6

Indian Removal and the Cherokee Cases

As early as 1803, President Thomas Jefferson proposed moving tribes located in the eastern United States west of the Mississippi. Jefferson acknowledged "the wrongs of our people" against the Indians and articulated a desire to provide them with civilization.[1] Accordingly, Jefferson believed tribes had to assimilate into Anglo-American culture or "remove beyond the Mississipi [*sic*]."[2] These were comparatively humane policy options because Jefferson thought the United States could easily "crush" tribes.[3] President James Madison shared his predecessor's opinion of the status of tribes, and in 1817 unsuccessfully attempted to entice the Cherokee into moving west.[4] In 1825, President James Monroe echoed Jefferson and Madison, stating removing the tribes from Georgia:

> [W]ould not only shield them from impending ruin, but promote their welfare and happiness. Experience has clearly demonstrated that in their present state it is impossible to incorporate them in such masses, in any form whatever, into our system. It has also demonstrated with equal certainty that without a timely anticipation of and provision against the dangers to which they are exposed, under

[1] Letter from Thomas Jefferson, U.S. President, to William Henry Harrison, Governor of the Ind. Territory (Feb. 27, 1803), Founders Online, https://founders.archives.gov/documents/Jefferson/01-39-02-0500 [https://perma.cc/2CWF-AEKA].

[2] *Id.*

[3] *Id.*

[4] *1816 James Madison – The Indian Removal Era Begins*, St. of the Union Hist. (Jan. 11, 2017), www.stateoftheunionhistory.com/2017/01/1816-james-madison-indian-removal-era.html [https://perma.cc/NX9P-B7EH].

causes which it will be difficult, if not impossible to control, their degradation and extermination will be inevitable.[5]

President John Quincy Adams thought removal was the proper Indian policy, too; however, he firmly believed removal could only be done through treaties.[6] Adams held this view even though he thought Indians had no property rights because he believed Indians merely roamed the land rather than improved it.[7]

By 1828, it was easily discernable that many tribes were sophisticated, sedentary farmers rather than roaming nomads. In particular, the Choctaw, Chickasaw, Creek, Seminole, and Cherokee had rapidly absorbed many aspects of Anglo-American culture. Many citizens of these tribes were thoroughly involved in the white economy; in fact, many owned black slaves like their white counterparts. Many citizens of these tribes wore the same clothing as white Americans, spoke English, and had converted to Christianity.[8] European educations were common among tribal citizens.[9] These tribes were far from simple hunter-gatherers and wandering nomads. Rather, they were actively involved in international politics and trade. For example, the Creek were actively playing the French, British, Spanish, and Americans off against each other. The Creek also actively traded with Jamaica and the Bahamas.[10] However, the Cherokee Nation is undoubtedly the best known of the so-called Civilized Tribes.

6.1 THE CHEROKEE AND GEORGIA

The Cherokee historic homeland encompassed part of what is today Alabama, Georgia, Tennessee, and North Carolina.[11] Like many other tribes, the Cherokee had always farmed; in fact, the Cherokee origin

[5] *James Monroe, Special Message to the U.S. Congress, Jan. 27, 1825*, Am. Presidency Project, www.presidency.ucsb.edu/documents/special-message-233 [https://perma.cc/Y9J4-RR85].

[6] *The Presidency of John Quincy Adams*, Digital Hist., www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=2&psid=3543 [https://perma.cc/JN9X-4VQA].

[7] *Oration at Plymouth*, Daily Republican, www.dailyrepublican.com/plymouth-orate.html [https://perma.cc/39LC-VJHC].

[8] *Five Civilized Tribes*, Britannica (updated Jan. 4, 2019), www.britannica.com/topic/Five-Civilized-Tribes [https://perma.cc/Y8GZ-HFDN].

[9] Jack Weatherford, Indian Givers: How Native Americans Transformed the World 200 (2010).

[10] *Id.* at 199–200.

[11] *About the Nation*, Cherokee Nation, www.cherokee.org/about-the-nation/ [https://perma.cc/KUB4-6LY5].

story involves the first woman, Selu, teaching the Cherokee to grow corn.[12] However, the profits from the fur trade caused Cherokee women to focus less on farming and become more involved in other economic pursuits. As the tribe grew more integrated into the western economy, men spent less time hunting and became more involved in agriculture. Cherokee women were gradually pushed from their traditional agricultural duties[13] into domestic work. Nevertheless, the United States' first treaty with the Cherokee Nation, in 1785, explicitly describes Cherokee land as "hunting grounds."[14]

The "hunting grounds" descriptive bore little relation to reality as the Cherokee Nation developed a robust, European-style agricultural economy by the early 1800s.[15] Sequoya, a Cherokee citizen, developed a syllabary for the Cherokee language in 1821. Sequoya was illiterate, so he devised a symbol for each of the eighty-six sounds in the Cherokee language. The syllabary was easy for Cherokee speakers to learn – allegedly it could be mastered in a matter of days.[16] Within a few years of the syllabary's creation, the Cherokee literacy rate was triple that of their American neighbors.[17] When the *Cherokee Phoenix*, the first Indigenous newspaper, was published on February 21, 1828, English and Cherokee were printed side by side.[18]

In addition to written language and agriculture, the Cherokee government was very "American." The Cherokee Nation adopted a constitution in 1827, which provided for three branches of government: executive, legislative, and judicial.[19] In fact, the Cherokee Nation had a

[12] Theda Perdue & Michael D. Green, The Cherokee Removal: A Brief History with Documents 1–2 (3d ed. 2016).

[13] Theda Perdue, *Cherokee Women*, ANCHOR, www.ncpedia.org/anchor/cherokee-women [https://perma.cc/K7GQ-YL7X]; *The Power of Cherokee Women*, Indian Country Today (updated Sept. 13, 2018), https://indiancountrytoday.com/archive/the-power-of-cherokee-women [https://perma.cc/4EGH-2GY6].

[14] Treaty with the Cherokee, Art. IV, Nov. 28, 1785, 7 Stat. 18, 19.

[15] David H. Getches et al., Cases and Materials on Federal Indian Law 119 (7th ed. 2016).

[16] Perdue & Green, *supra* note 12, at 15.

[17] *How Sequoyah, Who Did Not Read or Write, Created a Written Language for the Cherokee Nation from Scratch*, Am. Masters PBS (Nov. 24, 2020), www.pbs.org/wnet/americanmasters/blog/how-sequoyah-who-did-not-read-or-write-created-a-written-language-for-the-cherokee-nation-from-scratch/ [https://perma.cc/VVE6-VC8T].

[18] *Cherokee Language*, Britannica (updated Jan. 10, 2020), www.britannica.com/topic/Cherokee-language#ref1283246 [https://perma.cc/34BT-54MQ].

[19] Cherokee Nation Const. of 1827, art. II, § 1, Cherokee Phoenix, www.wcu.edu/library/DigitalCollections/CherokeePhoenix/Vol1/no01/constitution-of-the-cherokee-nation-page-1-column-2a-page-2-column-3a.html [https://perma.cc/TU4H-J9A3].

Supreme Court before the state of Georgia.[20] The Cherokee Constitution provided for a republican government dedicated to protecting life, liberty, and property.[21] Like its state and federal contemporaries, the Cherokee Constitution disenfranchised blacks.[22] The formalization of the Cherokee Nation further solidified its position as a bona fide government and strengthened its claim to belong on *its* land as a sovereign nation. Furthermore, the Cherokee Constitution provided the tribe with greater capacity to resist removal efforts by showing the Cherokee Nation was a civilized government.[23]

The Cherokee Constitution infuriated Georgia. Georgia adamantly believed the Cherokee had absolutely no right to claim any land within the state,[24] and Georgia's position was not baseless. In the Compact of 1802, Georgia relinquished its claims to territory in Mississippi and Alabama on the condition that the United States would extinguish all tribal land rights within Georgia's borders.[25] When the Compact was signed, the United States assumed the Cherokee would fade away in the near future or gladly cede its lands as American pressure mounted. Time proved the United States' assumption wrong. By enacting a constitution, Cherokee Nation announced it intended to remain on its ancestral, treaty-guaranteed lands. Georgia urged President John Quincy Adams to censure the Cherokee Nation for implementing a constitution; however, President Adams believed the Cherokee Nation had the right to govern itself.[26]

Georgia's efforts to remove the Cherokee Nation boiled over in the late 1820s. The Cherokee Nation was advancing too rapidly for Georgia's liking because the Cherokee's increasing sophistication undermined Georgia's argument for expelling "savages" from the state.[27]

[20] *See* J. Matthew Martin, The Cherokee Supreme Court: 1823–1835 (2021). In contrast, Georgia did not establish a Supreme Court until 1845. *See The Supreme Court of Georgia History*, Sup. Ct. of Geo., www.gasupreme.us/court-information/history/ [https://perma.cc/22WZ-6LHM].

[21] Perdue & Green, *supra* note 12, at 58; *Constitution of the Cherokee Nation*, Cherokee Phoenix, www.wcu.edu/library/DigitalCollections/CherokeePhoenix/Vol1/no01/constitution-of-the-cherokee-nation-page-1-column-2a-page-2-column-3a.html [https://perma.cc/5R7Y-NDFB].

[22] Cherokee Nation Const., *supra* note 19, at art. III, §§ 4, 7.

[23] Perdue & Green, *supra* note 12, at 59.

[24] *Id.*

[25] *1802 Thomas Jefferson – Compact of 1802*, State of the Union Hist., www.stateoftheunionhistory.com/2016/03/1802-thomas-jefferson-compact-of-1802.html [https://perma.cc/5P5J-TS26].

[26] Perdue & Green, *supra* note 12, at 59.

[27] *Id.* at 72.

Indeed, opponents of the Cherokee Nation claimed the Cherokee were not even real Indians due to intermarriage and cultural evolution.[28] But the Cherokee were too Indian for equal rights in Georgia as the state prohibited Indians from voting in the state's elections. Displacing the Cherokee with whites would increase Georgia's political power and help protect slaveholding interests.[29] Georgia stood to benefit from Cherokee expulsion economically, too. The Cherokee Nation's sovereignty prevented Georgia from developing railroads through treaty-guaranteed lands without the Cherokee Nation's consent, and without a railroad, accessing inland markets was difficult.[30] Georgia's champion entered the White House in 1828.

6.2 ANDREW JACKSON AND INDIAN REMOVAL

Andrew Jackson was elected president in 1828. Prior to politics, Jackson made his name in the military. In 1814, Jackson – thanks in large part to the effort of his Cherokee and Choctaw allies – ended the Creek War with his victory at the Battle of Horseshoe Bend.[31] Jackson became a national hero when he defeated the British at the Battle of New Orleans in 1814. Even though the conflict technically ended prior to the battle, Jackson was credited with ending the war. Significantly, tribal allies played a key role in the Battle of New Orleans. For example, Choctaw troops rescued an overmatched Tennessee rifle contingent from certain demise during the New Orleans campaign. Furthermore, fear of Choctaw stealth attacks prevented the British troops from sleeping.[32] As president, Jackson would show no loyalty to the Choctaw and Cherokee who had freely fought with him.

[28] Robert S. Davis, State v. George Tassel: *States' Rights and the Cherokee Court Cases, 1827–1830*, 12 J.S. Legal Hist. 41, 46 (2004).

[29] Perdue & Green, *supra* note 12, at 73.

[30] *Id.* at 72.

[31] Ethan Moore, *Spring 1814: The Battle of Horseshoe Bend*, U.S. Nat'l Park Serv., www.nps.gov/articles/behind-the-sharp-knife.htm [https://perma.cc/S6V7-A9AS]; *Cherokees Who Fought at Battle of Horseshoe Bend to Be Honored with Monument*, Cherokee Phoenix (Oct. 18, 2019), www.cherokeephoenix.org/news/cherokees-who-fought-at-battle-of-horseshoe-bend-to-be-honored-with-monument/article_8fd264cc-3678-54f3-84e1-b0a7bb95c43d.html [https://perma.cc/2DHP-BJZ8].

[32] Iti Fabvssa, *Choctaws and the War of 1812: A High Point in Relations with the U.S.*, Biskinik, Feb. 2015, at 11, https://choctawnationculture.com/media/33986/2015.02%20Choctaws%20and%20the%20War%20of%201812%20part%202.pdf [https://perma.cc/D7DA-TY4R].

During his first message to Congress,[33] President Jackson removed any doubt about whether he would support tribes' attempt to remain within their treaty-guaranteed lands. Jackson declared Indians were "[s]urrounded by the whites with their arts of civilization, which by destroying the resources of the savage doom him to weakness and decay …. That this fate surely awaits them if they remain within the limits of the states does not admit of a doubt."[34] In the name of justice and humanity, Jackson claimed tribes should be removed to lands west of the Mississippi, and "[t]here they may be secured in the enjoyment of governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace on the frontier and between the several tribes."[35] Jackson said removal "should be voluntary."[36] However, he made clear tribes could not exist as sovereigns within states. Tribal self-governance was only possible west of the Mississippi; otherwise, tribes would have to "submit to the laws of those states."[37]

Georgia had previously enacted resolutions decrying the Cherokee Nation's presence in the state; however, soon after Jackson's speech to Congress, Georgia implemented legislation transgressing the Cherokee Nation's sovereignty. Georgia injected its civil and criminal laws within the Cherokee Nation's borders. Furthermore, Georgia declared all laws enacted by the Cherokee Nation "to be null and void and of no effect, as if the same had never existed."[38] The Georgia law also prohibited persons with Indian blood from being witnesses in cases when white people were parties to the action. Georgia would go on to outlaw the Cherokee government and forbid white persons from entering the Cherokee territory without a license from the state. And in response to gold being discovered on Cherokee land,[39] Georgia claimed authority over the gold mines on Cherokee land.[40]

[33] *Andrew Jackson, Dec. 8, 1829, First Annual Message to Congress*, Presidential Speeches, UVA, Miller Ctr., https://millercenter.org/the-presidency/presidential-speeches/december-8-1829-first-annual-message-congress [https://perma.cc/2CR8-877G].

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Acts of the General Assembly of the State of Georgia, Dec. 20, 1828, at 89, https://dlg.usg.edu/record/dlg_zlgl_8970609#text [https://perma.cc/BJ59-TTFK]; Perdue & Green, *supra* note 12, at 76.

[39] Robert Anderson et al., American Indian Law: Cases and Commentary 53 (4th ed. 2020).

[40] Acts of the General Assembly of the State of Georgia, Nov. & Dec., 1829, at 116, https://dlg.usg.edu/record/dlg_zlgl_9655783#text [https://perma.cc/Z4T8-2BBM]; Perdue & Green, *supra* note 12, at 78.

By February of 1830, Congress was debating legislation to remove tribes from the eastern United States and a bill to do so was soon introduced.[41] Supporters of removal yearned for tribal land, but expelling the tribes was a flagrant violation of their treaty rights. Thus, removal proponents diminished the significance of tribal treaties on the basis that tribes lacked the sovereign capacity to enter into binding agreements. Georgia Congressman Wilson Lumpkin, a leading advocate for Indian removal,[42] epitomized the views of removal supporters by stating:

> 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.[43]

Lumpkin even contended the future would look upon supporters of tribal sovereignty with disdain.[44] Not all supporters of removal were as blunt as Lumpkin; nevertheless, even more moderate removal advocates noted the treaties acknowledged tribal dependence on the United States.[45] This language of dependency was used to justify deporting tribes for their own good.

But the Indian Removal Act[46] faced staunch opposition. Those who stood against Indian removal argued the Constitution made treaties the supreme law of the land, and treaties were also sacred promises. Moreover, removal opponents claimed there was no question about tribal capacity to enter treaties because England, France, and Spain had entered treaties with tribes as had the United States and individual states. Accordingly, Representative Isaac Bates of Massachusetts asked those in favor of removal, "How, then, can we say to Indians nations, that what we called treaties, and ratified as treaties, were not in fact treaties?"[47]

[41] *Indian Removal Act Debate References*, Libr. of Cong., https://guides.loc.gov/indian-removal-act/digital-collections [https://perma.cc/9E4W-9W4Y].
[42] Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly 161 (1994).
[43] David H. Getches et al., Cases and Materials on Federal Indian Law 120 (7th ed. 2016) (emphasis in original).
[44] Prucha, Treaties, *supra* note 42, at 165.
[45] *Id.* at 162.
[46] Indian Removal Act of 1830, Pub. L. No. 21–148, ch. 148, 4 Stat. 411 (repealed 1980).
[47] Prucha, Treaties, *supra* note 42, at 164.

In addition to law, removal opponents fortified their position with moral appeals. Senator Theodore Frelinghuysen of New Jersey asked:

> Do the obligations of justice change with the color of the skin? Is it one of the prerogatives of the white man, that he may disregard the dictates of moral principle, when an Indian shall be concerned? The question has ceased to be – What are our duties? An inquiry much more embarrassing is forced upon us: How shall we most plausibly, and with the least possible violence, break our faith? Sir, we repel the inquiry – we reject such an issue – and point the guardians of public honor to the broad, plain path of faithful performance, to which they are equally urged by duty and by interest.[48]

Similarly, Representative George Evans of Maine castigated Lumpkin for his remarks on how posterity would look upon the defenders of Indian rights by declaring:

> Before that period shall arrive, you must burn all the records of the Government – destroy the history of the country – pervert the moral sense of the community – make injustice and oppression a virtue – and breach of national faith honorable; and then, but not till then, will the visions of the gentleman assume the form of realities.[49]

Those who stood against removal believed breaking the United States' pledge to the tribes would be a perpetual stain on the United States' national honor.[50]

Indian rights were clearly the key component of the debate surrounding the Indian Removal Act; however, Indian rights were inextricably intertwined with other issues. One was state versus federal power, particularly in matters of race relations. Advocates of removal often assumed a states' rights position and operated on the supposition that if the federal government could exert authority over Indians – colored people – within state borders, then the federal government would extend its tentacles into matters of slavery – the other big issue involving colored people.[51] On the other side, removal adversaries described the Indian Removal Act as a massive expansion of executive power. Removal adversaries claimed the Indian Removal Act granted the president unchecked authority over millions of dollars, millions of acres of land, and thousands of Indian lives.[52]

[48] *Id.* at 165.
[49] *Id.*
[50] *Id.*
[51] Davis, *supra* note 28, at 42 ("Proponents of states' rights and other southerners feared that federal control of relations with the 'colored' Indians would also argue for federal authority over 'colored' slaves.").
[52] Prucha, Treaties, *supra* note 42, at 164.

When the vote was called in the House of Representatives, one representative was in a particularly difficult position. Davy Crockett served as a representative from the State of Tennessee, but Crockett represented much more than the Volunteer State. Crockett was a westerner from humble origins. He joined General Andrew Jackson's campaign against the Red Stick Creek in 1813.[53] Crockett earned acclaim for his tracking skills during the operation and later grew famous for allegedly killing 100 bears in a single winter.[54] Crockett was elected to the Tennessee legislature in 1821. His frontier lifestyle plus his oratory charm helped him get elected to represent Tennessee in the United States Congress.[55]

Crockett entered Congress as a Jacksonian Democrat, which seems natural as both were from Tennessee and Crockett previously served under Jackson.[56] However, Crockett sharply broke with Jackson on Indian Removal. Crockett described the Indian Removal Act in his autobiography as "a wicked, unjust measure, and that I should go against it, let the cost to myself be what it might."[57] On the floor of Congress, Crockett declared Indian tribes were sovereigns and "had been recognized as such from the very foundation of this government, and the United States were bound by treaty to protect them."[58] He said, "No man could be more willing to see them remove than he was, if it could be done in a manner agreeable to themselves; but not otherwise."[59] Crockett believed forced removal was "oppression with a vengeance."[60] Although Crockett knew voting against the Indian Removal Act would cost him his seat, he voted against it anyway. Four years after casting his vote, Crockett wrote, "I voted against this Indian bill, and my conscience yet tells me that I gave a good honest vote, and one that I believe will not make me ashamed in the day of judgment."[61]

[53] Elliott Drago, *An American Conscience*, Jack Miller Ctr. (Aug. 14, 2022), https://jackmillercenter.org/davycrockett/ [https://perma.cc/X4UY-Z9HV].

[54] *Id.*

[55] *Id.*; Stephen Railton, *David Crockett*, U. of Va. Libr., https://twain.lib.virginia.edu/projects/price/acrocket.htm [https://perma.cc/35BP-VJ4G].

[56] *Id.*

[57] Davy Crockett, A Narrative of the Life of David Crockett 206 (1834) (ebook), www.google.com/books/edition/A_Narrative_of_the_Life_of_David_Crocket/NjYDAAAAYAAJ?hl=en&gbpv=1&bsq= [https://perma.cc/D5VX-VCMK].

[58] Speeches of the Passage of the Bill for the Removal of the Indians Delivered in the Congress of the United States 251 (1830), www.minotstateu.edu/library/_documents/digital_collections/ecollections_na_remove.pdf [https://perma.cc/U5C8-ZRF4].

[59] *Id.* at 252.

[60] *Id.* at 253.

[61] Crockett, *supra* note 57, at 206.

On May 26 of 1830, the House of Representatives passed the Indian Removal Act by a vote of 102 to 97. The Act made its way through the Senate by a margin of 28 to 19 on the same day. President Jackson signed the bill into law two days later.[62] The law authorized the president to "exchange" land with Indians,[63] but this implication of consent was farcical – the entire impetus for the Act was the tribes' refusal to agree to removal. The plain text of the Indian Removal Act also extended federal protection to tribes "against all interruption or disturbance"[64] and ensured tribes' new lands would be theirs "forever."[65] Nevertheless, the Act assumed there was a high likelihood that the removed tribes would "become extinct."[66]

6.3 REMOVAL IN MOTION

Mississippi and Alabama were invigorated by the removal debates and followed Georgia's lead by passing laws extending state jurisdiction over lands guaranteed to the Choctaw, Chickasaw, and Creek by treaty.[67] These laws, like the Indian Removal Act, made it nearly impossible for tribes to exist as governments within these states. Given this reality, the Choctaw saw removal as their only option. Accordingly, the Choctaw drafted and delivered a removal treaty to the United States even before the Indian Removal Act was passed. The Choctaw's proposal was declined by the United States; however, the parties agreed to a separate treaty, the Treaty of Dancing Rabbit Creek, on September 27, 1830. In this treaty, the United States guaranteed the Choctaw Nation's land west of the Mississippi:

> [T]hat no part of the land granted them shall ever be embraced in any territory or state, but the United States shall forever secure said Choctaw Nation from and against all laws, except such as from time to time, may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties and Laws of the United States.[68]

The Chickasaw signed a removal treaty in 1832, and the Creek signed a treaty that sealed its removal in 1832.[69] The Creek's treaty contains a

[62] PRUCHA, TREATIES, *supra* note 42, at 165.
[63] Indian Removal Act of 1830, Pub. L. No. 21–148, ch. 148, § 2, 4 Stat. 411, 412 (repealed 1980).
[64] *Id.* § 6.
[65] *Id.* § 3.
[66] *Id.*
[67] PRUCHA, TREATIES, *supra* note 42, at 172.
[68] Treaty With the Choctaw, Art. IV, Sept. 27, 1830, 7 Stat.333, 333–34.
[69] Treaty With the Chickasaw, Oct. 20, 1832, 7 Stat. 381; Treaty With the Creek, Mar. 24, 1832, 7 Stat. 366.

similar jurisdictional disclaimer as the Treaty of Dancing Rabbit Creek: "[N]or shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them."[70]

In Florida, the Seminole negotiated their removal. Pursuant to the 1832 Treaty of Payne's Landing, a delegation of Seminoles went to Oklahoma to view a possible reservation site.[71] The delegation was deceived into signing the agreement – the United States allegedly bribed the Seminole interpreters.[72] The United States claimed a deal was struck in March of 1833, but the Seminole denied the treaty's validity.[73] This precipitated a war with the Seminole, which would last from 1835 until 1842. The war cost the United States approximately $30 million,[74] a massive sum considering the federal budget was roughly $30 million per year.[75] The United States suffered several stinging defeats at the hands of the Seminoles. Desperate, the United States resorted to treachery, most infamously capturing the Seminole's leader, Osceola, while he was invited to negotiate under a flag of truce.[76] Most of the Seminoles were removed, but a proud few remained in Florida forever unconquered.[77]

6.4 IS THE CHEROKEE NATION A "NATION"?

Though the majority of the Cherokee Nation remained in Georgia, there was also a growing push within the tribe itself to relocate – the so-called treaty faction – because the tribe's situation was becoming increasingly dire. Georgians were marching into Cherokee land and committing crimes with impunity. President Jackson refused to enforce the Cherokee

[70] Treaty With the Creek, at Art. XIV, 7 Stat. 366, 368.

[71] Pat Bauer, *Second Seminole War*, BRITANNICA (updated Dec. 21, 2022), www.britannica.com/event/Second-Seminole-War [https://perma.cc/LR9T-L2YH].

[72] *The Seminole Wars*, SEMINOLE TRIBE OF FLORIDA, http://floridahistory.org/seminoles.htm [https://perma.cc/WJL6-3QX8].

[73] *Id.*

[74] *Mary Greenwood Review: "The Seminole Wars: America's Longest Indian Conflict,"* ST. AUGUSTINE REC. (Sept. 24, 2016), www.staugustine.com/story/lifestyle/2016/09/24/marie-vernon-review-seminole-wars-americas-longest-indian-conflict/16296627007/ [https://perma.cc/2K4T-DPT9].

[75] *Federal 1839 Government Spending*, USGovernmentspending.com, www.usgovernmentspending.com/fed_spending_1839USmn [https://perma.cc/B5M3-JY3D].

[76] *Osceola*, U.S. NAT'L PARK SERV., www.nps.gov/people/osceola.htm [https://perma.cc/BE3D-GG4A].

[77] PRUCHA, TREATIES, *supra* note 42, at 168–81.

Nation's treaty borders. Moreover, Georgia law prohibited Indians from serving as witnesses in state court proceedings when whites were parties to the case. This meant there was no chance a Georgia court would convict a white of harming an Indian. Though the Cherokee Nation did prosecute non-Indians, the tribe was overwhelmed by the volume of American treaty violators.[78]

As civilized people, the Cherokee Nation did not answer Georgia's transgressions with force. Instead, the Cherokee Nation hired attorney William Wirt. Wirt served as the United States Attorney General under Presidents James Monroe and John Quincy Adams. While Wirt was pondering procedural questions of how to assert the Cherokee Nation's rights against Georgia, Georgia indicted Cherokee citizen George Corn Tassel for the murder of a Cherokee that took place within the Cherokee Nation's borders. Georgia's action clearly violated the Cherokee Nation's sovereignty. Wirt immediately challenged Tassel's conviction before the United States Supreme Court. Chief Justice Marshall sent a writ of error to Georgia Governor George Gilmer that arrived on December 22, 1830. Governor Gilmer took the writ to the Georgia legislature calling for the execution of Tassel in defiance of the Supreme Court. The legislature voted thirty-five to seven in favor of executing Tassel. On Christmas Eve of 1830, Tassel was hanged.[79]

With tensions rising, Wirt filed a lawsuit on the Cherokee Nation's behalf directly in the Supreme Court.[80] Chief Justice John Marshall summarized the complaint:

> This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, 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. If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined.[81]

Alas, Georgia's malfeasance was not the issue before the Court. The Court was presented with a more basic issue: Does the Cherokee Nation satisfy the jurisdictional requirements to bring a suit in the United States

[78] MARTIN, *supra* note 20, at 7, 74, 91–93.
[79] Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: The Story of the* Cherokee Cases, *in* INDIAN LAW STORIES 61, 66–68 (Carole Goldberg et al. eds., 2011); Davis, *supra* note 28, at 56.
[80] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
[81] *Id.* at 15.

Supreme Court? In order for the Court to have jurisdiction, the Cherokee Nation had to qualify as a foreign nation.

The Cherokee Nation had a powerful argument in support of its position. The Cherokee Nation contended it had been a self-governing society since time immemorial. The Cherokee Nation had its own legal system, its own language, its own land, its own customs. The Cherokee Nation asserted it had entered treaties with Britain as well as the United States, and treaties are agreements between nations. Furthermore, individual Cherokee were not citizens of the United States. Consequently, the Cherokee Nation – which was composed of people who were not United States citizens – had to be a foreign nation.

Chief Justice Marshall described the Cherokee Nation's argument as "imposing."[82] Georgia, on the other hand, was far less vigorous; in fact, Georgia refused to dignify the Cherokee Nation by even showing up in court. Ordinarily, an "imposing" argument defeats no argument in courts of justice, but this was an Indian law case with huge implications for the United States. Thus, the Court divided into four separate opinions.

Chief Justice Marshall's opinion provided a middle ground between the dissent and concurrences. Rather than foreign nations, Chief Justice Marshall determined the Cherokee Nation – and by implication every other tribe – was a "domestic dependent nation" because "they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[83] Chief Justice Marshall posited the authors of the Constitution did not have Indian tribes in mind when penning "foreign nations" in the Constitution's jurisdictional grant to the Supreme Court because Indian tribes' "appeal was to the tomahawk."[84] He further supported this position with the Constitution's Commerce Clause, which mentions both "foreign nations" and "the Indian tribes." Had the Framers of the Constitution considered tribes "foreign nations," adding "Indian tribes" at the end of the Commerce Clause would have been superfluous. This prevented him deeming the Cherokee a foreign nation; therefore, the case was dismissed for lack of jurisdiction.

Justices Baldwin and Johnson concurred in the judgment, averring the Cherokee Nation was not a nation at all. Justice Johnson's opinion emphasized Indian inferiority claiming, "I cannot but think that there are strong reasons for doubting the applicability of the epithet state, to a

[82] *Id.* at 16.
[83] *Id.* at 17.
[84] *Id.* at 18.

people so low in the grade of organized society as our Indian tribes most generally are."[85] In support of the Indian tribes' low grade, he described the Indians as "a race of hunters, connected in society by scarcely a semblance of organic government."[86] Justice Johnson asked, "Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state?"[87] He answered his own question by declaring:

> But I think it very clear that the constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes; an anomaly unknown to the books that treat of states, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state.[88]

Under no circumstances could Justice Johnson consider tribes the equal of nations.

Justice Baldwin focused primarily on the legal framework governing tribes, relying heavily on the ideas in *Johnson* v. *M'Intosh* denying tribes full ownership of their land. Although Justice Baldwin ceded, "Indians have rights of occupancy to their lands as sacred as the fee-simple, absolute title of the whites,"[89] the United States asserted ultimate control over the disposition of tribal lands. Similarly, he noted the United States' authority over Indian trade. Stereotypes embedded in the law also factored into Justice Baldwin's concurrence; indeed, he pointed out:

> In this examination it will be found that different words have been applied to them in treaties and resolutions of congress; nations, tribes, hordes, savages, chiefs, sachems and warriors of the Cherokees for instance, or the Cherokee nation. I shall not stop to inquire into the effect which a name or title can give to a resolve of congress, a treaty or convention with the Indians, but into the substance of the thing done, and the subject matter acted on: believing it requires no reasoning to prove that the omission of the words prince, state, sovereignty or nation, cannot divest a contracting party of these national attributes, which are inherent in sovereign power pre and self existing, or confer them by their use, where all the substantial requisites of sovereignty are wanting.[90]

Justice Baldwin further observed tribal lands were typically described as mere "hunting grounds." Based on the language used to describe tribes

[85] *Id.* at 21 (Johnson, J., concurring).
[86] *Id.* at 22.
[87] *Id.* at 25.
[88] *Id.* at 27–28.
[89] *Id.* at 48 (Baldwin, J., concurring).
[90] *Id.* at 33–34.

and their rights, Justice Baldwin rejected denominating tribes as foreign nations.

Justice Thompson penned a dissent joined by Justice Story. The dissent set out the established international law: "Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. Its rights are naturally the same as those of any other state."[91] Justice Thompson explained even if a nation be tributary or feudatory, it remains sovereign so long as it continues to govern itself. Therefore, Justice Thompson concluded:

> Testing the character and condition of the Cherokee Indians by these rules, it is not perceived how it is possible to escape the conclusion, that they form a sovereign state … And this has been the light in which they have, until recently, been considered from the earliest settlement of the country by the white people.[92]

Justice Thompson elucidated that the United States thought the Cherokee were sovereign enough to form treaties with, "[a]nd if they, as a nation, are competent to make a treaty or contract, it would seem to me to be a strange inconsistency to deny to them the right and the power to enforce such a contract."[93]

Immediately after the opinion, the Cherokee Nation continued its struggle for sovereignty and to have the United States honor its treaty rights. The chief of the Cherokee Nation, John Ross, issued a public statement emphasizing a majority of the Court acknowledged the Cherokee Nation was a sovereign. The Cherokee Nation's public appeal received a lucky break. Soon after the Court's opinion, the Supreme Court reporter, Richard Peters, published a 286-page volume on the case along with related legal documents, including the arguments of the Cherokee Nation's attorneys, treaties, and Georgia's anti-Indian laws. The dissenting Justices and Chief Justice John Marshall were pleased by the volume; in fact, Justice Story believed the publication was important to the public's morality, stating:

> The publication will do a great deal of good – the subject unites the *moral* sense of all New England – It comes home to the religious feelings of our people. It touches their sensibilities, and sinks to the very bottom of their sense of Justice – Depend on it there is a depth of degradation in our national conduct, which will irresistibly lead to better things.[94]

[91] *Id.* at 53 (Thompson, J., dissenting).
[92] *Id.* at 53–54.
[93] *Id.* at 59.
[94] Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 518 (1969) (emphasis in original).

6.5 THE LAWS OF GEORGIA CAN HAVE NO FORCE

The Cherokee Nation's resistance to removal had long been aided by white missionaries. Pursuant to Georgia law, white people residing within the borders of the Cherokee Nation were required to obtain a license from the state before doing so. Georgia arrested several white missionaries for violating this prohibition. The Georgia court released the missionaries to avoid an appeal to the Supreme Court, but upon their release, the missionaries returned to the Cherokee Nation sans license. Georgia arrested them again. This time, they were sentenced to four years' hard labor. In another attempt to avoid appeal, the missionaries were offered pardons. All but Samuel Worcester and Elizur Butler accepted. They chose to remain incarcerated to provide the Cherokee Nation with another day in court.[95]

As the case made its way into the Supreme Court, Georgia's governor and legislature vowed to disregard an opinion supporting the Cherokee Nation. Likewise, the Georgia court refused to comply with the Supreme Court's request for the records of the case. Georgia, as it did a year earlier in *Cherokee Nation* v. *Georgia*, refused to argue its case before the Supreme Court. Failing to argue is usually a bad litigation tactic, but no argument had previously prevailed in a nearly identical case. Plus, it was widely believed that President Jackson would not enforce an opinion against Georgia.[96]

Georgia's nonappearance did not work this time. First of all, Worcester and Butler were white men from Vermont. The Constitution grants the Supreme Court the power to adjudicate controversies between a state and citizens of different states, so there was no question of the Court's jurisdiction as the case was between Vermont citizens and Georgia.[97] With jurisdiction, Chief Justice Marshall chronicled the history of the Americas and acknowledged its original inhabitants were "a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."[98] Accordingly, Chief Justice Marshall conceded it was difficult to comprehend how the Doctrine of Discovery could dispossess the tribes of their land, describing it is an "extravagant and absurd idea."[99] Despite calling into question the Doctrine of Discovery

[95] *Id.* at 520.
[96] *Id.*
[97] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 541 (1832).
[98] *Id.* at 542–43.
[99] *Id.* at 544.

and admitting tribes had always been self-governing, Chief Justice Marshall justified Euro-American superiority over tribes because they are "a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing."[100]

Indian tribes may have been simple, but Chief Justice Marshall admitted "they might be formidable enemies, or effective friends."[101] Hence, Chief Justice Marshall noted the European powers vied to obtain tribal alliances. Prevailing policy left tribes free to govern their internal affairs, and Chief Justice Marshall stated the American colonies continued this policy. Indeed, he acknowledged, "The early journals of congress exhibit the most anxious desire to conciliate the Indian nations."[102] Furthermore, the treaty language declaring the Cherokee Nation is under the protection of the United States did not divest the Cherokee Nation of its sovereignty because, Chief Justice Marshall explained, standard international law permitted nations to seek protection from another nation while retaining their ability to exist as a self-governing entity.

Toward the end of his opinion, Chief Justice Marshall penned what may be the most famous passage in all of Indian law:

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[103]

Therefore, Chief Justice Marshall described Georgia's prosecution of the missionaries on Cherokee soil "as being repugnant to the constitution, treaties, and laws of the United States, and ought, therefore, to be reversed and annulled."[104]

The opinion was not unanimous. Justice McLean concurred. He agreed Georgia was in the wrong, but he did not believe the Cherokee Nation had the right to exist perpetually on their treaty-guaranteed land. Justice McLean believed, "But, a sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or, eventually, consent to become amalgamated in our political

[100] *Id.* at 543.
[101] *Id.* at 546.
[102] *Id.* at 549.
[103] *Id.* at 561.
[104] *Id.* at 562.

communities."[105] Justice McLean described Indians as "children of the wilderness,"[106] who were doomed to vanish as civilization expanded. Justice Baldwin dissented on procedural grounds; however, his opinion was allegedly not delivered to the court reporter. Justice Johnson did not participate in the case due to illness. He likely would have dissented, consistent with his opinion in *Cherokee Nation* v. *Georgia* a year earlier.[107]

The Cherokee Nation celebrated the decision, but few expected it to be enforced. Georgia made no pretense it would abide by the Court's ruling; in fact, the Georgia courts refused to even enter the Supreme Court's order into the record. Despite being charged with enforcing the Constitution, President Jackson described the Court's opinion as "still born" and is rumored to have said, "Well: John Marshall has made his decision; now let him enforce it!"[108] Accordingly, Worcester and Butler remained in jail for ten months after the Supreme Court ruled in their favor. The pair and their allies eventually gave up hope after Jackson's landslide reelection in 1832. Worcester and Butler accepted pardons and were released from prison.[109]

As time wore on, the reality was becoming increasingly clear. Georgia would not honor the high court's decree, and the federal government was not going to uphold its treaties with the Cherokee Nation. Thus, a small faction of the Cherokee Nation under the leadership of Major Ridge entered a removal treaty with the United States in December of 1835. The United States knew the treaty was not signed by the legitimate Cherokee Nation government; nonetheless, the Senate ratified the treaty by a margin of one vote in 1836.[110] The ratified Treaty of New Echota had a mandatory migration date of May 23, 1838.[111]

Most Cherokee held firm and refused to move. Chief Ross penned a letter to Congress protesting the Treaty of New Echota as a fraudulent document. Ross' letter called out the hypocrisy of the United States ratifying the illegitimate treaty exclaiming, "[O]ur cause is your own; it

[105] *Id.* at 593 (McLean, J., concurring).
[106] *Id.* at 588.
[107] Burke, *supra* note 94, at 524.
[108] Getches et al., *supra* note 43, at 147.
[109] Will Chavez, *Historic Profile: Missionaries Stood with Cherokees to Fight Removal*, Cherokee Phoenix (Aug. 21, 2012), www.cherokeephoenix.org/culture/historic-profile-missionaries-stood-with-cherokees-to-fight-removal/article_c465a5a2-6344-5054-9d87-e0c89756d3d8.html [https://perma.cc/9GEU-DQAJ].
[110] Carl J. Vipperman, *The Bungled Treaty of New Echota: The Failure of Cherokee Removal, 1836–1838*, 73 Ga. Hist. Q. 540, 540 (1989).
[111] Prucha, Treaties, *supra* note 42, at 180.

is the cause of liberty and of justice; it is based upon your own principles, which we have learned from yourselves."[112] The letter was signed by 15,665 of the approximately 16,000 Cherokee Nation citizens.[113] Ironically, the Cherokee Nation signed more than a dozen treaties with the United States,[114] and the only one the United States enforced was a sham.

The United States sent General Winfield Scott to the Cherokee Nation on May 10, 1838, to make pellucid the United States' intent to enforce the Treaty of New Echota.[115] General Scott returned with 7,000 troops on May 26. He forced the Cherokee citizens into stockades and internment camps.[116] Conditions on their forced march to Oklahoma were harsh. Approximately a quarter of the Cherokee Nation died along what is remembered as the Trail of Tears.[117] Hundreds of other tribes faced similar fates.

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Hungry for land, Americans ignored the treaties securing tribal territories. The United States hoped tribes would surrender their treaty lands and move west. But tribes held firm, and many thrived – removing any doubt about Indians' capacity to function in "civilized society." Alas, President Jackson changed federal Indian policy. Previous presidents were interested in tribal consent; however, Jackson was only concerned with claiming tribal lands. The Indian Removal Act enabled him to accomplish his goal. States emboldened by the Jackson policies extended their laws over tribes. Although the Supreme Court ruled states lacked authority over tribal lands and the people upon them, President Jackson flouted his constitutional duty and failed to enforce the law. Consequently, tribes in the east had few options – essentially hide or move onto reservations out west.

[112] *"Our Hearts are Sickened": Letter from Chief John Ross of the Cherokee, Georgia, 1836*, Hist. Matters, http://historymatters.gmu.edu/d/6598/ [https://perma.cc/W6TC-YG3H].

[113] Prucha, Treaties, *supra* note 42, at 180.

[114] *Cherokee Treaties*, Wikipedia (updated Nov. 9, 2022), https://en.wikipedia.org/wiki/Cherokee_treaties [https://perma.cc/D99C-E4EH] (listing treaties from before the American Revolution to after the United States was established).

[115] Prucha, Treaties, *supra* note 42, at 181.

[116] Christopher Klein, *How Native American Struggled to Survive on the Trail of Tears*, Hist. (Nov. 7, 2019), www.history.com/news/trail-of-tears-conditions-cherokee [https://perma.cc/L3YR-AZGW].

[117] *Id.*