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*Ronald A. Berutti**

Introduction

The United States Supreme Court cases *Cherokee Nation v. Georgia*[1] and *Worcester v. Georgia*[2] (the Cherokee cases) were the culmination of a longstanding political dispute over the rights of American Indians in the face of the expansionist policies of the United States. Both *Cherokee Nation* and *Worcester* were argued during the administration of avowed "state's rights" supporter President Andrew Jackson, who had no sympathy for the Indian cause. Embroiled in political intrigue, the Cherokee cases can be seen as the historical low point of the Supreme Court. However, the ultimate result of the Cherokee cases was to greatly enhance the protections afforded American Indians.

Two quotes — one real, one allegedly real — highlight the dynamics of these cases which pitted Chief Justice John Marshall, an ardent Federalist, against President Jackson. The first quote, taken from Chief Justice Marshall's obituary,[3] reads:

> John Marshall, Chief Justice of the Supreme Court of the United States, died at Philadelphia on the 6th day of July, 1835 . . .
>
> His private virtues as a man, and his public services as a patriot, are deeply inscribed in the hearts of his fellow citizens.
>
> His extensive legal attainments, and profound, discriminating judicial talents, are universally acknowledged.
>
> His judgments upon great and important constitutional questions affecting the safety, the tranquility and the permanency of the government of his beloved country — his decisions on international and general law, distinguished by their learning, integrity and accuracy, are recorded in the reports of the cases adjudged in the Supreme Court of the United States, in which he presided during a period of thirty-four years.

* J.D., 1992, Seton Hall University School of Law; B.S., 1988, University of Massachusetts, Amherst. This note is dedicated to my parents and to Keva Treacy.

Second place winner, 1990-91 *American Indian Law Review* Writing Competition.

1. 30 U.S. (5 Pet.) 1 (1831).
2. 31 U.S. (6 Pet.) 515 (1832).
3. 35 U.S. (10 Pet.) v (1835) (obituary of Marshall, C.J.).

> As long as the constitution and laws shall endure and have authority, these will be respected, regarded and maintained.[4]

The second quote is attributed to President Jackson just three years earlier. Upon learning of the *Worcester* decision in 1832, President Jackson allegedly said, "John Marshall has made his decision; now let him enforce it."[5] Whether this quote is real or imagined, Jackson's refusal to execute the *Worcester* mandate could have rendered the Court impotent. Should a President fail to execute a Supreme Court decree because of his ideological opposition to it, he would effectively be vetoing the Supreme Court's interpretation of the Constitution and replacing it with his own interpretation. Such precedent could potentially destroy the Supreme Court's role as a functional branch of government, and its opinions could be rendered meaningless on a presidential whim. This was the scenario of the Cherokee cases.

How is it that Chief Justice Marshall was so highly praised only three years after President Jackson refused to execute *Worcester*? How did the Supreme Court survive President Jackson's failure to execute the law, as was his constitutional duty?[6] The answers to these questions are the result of many contributing factors. In order to understand those factors as well as the Cherokee cases themselves, an overview of the United States' Indian policy is necessary.

I. United States Policy Toward the Indians

A. Removal

Following the Revolution, the United States expanded as its population increased and American cotton became the nation's major crop. Since it ravaged the soil, cotton perpetually required new land upon which to be grown. The Indians, who possessed thousands of miles of land east of the Mississippi River, became an obstacle for those who needed or wanted that land.[7] To many, "removal" was the answer to this problem.

Removal basically entailed moving the Indian tribes west of the Mississippi River. Displacing the Indians would enable white Americans

4. *Id.*

5. ARTHUR M. SCHLESINGER, THE IMPERIAL PRESIDENCY 37-40, 56-57, 157-58 (1973).

6. U.S. CONST. art. II, § 3 reads in pertinent part, "[The President] shall take care that the laws be faithfully executed."

7. *See generally* Robert A. Williams, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 243 (1989).

to have plenty of farmland. As early as 1789, it was argued (in a report to Congress by Henry Knox, President George Washington's Secretary of War) that Removal would be America's wisest policy in dealing with the Indians.[8] Others of the day concurred. Benjamin Lincoln, an American statesman and Revolutionary War general, wrote that "civilized and uncivilized people cannot live in the same territory or even in the same neighborhood."[9] These discourses in favor of Removal during the Constitution's formative years cast an ominous shadow over future Indian relations.

In 1802 the United States government took a large step toward making Removal a national policy. In what was known as the "Georgia Compact," Georgia agreed to cede to the national government all of its western lands which were occupied by Indians. In return, the United States would extinguish Indian title to these lands as quickly as possible.[10] Obviously, Removal was the easiest way to accomplish this.

One of President Thomas Jefferson's primary purposes for making the Louisiana Purchase in 1803 was to effectuate this policy.[11] In a letter written to Louisiana Governor William Henry Harrison, Jefferson wrote, "Our settlements will gradually circumscribe and approach the Indians, and [the Indians] will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi."[12] He noted further that "our strength and their weakness is now so visible that they must see we have only to shut our hand to crush them and that all our liberties to them proceed from motives of pure humanity only."[13] Jefferson's bloodcurdling passages characterized the views held by many Americans of the Indians. Andrew Jackson clearly fit within this category of Americans, as his own Indian policies displayed.

With the Louisiana Purchase, it became clear that the United States would vigorously pursue the policy of removing the red man from his tribal homeland. This would allow the white man to claim the land so that the black man could work it for him. With the whites surrounding them on all sides, it became very easy to assert this supremacist policy against the less-mighty Indians.

8. *Id.* at 254.

9. ROY H. PEARCE, SAVAGISM & CIVILIZATION: A STUDY OF THE INDIAN AND THE AMERICAN MIND 68 (Johns Hopkins Paperbacks ed. 2d prtg. 1971).

10. Jessie D. Green & Susan Work, Comment, *Inherent Indian Sovereignty*, 4 AM. INDIAN L. REV. 311, 321 (1976).

11. *Id.*

12. Letter from President Jefferson to William Henry Harrison (Feb. 27, 1803), *in* Documents of United States Indian Policy 22 (Francis P. Prucha ed., 1975).

13. *Id.*

B. The Treaty Period

An alternative to Removal was to make treaties which would create a peaceful coexistence between the Americans and the Indians. This was the initial approach taken by the United States. Although destined for failure, the legacy left by these treaties was important to the outcome of the Cherokee cases, which in turn had a critical effect upon Indian rights as a whole.

In 1783, after the powers of Europe had largely been dislodged from the eastern portion of America, the Americans became aggressively expansive.[14] The various Indian tribes, including the Cherokees, initially attempted to dismantle the new white settlements by force. However, this policy resulted in the virtual elimination of several previously populous tribes, transforming them into mere bands of Indians which were easy prey for the federal government's demands.[15]

Perceptive southern tribes tried an alternative response to American aggression. The Cherokees, Creeks, Chickasaws, Choctaws, and Seminoles — who collectively became known as the "Five Civilized Tribes" — began a strategy of "passive defense."[16] Attempting to save their tribal homelands, they strengthened their internal institutions in order to more effectively deal with the United States. The tribes invited missionaries into their territories, centralized their governments, and supported literacy programs in order to have better-informed tribesmen.[17] At this time, a Cherokee named Sequoyah created a written alphabet for the Cherokee language, which soon led to the publishing of the *Cherokee Phoenix*, the first American Indian newspaper.[18] Moreover, the governments of the Five Civilized Tribes began to develop "organic laws" emulating those of the Anglo-Americans. In conjunction with this, these tribes began making treaties with the United States government.[19]

In 1785 the Treaty of Hopewell[20] became the first treaty made between the Cherokees and the United States. Declaring that "the hatchet shall be forever buried,"[21] this treaty set boundaries between the two nations and withdrew United States protection of settlers not complying with the treaty. Finally, this treaty gave Congress the sole

14. Arrell M. Gibson, *Constitutional Experiences of the Five Civilized Tribes*, 2 AM. INDIAN L. REV. 17, 20 (1974).
15. *Id.*
16. *Id.*
17. *Id.* at 21.
18. *Id.* at 21-22.
19. *Id.* at 22.
20. Treaty of Hopewell, Nov. 28, 1785, U.S.-Cherokee Nation, 7 Stat. 18.
21. *Id.* at 20.

power to manage the trade of the Indians as a way for the Cherokees to be received "into the favor and protection" of the United States.[22] This part of the treaty was to cause the Indians much difficulty in the future.

Like those which were to follow, the Treaty of Hopewell was immediately doomed to failure. Believing that its interests were not represented by the treaty, North Carolina refused to recognize it. Since the state had yet to ratify the Constitution, political expedience required that President Washington not enforce the treaty against North Carolina until it had done so. By then, there were too many white settlers within Cherokee territory to effectively enforce the treaty, and a new treaty had to be negotiated.[23]

The resulting 1791 Treaty of Holston[24] moved the boundary westward, to protect the illegal settlers. This treaty further "solemnly guarantee[d] to the Cherokee nation, all their lands not hereby ceded."[25] Apparently, the federal government's intent was genuine. As incursions by settlers continued, Congress passed an act supporting the boundary line created by the Treaty of Holston.[26] However, this sincerity once again gave way to political expedience when Tennessee began bitterly complaining about both the congressional act and the Treaty of Holston.[27] As a result, President John Adams proposed to again renegotiate the boundaries with the Cherokees,[28] resulting in the Treaty of Tellico,[29] which for a consideration of $25,000 again moved the United States-Cherokee Nation border further west.

Because the young federal government's relationship with the various states was characterized by friction, it is no wonder that the Indians were so poorly treated. Any time the federal government acted in a manner which mildly harmed the states and which could be viewed as pro-Indian, the threat arose of secession, civil war, or both. The Indians were, therefore, victimized by the tension created by federalism. The Louisiana Purchase gave the federal government a perfect opportunity to abrogate this tension. It appeased the states by taking Indian land while seemingly not causing the Indians harm as they were given new lands west of the Mississippi River. This moralistic, Union-saving approach to dealing with the Indians led to the merging of

22. Ben O. Bridgers, *An Historical Analysis of the Legal Status of the North Carolina Cherokees*, 58 N.C. L. REV. 1075, 1077 (1980).

23. *Id.* at 1077-78.

24. Treaty of Holston, July 2, 1791, U.S.-Cherokee Nation, 7 Stat. 39.

25. Bridgers, *supra* note 22, at 1078.

26. Intercourse Act of May 19, 1796, ch. 30, § 1, 1 Stat. 469.

27. Bridgers, *supra* note 22, at 1078-79.

28. *Id.* at 1079.

29. Treaty of Tellico, Oct. 2, 1798, U.S.-Cherokee Indians, 7 Stat. 62.

treaty-making and Removal policies. Of course, the Indians were never seriously consulted on these matters.

In 1804 and 1805, three separate treaties were negotiated with the Cherokees.[30] The United States purchased large tracts of Cherokee land in Georgia, Tennessee, Kentucky, and Alabama. In an act typifying American greed, one of these treaties, which called for a purchase price of $2000, was secretly renegotiated for a price of $1000 and two rifles for Cherokee chiefs.[31] A period of quiet followed enactment of these treaties, due to the War of 1812.

The United States once again became concerned with the Indians in 1816 when two treaties were negotiated on the same day.[32] One of these ceded all Cherokee lands within South Carolina to the United States. The second allowed for unrestricted road privileges through Cherokee territory. As a result of these treaties, a large band of Cherokees moved west of the Mississippi and formed the Western Cherokee tribe. Needing land, the Cherokees traded large portions of their Georgia and Tennessee lands to the United States.[33] Shortly thereafter, the Cherokees declared that they would no longer sell land to the United States. This has been considered "[t]he doom of the Cherokees."[34]

II. The Jacksonian Period

A. Background

Although elected President in 1828, events in 1827 were largely responsible for Andrew Jackson's position on the Cherokee cases. Following these events were a curious mix of political intrigue and court battles, among them the Cherokee cases.

In 1827 gold was discovered on the Georgia-based Cherokee and Creek lands. Georgia Governor George C. Gilmer ordered a survey of this land and called out the state militia to protect surveyors. Moreover, he threatened civil war should the federal government intercede. Al-

30. Treaty for Cession of Land in Georgia, Oct. 24, 1804, U.S.-Cherokee Indians, 7 Stat. 228; Treaty for Cession of Land and Road Privileges, Oct. 25, 1805, U.S.-Cherokee Nation, 7 Stat. 93; Treaty of Cession of Land and Road Privileges, Oct. 27, 1805, U.S.-Cherokee Nation, 7 Stat. 95.

31. Bridgers, *supra* note 22, at 1079-80.

32. Treaty for Cession of Land in South Carolina, Mar. 22, 1816, U.S.-Cherokee Nation, 7 Stat. 138; Convention to Settle Boundary Lines, Mar. 22, 1816, U.S.-Cherokee Nation, 7 Stat. 139.

33. Treaty for Cession of Land in Georgia and Tennessee, July 8, 1817, U.S.-Cherokee Nation, 7 Stat. 156.

34. Williams, *supra* note 7, at 243 (quoting HELEN H. JACKSON, A CENTURY OF DISHONOR (1881)).

though President John Quincy Adams did threaten to send troops, the Creeks capitulated and moved west. Military conflict was thereby prevented.[35]

The Cherokees responded to Georgia's actions by adopting a written constitution. They proclaimed themselves an independent state outside of the jurisdiction of either the federal government or the several states.[36] The Cherokee constitution was largely patterned after that of the United States, creating a republican government with the Cherokee Nation divided into several districts.[37] This proved to be short-lived, however, as the Georgia legislature attempted to destroy Cherokee sovereignty by effecting its own laws within Cherokee territory and declaring those of the Cherokees to be null and void.[38] Cherokee land was sold at public lottery, and several of the existing counties of the state were apportioned land that was formerly Cherokee territory.[39] By this time, Andrew Jackson had been elected President with heavy support from the South, and, as a result, threat of military action by the federal government was no longer forthcoming.

B. Motives Behind Jackson's Indian Policy

Andrew Jackson's Cherokee policy resulted not only from his upbringing in the notoriously anti-Cherokee state of Tennessee, but also from three major political squabbles of the day. Besides the Georgia-Cherokee dispute, Jackson was trying to push a protective tariff through Congress. He challenged the rechartering of the Second Bank of the United States, and sat idly by while Congress tried to strip the Supreme Court of its powers of review. These policies were all to become intimately tied to the Cherokee cases.[40]

First, Jackson sought a protective tariff, which would effectively hurt the interests of some southern states. South Carolina was the most bitterly opposed to this tariff and sought to nullify it within its borders. Although normally a states' rights supporter, Jackson opposed South Carolina's nullification attempt because it conflicted with his policy objectives.

Being a natural ally to South Carolina in the nullification battle, Georgia was wooed by President Jackson on the Indian issue in order

35. Clifford M. Lytle, *The Supreme Court, Tribal Sovereignty, and Continuing Problems of State Encroachment into Indian Country*, 8 AM. INDIAN L. REV. 65, 67 (1980).

36. *Id.*

37. Bridgers, *supra* note 22, at 1082.

38. *Id.*; Lytle, *supra* note 35, at 67.

39. Bridgers, *supra* note 22, at 1082; Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 525-26 (1832).

40. *See generally* William F. Swindler, *Politics as Law: The Cherokee Cases*, 3 AM. INDIAN L. REV. 7, 8 (1975).

to keep it from joining South Carolina's nullification forces. First, Jackson appointed Georgia Senator John N. Berrien, a known advocate of Removal, as his attorney general.[41] Jackson also made it very clear that he would not stand between Georgia and its actions regarding Cherokee lands. In an 1829 address to Congress, Jackson said:

> [S]urrounded by the whites, with their arts of civilization, which by destroying the resources of the savage, doom him to weakness and decay, the fate of the Mohegan, the Narragansett, and the Delaware, is fast overtaking the Choctaw, the Cherokee and the Creek. That this fate surely awaits them if they remain within the limits of the states does not admit of a doubt. Humanity and national honor demand that every effort should be made to avert so great a calamity.[42]

This "natural law" theory that pitted civilized white society against non-Christian "savages" was a familiar theme of Removal politics[43] and was a clear indication to Georgia that President Jackson would not stand in its way as President John Quincy Adams had almost done.

Meanwhile, a Georgia-inspired bill was making its way through the House of Representatives. The bill, which had been approved by the House Judiciary Committee, called for amendments to the Judiciary Act of 1789.[44] The focus of this bill was to deny the Supreme Court jurisdiction over state court rulings.[45]

Finally, Jackson was embroiled in a political dispute with Congress over the rechartering of the Second Bank of the United States. Jackson was rabidly opposed to the bank, and was not fond of its stockholders. Along with the tariff, Jackson's desire to see the demise of the bank was a central goal of his presidency.

Against the backdrop of this series of events, the challenge to Georgia's laws within Cherokee territory was heard by the Supreme Court in *Cherokee Nation*. It was a "no-win" situation for the Cherokees. The Court could not rule in favor of them because Jackson

41. *Id.*

42. Williams, *supra* note 7, at 246 (quoting Andrew Jackson, Message of the President to Both Houses of Congress (Dec. 8, 1829), *in* 6 CONG DEB. app. 15 (1829)).

43. *See* Williams, *supra* note 7, at 246. *But see* Dario F. Robertson, Note, *A New Constitutional Approach to the Doctrine of Tribal Sovereignty*, 6 AM. INDIAN L. REV. 371, 376-79 (discussing a natural law theory dating back to the year 1532 which gave the American Indians a natural right of self-government).

44. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73; *see also* H. REP. No. 43, 21st Cong., 2d Sess. (1831).

45. Swindler, *supra* note 40, at 8.

would have ignored its ruling in order to keep Georgia happy. Further, a ruling in favor of the Cherokees would have given Congress the added impetus to destroy the Court's power to hear cases arising in the states. Without the power to review, the federal government would be rendered powerless in the face of state incursions on federal law, thereby making a mockery of the Supremacy Clause.[46] Chief Justice Marshall was not going to allow his life's work to be destroyed so easily.

III. The Cherokee Cases

A. The Tassel Case

In 1830, George Tassel, a Cherokee Indian, was arrested for committing murder within Cherokee territory.[47] The state convicted Tassel under Georgia law although the matter should have fallen under Cherokee law per the treaties with the United States. However, the state's claim that it had jurisdiction over Cherokee lands within its boundaries was upheld by the Georgia Supreme Court.[48] The Cherokees sought President Jackson's assistance in upholding their treaty rights. Jackson, however, refused to help.[49] Tassel then sought a writ of error from the United States Supreme Court. When Georgia Governor Gilmer received the Court's writ, he referred it to the state legislature, which resolved to disregard any federal process.[50] Tassel was then executed.[51]

In response to the *Tassel* case, the Cherokee Nation petitioned the United States Supreme Court to invoke its powers of original jurisdiction,[52] asking that an injunction be granted preventing Georgia from effecting its laws within Cherokee territory. The Cherokees claimed that Georgia's legislative acts directly violated the Constitution of the

46. U.S. CONST. art. VI, which provides in pertinent part:
> This constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

47. Lytle, *supra* note 35, at 67.
48. *Id.*
49. *Id.*
50. Swindler, *supra* note 40, at 9.
51. *Id.*
52. U.S. CONST. art. III, § 2, which provides in pertinent part, "[the] judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made . . . between a state, or the citizens thereof, and foreign states, citizens or subjects."

United States as well as the various treaties between the United States and the Cherokee Nation.[53]

B. *Cherokee Nation v. Georgia*

Less than a month after the Supreme Court issued its subpoena to Governor Gilmer to appear in *Cherokee Nation*, a judiciary bill seeking to diminish the Court's jurisdiction was circulating in the House of Representatives.[54] It appeared that a determination in favor of the Cherokee Nation would surely result in the passage of this bill. Justice Story wrote that limiting its jurisdiction "would deprive the Supreme Court of the power to revise the decisions in the state courts and state legislatures, in all cases in which they were repugnant to the Constitution of the United States."[55] As such it would "tread down the power on which [the government's] very existence depends."[56]

The Cherokees' choice of chief counsel, former Attorney General William Wirt,[57] can best be described as suicidal to their case. One reason was that because Wirt was a stockholder in the Second Bank of the United States, he was an enemy of President Jackson.[58] Such an added incentive for Jackson to ignore a Supreme Court decision in favor of the Cherokees was hardly needed. Also hired to represent the Cherokees was John Sergeant, a prominent Philadelphia attorney.[59]

Wirt immediately went to work using the highly questionable practice of trying to solicit information regarding the case from Chief Justice Marshall. Wirt wanted to know whether it was worth bringing the case before the Supreme Court.[60] The Chief Justice, in a reply through a mutual friend, wrote that he "wished, most sincerely, that both the executive and legislative departments had thought differently on the subject . . . . Humanity must bewail the course which is pursued, whatever may be the decision of policy."[61] Clearly the Justices were aware that their backs were to the wall on this question.

In a very short opinion which smacks of political contrivance and in which he was joined by only one Associate Justice, Chief Justice

53. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 14 (1831).

54. Swindler, *supra* note 40, at 9-10.

55. Letter from Joseph Story to George Tickner (Jan. 22, 1831), *in* 2 LIFE AND LETTERS OF JOSEPH STORY 45, 48 (William W. Story ed., 1881).

56. *Id.*

57. Swindler, *supra* note 40, at 9.

58. *Id.* at 8.

59. *Id.* at 12.

60. *Id.*

61. *Id.* (quoting Letter from William Wirt to Dabney Carr (June 21, 1830), *in* 2 MEMOIRS OF THE LIFE OF WILLIAM WIRT, ATTORNEY GENERAL OF THE UNITED STATES 296-97 (John P. Kennedy, ed. 1849)).

Marshall never reached the question of whether Georgia had violated either the Constitution or the treaties of the United States. Rather, Marshall presented the question as, "Do the Cherokees constitute a foreign state in the sense of the Constitution?"[62] If not, then the Court would have no jurisdiction under Article III of the Constitution.[63]

In concocting his theory, Marshall wrote that

> [I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations . . . . Their relation to the United States resembles that of a ward to his guardian.[64]

Marshall went on to assert that it was not within the framers' intent that the Indian tribes be included "when they opened the courts of the Union to controversies between a State or the citizens thereof, and foreign states."[65] Chief Justice Marshall further contended that

> [a]t the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the Courts of the union.[66]

Marshall then looked to Article I, Section 8, of the Constitution for further guidance.[67] Based on this, he determined that Indians

> are as clearly contradistinguished by a name appropriate to themselves from foreign nations, as from the several states composing the union. . . .
>
> . . . Had the Indian tribes been foreign nations, in the view of the convention, this exclusive power of regulating intercourse with them might have been, specifically given in

62. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

63. *See supra* note 52.

64. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

65. *Id.* at 18.

66. *Id.*

67. U.S. CONST. art. I, § 8, cl. 3 provides in pertinent part, "Congress shall have [the] power . . . [t]o regulate commerce with foreign nations, and amongst the several states, and with the Indian tribes."

> language indicating that idea, not in language contradistinguishing them from foreign nations.[68]

This, Marshall determined, sufficiently proved that Indian tribes, or nations within the United States, could not be considered foreign states. Hence, the Supreme Court could not invoke its power of original jurisdiction.[69]

The Chief Justice concluded his opinion with a chilling paragraph which signaled the low point of the Marshall Court, if not the Supreme Court:

> If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.[70]

Although he had found a constitutional basis for his assertion, this was clearly not the precedent which Marshall wanted to set. He effectively traded away the rights of American Indians in exchange for retention of the Supreme Court's power. Yet what power did the Court really have if politics prevented it from making a principled decision? This might be the question Chief Justice Marshall asked himself when deciding *Worcester* the next year.

Two windy concurring opinions in *Cherokee Nation* rejected the claim that the Indian nations had any characteristics of sovereignty, and were, therefore, subject to the whims of the states.[71] Justice Johnson, ignoring the fact that the Five Civilized Tribes had been actively adopting organic laws for years, wrote:

> 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 known 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 governments beyond what is required in a savage state.[72]

Finally, the two dissenting Justices, who had to be convinced to file a dissenting opinion by Chief Justice Marshall,[73] felt that the Cherokees

68. *Cherokee Nation*, 30 U.S. (5 Pet.) at 18-19.

69. *Id.* at 20.

70. *Id.*

71. *Id.* at 20-31 (Johnson, J., concurring); *id.* at 31-50 (Baldwin, J., concurring).

72. *Id.* at 27-28 (Johnson, J., concurring).

73. Lytle, *supra* note 35, at 69 ("The critical response to the case was so anti-Indian that Chief Justice Marshall persuaded Thompson and Story to pen their thoughts into a separate opinion so as to broaden the base of legal support for the Indian cause.").

were a competent party to sue in court[74] and that they had made a sufficient case.[75] As a result, the dissenters felt an injunction was an appropriate remedy.[76]

In the aftermath of *Cherokee Nation*, Chief Justice Marshall considered retiring from the Court. "I cannot be insensible to the gloom that lours [*sic*] over us," he wrote.[77] Speculating on a possible successor should Marshall decide to retire, John Quincy Adams wrote that "some shallow-pated wild cat . . . fit for nothing but to tear the Union to rags and tatters, would be appointed in his place."[78] However, Marshall remained with the Court, and the next term would provide his reversal of fortune.

C. *Worcester v. Georgia*

The Cherokees were desperate to save their tribal government and, thus, were in dire need of a test case the Supreme Court could hear. They found that case when four missionaries were arrested for being in Cherokee territory without a permit from the governor of Georgia.[79] All four were convicted and sentenced to hard labor for four years.[80] The governor extended them all pardons, but two of the four, Samuel Worcester and Elizur Butler, refused to accept them so that the constitutionality of the Georgia law could be tested.[81]

Initially, the Georgia trial court had released Worcester, a Vermont citizen,[82] because, as a missionary, he had authority to dispense federal funds and could therefore technically be considered a federal agent.[83] Moreover, Worcester, as the postmaster of the Cherokee capital of New Echota, was properly within the territory.[84] However, to ensure that Georgia's law would have effect, President Jackson denied the missionaries federal agent status.[85] He then fired Worcester as postmaster, thereby leaving him unprotected by the federal government and putting him in violation of the Georgia law. This cleared the way

74. *Cherokee Nation*, 30 U.S. (5 Pet.) at 50-69 (Thompson, J., dissenting).
75. *Id.* at 69-77 (Thompson, J., dissenting).
76. *Id.* at 77-80 (Thompson, J., dissenting).
77. Swindler, *supra* note 40, at 14 (quoting Letter from John Marshall to Joseph Story (Oct. 12, 1831), *in* MASS. HIST. SOC. PREC. (2d ser.) XIV)).
78. Swindler, *supra* note 40, at 14 (quoting diary entry of John Q. Adams (Feb. 13, 1831), *reprinted in* 8 MEMOIRS OF JOHN QUINCY ADAMS 315 (Charles F. Adams ed. 1836)).
79. Lytle, *supra* note 35, at 70.
80. *Id.*
81. *Id.*
82. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 536 (1832).
83. Swindler, *supra* note 40, at 15.
84. *Id.*
85. *Id.*

for the state court to try the case and ultimately to convict the defendants.[86]

Cherokee Nation attorneys Wirt and Sergeant also represented Worcester.[87] As in *Cherokee Nation*, the State of Georgia refused to appear when served with the writ of error, as the Georgia legislature resolved to ignore the process.[88] Hiring Wirt seemed once again to be suicidal. It was 1832, a presidential election year, and one of Jackson's opponents for the presidency was none other than William Wirt.[89] Surely Jackson was not going to execute in Wirt's favor any Supreme Court mandate which could prove harmful to Jackson's administration.

Unlike *Cherokee Nation*, the procedural grounds in *Worcester* were firm. This was not a case where standing to sue could be questioned. Rather, the question here concerned Georgia's right to control Indian affairs under the Constitution and in the face of the numerous treaties between the United States and the Cherokee Nation.

In writing for the six-Justice majority, Chief Justice Marshall held Georgia's actions to be unconstitutional.[90] The Chief Justice first determined that the case was properly before the Court.[91] He then set out to prove that the laws of Georgia were repugnant to the Constitution, by launching into a long dissertation on the history of Indian relations from the discovery of the New World through the present day.[92]

Deflecting the notion that the Cherokees abandoned their independent status in treaties by acknowledging the United States as their protector, Marshall wrote that "[p]rotection does not imply the destruction of the protected."[93] He described the relationship as one "of a nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[94] Marshall went on to note that the very fact treaties were repeatedly made with the Cherokees was evidence of their right to self-government.[95]

> [T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right of self-government, by associating with a stronger, and taking

86. *Id.*
87. *Id.*
88. *Id.* at 14-15.
89. *Id.* at 9.
90. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).
91. *Id.* at 536-42.
92. *Id.* at 542-61.
93. *Id.* at 552.
94. *Id.* at 555.
95. *Id.* at 560.

> its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.[96]

Marshall concluded that the Cherokee nation

> is a distinct community, occupying its own territory . . . 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 the 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.[97]

Although Chief Justice Marshall did not make it perfectly clear to what extent Indian territory could be regulated by the states or the federal government,[98] what was clear was that the Cherokees had won. Why the Court decided to find for Worcester is a mystery. President Jackson was clearly going to ignore the Court's mandate. Perhaps the conscience of the Justices caused them to reach their result. Also, the Justices might have foreseen the upcoming tariff nullification battle as eventually working in their favor, causing Jackson to rethink his position on the Cherokees. Foreseen or not, this is what eventually happened.

After they handing down the *Worcester* opinion, the Court, knowing that the President would probably not execute the law, did not follow the normal procedure of preparing a mandate requiring federal marshals to effectuate the decision.[99] As a result, President Jackson was

96. *Id.* at 560-61.

97. *Id.* at 561.

98. *See* William Walters, *Review Essay: Preemption, Tribal Sovereignty, and Worcester v. Georgia*, 62 OR. L. REV. 127 (1983) (arguing that there were three possible bases for the *Worcester* holding: (1) that the federal treaties preempted state law; (2) the Constitution gave the federal government exclusive control over Indian affairs; and (3) the Cherokees were a separate sovereign within which Georgia could not legislate and with whom the United States could only conduct business through treaties and agreements. Walters concluded that this third position was that which Marshall intended); *see also Worcester*, 31 U.S. (6 Pet.) at 590-96 (M'Lean, J., concurring) (querying as to the point at which a state may regulate within an Indian territory, M'Lean wrote, "[I]f a tribe of Indians shall become so degraded or reduced in numbers as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them."). *But see* Lytle, *supra* note 35, at 72 (arguing that M'Lean's view has not been followed through the years).

99. Swindler, *supra* note 40, at 16.

not constitutionally required to act on the decision.[100] The Court, therefore, had a constitutional excuse to explain President Jackson's failure to execute the law. Because it prevented precedent from being set in which the President could "veto" a Supreme Court decision by not executing it, this politically adept move by the Court also left *Worcester* intact as precedent for future courts to follow during more docile administrations.

This, however, was of little comfort to the Cherokee Nation, which, despite winning a verdict, was afforded no relief. Further, state courts, led by Tennessee in *State v. Foreman*,[101] did not obey the *Worcester* holding, allowing their respective state's criminal laws to be extended over any Indian territory within the state. So the Cherokees were actually worse off than before the *Worcester* decision.

D. Turn of Political Events

After Jackson's reelection in 1832, a turn of political events occurred which completely altered his policy toward the Supreme Court. Led by Jackson's first-term Vice President John Calhoun, forces in South Carolina mobilized in an effort to nullify the tariff within that state. In its Nullification Ordinance, South Carolina did, in fact, declare the tariff null and void.[102] President Jackson responded by issuing a Proclamation Against Nullification, which declared that South Carolina's ordinance amounted to rebellion and treason.[103]

One element of the South Carolina ordinance forbade its courts from complying with any Supreme Court process.[104] This, like the Georgia legislature's refusal to comply with the process in the Cherokee cases, was designed to prevent the Supreme Court from declaring the state's act unconstitutional. South Carolina's ordinance went further, however, by prohibiting any court records from being sent to the Supreme Court.[105]

Jackson responded by asking Congress to draft a "force bill," which made it a criminal violation to carry out South Carolina's ordinance.[106] The force bill eventually passed, and, ironically, gave the Supreme Court more authority over state cases than it had ever had before.[107] President Jackson also promised that he would enforce any Supreme

100. *Id.*
101. 16 Tenn. (8 Yer.) 256 (1835).
102. Swindler, *supra* note 40, at 16.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*

Court decision which found unconstitutional a state attempt to override a legitimate federal government power.[108]

Having been reelected, President Jackson no longer felt the need to court certain factions. The policies which ensued from the squelching of nullification were now more important than his first-term promises. Jackson's once vigorous support of Georgia in the Cherokee cases was no longer necessary, since Jackson no longer feared Georgia's joining forces with South Carolina against him. Any Georgian who backed South Carolina's policy of nullification would be breaking the law. Also, by failing to comply with the *Worcester* decision during President Jackson's first term, Georgia now found itself in the uncomfortable position of being directly opposed to Jackson's second-term Supreme Court policy. Looking for a way to gracefully escape this predicament, the Georgia governor extended pardons to Worcester and Butler in return for a withdrawal of their suit against the state.[109]

With the crushing of South Carolina's nullification attempt, Andrew Jackson had completed almost all of his objectives. Besides installing the tariff, he had successfully vetoed the rechartering of the Second Bank of the United States. Further, his handling of the nullification movement worked to destroy the presidential hopes of South Carolina's John Calhoun. Thus, Jackson's chosen successor, Martin Van Buren, was virtually assured of winning the next election.[110] Finally, President Jackson had successfully used the Supreme Court to further his own political agenda. The Cherokee cases highlighted this final achievement. Initially, Jackson saw them as despicable attempts by the Supreme Court to encroach upon state power. They ended up a shining example of the President's respect for the integrity of the Supreme Court and federal powers.

Jackson had one remaining objective. This was to effect the removal of the Cherokee Indians completely. In what was probably partial payment to Georgia for pardoning Worcester and Butler, the Jackson administration forced the Treaty of New Echota[111] upon the Cherokees in 1835. Unsigned by any member of the Cherokee Nation, the treaty ceded the Cherokees' entire eastern territory to the United States for $5 million.[112] The United States was also to bear the expense of moving the Cherokees west of the Mississippi.[113] Unsatisfied with this aspect of the treaty, Georgia's governor warned that "if trouble came from

108. *Id.*
109. *Id.* at 17.
110. *Id.* at 16-17.
111. Treaty of New Echota, Dec. 29, 1835, U.S.-Cherokee Nation, 7 Stat. 478.
112. Bridgers, *supra* note 22, at 1083.
113. *Id.*

any protection afforded by the government troops to the Cherokee[s], a direct collision [would occur] between the . . . state and [the federal] government."[114] However, this fear was unwarranted, because President Jackson was not going to protect the Indians from the state government. Thus, with Jackson conclusively effecting Removal through the formality of yet another fraudulent treaty, the Cherokees began their infamous journey along the Trail of Tears.

Conclusion

Presented with a tremendous burden by President Andrew Jackson, the Supreme Court fought and survived this political battle for its life. Although embarrassed by its *Cherokee Nation* decision, the Court redeemed itself the next term with the *Worcester* opinion. Chief Justice Marshall's shrewd maneuvering following *Worcester* prevented the destruction of the Court. The decision also enabled Marshall to live out his term knowing that the Supreme Court was resting on a solid foundation. Thus, John Marshall's obituary does, in fact, ring true.

As for the Cherokee cases, they created important rights which protected Indians from the states. However, the Jackson administration's Indian policies, which were created through a combination of past policy and contemporary politics, foreclosed the Cherokee Indians themselves from enjoying those protections.

114. *Id.*