Tale of Two Marshals: Reflections on Indian Law and Policy, the Cherokee Cases and the Cruel Irony of Supreme Court Victories

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The history of the Cherokee Nation before the Supreme Court is marked off at each end by two important cases. The first is Worcester v. Georgia1 and its earlier companion case of Cherokee Nation v. Georgia;2 the most recent is the "Arkansas Riverbed Case."3 Both have been hailed as tribal victories in which the Supreme Court found in favor of the Cherokee Nation and upheld native rights. Worcester is regarded by Indian lawyers as one of John Marshall's most influential decisions; the "Riverbed" opinion is less known amongst the body of Thurgood Marshall's many important decisions.

A uniting thread between these two Indian law cases, authored by two different Justice Marshalls, is that while the tribe prevailed in each, the victory was cruelly ironic. In each case, national policy ultimately trumped the Supreme Court's legal judgment. After John Marshall's 1832 Worcester decision, sixteen thousand Cherokees were driven at gunpoint from their homeland in Georgia over the "Trail of Tears" and more than four thousand of their number died enroute.4 In the almost

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1. 31 U.S. (6 Pet.) 515 (1832).
twenty-five years since Thurgood Marshall's 1970 "Riverbed" decision, the Cherokee Nation has been continually rebuffed in its efforts to claim the fruits of that victory; although non-Indians similarly situated were long ago compensated for the taking of their adjacent lands. The Cherokees have yet to receive one penny from the nation which used their tribally owned land to build an inland waterways navigation system. This is doubly ironic because the "Riverbed" lands, for which the United States Government refuses to pay, is part of the negotiated treaty lands acquired by the tribe after they were driven from Georgia in the 1830s after the Supreme Court Worcester decision was ignored.

This essay reflects upon the role of justice, law, and policy in an Indian tribal context. It asks, in light of the Worcester and the "Riverbed" case, how Native people can be expected to function in such a legal world. The answer may be Thurgood Marshall's ultimate contribution to all peoples whose rights must continually be established and reestablished in a nation where, as the nineteenth century political observer Mr. Dooley noted, "The Supreme Court follows the election returns." This tragic tale of two Marshalls and two Native American Supreme Court victories adds up to one bitter historic lesson of how public policy too often prevails over Indian law.

News of John Marshall's favorable 1832 Supreme Court decision in Worcester v. Georgia was greeted with euphoria among the Cherokees in Georgia and their friends in Washington. Worcester was the second of the so-called "Cherokee cases" growing out of Georgia's effort to extend her jurisdiction over Cherokee tribal treaty lands within the boundaries of the state. Earlier in Cherokee Nation John Marshall and a divided court had found that the Supreme Court had no jurisdiction to enjoin Georgia's seizure of Cherokee land, exclusion of Indians from testifying in state court, or other extensions of state law over tribal members. When congregationalists missionary Samuel Worcester was arrested and imprisoned by the State of Georgia for failure to obtain a state permit to live in the Cherokee treaty territory, the Supreme Court had the case needed to uphold tribal treaty rights. The Court found Georgia law void and that these laws violateed the treaty agreements, the Commerce and Contract Clause of the Constitution, and the sovereignty of the Cherokee Nation. Thus, the Marshall Court established the legal concept, valid to this day, that Indian nations are distinct communities with the right to exercise their independent, sovereign governmental functions unrestricted by state law. It was proclaimed "glorious news" by the Cherokee leader Elias Boudinot. Reverend Lyman Beecher, father of Henry Ward Beecher, is reported to have jumped in the air, clapped his hands, and shouted "God be praised." In the Cherokee Nation the response to the victory in Worcester v. Georgia was even less restrained. "It was
trumpeted forth among the Indian," a federal official observing the Cherokees wrote to the War Department, "that the decision mentioned had forever settled the controversy about their lands; that their laws and country would be unconditionally restored to them again, and the Georgians expelled from their territory." There is no doubt that a reasonable reading of the Marshall decision compelled such a conclusion. The Cherokees believed the Supreme Court decision had settled the removal question in their favor. This view is reflected in their public celebration and increased tribal resistance, as noted in the following intelligence report to Secretary of War Cass:

[C]ouncils were called in all the towns of the nation, rejoicing, night dances, etc., were had in all parts upon the occasion and the Indians urged and pressed not to enroll [for removal west]. For a time these deluded people believed in the reality of the reports and assurances, and were rejoicing, yelling and whooping in every direction. Indeed, such was their audacity, that they sent private emissaries into our camp at Highwassee river, before the emigrants embarked for Arkansas, and persuaded them not to go; that if they remained they would be protected. . . .

Tragically for the Cherokees, the Supreme Court decision in Worcester v. Georgia had done but one thing. It had, as Cherokee leader Elias Boudinot noted, "for ever settled ... who is right and who is wrong." This "glorious news" did not, as Boudinot hoped, drive the Georgians off Cherokee land and end the threat of removal by creating "a new era on the Indian question." Earlier, Cherokee Chief John Ross had predicted that "the day of retributive justice must and will come, when integrity and moral worth will predominate and make the shameless monster hide it's head." But as another Cherokee leader John Ridge noted after "a day of rejoicing ... the contest is not over. . . ." Ridge warned his Cherokee countrymen:

[T]he Chicken Snake General Jackson has time to crawl and hide in the luxuriant grass of his nefarious hypocrisy until his responsibility is fastened upon by an execution of the Supreme Court at their next session. . . . Now before the explained laws are carried into effect, it will, I fear, first be necessary to cut down this Snake's head and throw it down in the dust.

The ultimate, pragmatic victory belonged to Georgia and to Jackson. The position which Georgia supported by not appearing to argue the case before the Supreme Court, and which the Supreme Court affirmed in its decision, was vindicated.

9. GRANT FOREMAN, INDIAN REMOVAL 244 (1953 ed.).
10. Id. at 244-45.
11. DALE & LITTON, supra note 7, at 5.
12. Id. at 4-5.
14. Letter from John Ridge to Stand Watie (Apr. 6, 1832), in DALE & LITTON, supra note 7, at 7-8.
15. Id. at 8.
Court proved to be the strongest; the state simply refused to free the missionaries. The Macon Advertiser on March 13, 1832, summarized the legal battle:

They [the missionaries] have been placed where they deserved to be, in the State Prison, and not all the eloquence of a Wirt, or a Sergeant, nor the decision or power of the Supreme Court can take them from it unless the State chooses to give them up, which, at this time is very improbable.16

Georgia, as expected, refused to even acknowledge the Supreme Court's decision and kept the missionaries in jail. Cries of "Force Georgia" were heard all over the North. Jackson was called upon to support the Court. He refused. Jackson, in reality, could not have enforced the decision if he had wanted to. The Court could not have issued a writ of habeas corpus until its 1833 terms; and since "the Georgia court never put its refusal in writing, it is arguable that the Supreme Court could not have awarded execution" even in its next term.17

The failure to enforce the Supreme Court mandate left the Cherokees with a decision in their favor and the question of right decided. Whether or not Jackson actually said, "Marshall has made his law, now let him enforce it," the result was the same.18 Georgians remained on Cherokee soil and the Cherokee missionaries remained imprisoned. Nothing seemed to stand between the Cherokees and forced removal from their homeland. Eventually, the forced removal of the Cherokees from Georgia over the Trail of Tears was complete, making history which would have been echoed if President Eisenhower, in following the Supreme Court mandate in Brown v. Board of Education19 had chosen to send federal troops into Little Rock to support Governor Faubus as he sought to bar black students from attending Little Rock Central High School. John Marshall might indeed have had the law; however, he had no troops.20

The Cherokee confrontation with President Jackson came only after a long series of struggles which took them through all three branches of the federal government. They turned first to the Executive and were told to move west. They next turned to Congress and were again told to move west. They finally turned to the Supreme Court and were told that their rights would be protected. This may have been the cruelest of all the answers given, for the Court had neither the power nor the will to grant this protection.

16. Macon Advertiser (Macon, Georgia), March 13, 1832.
18. This is one of the great unanswered and unanswerable questions of the Cherokee cases. See the sources and arguments set forth in Anton-Hermann Chroust, Did President Jackson Actually Threaten the Supreme Court with Nonenforcement of Its Injunction Against the State of Georgia?, 4 AM. J. LEGAL HIST. 76 (1960).
20. For a brief summary and the basis for comparison, see THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 93-95, 139 (Kermit L. Hall ed., 1992).
After it became apparent that the Supreme Court victory was a hollow one, the Cherokees believed they had only one final place to turn: the American electorate. If Jackson could be defeated in the election of 1832, their homeland might still be saved. After the Supreme Court decision in the spring of 1832, they once again took their case to northern audiences and prayed for the victory of Henry Clay. Clay made the Indian question a central issue in the 1832 presidential campaign. His running mate was John Sargeant (one of the Cherokees' lawyers). The "platform" of the National Republican Party included a large section on the injustices committed against the Indians. However, Jackson was reelected. The Indians had finally and completely lost. After 1832 the Cherokees seemingly had nowhere else to turn but westward.

By the end of 1832 the Cherokee cause was being undermined by significant national desertions. Among the first of their supporters to go were the politicians who were more anti-Jackson than pro-Cherokee or anti-removal. After the November 1832 election, the Cherokees were of no value to the newly forming Whig party and the Whigs' denunciation of the breach of national faith and honor toward the Indian came to a halt. This action suggested the truth of what Georgia had already asserted — Cherokee support was opportunistic and came from self-interest, not principle. "The Cherokees must have wondered how a cause so connected with politics, law, and morality in 1832 could be of so little interest to politicians and lawyers in 1833." Desertions were not limited to the Indians' political friends but spread to their Christian champions. This single most active and vocal group in support of the Cherokees soon decided the cause was lost and advised the Cherokees to remove. Marion Starkey noted:

On Christmas Day of 1832, the American Board assembled in their rooms on Pemberton Square, Boston. They had a heavy decision to make. They read Worcester's letter . . . and reviewed the whole history of the Cherokees versus the state of Georgia; then each gave his opinion. When these were tabulated they found that they were in agreement on two points: Worcester and Butler might now honorably seek pardon; the Cherokees must be advised that hope had ended; they must remove.

Worcester and Butler had been informed that any time they petitioned Georgia they would be released from prison. After hearing of the Christmas Day decision of the American Board, the missionaries applied for pardon. They wrote Governor Lumpkin on January 8, 1833: "We have this day forwarded instructions to our counsel to forbear the intended motion, and to prosecute the case no farther."

22. Burke, supra note 17, at 530.
24. NEW ECHOTA LETTERS: CONTRIBUTIONS OF SAMUEL A. WORCESTER TO THE CHEROKEE
January 15, the prisoners headed home to their mission. Individual desertions were also significant. Among their congressional supporters, both Edward Everett and Senator Frelinghuysen came to the conclusion that the Cherokees must move westward. Frelinghuysen wrote to a friend, "I think removal is best." The power base of northern money and agitation quickly crumpled. Even the once unified Cherokee resistance to removal was shaken.

To say that after the Supreme Court decision the Cherokee cause collapsed because of desertions is to look to the effect and not to the cause. Jackson's reelection was a major factor in viewing the removal fight as lost. Many of the political friends of the Cherokees, seeing the Indian cause as one which did not have significant voter support, stopped their agitation for enforcement of the Court's decision. The reelection was even a factor in the decision of the missionaries Worcester and Butler to seek release. They wrote to *The Missionary Herald* explaining why they accepted a pardon:

There was no longer any hope, by our perseverance, of securing the rights of the Cherokees, or preserving the faith of our country. The Supreme Court had given a decision in our favor, which recognized the rights of the Cherokees; but it still rested with the Executive Government, whether those rights should be protected, and it had become certain that the Executive would not protect them.

Another reason for lessened interest in the Cherokee cause was the rise of a seemingly more important and crucial national issue: nullification. In late 1832 the country's attention turned to the danger of disunion as a result of the dispute over the tariff question. South Carolina claimed the right to nullify any Federal law with which it disagreed. While Georgia's actions in the Cherokee controversy were virtual nullification, the crucial difference in the two cases was how Jackson treated them. Jackson supported Georgia and fought South Carolina. The result was that many who supported the Cherokees abandoned them to join Jackson in his efforts against South Carolina. One could sense the Cherokee cause was lost when Jackson delivered a toast at a birthday dinner in honor of Thomas Jefferson, in which Jackson electrified the country by expressing sentiments sounding like a speech from Daniel Webster: "Our Federal Union — it must be preserved."

On November 24, 1832, a convention in South Carolina passed the famous Nullification Ordinance. Jackson responded with his Nullification Proclamation expressing a strong nationalistic philosophy, supporting the right of Congress to establish protection, denying that the constitution is a compact of sovereign states, and announcing that a state has no right to secede. Many of those most opposed to Jackson's Cherokee policy rallied to Jackson's cause on nullification. Daniel

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25. Id.
Webster, who just a few months before had condemned the President for his support of Georgia, now spoke in favor of Jackson at a meeting in Faneuil Hall, a favorite meeting place for pro-Indian groups. Webster said: "I regard the issuing of this Proclamation by the President as a highly important occurrence. The general principles of the Proclamation are such as I entirely approve. I esteem them to be the true principles of the Constitution." J.T. Austin, another political opponent of Jackson, declared at the same meeting: "Laying aside all private feelings, we are ready, in this trial, to rally around the Chief Magistrate of the Union; with one heart and voice, we stand ready to support him, as the Israelite upheld the arm of Moses."

Even Worcester's decision to seek a pardon was based partially on the danger to the Union from South Carolina. Jackson also received the support of his longtime Supreme Court foe Justice Joseph Story. Story had been the strongest supporter of the Cherokees, standing with them even in the earlier case of Cherokee Nation v. Georgia. Story wrote Richard Peters, "The President's proclamation is excellent, and contains the true principles of the Constitution." Story also wrote home that he and Chief Justice Marshall "were to be counted among the president's warmest supporters." He recounted that at the state dinner "President Jackson specially invited me to drink a glass of wine with him. . . . Who would have dreamed of such an occurrence?"

The Cherokees, who had earlier celebrated their Supreme Court victory with lighted bonfires, could not believe what was happening. In an editorial the tribal newspaper, the Cherokee Phoenix, asked:

> What do the good people of the United States think of the distressed condition of the Cherokees? Is their attention so completely engrossed in their own private affairs that they cannot even find time to shed a tear at the recollection of such accumulated oppressions heaped upon their fellow creatures? Has the cause of the Indians been swallowed up in other questions, such as the tariff. . . .

What the Cherokees did not understand was that it was not that their friends cared less about them; it was that they cared more about the Union. When Story, Marshall, and Webster, along with many other friends of the Indian, were presented with the choice of supporting Jackson and the Union or opposing Jackson and supporting the Cherokee, the choice was the Union.

While the reelection of Jackson and the shift of interest to nullification helps explain the desertions, they are only symptoms of the ultimate cause of the Cherokee failure. Quite simply, those supporting Georgia and the Cherokee removal articulated the beliefs of the majority of Americans. While the year 1828 can be used to mark a genuine moral upsurge with the rise of temperance societies,

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32. *Cherokee Phoenix* (New Echota), July 7, 1832.
opposition to Sunday mail, the lyceum, social reform, and colonization societies, most Americans were unaffected by these movements and organizations. Despite the national rhetoric, United States citizens were personally focused. Americans were, not surprisingly, more interested in their own progress and economic advancement and "less interested in moral uplift." Issues such as the national bank, the tariff, and internal improvements were more dear to the American electorate than the fate of a group of southern Indians being driven west, even though the Indians were being driven west in the face of a Supreme Court decision in their favor. What the majority of Americans wanted in 1832, as in 1882 or 1992, was economic progress and expansion of opportunity for themselves and their nation. Progress was, to the nineteenth century man, the ultimate touchstone to even higher goals of personal wealth and national achievement. The American Indian was viewed as a savage. He stood at the opposite end of the scale of progress. He was to the American settlers a part of a hostile environment which had to be overcome if the white man was to conquer and civilize the new world. The Indian symbolized the past in a nation of the future.

The conflict between Georgia and the Cherokees, to most Americans, was simply a contest between the savage and the civilized, between expansion and stagnation, between progress and decay. The American Indian was an obstacle to all that the American public wanted, and thus, the Native would have to be overcome. Rather than being immoral in this expansionist society, removal was sanctioned by the ultimate authority of their beliefs, by God and God's plan of conquest. The idea of the Indian as a savage and as an obstacle to civilization was almost totally pervasive during this period. This belief was the basis for almost all thought on Indian matters. "[M]ost often it functioned not so much as an argument but as an assumption; not so much as a step in a logical chain leading to action, as the very foundation of the logic itself." Jackson understood the real basis of America's thoughts on the Indian — the savage versus civilization. Jackson expressed this shared value in his Second Annual Message:

> Humanity has often wept over the fate of the aborigines of this country, and Philanthropy has been long busily employed in devising means to avert it, but its progress has never for a moment been arrested, and one by one have many powerful tribes disappeared from the earth. To follow to the tomb the last of his race and to tread on the graves of extinct nations excite melancholy reflections. But true philanthropy reconciles the mind to these vicissitudes as it does to the extinction of one generation to make room for another. In the monuments and fortresses of an unknown people, spread over the extensive regions of the West, we behold the memorials of a once powerful race, is to be regretted. Philanthropy could not wish to see this continent restored to

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34. See generally Ramond W. Stedman, Shadows of the Indian (1982).
the condition in which it was found by our forefathers. What good men would prefer a country covered with forests and ranged by a few thousand savages to our extensive Republic, studded with cities, towns, and prosperous farms, embellished with all the improvements which art can devise or industry execute, occupied by more than 12,000 happy people, and filled with all the blessings of liberty, civilization, and religion?  

There was pity for the plight of the Indian — real pity. Some Americans were truly saddened over the Indians’ fate, but to most the Indian was victim of the inevitability of civilized progress. One of the key lessons of the triumph of public policy attitudes over Supreme Court interpretation is that "minority rights" are often defined on a different axis. An important aspect of the difficulty of the tribe in the Cherokee removal struggle was that the traditional burdens of a public policy debate were reversed. The side proposing a new policy is said in traditional rhetorical theory to be "the affirmative" or the mover and thus has the burden of proving that the new or proposed policy is needed, workable, and desirable. In general public policy disputation, the present policy or system is presumed to be adequate until proven otherwise. In the Cherokee controversy, Georgia, proposing the new policy of removal, should have been in traditional parliamentary debate, on the affirmative with the burden of proof. However, the Cherokees were forced into the position of speaking out, of proving their right to remain where they were. The reason the sides were reversed seems to be that the Indians, and arguably all minorities, were not a real part of the present system and thus could not be a part of the status quo in the traditional parliamentary disputation. Quite simply, the Indians were an obstacle to the United States and not part of it; they were, therefore, presumed to be wrong until they proved otherwise. This allowed Georgia to move aggressively at every opportunity while the Cherokees were forced to behave reactively. This pushed the Cherokees onto the public policy defensive.  

In the final analysis, the Cherokees faced the inevitability of removal and the necessity of creating an internal tribal policy to deal with a national executive seemingly determined to ignore the decision of the highest court in the land. The Cherokees were not free to casually contemplate effective policy alternatives from the safe distance of the executive mansion in Washington or even from the comparative calm of the Georgia capital at Milledgeville. Portions of the Cherokee Nation were literally in flames. The people were displaced, scattered, and destitute. Cherokee Chief John Ross returned from Washington to find his family turned out

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from his plantation and a Georgian asleep in his bed. The great Vann House was drawn in the land lottery by a lucky Georgian under whose neglect it fell into ruin. The general state of anarchy and the decline in morality in the Cherokee Nation during this period was described by Elias Boudinot:

> In the light that I consider my countrymen, not as mere animals... I say their condition is wretched. Look... around you and see the progress that vice and immorality have already made! See the spread of intemperance and the wretchedness and misery it has already occasioned. I need not reason with a man of your sense and discernment, and of your observation, to show the debasing character of that vice to our people... you will find its cruel effects in the bloody tragedies that are frequently occurring — in the frequent convictions and executions for murders, and in the tears and groans of the widows and fatherless, rendered homeless, naked and hungry...

How, with a Supreme Court decision in the Indians' favor, could this devastation have happened — and happened so quickly? While the Cherokees and their friends were debating removal in the public arena, Georgia and her troops were in the field rapidly establishing control over the Cherokee's tribal homeland. The process was simple and systematic and absolutely and completely legal under the statutes and regulations enacted by the State of Georgia. Even after the United States Supreme Court held these laws to be unconstitutional and void, Georgia continued to enforce her own laws, which confiscated Cherokee property and transferred its title to Georgia citizens.

The procedures by which this confiscation was accomplished are set forth in the Georgia statutes. Session after session, the legal steps unfolded. The state's premise behind these enactments was that the Cherokee lands in Georgia were Georgia lands. Therefore, the laws of Georgia were extended over the geographic areas included within the boundaries guaranteed to the tribe by the United States under treaty. Georgia declared this area to be "Cherokee County" and simply legislated the opening of the new county. All Cherokee lands not fully improved and occupied were declared by the State of Georgia as "surplus" and subject to state allotment by lottery to non-Indian citizens of Georgia. The state provided that Cherokees who wished to remain in Georgia as non-Indian citizens, who renounced their tribal political affiliation and swore allegiance to the State of Georgia, could retain a homestead. Otherwise, the citizens of the Cherokee Nation found themselves dispossessed of their lands and their improvements under the operation of Georgia

38. FOREMAN, supra note 9, at 251; MOULTON, supra note 13, at 62.
39. The Vann House has now been restored and is now open to the public as an example of Moravian-influenced Southern architecture.
40. RALPH H. GABRIEL, ELIAS BOUDINOT, CHEROKEE AND HIS AMERICA 162-63 (1941).
41. For a discussion of Georgia's actions in the context of American Indian policy, see the 1789 statute in Rennard Strickland, The Price of a Free Man: Resources for the Study of Indian Law, History and Policy at the University of Tulsa, 15 TULSA L.J. 720, 726 (1980).
The sense of the seeming regularity of it all is conveyed by this matter-of-fact report on the lottery system by Governor Wilson Lumpkin to the Georgia House of Representatives in December 1831:

The survey of the County of Cherokee, in conformity with, and under the provisions of, the several acts of the Legislature, has been completed without any serious obstacles or difficulty, and, in the exercise of that discretion confided to me by law, I have not hesitated to move forward in that direct line which I deemed best calculated to ensure a speedy settlement of the unoccupied lands in Cherokee County. Accordingly, in due time, the Justices of the Inferior Courts of the several counties, were notified and required to execute the duties devolving on them, in regard to receiving and returning the names of persons entitled to draws in the lotteries, which have been done according to law, and the tickets having been prepared, the Lottery Commission were convened and commenced the preparatory arrangements for the drawings, which was commenced on the twenty-second day of October last, and is now in progress, under their superintendence.

United States military officials, missionaries, travelers, and doctors passing through the Cherokee country portrayed a vastly different world from these official reports of Georgia. The poet, songwriter, and playwright John Howard Payne dramatized the scene for his fellow Americans in language so vivid that Georgians formally complained of his actions to federal officials. The story of Payne's arrest with Chief John Ross counters the Georgians' statements about the operation of their law. No account of the preremoval anarchy is more precise than the Cherokee leader Major Ridge's appeal to President Jackson.

They have got our lands and now they are preparing to fleece us of ... money. ... We found our plantations taken either in whole or in part by Georgians — suits instituted against us for back rents for our farms. These suits are commenced in the inferior courts, with the evident design that, when we are ready to remove, to arrest our people, and on these vile claims to induce us to compromise for our own release to travel with our families. Thus our funds will be filched from our people, and we shall be compelled to leave our country as beggars and in want.

Even the Georgia laws, which deny us our oaths, are thrown aside and notwithstanding the cries of our people, and protestation of our

43. Lumpkin, supra note 37, at 95-106.
44. See generally JOHN HOWARD PAYNE, JOHN HOWARD PAYNE TO HIS COUNTRYMEN (1961) (misc. publication no. 2). See also the discussion and selected letters in GABRIEL HARRISON, JOHN HOWARD PAYNE, DRAMATIST, POET, ACTOR (Philadelphia, J.B. Lippincott & Co. 1885).
innocence and peace, the lowest classes of the white people are flogging
the Cherokees with cowhides, hickories, and clubs. We are not safe in
our houses — our people are assailed by day and night by the rabble.
Even the justices of peace and constables are concerned in this business.
This barbarous treatment is not confined to men, but the women are
stripped also and whipped without law or mercy. ... [W]e shall carry
off nothing but the scars of the lash on our backs . . . .

What were the Cherokees to do? What policy should they follow? The laws of
the State of Georgia drove them from their homes. In *Worcester v. Georgia* the
laws of the State of Georgia had been declared null and void as contrary to the laws
of the land and the Constitution of the United States. Despite their pronounced
unconstitutionality, the laws of Georgia were still operating in the State of Georgia.
No help for the Cherokees was coming from the President, none from the Congress,
and their Supreme Court victory was unenforced and apparently unenforceable.
These were the circumstances the tribe faced at the beginning of 1833. It was upon
these facts that Cherokee policy had to be built.

The years after the Supreme Court decisions in the Cherokee cases, from 1833
to 1836, were among the most turbulent and divisive in tribal history. While once
the Cherokees had stood united against Georgia, tribal leadership no longer saw the
removal struggle with the same unanimity. Intrigues were byzantine and bitter. One
faction determinedly refused to consider compromise, holding religiously to the
notion that the people of the United States as represented by their highest court
would never allow the tribe to be driven from its homeland. Another was shattered
by the hypocrisy of the court fiasco, believing that if the Supreme Court could be
ignored there was no hope that the Cherokees would not be driven westward. Rival
delegations pressed their position on the Congress and on the executive. And the
executive and the Indian bureaucracy used the tribal division to weaken and
discredit each of the factions. Georgia's militia, federal troops, marauding
frontiersmen, questionable clergy, Jackson's agents, unscrupulous land speculators,
and assorted politicians bombarded the Cherokees with threats and bribes, with
proposals and counterproposals, with proposed treaties and favorable statutes,
military assaults and petty thievery.

With the same vigor and intellect that they had once turned on the Georgians, the
Cherokees now turned on each other. The same pens that joined to document the
Cherokee cause and to persuade whites to support them now spewed forth
broadsides and pamphlets in defense of partisan positions. Each side eloquently and
persuasively argued its case. The tragedy was that neither of the Cherokee factions
was truly in control of the alternatives, that the limits of their policy making options
had been set by white society and white policy makers. There was no acceptable
alternative available for the Indian. The choices were so framed by white society

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45. GABRIEL, *supra* note 40, at 166.
46. Perhaps the fairest and most concise discussion of the tragic events of this era and the impact
of decisions from this time is WARDELL, *supra* note 4, at 3-61.
that whichever side prevailed the Cherokee Nation was the ultimate loser. The Cherokee Nation had fought a united struggle and lost in its efforts to persuade the Nation, had lost in the congress, had lost with the executive, and had even lost their victory in the court. All that was left were the losers' options. If those Cherokees who advocated a negotiated settlement or a compromise treaty prevailed now, the homeland would be lost. If those Cherokees who refused to negotiate and continued to rely upon the good faith of white institutions prevailed, the homeland was taken by force and the tribe driven out at gunpoint. It was a decision about which good and fair men might and did differ. It was an issue they could not win. It was the decision forced upon a minority by a majority willing to ignore the rule of law.

The devastating impact of these alternatives upon the tribe and the deterioration of civility in the Cherokee body politic is apparent from the voluminous correspondence of tribal leaders of all persuasion. In 1833 John Ridge wrote to John Ross, saying, "I do trust that you will return and know you are capable of acting the part of a statesman in this trying crisis of our affairs." By 1835 John Ridge described the elected Chief's conduct in a letter to his father Major Ridge. "Ross has failed before the Senate, before the Secretary of War, & before the President. He tried hard to cheat you & his people, but he has been prevented. In a day or two he goes home no doubt to tell lies." In his own defense John Ross wrote letters to many of his Cherokee friends and supporters. "I shall never deceive you," Ross began. "[S]o far as my feeble talent and ability will permit, it shall be exerted solely with the view of promoting the welfare and happiness of the whole people." The chief, speaking of his tribal opposition, concluded: "A man who will forsake his country . . . in time of adversity and will co-operate with those who oppose his own kindred is no more than a traitor and should be viewed — and shunned as such." More and more, the increasingly hostile debates of the Cherokee factions began to focus on the terms of a removal treaty. The forces of John Ross spoke of a settlement of $15 million. Groups of Cherokees continued to agitate for this or that settlement. Finally, in December 1835, the internal conflict climaxed when a minority faction of the tribe, including Major Ridge, John Ridge, Stand Watie, and Elias Boudinot, signed what became known as The Treaty of New Echota, or the Scheremerhorn Treaty. It provided for systematic removal and the exchange of tribal lands in Georgia for new lands in which was called Indian Territory, a region destined to become the State of Oklahoma. The treaty was denounced by Chief Ross and his followers, clearly a majority of the tribe, as "the false treaty" and the signatories branded as traitors. When the Senate ultimately ratified the treaty, by only one vote, the formality of the removal struggle was at an end but the agony of removal itself was just beginning.

47. MOULTON, supra note 13, at 52.
49. MOULTON, supra note 13, at 52.
51. FOREMAN, supra note 9, at 269.
It is a tragic but undisputed historical fact that none of the institutions the Cherokees borrowed from white society were sufficient to protect the Cherokees against the institutions of white society itself. Some Cherokees believe that it was not just a question of the failure of the "white way" but that the abandonment of their own old Indian ways which was, in fact, the ultimate cause of the crisis. Even to this day some traditionalists contend that the expulsion, the Trail of Tears, was a punishment for transgression as well as a reminder of the ancient laws of the People of the Fire. More than a century and a half after removal, gathered around the eternal flame of the Cherokee's ancient fire, one hears the stories of that fire and of the spirits, of the protection and the retribution, and of the divine powers that could have used Andrew Jackson and his soldiers to bring the Cherokees back — back to the fire and the ways it stands for. Or one hears the Trail blamed on a spiritual failure that had so weakened the Cherokees that they had lost their true power to resist. Their prayers, these Cherokees believe, were unanswered because they were praying to the wrong gods.

In the years between 1836 and 1839 the Cherokee controversy ceased to be a legal and became a military question. Rhetoric gave way to reality as Justices Marshall and Story were replaced by Generals Wool and Scott as the central figures in the Indian drama. The reassuring rhetoric of Jackson's first message that removal would be voluntary gave way to the cruel reality of the soldiers' bayonets. True, Cherokee leadership continued to press their case in the public arena, to lobby before Congress and the executive, to argue and to intrigue, to come and to go on secret missions and missions of mercy, but this political maneuvering did not stop the military marauding. Cherokee land was lotteried away and troops drove them into prison stockades to wait the forced marches from Georgia.

The Cherokee evacuation was so complete that on June 18, 1838, General Charles Floyd of the Georgia militia stood at New Echota in the old Cherokee Nation with his troops amidst the abandoned buildings of the Cherokee Council, the Cherokee Supreme Court, and the newspaper printing office of The Cherokee Phoenix. General Floyd sat down here in the old Cherokee Nation, now "Headquarters . . . Middle Military District" of Georgia, and wrote Governor Gilmer:

I have the pleasure to inform your excellency that I am now fully convinced there is not an Indian within the limits of my command, except a few in my possession, who will be sent to Ross' Landing tomorrow. My scouting parties have scoured the whole country without seeing an Indian or late Indian signs. If there are any stragglers in

52. For a fuller development of this theme, see generally RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1974).
54. For a view of these years from the treaty party perspective, see THURMAN WILKINS, CHEROKEE TRAGEDY: THE STORY OF THE RIDGE FAMILY AND THE DECIMATION OF A PEOPLE (1970); the Ross perspective is clearly articulated in Gary Moulton's Chief John Ross and the Internal Crisis of the Cherokee Nation in H. GLENN JORDON & THOMAS M. HOLM, INDIAN LEADERS (Okla. Hist. Soc'y 1979).
Georgia, they must be in Union and Gilmer counties, and near the
Tennessee and North Carolina line; but none can escape the vigilance
of our troops. Georgia is ultimately in possession of her rights in
Cherokee country.\textsuperscript{55}

Leaving Georgia meant something uniquely personal to every Cherokee. While
the magnitude of the collective loss was common to all, there was a peculiarly
individual dimension for every single Indian. The loss of their homeland, the
abandonment of the graves of ancestors was a burden shared. The tragic deprivation
and bitter humiliation of forced exile touched every tribal member. To the fullblood
traditionalist whose religion was intimately tied to a particular place and to
particular happenings remembered, the move was a spiritual disaster. To the
wealthy mixed-blood trader and planter, the economic blow was devastating. But
the varied nature and depth of individual losses can only be seen in the lives of
individual Cherokees.\textsuperscript{56}

Today, more than one hundred and sixty years have passed since the United
States Supreme Court decided the case of \textit{Worcester v. Georgia} in favor of the
Cherokees. The Cherokees have returned to the Supreme Court upon a number of
occasions in the years since 1832 and their ill-fated experience with the \textit{Worcester}
decision. Perhaps the most significant of these was the "Arkansas Riverbed Case;"
for which Thurgood Marshall wrote the majority opinion in favor of the Chero-
kees.\textsuperscript{57}

Thurgood Marshall, speaking for the court in the "Riverbed" case, found that the
Cherokees and their fellow tribes the Chickasaws and the Choctaws were the
rightful legal owners of the bed of the Arkansas River.\textsuperscript{58} They were thus entitled
to the sand, the gravel, and the oil leases under their river. Soon after the decision
the State of Oklahoma paid for their taking of these resources. Furthermore, it
seemed clear that since the river had been condemned for the Arkansas Navigation
Project of the Kerr-McClellan Waterways, the tribe was entitled to compensation
on the same basis as neighboring whites whose land had been taken by the eminent
domain process. Using this formula, the Corp of Engineers itself found a value of
$177 million. Just as the \textit{Worcester} Court had no soldiers, the "Riverbed" Court had
no treasury. Despite a decision in its favor by the highest court in the land, the
Cherokee Nation has waited more than two decades since the "Riverbed" decision
in 1970 and have often been forced to return to the Supreme Court to hold that
victory. The Cherokees still wait at the pleasure of the Congress for the appropria-
tion of the funds for property the Court has found to have been theirs under the

\textsuperscript{55} Quoted in GABRIEL, \textit{supra} note 40, at 171.
\textsuperscript{56} Readers who wish to explore the human impact might look at the removal as it changed the
lives of Reverend Jesse Bushyhead, George Gist (known as Sequoyah), the fullblood hero Tsali, or the
\textsuperscript{58} Id. at 635-36.
terms of the 1835 Treaty of New Echota, the treaty forced on the tribe after the
failure to execute the mandate of the Supreme Court in \textit{Worcester v. Georgia}. Once
again, the tribe, the court, and the American people have come full circle.\textsuperscript{59}

\textsuperscript{59} The process has been so long that the case is now in the third generation of lawyers, having
started with Earl Boyd Pierce, who invited Andrew Wilcoxen to join him. Today, after the deaths of
Pierce and Wilcoxen, the case is in the hands of Andy Wilcoxen's son James Wilcoxen. The proposed
full payment of $177 million was included in the last prepared budget of the Ford administration but was
stricken when the budget was revised by the Carter administration and has remained unpaid through the
Reagan, Bush, and Clinton years. The legislative dance has followed the claim in and out of the judicial
arena as well. \textit{See} Malvena Stephenson, \textit{$177 Million Mirage for Oklahoma Indians}, \textit{TULSA WORLD},
Aug. 21, 1983, § I, at 1; Interview with James Wilcoxen, \textit{supra} note 5. Those wishing to follow the
struggle will find the most complete discussions in the \textit{Cherokee Advocate}, the tribal newspaper.