," . . . it must be apparent that unless the President of the United States exercise the authority and power vested in him by the Sixth Article of said Treaty ordering that restitution be made, said freedmen and other members of said nation thus excluded . . . will be forever barred and cut off from all benefits thereof to which they are entitled by the terms of said Treaty. Therefore . . . petitioner doth further pray the President of the United States to act under the authority of said Sixth Article of said Treaty of 1866, by issuing his executive notice to the government of said Cherokee Nation, pointing out the various and persistent violations by said Cherokee Nation, of the terms and provisions applying in said Treaty of 1866 to the protection and rights of said freedmen, formerly the slaves of said Cherokee Nation, and of other classes of citizens of said Cherokee Nation by adoption and incorporation.¹⁴

A supplementary petition was filed one week later. It presented a procedural and jurisdictional basis for granting the prayers of the freedmen under the 1866 Treaty.¹⁵ President Cleveland realized that the appropriation of addi-

¹² For further information on Turner see: Richard Bardolph, *The Negro Vanguard* (New York, New York: Random House, 1961), pp. 96-97; Teall, pp. 95-97; Irving Dilliard, "James Milton Turner," *Dictionary of American Biography*, 19 (1934), 66-67; Irving Dilliard, "James Milton Turner, A Little Known Benefactor of His People," *Journal of Negro History*, 19 (1934), 372; Irving Dilliard, "James Milton Turner," *Encyclopedia of the Social Sciences*, 15 (1935); N. Webster Moore, "James Milton Turner, Diplomat Educator, and Defender of Rights, 1840-1915," *Missouri Historical Society Bulletin*, 23 (1971) 194-201.

¹³ Dilliard, *Journal of Negro History*, 19 (1934), 372, mentions a suit but no references are cited.

¹⁴ Rep. No. 844, p. 6.

¹⁵ Rep. No. 844, p. 11.

tional money would have to be handled by Congress and turned the petition over to the Secretary of the Interior who in turn had the Office of Indian Affairs prepare a memorandum evaluating the petition. The memorandum supported Turner and concluded:

1. These people [the freedmen and other Indians], having the vested rights of native Cherokees, were entitled to their *pro rata* share of this fund.
2. The Act [of the Cherokee legislature excluding the freedmen and other Indians from sharing in the \$300,000] is in violation of the Treaty of 1866, and the agreements between the Cherokees and Delawares, and Cherokees and Shawnees.
3. The Act is in violation of the United States Constitution – “Nor shall any person be deprived of life, liberty or property without due process of law.”
4. The Act is in violation of the spirit and intent of the Congressional appropriation of the \$300,000. . . . Under the construction of the Congressional appropriation by the Cherokee legislature, that body had the power to appropriate the \$300,000 to the exclusive use or benefit of themselves, the principal chief, or any other individual member of the nation. But Congress never intended to vest in the Cherokee legislature this unbounded and unqualified right and power.
5. The Act is in violation of every principle of equity and justice, and steps should be taken by the United States Government to right this manifest wrong.¹⁶

The memorandum proposed two remedies. The more feasible was that Congress appropriate \$75,000 to be distributed on a *per capita* basis to the freedmen and other Indians, this sum to be charged against the Cherokee Nation, secured by a lien against all Cherokee lands, and deducted from any sums to be paid to the Cherokees for future land sales to the United States.¹⁷

This memorandum was included in a message sent to Congress by President Cleveland on 2 March 1886. It was considered by the Committee of Indian Affairs, which wrote a report, but no legislation concerning the matter was passed during that session of Congress.¹⁸ Two years later the claim of the freedmen and other Indians to their *pro rata* share of the \$300,000 was again considered by the Committee on Indian Affairs, after a petition drafted by Turner was presented directly to Congress.¹⁹ The Committee adopted the Report and recommendations of the Forty-ninth Congress and incorporated in it the petition of James Milton Turner, the findings and suggestions of the memorandum prepared by the Office of Indian Affairs, and a draft of the proposed bill granting the freedmen and other Indians \$75,000 to be distributed in shares equal to the shares of the \$300,000 taken by those of Cherokee blood.²⁰ The Senate accepted the House findings

¹⁶ Rep. No. 844, pp. 3-4.

¹⁷ *Ibid.*

¹⁸ United States Senate Executive Document Number 82, 49th Congress, 1st Session (Washington, D.C.: U.S. Government Printing Office, 1886).

¹⁹ Teall, p. 97.

²⁰ Rep. No. 844, n. 13.

and passed a bill identical to the House bill.²¹ Objections were raised in the House to passage of the legislation in August of 1888.²² But two months later the House considered and passed the bill. Its chief proponent, Representative Phelan of Tennessee, summed up its merits during the floor debate:

I shall not detain the House by entering into elaborate discussion of this bill, but will simply say that it has all been passed upon by every department of the Government which can take it into consideration. It has been passed upon very fully and given careful and full examination by the Interior Department – by the Secretary of the Interior [Lucius Lamar, who had become an Associate Justice of the Supreme Court in 1888] and by the Commissioner of Indian Affairs – and it was sent to the Committee on Indian Affairs and carefully considered there. No money is to be appropriated ultimately out of the Treasury of the United States. The money which is appropriated is to be charged against the Cherokee Nation, and taken out of money that will be paid for some of their lands which are yet to be sold. We are merely advancing to the parties who have been treated unjustly and unfairly by the Cherokee Nation an amount sufficient to pay them out of the Cherokee funds. It is an act of justice which will not cost the United States Government a single cent. The people who are chiefly interested in this bill, as is well known, are the freedmen of the Cherokee Nation. Under the Treaty of 1866 they were given all the rights of Cherokee citizens. Under the act distributing the money which was paid to these Indians from the sale of their lands, it was distributed solely and exclusively among the citizens of the Cherokee Nation of Cherokee blood. In this way the freedmen were excluded and also the Shawnees and the Delawares. This Bill is simply an act of justice, which they now request at the hands of the House, and I hope there will be no objection to it. I am sure there can be none upon any ground of equity or of law.²³

This supplementary law to benefit the freedmen and other Indians of the Cherokee Nation, who had been denied a proportionate share of the earlier grant of \$300,000, explained the necessity and distribution of the grant.

Whereas by an Act of the Cherokee legislature, which was passed over the veto of the principal chief and became a law on May 19, 1883, the principal chief was directed to cause the said sum of \$300,000 to be paid out *per capita* to the citizens of the Cherokee Nation by blood and which sum has been paid out only to Cherokee citizens by blood, as directed by said act; and whereas by the said Act of the Cherokee legislature the aforesaid freedmen, Delaware and Shawnee Indians have been deprived of their just dues guaranteed them by treaty stipulations; . . . be it enacted \$75,000 to be distributed *per capita*, first among such freedmen and their descendants, second among the Delawares incorporated into

²¹ Senate Bill Number 1494, 50th Congress, 1st Session (Washington, D.C.: U.S. Govt. Printing Office, 1888); *The United States Congressional Record*, 19 (1888) 2562 (the bill was read for the third time, as required by law, and passed without debate).

²² *The United States Congressional Record*, 19 (1888), 7493.

²³ *Ibid.*, pp. 9337–38 (remarks of Representative Phelan).

the Cherokee tribe and made Cherokees by an earlier statute, and third among the Shawnees. . . .²⁴

Another provision of the Act held the \$75,000 was to be charged against the account of the Cherokee Nation.²⁵ To distribute the \$75,000 to the freedmen, Delawares, and Shawnees one last piece of legislation was necessary. Later in 1888, Congress passed an appropriation of \$15,000, to be used to find and ascertain those persons who were entitled to share in the *per capita* distribution of the \$75,000.²⁶

This entire incident is significant on three accounts. First, the legislation subsequent to the purchase of the land by the United States from the Cherokee Nation showed the Congressional intent to see the spirit and letter of the 1866 Treaty carried into effect, making the adopted freedmen, Delawares, and Shawnees full members of the Cherokee Nation with all the rights and privileges of Cherokee citizenship. Second, the Act by the Cherokee legislature, which excluded the freedmen and other Indians from sharing in the distribution of the \$300,000, showed the willing discrimination which members of a low caste readily practise towards members of a still lower caste. This Act of the Cherokee legislature suggests enforcement of any social structure or caste system comes not from the top of the system, which is usually benevolent and often liberal and tolerant; rather enforcement of the caste order and discrimination come from those groups and individuals whose sole security in maintaining the status quo is that there will continue to be at least one caste beneath theirs. Third, a candle of hope was lit by the principal chief who attempted to veto this act of discrimination by the Cherokee legislature.²⁷ He may have believed the 1866 treaty required that he veto the Act; he may have wanted to avoid reviving the jurisdictional problems of freedmen citizenship; he may have been responding to some

²⁴ United States Laws, 25 Statutes at Large 609 (Washington, D.C.: U.S. Govt. Printing Office, 1888).

²⁵ *Ibid.*

²⁶ United States Laws, 25 Statutes at Large 994 (Washington, D.C.: U.S. Govt. Printing Office, 1888). The necessity and justice of this act was explained to the Cherokees by their principal chief, Joel B. Mayes. "It is very important that the Cherokees should know who of these classes of people are our bonafide citizens according to said treaty stipulations. There seems to arise no difficulty in regard to the Shawnees and Delawares. It is the status or citizenship of the colored people, that will be the most difficult to settle. . . . It is but fair, to our colored citizens and the Cherokees that the bonafide colored citizens should be definitely known." Joel B. Mayes, *Third Annual Message of J. B. Mayes, Principal Chief of the Cherokee Nation*; (Talequah, Indian territory: Cherokee Nation, 1889), p. 8.

²⁷ Dennis W. Bushyhead, *Sixth Annual Message of D. W. Bushyhead, Principal Chief of the Cherokee Nation to the Senate and Council* (Talequah, Indian territory: Cherokee Nation, 1885), p. 9.

unrelated internal political situation; or his act may have been merely an example of benevolence by a member of the highest caste in the Cherokee society toward members of the lowest caste in that society. But it may have been the result of wisdom and insight into the injustice of discrimination and the need for brotherhood among all people of the Cherokee Nation. Chief Bushyhead did not hide his sympathy for the plight of the freedmen and he defended their rights as citizens. "All of these classes [black freedmen and other Indians] were made citizens of this Nation in compliance with our understanding of what had been agreed to in the treaty of 1866. But as soon as they became citizens, the same condition governed as to their remaining citizens which had applied to Native Cherokees from time immemorial. . . . [T]he Constitution apply[s] to one class of citizens as much to another and no more."²⁸ Regardless of what motivated the actions of those involved, from this inglorious incident two heroes emerged, one red one black, one a great chief and the other a former slave.

²⁸ *Ibid.*