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The Cherokee Nation: A Question of Sovereignty

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Abstract

The history of the Cherokee people with the advent of white settlers in North America is a sad one. Long before Christopher Columbus set foot in the 'new world' the Cherokee people were free to live and conduct their relations with each other and with other tribes as they saw fit. With the emergence of foreign hegemony over Native soil followed the suppression and eventual removal of the Cherokee people from their homeland where they had resided for hundreds of years to a reserved area where they would be out of the way of white progression. This thesis proposes to demonstrate how the United States government has unjustly treated the Cherokee Nation by ignoring the original meaning of the Constitution, manipulating and nullifying the many treaties made with the Nation, and treating the Cherokees themselves as if they were less than human. These issues turn on the question of sovereignty which stems directly from an application of the Commerce Clause of the Constitution. Unfortunately, however, the meaning of the Commerce Clause and its subsequent impact on tribal sovereignty has been allowed to change throughout Cherokee history. This thesis will discuss the Cherokees' early relations with the European and United States government, fight against removal in the Supreme Court, eventual forced removal to Indian Territory, effect of the Civil War, and struggle to resist the federal government's goal to twist the Commerce Clause and various treaties in order to greatly diminish the Cherokees' rights as a sovereign nation.

The Cherokee Nation: A Question of Sovereignty

Early Native Relations with Europeans

The spread of Europeans to North America began with Christopher Columbus and has continued to proliferate since. However, European explorers viewed the Native Americans much differently than the United States government later would. Before Europeans landed on the New World, Native American nations and confederacies were completely independent, self-determined societies (Lyons et al., 1992). When Europeans first came to North America, they recognized the Native Americans' 'right of occupancy' as a right which could be subjugated in only two ways: by purchase or by conquest (Jackson, 1993). During the early colonial period, European settlers and Native Americans lived separately under their different sovereigns and adjusted to one another (Pommersheim, 2009).

The colonists' attitude toward the Native Americans changed, however, during the later colonial period. The colonist approach toward the Native Americans became contradictory and opportunistic. When Indians including the Cherokees were willing to sell their land to the colonists, they were thought of as having the ownership rights necessary to sell (Pommersheim, 2009). However, they were not viewed as having sufficient sovereignty in order to dictate the terms of the sale. Also, if the Native Americans declined to make a land sale, the Crown often used the 'doctrine of discovery' to indicate that the Indians did not actually own the land because they were 'uncivilized' (Pommersheim, 2009). The 'doctrine of discovery' stipulated that "by law and divine intervention" European Christian countries could gain legal rights over indigenous non-Christian peoples "upon their discovery by Europeans" (Miller, 2012, ¶ 2). In this way,

the Colonies and the Crown, like the United States Government that would come after them, bent the rules in whatever way that would give them the most benefit without any regard to Native rights.

Before the advent of white hegemony on Native American soil, the Cherokees were an independent, sovereign nation with an understood right to self-government which they had maintained throughout their existence. However, with the arrival of Europeans and the subsequent establishment of the United States of America, the Cherokees were compelled to enter into treaties with the stronger power. Under the Articles of Confederation and later the United States Constitution, the Cherokees were to be considered a sovereign, self-governing Nation capable of entering into treaties with the United States government. Unfortunately, greed outweighed honor, and the United States government twisted the words of the Constitution and ignored treaties in order to place themselves in a position of authority of the Cherokee Nation. Over the years, this authority was affected in order to deprive the Cherokees of whatever asset the United States coveted at the time whether it be gold, coal, land, or power. Attempts by the Cherokees to retain their sovereignty through cases such as *Cherokee Nation v. Georgia* and *Worcester v. Georgia* resulted in further reductions in sovereignty. Overall, although the Cherokee Nation was regarded as a sovereign, independent entity under the Articles of Confederation, various treaties, and most importantly the United States Constitution, the United States government twisted or overlooked these agreements in order to fulfill their lust for power and land to the detriment and eventual destruction of Cherokee sovereignty.

However, although the Cherokees attempted to integrate themselves more vigorously into American society more than any other tribe, they were not the only tribe impacted by white infiltration. The Creeks, Choctaws, Chickasaws, and Seminole, which would later be known as the Five Civilized Tribes along with the Cherokees, also lived on the east coast and were treated similarly to the Cherokees (Waldman, 1999). Eventually, each of these tribes were driven off of the lands that their people had inhabited for centuries and were placed on reservations in Oklahoma. Tribes farther west were treated similarly. The Nez Perce, located mainly in Idaho, were driven from their homes in 1863 when gold was discovered on their land (Waldman, 1999). After putting up a valiant fight for their homeland, the Nez Perce attempted to flee to Canada but were overtaken about 30 miles short of their destination and forced onto a reservation (Waldman, 1999). Likewise, the Sioux, Blackfoot, Cheyenne, and Comanche were overtaken and sent to reservations when gold was discovered on their lands in the mid 1800s (Waldman, 1999). The Cherokees, however, differed from these tribes because they endeavored to become a part of American society more ardently than any other tribe, and yet they were still driven off of their lands and stripped of their sovereignty and independence.

Early Relations with the New United States Government

After the United States became a nation through its victory over England in the Revolutionary War, it established its government under the Articles of Confederation in 1781. Under the Articles, Congress was given exclusive right to “regulate trade and manage all affairs with the Indians not members of any of the states, provided that the legislative right of any State is within its own limits be not infringed or violated”

(Pommersheim, 2009, p. 29). It is apparent that from its beginning the United States government found itself faced with the 'Indian problem' and was continuously attempting to determine the most effective way to deal with this difficulty (Page, 2003). The Articles of Confederation made it absolutely clear that the Native Americans were not thought of part of the "perpetual union" (Pommersheim, 2009, p. 30). Article IX located the Indians outside of the Confederation. It also attempted to distribute the power to manage relations with the Indians between the states and Congress by stating that Congress shall have the exclusive right of regulating affairs with the Indians that are not members of any states "provided that the legislative right of any state within its own limits be not infringed or violated" (Preso, 1994, p. 448). Although this distribution of power would prove too vague and therefore unsuccessful and the Articles would eventually fail, it is important to distinguish that, at this point, the Native Americans were viewed as legally recognized sovereigns.

Another important early document that had this same effect was the Northwest Ordinance of 1787 which stated in Article III that "the utmost good faith shall always be observed toward the Native Americans; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws shall from time to time be made to preserve wrongs being done to them, and for preserving peace and friendship with them" (Thompson, 2005, p. 147). This ordinance further indicates that the Native Americans were thought of as separate sovereigns with whom treaties were to be made. Once again, it is important to note that at this point tribal

sovereignty was still intact. Unfortunately, the “utmost good faith” promised them in this ordinance did not remain a reality for very long.

The new United States government, after being exhausted by the Revolutionary War, desired to make peace with the Native Americans. In 1785, the U.S. signed the Treaty of Hopewell with the Cherokees which established friendly relations between the two nations. Under this treaty, the United States promised that no U.S. citizens would settle on Cherokee land and any U.S. citizen caught breaking this law would forfeit the protection of the United States and would become subject to the laws and subsequent punishment of the Cherokees (Treaty of Hopewell, 1785). The Treaty of Hopewell also established that the Cherokees would receive the “favor and protection of the United States” (Treaty of Hopewell, 1785, ¶ 2). However, being placed under the protection of a stronger power, in this case the United States, does not mean that the weaker power, the Cherokee, loses any of its sovereignty as a nation. This distinction between protection and sovereignty would be further established in *Worcester v. Georgia* in 1831. The Treaty of Hopewell also specified that Congress alone would have the “sole and exclusive right of regulating the trade with the Indians” (Treaty of Hopewell, 1785, ¶ 10). This meant that no state or other branch of the United States government would have jurisdiction to regulate relations with the tribes.

The Treaty of Holston along with the Ordinance of 1787, which stated that “the United States will never take the lands of the Native Americans without their consent except in just wars,” convinced the Cherokees that they would forever retain the right to remain on their land (Deloria, 1974, p. 136). Later in 1791, the United States signed the Treaty of Holston with the Cherokees which reaffirmed the agreement made in the Treaty

of Hopewell. In addition, Article VII of the Treaty of Holston specified that “the United States solemnly guarantees to the Cherokee Nation, all their lands not hereby ceded” (Treaty of Holston, 1791, ¶ 8). These agreements firmly established that although the Cherokee nation was under the protection of the United States, it was to be considered sovereign with the right to conduct its own affairs. These three treaties would later form the basis of the Cherokee Nation’s defense against encroachment by the United States government upon their established rights as a sovereign entity.

During the era of peace that ensued after the Treaty of Holston, the Cherokees began to change and adapt their laws. As the Cherokees became more ‘civilized’ and began farming and raising livestock rather than hunting and fishing, the U.S. government saw this as an opportunity to press the Cherokees to cede more land (Wilkins, 1986). Several land cessions were made and this angered many Cherokees. Upon entering office, President Thomas Jefferson continued to encourage land cessions and ordered his federal agents to push certain influential chiefs as heavily into debt as possible (Jahoda, 1975). He is quoted as having said, “We observe that when these debts get beyond what the individual can pay, they become willing to lop them off by a cession of lands” (Jahoda, 1975, p. 115). Many Native American chiefs fell prey to this deception and sold their lands to the United States to pay off their debts.

A Question of Sovereignty

By 1787 the founding fathers had decided that the Articles of Confederation were unsuitable and subsequently established the Constitution as the basis for the United States government. As such, it contained the guidelines by which the federal government may regulate its relations with various entities including foreign nations, the several states, and

Indian Tribes. The section of the Constitution that the federal government relies upon most heavily with regard to its dealings with the Indian tribes is the Commerce Clause located in Article I Section 8. The Commerce Clause states that “Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes” (U.S. Constitution). It is important to note that here the Commerce Clause refers to the Indian tribes in the same way that it refers to foreign nations, as an entity to “regulate commerce *with*” rather than “among” as it refers to the states. The segment of Article I Section 8 dealing with the Indian tribes is known as the Indian Commerce Clause. It must be recognized that the Indian Commerce Clause was created to resolve a federalism discrepancy between the federal government and the states (Pommersheim, 2009). It was not created to invade tribal sovereignty rights. The Commerce Clause recognizes federal authority to regulate the federal government’s side of commercial relations with Indian tribes and individual Indians (Pommersheim, 2009).

The framers saw the Indian Commerce Clause as a fundamental remedy for “the uncertainty that had pervaded Indian affairs under prior regimes, specifically under the Articles of Confederation” (Preso, 1994, p. 444). Under the Articles of Confederation, there had been some uncertainty with regard to state authority over commerce with the Native Americans which hindered the federal government’s Indian policy (Preso, 1994, p. 444). Article XI of the Articles stated that Congress shall have the exclusive right of regulating affairs with the Indians that are not members of any states as long as the legislative right of any state operating within its own limits is not violated (Preso, 1994). This language gave the states considerable leeway in skirting federal authority over relations with the Indians, and many states took advantage of this discrepancy. It was for

this reason that the framers clearly stated in the Constitution that Indian relations were to fall under the authority of Congress alone.

When the Constitution was written in 1787, it was understood that it was up to the Native Americans to regulate commercial relations between their own citizens as well as the U.S. government. At this time, the U.S. government through the Constitution recognized the Indian tribes, like foreign nations, as fellow sovereigns and therefore, recognized their implicit right to regulate their own affairs. The U.S. government exemplified this by passing several laws, the first of which was the Non-Intercourse Act in 1790. This Act stated that “no person shall be permitted to carry on any trade or intercourse with the Indian tribes without having been appointed by the President of the United States for that purpose” (Nonintercourse Act, 1790). It also stated that non-natives who committed crimes against the Native Americans or their lands would suffer the same penalty given to those that committed crimes against fellow non-natives (Thompson, 2005).

Another Non-Intercourse Act was passed in 1793 which prohibited whites from settling on Indian lands stating, “no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or a convention entered into pursuant to the constitution” (Nonintercourse act, 1793). Both of these Acts were passed by the federal government in order to establish peaceful relations as well as to protect Native American tribes from non-Indians. They were not created to regulate Indian affairs but to regulate non-Indian and state conduct in dealing with the tribes (Pommersheim, 2009). Nevertheless, these acts have since been used to regulate

Indian tribes and have “contributed to the development of the concept of tribes as dependent wards of the federal government and not independent sovereigns” (Schraver & Tennant, 2011).

However, although the existence of an Indian Commerce Clause indicates that the Native Americans were excluded from the jurisdiction of the Constitution, this Clause has been both ignored and molded into almost any means necessary to serve the federal interest. Although it is Congress that has been given power under the Commerce Clause to regulate trade with the Indian tribes, the federal government has previously buckled under state pressure and has allowed certain states to have this authority (Pommersheim, 2009). This is a problem because it has decreased the sovereign power of the tribes to regulate their own affairs.

After being hounded by General Andrew Jackson and other powerful individuals in the capitol with the idea of relocation, many Cherokees including Major Ridge, a Cherokee chief, believed that the education of their people and the reconstruction of their laws was the only way to stop the coming conflict. In 1817, the Cherokees adopted a set of articles designed to change the structure of their National Council. Article I created a thirteen-member executive committee called the National Committee which would be given the responsibility of supervising the affairs of the nation (King, 1979). In Article V, the National Committee was given jurisdiction over diplomatic relations with the United States (King, 1979,). Articles III, IV, and VI also helped to establish a more grounded legal system by discussing the particulars of property rights as well as the procedure for the adoption and amendment of future laws (King, 1979). That same year the Cherokees also established a smaller executive committee known as the National Council in order to

achieve greater centralization of power as well as increase the efficiency of management (King, 1979). Both houses together were called the General Council and worked jointly in governing the nation. Each house effectively checked the other so that neither house would obtain too much power.

In 1826, the General Council adopted a Cherokee Constitution modeled after that of the United States (Tebbel & Jennison, 2006). The Cherokee Constitution adapted some of the functions of their legislative branch so that it was more similar to that of the United States Congress (King, 1979). The General Council continued to function as it had in previous years and the role of an executive chief was created with veto powers over the Council's actions (King, 1979). During this time the National Committee also appointed a high court to handle some of the minor cases while the majority of cases would still be handled by the Council. The General Council also divided the nation into eight districts and established eight district courts within each (King, 1979).

The adoption of their own Constitution gave the Cherokee people great pride in their nation and many believed that it was a significant step toward gaining equal footing with the white Americans. It also indicated that the Cherokees considered themselves a sovereign nation with a right to self-governance. The Cherokee Constitution began similarly to the United States Constitution and stated, "We the representatives of the people of the Cherokee Nation do ordain and establish this Constitution for the government of the Cherokee Nation" (Constitution of the Cherokee Nation, 1827). It also related the boundaries between the Cherokee Nation and the United States in Article I Section 1, and then reaffirmed the Cherokee Nation's sovereignty over those lands in Article I Section 2 stating, "The sovereignty and jurisdiction of this government shall

extend over the country within the boundaries above described, and the lands therein are, and shall remain the common property of the Nation” (Constitution of the Cherokee Nation, 1827). Clearly, the Cherokees felt assured of their right to sovereignty and independence. However, although there were many leaders in Washington and England who were impressed with the Cherokees’ progress, the Cherokees were unable to impress the state of Georgia which had been pressuring the federal government to force the Cherokees to cede their homeland in that state since 1823 (Wilkins, 1986).

Georgia Advocates Removal

As Georgia continued to pressure the federal government into forcing the Cherokees to cede their homeland, the Cherokees rallied together in a valiant fight against removal. Major Ridge and his son John Ridge, now a fellow prominent member of the Cherokee government, openly stated their position against removal declaring “Not one more foot of land to the whites!” (Wilkins, 1986, p. 146). However, Georgia continued to press for Cherokee removal, and this forced the Cherokee leaders to constantly fight against it. Not long after, gold was discovered on the Cherokee lands in Georgia. White settlers began flooding into Cherokee lands in hoards to mine the gold. That same year, Andrew Jackson became President of the United States, and in his first annual message to Congress, he stated that he intended to initiate an act which would effectively remove all Indians from the East to the West (Wilkins, 1986).

Encouraged by Jackson’s statement, Georgia went forward and extended her laws over the Cherokee lands within her boundaries. Georgia’s legislature went a step further in 1830 and enacted a law which divided the Cherokee lands and annexed them to several Georgia counties (Wilkins, 1986). Cherokee laws would be null within these counties,

and Georgia also decreed that any Cherokee who influenced his fellow Cherokees to reject removal would be arrested and imprisoned (Wilkins, 1986). Furthermore, all Cherokees were forbidden to testify against white men in Georgia courts, and the Cherokees were prohibited from mining for gold on their own land (Wilkins, 1986). It is certainly difficult to understand how a people who tried to tirelessly to educate themselves and create a nation on equal and cooperative terms with the United States could be treated in such a base manner. Soon after Georgia enacted these new regulations, many Georgians took advantage of these laws and began pillaging Cherokee homes including those of several prominent chiefs, knowing that no Cherokee would be able to testify against them in court (Wilkins, 1986). After learning of this, one court stated, "We cannot omit to express ourselves decidedly hostile to the law excluding Indians from the privilege of testifying in our courts. It is unjust and inexpedient and should be repealed" (Wilkins, 1986, p. 210).

Taking the War to the Supreme Court

After concluding that legal action was their only recourse, the Cherokee chiefs began investigating the various legal ways to improve their situation. John Ridge and the other chiefs continued to press the United States Government for assistance against Georgia. Ridge proceeded by writing a five-page memorial to Congress in which he spoke out against the many wrongs Georgia had afflicted upon his people (Wilkins, 1986). He discussed Georgia's act of making the Cherokee laws null, the suffering of the Cherokees at the hands of the greedy and often violent gold seekers, and the president's apparent disregard for Georgia's actions (Wilkins, 1986). The encouragement of several

Congressmen including Davey Crocket and Henry Clay gave the Cherokee leaders hope that justice would be served.

However, the Cherokees received a scathing blow on May 28, 1830 when President Jackson signed the Indian Removal Act which gave the president the authority to grant lands west of the Mississippi River to Indians in exchange for their lands within state borders (Berry, 2011). Afterwards, Jackson is remembered as having stated, “The Indian Removal Act will place a dense and civilized population in large tracts of country now occupied by a few savage hunters” (Berry, 2011, p. 1). Unfortunately, the Indian Removal Act did not define exactly the constitutional rights of any tribes after they had been removed. It did not make the money designated for tribal assistance mandatory if Congress decided it wanted to use those funds for something else (Jahoda, 1975). It also did not specify how the removal would be carried out. These mistakes would return to haunt the Cherokees for years to come.

The Cherokee Nation attempted to lawfully contest this action by sending a memorial to Congress indicating that they wanted to “remain on the land of our fathers...which has been guaranteed pursuant to treaties” and also directly appealed to President Jackson to uphold Cherokee treaty rights (Pommersheim, 2009, p. 103). However, Congress and the President would not be moved. Consequently, the Cherokee nation appealed to the Supreme Court for injunctive relief asking the Court to prevent Georgia from enforcing its laws within Cherokee territory as an earlier treaty had specified (Pommersheim, 2009). In the ensuing case of *Cherokee Nation v. Georgia*, the Cherokee Nation invoked the Supreme Court’s original jurisdiction based on their claim that the Cherokee suit was brought by a foreign nation against a state (Pommersheim,

2009). In its argument, the Cherokee nation relied on treaties such as the 1785 Treaty of Holston and the 1791 Treaty of Hopewell, under which the federal government had recognized the tribe as “sovereign and independent” and free from the interference of any state, to prove its historical status as a “foreign nation” under Article III of the Constitution (Pommersheim, 2009, p. 104). However, Chief Justice John Marshall ruled that the Cherokee Nation did not have the status of a foreign nation, and therefore, the Supreme Court did not have the jurisdiction to hear the case (Thompson, 2005).

Justice Marshall continued to discuss the Commerce Clause and concluded that it divides the “power of regulating commerce into three classes – foreign nations, the several States, and Indian Tribes – each should be considered entirely distinct” (*Cherokee Nation v. Georgia*, 1831, ¶ 12). However, Marshall also noted that the Constitution does not “comprehend Indian tribes in the general term ‘foreign nations,’ not because a tribe may not be sovereign, but because it is not foreign to the United States” (*Cherokee Nation v. Georgia*, 1831, ¶ 14). Subsequently, the Court decided that because the Cherokees were neither citizens of the United States nor foreign nations, the Supreme Court was unable to hear the case (Guttmann, 1965). Chief Justice Marshall also stated that “if it be true that the Cherokee Nation has rights, this is not the tribunal in which those rights are to be asserted” (Guttmann, 1965, p. 70).

However, Chief Justice Marshall did classify the Cherokee Nation as “a State as a distinct political society, separated from others, capable of managing its own affairs and governing itself” (*Cherokee Nation v. Georgia*, 1831, ¶ 4). The Supreme Court also examined the Commerce Clause of the United States Constitution and held that it “treated Indian tribes and foreign nations as discrete, not identical entities” (Pommersheim, 2009,

p. 104). Chief Justice Marshall went on to state that the tribes were “domestic dependent nations,” and that although they retained powers of self government, their relationship to the federal government was one of a ward and its guardian (Pommersheim, 2009, p. 105). Marshall based this idea on the protection agreement between the Cherokees and the federal government in the Treaty of Hopewell.

The dissent in this case is important because in it, Justice Thompson (with Justice Story concurring) declared that the Cherokee Nation should be considered a sovereign, foreign nation. Justice Thompson began by relating what constitutes a sovereign state or nation by stating that they “imply a body of men, united together to procure their mutual safety and advantage by means of their union” and that such a society “takes resolutions in common, and thus becomes a moral person, having an understanding and a will peculiar to itself” (*Cherokee Nation v. Georgia*, 1831, ¶ 8). He then stipulated that some nations such as the Cherokees Nation place themselves under a greater nation for protection but do not therefore “cease to be sovereign and independent states, so long as self-government and sovereign and independent authority is left in the administration of the state” (*Cherokee Nation v. Georgia*, 1831, ¶ 8). Consequently, Justice Thompson declared that under these rules, “it is not perceived how it is possible to escape the conclusion that they [the Cherokee Nation] form a sovereign state” (*Cherokee Nation v. Georgia*, 1831, ¶ 9). He then defends this position by pointing out that the Cherokees have always been dealt with as a sovereign state by the United States government both before and after the adoption of the Constitution and have been “treated as a people governed solely and exclusively by their own laws and treaties” (*Cherokee Nation v. Georgia*, 1831, ¶ 9).

Justice Thompson subsequently maintained that the Cherokees can also be considered 'foreign' by stating that "the progress made in civilization by the Cherokee Indians cannot surely be considered as in any measure destroying their national or foreign character so long as they are permitted to maintain a separate and distinct government; it is their political condition that constitutes their foreign character, and in that sense must the term "foreign" be understood as used in the Constitution" (*Cherokee Nation v. Georgia*, 1831). Justice Thompson concluded by stating that "the Cherokees compose a foreign state within the sense and meaning of the Constitution, and constitute a competent party capable of maintaining a suit against the State of Georgia" (*Cherokee Nation v. Georgia*, 1831, ¶ 46).

Unfortunately, *Cherokee Nation v. Georgia*, in spite of a powerful dissent by Justice Thompson and Justice Story, effectively lessened the sovereignty of the Cherokee Nation by declaring that they could not be considered foreign nations. The argument turned on the meaning of 'foreign nation'. Chief Justice Marshall maintained that although they retained powers of self-government, the Cherokees could not be considered 'foreign' under Article III of the Constitution, while Justice Thompson argued that it was *because of the Cherokees' historical and present right to self-governance and sovereignty* that they constituted a foreign nation. *Cherokee Nation v. Georgia* also established that the federal government had sole authority in tribal affairs and not the states. Although the Cherokees had not received the desired outcome in that they had been refused the status of foreign nation, they took comfort in the fact that it was the federal government alone that held authority to regulate relations with them rather than any state including Georgia (Wilkins, 1986).

Law and order had virtually deteriorated throughout the Cherokee Nation by this time. Major Ridge and a few other leaders began visiting the Cherokee towns and instructing the local Cherokee sheriffs and courts to execute the Cherokee laws as they normally would (Wilkins, 1986). Georgia saw this as an affront to her latest regulations and declared the enforcement of Cherokee laws to be a crime punishable by imprisonment (Wilkins, 1986).

Because the Cherokees were unable to enforce their laws, the nation fell into lawlessness. The Cherokees' circumstances continued to worsen as more and more gold seekers swarmed into the Cherokee Nation. John Ridge put the situation into words:

This class of people is numerous and all ignorant – they do not know anything about writs of error, the Constitution of the United States, etc. They know they are poor and wish to be rich, and believe that, if they have luck, they will draw a gold mine, and most everyone expects to have his luck in the lottery. (Wilkins, 1986, p. 231)

However, the Cherokees continued to attempt to circumvent Georgia's actions by appealing to those in Congress and other government officials such as the Secretary of War.

Later, Georgia passed a law stating that no white man could remain in the Cherokee part of Georgia after March 1, 1831 unless he obtained a special permit from the governor and swore an oath of allegiance to the state (Wilkins, 1986). However, a group of missionaries who had been living among the Cherokees refused to leave and sided with the Indians (Jahoda, 1975). Georgia responded by revoking their missionary licenses. However, the missionaries were determined to stay on unlicensed. Georgia

retaliated by arresting the missionaries and placing them in prison to await trial (Jahoda, 1975). After standing trial, several of the missionaries relented, gave in to Georgia's demands, and were given their freedom. Nevertheless, two of the missionaries rejected Georgia's offer of clemency, were convicted on felony charges, and sentenced to serve four years hard labor in the state penitentiary (Wilkins, 1986).

From this controversy arose the case of *Worcester v. Georgia* which came before the Supreme Court with the issue of whether the State of Georgia had a "legitimate jurisdiction to prosecute a non-Indian for preaching within the Cherokee reservation without a state license to do so" (Pommersheim, 2009, p. 109). The Supreme Court stated that it did not have this authority. The Court, after revisiting the Treaties of Hopewell and Holston between the Cherokee Nation and the federal government, held that these treaties recognized the Cherokee Nation as a "distinct, independent political community" which retained their original sovereign right in which the "laws of Georgia can have no force" (Pommersheim, 2009, p. 110). The Court also stood by its decision in *Cherokee Nation v. Georgia* and held that the federal government alone has the authority to interact with the Indian tribes. This effectively excluded the states from regulating Indian affairs and once again maintained that all the laws of Georgia dealing with the Cherokees were "unconstitutional, null, void, and of no effect" (Remini, 2001, p. 123).

Chief Justice John Marshall wrote the opinion for *Worcester* and stated that "the Indian nations have always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial" (*Worcester v. Georgia*, 1831, ¶ 23). Marshall also affirmed that the term nation in and of itself indicates a "people distinct from others," (*Worcester*

v. Georgia, 1831, ¶ 23). Marshall builds on this by maintaining that “the constitution, by declaring treaties to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties” (*Worcester v. Georgia*, 1831, ¶ 23).

By declaring that the Indians are ranked among those capable of making treaties, Marshall is effectively defining the Cherokee Nation as having a sovereign right to self-governance. Marshall continues by reaffirming the language of the Treaty of Hopewell and Holston by stating that “the very fact of repeated treaties recognizes their title to self-government, and the settled doctrine of the law of nations is that a weaker power does not surrender its independence or right to self-government by taking protection from a stronger government” (*Worcester v. Georgia*, 1831, ¶ 25). In *Worcester*, not only did John Marshall reaffirm the Cherokees’ status as a sovereign, independent society, but he also established that receiving protection from the United States does not subject the Cherokee Nation to a loss of self-government.

Cherokee Nation and *Worcester* reveal the indeterminacy of the Supreme Court at this time. In *Cherokee Nation*, Chief Justice Marshall maintains that the Cherokees cannot be considered foreign nations, and yet in *Worcester v. Georgia*, he affirms that their treaty-making power places them among those nations capable of making treaties. However, the United States does not make treaties with the several states which are under its jurisdiction. Under the treaty-making power it would seem that the Cherokee Nation should constitute a sovereign, foreign nation as Justice Thompson maintained in his dissent in *Cherokee Nation v. Georgia*. However, instead of upholding the powers of complete sovereignty which should be automatic in a foreign nation with treaty-making

power, the Court upheld the Cherokee Nation's sovereignty as independent from state jurisdiction but not from federal jurisdiction.

After making his decision in *Worcester v. Georgia*, Chief Justice John Marshall issued an affirmative mandate ordering the release of the two missionaries (Pommersheim, 2009). However, during this time there was considerable tension between the Supreme Court and the Executive Branch. After the Court's decision in *Worcester*, President Jackson allegedly stated, "John Marshall has made his decision; now let him enforce it" (Remini, 2001, p. 123). This statement undoubtedly shows that President Jackson supported Georgia's claim of sovereignty over Cherokee lands as well as the methods she used to obtain their lands. After the Governor of Georgia refused to release the missionaries, John Ridge went to the White House to seek an audience with the President. When Ridge asked if the United States government would use its force to execute the decision and put down Georgia's legislature, Jackson replied that it would not and instead counseled Ridge to advise his people that their only solution would be to remove themselves west (Wilkins, 1986). Jackson stressed that through the Removal Treaty the Cherokees would be allowed to conduct their own government in their new western territory and would receive annuities from the U.S. as well as improvements such as schools, blacksmiths, etc. (Wilkins, 1986). Jackson further promised that no white person would be allowed to live in the new lands unless they were given specific permission. However, this was yet another promise that would remain unfulfilled.

Steps toward Removal

Because President Jackson had made no move to enforce the Supreme Court's decision, Georgia proceeded with her plan to survey and divide the Cherokee lands

(Wilkins, 1986). The land was carved into plots of 160 acres each which were to be distributed by lottery to white settlers. Although some Cherokees scoffed at the surveyors, others such as Major Ridge and John Ridge took Georgia's actions seriously and began to earnestly consider and advocate the possibility of escaping west. They began to feel that this would be the only way the Cherokee people could maintain their heritage and traditions. The Ridges felt that if the Cherokees stayed in Georgia where their lands would undoubtedly be divided and overrun by whites, they would no longer be a united people with their own unique way of life but would slip away into mainstream white culture (Wilkins, 1986). As the Georgia lottery began to take effect, hundreds of Cherokees including several chiefs such as Major Ridge lost their land and homes to white settlers (Wilkins, 1986). Many Cherokees were instantly evicted by the white invaders and the Cherokee victims were left helpless to defend their homes since it was still illegal for a Native American to testify against a white person in court (Wilkins, 1986).

As conditions in the Cherokee Nation worsened, an intense factionalism developed. Those who desired to settle a treaty and remove the Nation West were called the "Treaty Party" and were led by Major and John Ridge, while those that opposed a treaty were known as the "Anti-Treaty" or "National Party" and were led by John Ross who had maintained his role as principle chief (Wilkins, 1986). At one point the two parties attempted to unite and promote a plan which would allow the Cherokees to remain in the East on part of their land, submit to the states where they lived, and eventually integrate with the whites (Wilkins, 1986). However, this course was promptly shut down by the federal government, and the two parties returned to their respective positions.

Later in 1835, the Ridges and several other Cherokees declared that they were ready to make a treaty with the United States concerning their removal. These Cherokees met with federal officials and settled on the price of \$4,500,000 to be paid to the Cherokees in exchange for their lands in the East (Wilkins, 1986). At this point, only the price of the sale had been ratified by the Senate.

Subsequently, Chief John Ross mandated that all of the Cherokees should have their voices heard in a vote to determine whether they would remove west or not. However, on December 29, 1835 a committee of twenty Cherokees met with a federal agent and signed the Treaty of New Echota by which they agreed to remove West. After the signing, Major Ridge is remembered as having said, "I have signed my death warrant" (Wilkins, 1986, p. 289). Although they had gone against the wishes of the majority of Cherokees and had signed the treaty without the consent of the nation, the Ridge party earnestly believed they had done what was best for their people in the long run. The Ridges and their followers would later be seen by many Cherokees as traitors.

The Trail of Tears

No sooner had the Treaty of New Echota been signed, thousands of white settlers began pouring into the Cherokee Nation violently forcing many Cherokees from their homes. John Ridge reported that "many of the Cherokees had been disarmed of their rifles by the Georgians and were in wretched condition for food" (Wilkins, 1986, p. 294). The National Party under John Ross sent numerous signed petitions with over 16,000 signatures to the president indicating that the Treaty of New Echota was invalid because it had not been voted and agreed upon by the entire Cherokee Nation or the Cherokee

government itself (Golden Ink, 2006). Because the treaty was not signed by Cherokee chiefs with the authority to do so, the Cherokees believed it should be considered null.

However, these pleas were ignored by the president and Congress who had achieved the desired result of Cherokee removal and cared not how it had been affected.

The treaty had called for the removal to take place within two years of the treaty being signed. However, by 1837 only 325 Cherokees had moved West. Many of the Cherokees believed that John Ross would succeed in having the treaty nullified so that they would no longer have to leave their homes (Tebbel & Jennison, 2006). The United States government decided that in 1838 the Cherokees would have to be forcibly removed and they sent General Winfield Scott and 7,000 men to accomplish the task (Tebbel & Jennison, 2006). Scott had his men build several stockades and then sent them to round up all of the Cherokees and bring them to these holding areas. Although Scott ordered his men to treat the Cherokees in a humane manner, his orders were not obeyed. The majority of Cherokees were not allowed sufficient time to pack but were instead forced out of their homes at gun point. Eyewitness reports recounted that the soldiers often drove their captives along like cattle and the Cherokees were often not allowed to remove their shoes before being driven across rivers (Wilkins, 1986). One deaf-mute Cherokee was shot when in his confusion he turned right when ordered to go left (Wilkins, 1986). Another man was given a hundred lashes for attacking a soldier who had been goading his wife with a bayonet (Wilkins, 1986).

The living conditions in the stockades were horrible with many Cherokees suffering from dysentery and fevers and lodged in very close quarters (Tebbel & Jennison, 2006). The area suffered a terrible drought that summer, and it was reported

that there were approximately 2,000 deaths in the Cherokee camps (Wilkins, 1986). By the end of June, half of the Cherokees were loaded onto flatboats while the other half was loaded into covered wagons. The Cherokees suffered from the cold due to insufficient clothing as well as fatigue and overexertion from the grueling pace and contracted diseases such as pneumonia, tuberculosis, and pellagra (Wilkins, 1986). By the end of the journey more than 4,000 Cherokees, nearly one-fifth of the population, had perished (Tebbel & Jennison, 2006). Today this journey is known as the “Trail of Tears”, with good reason. Upon reaching their new reservation in Oklahoma, the Cherokees were promised under the Treaty of New Echota that this land “shall in no future time, without their consent, be included within the territorial limits or jurisdiction of any state or territory” (Jahoda, 1975, p. 290). The Cherokees were to “govern themselves eternally” (Jahoda, 1975, p. 290). Unfortunately, this promise like those that had come before it would also be broken by the United States Government.

Post-Removal

After the Cherokee removal to the Oklahoma reservation, the two Cherokee parties attempted to reunite and create a new constitution in 1839. The Cherokees held several conventions to determine the new set of laws, but the Act of Union failed to unite the Cherokee Nation (King, 1979). Disorder and intense factionalism continued for several years. In 1840, the Cherokees once again attempted to unite under an Act of Union by making John Ross the principle chief of the entire nation (King, 1979). However, because the Nation still failed to be united under a uniform set of laws, murders and other crimes prevailed throughout the territory (King, 1979). As the factionalism continued, the United States Government began to consider intervening in

the Cherokees' affairs by proposing that they divide their nation between the two parties. This alarmed both Cherokee parties, and they decided to create a new treaty in 1846 that would end the factionalism between them once and for all (King, 1979). This union brought with it more than a decade of peace to the Cherokee Nation. The Cherokees began concentrating on business pursuits and improving their government rather than the differences between political groups (King, 1979).

This era of peace may have continued had it not been for the Civil War which brought with it new factional enmity as the Cherokees divided to join the North or the South (King, 1979). John Ross began by insisting that the Cherokee Nation remain neutral in the war. However, when both sides began to occupy portions of Cherokee territory, Ross felt that joining the war was inevitable (Wilkins, 1986). He and the National Party sided with the Union while the Treaty Party sided with the Confederacy (Wilkins, 1986). The Cherokees suffered considerably during the war. Their population was reduced by approximately twenty-five percent, their land was ransacked, and all of the political unity they had worked so hard to achieve was completely destroyed (King, 1979).

Although Abraham Lincoln may have promised "charity for all," the United States government dealt harshly with the Native Americans after the war (Huston, 2007). Congress passed the Harlan Bill in 1865 which provided for the organization of the Indian Territory (Prucha, 1976). The Bill stipulated that each tribe must enter into a treaty for permanent peace among themselves and the U.S. Government, the institution of slavery among the tribes must be abolished, and a portion of each tribe's land must be set aside for incoming tribes from outside of the Oklahoma reservation (Prucha, 1976). The

Harlan Bill also stated that “all the tribes in Indian Territory must be formed into one consolidated government after the plan proposed by the Senate” (Prucha, 1976, p. 376). It can be gathered from this bill that the federal government was already planning to incorporate the Five Civilized Tribes that were located on the Oklahoma Reservation including the Cherokees fully into the American political system (Prucha, 1976). The Harlan Bill also helped to reduce tribal sovereignty by forcibly regulating and dividing their lands. Although the Cherokees refused to submit to this particular arrangement, they along with the other Five Civilized Tribes (the Chickasaw, Choctaw, Creek, and Seminole) were forced to sign treaties in 1866 which sold large parts of their land to the U.S (Prucha, 1976). This effectively divided the Indian Territory in two with the other half set aside for reservation to be settled by western tribes that had been more recently conquered by the U.S.

The additional reduction in sovereignty experienced by the Cherokees can be paralleled with the reduction in sovereignty experienced by the states after the Civil War. Individualism and independent thought were highly prized before the war, but these ideals gave way to a new supreme ideal – service to the Union (Richman, 2001). Self-reliance was replaced by “service and obedience” (Richman, 2001, ¶ 3). After the Civil War, strong central government and nationalism were heavily impressed upon the states as well as the need for “strong citizen compliance with the state” (Richman, 2001, ¶ 6). This notion of complete reliance on the central government to the detriment of individualism and self-reliance which had been forced on the Native Americans at an increasing rate was now being forced on the states. Philosophers at this time such as William James called for the “surrender of private interest in favor of obedience to

command” (Richman, 2001, ¶ 6). Similarly, Robert Higgs maintains that the Civil War was a “convenient excuse for the state to assume powers that were never fully abandoned after the war” (Richman, 2001, ¶ 7).

The states, like the Cherokee Nation, experienced a significant reduction in sovereignty and ability to conduct their own affairs after the Civil War. War was part of Abraham Lincoln’s plan to establish a strong centralized government, and as a result, the states suffered a loss of sovereignty and became subservient to the federal government (DiLorenzo, 2002). However, while the sovereignty lost to the states was a new phenomenon, the sovereignty lost to the Cherokee Nation had been increasing since the beginning of foreign involvement. The resulting additional loss in sovereignty via the Harlan Bill was simply the latest device wielded by the United States government to strip the Cherokee Nation of their right to independence and self-government.

After the Civil War, the federal government passed several additional acts that helped to further reduce the independence and right to self-governance of the Cherokee Nation. One such act was a rider attached to the Indian Appropriation Bill in 1871. Under this act, Congress outlawed treaty making with Indian tribes and specified that “hereafter, no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract a treaty” (Schraver & Tennant, 2011, p. 6). Justice Thomas later stated in *United States v. Lara* that the termination of treaty-making established in this act marked the end of tribal sovereignty (Schraver & Tennant, 2011).

Congress continued to ignore the arguments of the tribes when it extended federal law over the citizens of the Five Civilized Tribes in 1897, and required that the President

approve all acts made by the tribal governments (Deloria, 1974). This act formerly nullified the tribes' powers of self-government. Congress took one step further in 1898 when it passed the Curtis Act which "authorized the allotment of the Five Civilized Tribes' land, divided their property, and terminated their tribal governments" (Deloria, 1974, p. 11). In 1901, Congress forced every Indian in Indian Territory to become a citizen of the United States, and in 1907 tribal government was shown to be forever suspended with the formation of the State of Oklahoma (Wilkins, 1986). The Cherokees continued to try and prevent any further erosion of their treaty rights during the 20th century, but they were overwhelmed at every turn.

The Cherokee Nation has suffered unjustly at the hands of the United States government throughout its history. The United States government has twisted the meaning of the Commerce Clause and other agreements and has completely ignored past treaties in order to gain land, gold, coal, and power. This deception has resulted in the forced removal of the Cherokee Nation from their home in Georgia to the Oklahoma Reservation, the death of thousands of their members, and the subjugation of their people from a sovereign, independent Nation to one stripped of their right to independence and self-government. This subjugation has occurred as result of the Supreme Court's continuous changing of the Cherokee's status under the Constitution, and the federal government's desire for complete obedience from its constituents. Because of the United States government's lust for power and lack of honor, the Cherokee Nation has suffered a continuous loss of sovereignty which has resulted in the termination of its right to independence and self-government.

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