2. THE CHEROKEE CASES

During the period when the United States was under the Articles of Confederation, a committee of the Continental Congress condemned the "avaricious" attempts of people in the southern states to get Indian lands "by unfair means," citing it as "the principal source of difficulties with the Indians." Shortly afterwards, in 1788, Henry Knox reported that the intrusions of whites on Cherokee lands were tantamount to war. The Continental Congress responded with a resolution citing the Hopewell Treaty provisions and directed Knox to prepare to expel the intruders by force. The states did not respond and the troops were not mobilized, but the dispute delayed North Carolina's ratification of the Constitution.

In 1789, President George Washington personally appeared before the Senate to complain that "the treaty with the Cherokees has been entirely violated by the disorderly white people on the frontiers." Armed invasions of Indian country in the western lands of Georgia and North Carolina took the lives of hundreds of Indians and dispossessed the tribes of their treaty-guaranteed lands.

Finally, North Carolina ratified the Constitution and ceded its western lands to the United States. By then many whites had infiltrated the Indians' lands, and instead of enforcing the Treaty of Hopewell, the United States negotiated the Treaty of Holston with the Cherokees in 1791, which changed the boundary line of the Cherokee reservation, ceding more territory to the United States. Nor did the government hold this new line against settlement, even with the advantage of federal control over the ceded territory. Deep concern in the Capitol over dishonoring the treaties was diluted at the hands of the territorial government.

When it turned out that the Holston line did not preserve the settlements of many whites, yet another treaty of land cession was sought by the United States. President Adams was driven to obtain the additional lands by angry settlers and state officials and the objecting Cherokees were overwhelmed by pressure from the federal government. Any hope that the Cherokees' latest acquiescence would finally satisfy the whites' land lust was soon dashed.

By the 1820s, most remaining Cherokee land, once spread over five states, was located in Georgia. Georgia did not cede its western land claims to the United States until 1802 in a compact that required the United States to extinguish Indian title to lands within the state. This was impossible, of course, under the federally negotiated treaties, and the United States government did little to implement the compact for many years. The removal policy was, however, well-formulated by this time as the ultimate solution to this delicate problem of federal-state relations.

The Cherokees held tenaciously to the vestiges of their domain as the basis of a solid, well-established society. They had a thriving agricultural economy, a written language, and a formal government,

including a legislature, courts, and a written constitution. When gold was discovered on tribal lands in 1827, Georgia increased its demands on the United States to remove the Cherokees west to the Indian territory. This was required, Georgia argued, by its 1802 compact with the United States. The Cherokees, for their part, had enacted a constitution which declared that the Cherokee Nation was absolutely sovereign and autonomous on tribal soil.

The tribe's 1830 memorial shortly after the passage of the Removal Act by Congress reminded the national government that the Cherokees' sovereignty was secured by treaty and asserted in the Cherokee constitution:

> We wish to remain on the lands of our fathers. We have a perfect and original right to remain without interruption or molestation. The treaties with us and the laws of the United States made in pursuance of treaties, guaranty our residence and privileges, and secures us against intruders. Our only request is, that these treaties may be fulfilled, and these laws executed.

Quoted in Allen Guttman, States' Rights and Indian Removal: *The Cherokee Nation v. Georgia* 58 (1965).

Georgia enacted a series of laws beginning in 1827 which, in effect, would have abolished the Cherokee government and distributed Cherokee lands among five Georgia counties. All tribal "laws, usages and customs" were annulled and Georgia law was extended to Cherokee lands in toto. In addition, the Cherokee legislature and courts were prohibited from meeting.

Advocates of forced Indian removal argued that tribal Indians, by virtue of their radical divergence from the norms and values of white society, could not retard the advance of civilization. According to the proponents of Indian removal, the territories reserved to the tribes east of the Mississippi were now so surrounded by land hungry whites that destruction of the tribes appeared inevitable and the treaties could therefore no longer be regarded as binding. Conditions had changed so dramatically from the time of the treaties' negotiation that only removal could save the tribes from inevitable destruction.

President John Quincy Adams, in his message to Congress in 1828, described the "Indian problem:"

> [I]n appropriating to ourselves their hunting grounds we have brought upon ourselves the obligation of providing them with subsistence; and when we have had the same good fortune of teaching them the arts of civilization and the doctrines of Christianity we have unexpectedly found them forming in the midst of ourselves communities claiming to be independent of ours and rivals of sovereignty within the territories of the members of our Union. This state of things requires that a remedy should be provided—a remedy which, while it shall do justice to those unfor-

> tunate children of nature, may secure to the members of our confederacy their right of sovereignty and soil.

Reprinted in Francis Paul Prucha, The Great Father 190 (1984).

The "remedy" was to breach the Cherokees' treaties and forcibly remove them across the Mississippi River. In 1830, Georgia Governor George Gilmer rationalized the Removal policy as follows: "[T]reaties were expedients by which ignorant, intractable, and savage people were induced without bloodshed to yield up what civilized peoples had a right to possess by virtue of that command of the Creator delivered to man upon his formation—be fruitful, multiply, and replenish the earth, and subdue it." Quoted in id., 196.

Georgia Congressman, later governor, Wilson Lumpkin put it more gently:

> The practice of buying Indian lands is nothing more than the substitute of humanity and benevolence, and has been resorted to in preference to the sword, as the best means for agricultural and civilized communities entering into the enjoyment of their natural and just right to the benefits of the earth, evidently designed by *Him* who formed it for purposes more useful than Indian hunting grounds.

Wilson Lumpkin, The Removal of the Cherokee Indians from Georgia 83 (1969).

The Removal Act was passed by Congress and signed by President Jackson in 1830. It stated:

> That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there * * *.
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> That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always,* That such lands shall revert to the United States, if the Indians become extinct, or abandon the same.
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> * * *

Ch. 148, 4 Stat. 411–12 (1830).

Notes

1. President Jackson refused the direct request of the Cherokee Nation for federal intervention to uphold tribal treaty rights against Georgia's legislative encroachments on Cherokee territorial sovereignty. Thus, the Cherokees had little choice but to test the Georgia laws in the court.

The Supreme Court had infrequently addressed the issue of Indian rights under United States law. Chief Justice Marshall, in his opinion for the Court in the 1823 case *Johnson v. McIntosh,* p. 72, supra, had declared that the legal relationship between the Indians and the discovering nations of Europe was the product of "necessity." Recognition of a right to use and occupy their lands was reserved to the Indians so that this territory later could be purchased or the Indians' rights of occupancy otherwise extinguished exclusively by the sovereign. Indian title was created by the white man's legal institutions to avoid the impracticalities, dangers and ugliness of forcible expropriation and annihilation. The processes of colonization modified the Indian tribes' relationship to the soil and to the settlers. European concepts of property were introduced; land dealings became the sole prerogative of the national government consistent with the new nation's legislation (the Nonintercourse Act), with the British Proclamation of 1763, and with a legal tradition reaching back to the Middle Ages.

Johnson had left many questions unresolved respecting Indian rights. How did the processes of colonization define the federal-tribal relationship beyond the question of land rights? What was the significance of the treaties between tribes and the federal government? What was the relationship between Indians and the states? What was the extent, if any, of self-government retained by the Indians? Enduring answers were provided to these questions in the two cases brought about by the Cherokee Nation's challenge to Georgia's exercise of jurisdiction over its reservation.

2. The *Cherokee* cases, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), were the central fury of what was, by all accounts, one of the greatest constitutional crises in the history of the nation. A leading historian of the court, Charles Warren, though he wrote well before Truman's takeover of the steel mills or Watergate, called the Cherokee issue "the most serious crisis in the history of the Court." Charles Warren, 2 The Supreme Court in United States History 189 (1922). At the height of the Cherokee conflict, former President John Quincy Adams declared that "the Union is in the most imminent danger of dissolution * * * The ship is about to founder." 4 Albert J. Beveridge, The Life of John Marshall 544 (1919). One writer summarized the Cherokee–Georgia conflict this way:

> The Governor, legislators, and judges of Georgia had publicly dared the Supreme Court to interfere; and the President of the United States, who had encouraged—or at least winked at—this outrage, now seemed prepared to stand by and watch the State defy the Constitution, laws, and treaties of the United States.

Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality,* 21 Stan.L.Rev. 500 (1969).

By the time the first case reached the court the justices were apparently aware of the issues:

> The policy of removal * * * and the dire consequences for the Indian population precipitated a growing concern among a segment of educated nineteenth-century Americans for what they termed the "plight" of the Indians * * * caused by their inability to acculturate. Given that fact, most Indians would inevitably be forced to emigrate. Most could not adapt to white customs and institutions: they lacked the inherent qualities of republican yeomen. While civilizing Indians was preferable to dispossessing them, for humanitarian and paternalistic reasons, the civilizing process did not take in most cases. The result was a "plight": dependency and poverty or emigration and dispossession.
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> In 1828, in an address commemorating the first settlement of Salem, Massachusetts, [Justice Joseph] Story called attention to the "plight" of the Indians.
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> The westward exodus of the Indians signified for him "the general background of their race." They were "incapable of * * * assimilation" with Western culture: "by their very nature and character, they neither unite themselves with civil institutions, nor can with safety be allowed to remain as distinct communities." Their "ferocious passions, their independent spirit, [and] their wandering life" represented a challenge to white society. By their presence they raised the question "whether the country itself shall be abandoned by civilized man, or maintained by his sword as the right of the strongest." Story knew what the answer to that question would be.
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> Story sent a copy of his address to [Chief Justice John] Marshall, who responded with a lengthy discussion of the "Indian question."
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> > I have been still more touched with your notice of the red man than of the white. The conduct of our forefathers in expelling the original occupants of the soil grew out of so many mixed motives that any censure which philanthropy may bestow upon it ought to be qualified. The Indians were a fierce and dangerous enemy whose love of war made them sometimes the aggressors, whose numbers and habits made them formidable, and whose cruel system of warfare seemed to justify every endeavor to remove them to a distance from civilized settlements. It was not until the adoption of our present government that respect for our own safety permitted us to give full indulgence to those principles of humanity and justice which ought always to govern our conduct towards the aborigines when this course can be pursued without exposing ourselves to the most afflicting calamities. That time, however, is unquestionably arrived, and every oppression now exercised on a helpless people depending on our magnanimity and justice for the preservation of character. I often think with indignation on our disreputable conduct (as I think) in the affairs of the Cherokees in Georgia. * * *

G. Edward White, The Marshall Court and Cultural Change: 1815–35 (the Oliver Wendell Holmes Devise History of the Supreme Court, Vols. III–IV) pp. 712–713 (1988).*

3. The Cherokees' own lawyer, William Wirt, former United States Attorney General in the administrations of Presidents Monroe and Adams and hired by the tribe at the urging of Daniel Webster among others, held grave doubts about the ability of the Cherokees to survive without removing westward. Responding to a letter from James Madison, who had been a long-time advocate of the Removal policy, Wirt confided:

> I * * * concur with you entirely, as to the best mode of solving the political problem with regard to the Indians within the bounds of the States * * * While the [Cherokee] delegation was * * * in consultation [with me] on this subject, [I said that] there are many in the United States who will think it your wisest course to remove, *and I am among them,* [despite having given] my opinion * * * in favor of your right to remain.

Quoted in id., at 721.*

Wirt decided to represent the Cherokees in the case before the Court. He was worried, however, about the Court's jurisdiction and communicated his concerns through a friend to Chief Justice John Marshall who replied:

> I have followed * * * the debate in both houses of Congress, with profound attention and deep interest, and have wished, most sincerely, that both the executive and legislative departments had thought differently on the subject. Humanity must bewail the course which is pursued, whatever may be the decision of policy.

Marshall added, however, that he "thought it his duty to refrain from indicating any opinion" on the jurisdictional issues. Id. at 721.*

Wirt brought an original action before the Supreme Court arguing that the laws of Georgia could have no force within the Cherokees' treaty-guaranteed reservation. Georgia refused to argue before the Court. While the case was pending, Marshall got a taste of Georgia's attitude. A Cherokee named George Tassel was convicted of murdering another Indian on Cherokee land by a Georgia trial court. Tassel applied to the United States for a writ of habeas corpus on the grounds that under the treaty the Cherokees were entitled to their own courts and that he could not be tried in state court. Marshall issued a writ. The legislature condemned the Chief Justice's "interference". Tassel was hanged five days later.

A few months later, *Cherokee Nation v. Georgia* was dismissed because Chief Justice John Marshall ruled, as Wirt had feared, that the Court had no jurisdiction. The Cherokee Nation was not a "foreign nation" within the meaning of article III, section 2, the constitutional grant of the judicial power. But in dictum, Marshall laid down principles that, even now, make *Cherokee Nation v. Georgia* an important part of the foundation of the federal-tribal relationship.