JOHNSON, J., Separate Opinion

SUPREME COURT OF THE UNITED STATES

30 U.S. 1

Cherokee Nation v. Georgia

Argued: --- Decided:

Mr. Justice JOHNSON.

In pursuance of my practice in giving an opinion on all Constitutional questions, I must present my views on this. With the morality of the case I have no concern; I am called upon to consider it as a legal question. [p21]

The object of this bill is to claim the interposition of this Court as the means of preventing the State of Georgia, or the public functionaries of the State of Georgia, from asserting certain rights and powers over the country and people of the Cherokee Nation.

It is not enough, in order to come before this Court for relief, that a case of injury, or of cause to apprehend injury, should be made out. Besides having a cause of action, the complainant must bring himself within that description of parties, who alone are permitted, under the Constitution, to bring an original suit to this Court.

It is essential to such suit that a State of this union should be a party; so says the second member of the second section of the third article of the Constitution; the other party must, under the control of the Eleventh Amendment, be another State of the union, or a foreign state. In this case, the averment is that the complainant is a foreign state.

Two preliminary questions then present themselves.

1. Is the complainant a foreign state in the sense of the Constitution?

2. Is the case presented in the bill one of judicial cognizance?

Until these questions are disposed of, we have no right to look into the nature of the controversy any farther than is necessary to determine them. The first of the questions necessarily resolves itself into two: 1. Are the Cherokees a State? 2. Are they a foreign state?

1. I cannot but think that there are strong reasons for doubting the applicability of the epithet "state" to a people so low in the grade of organized society as our Indian tribes most generally are. I would not here

be understood as speaking of the Cherokees under their present form of government, which certainly must be classed among the most approved forms of civil government. Whether it can be yet said to have received the consistency which entitles that people to admission into the family of nations is, I conceive, yet to be determined by the executive of these States. Until then, I must think that we cannot recognize it as an existing State, [p22] under any other character than that which it has maintained hitherto as one of the Indian tribes or nations.

There are great difficulties hanging over the question, whether they can be considered as States under the Judiciary Article of the Constitution. 1. They never have been recognized as holding sovereignty over the territory they occupy. It is in vain now to inquire into the sufficiency of the principle that discovery gave the right of dominion over the country discovered. When the populous and civilized nations beyond the Cape of Good Hope were visited, the right of discovery was made the ground of an exclusive right to their trade, and confined to that limit. When the eastern coast of this continent, and especially the part we inhabit, was discovered, finding it occupied by a race of hunters, connected in society by scarcely a semblance of organic government, the right was extended to the absolute appropriation of the territory, the annexation of it to the domain of the discoverer. It cannot be questioned that the right of sovereignty, as well as soil, was notoriously asserted and exercised by the European discoverers. From that source we derive our rights, and there is not an instance of a cession of land from an Indian nation in which the right of sovereignty is mentioned as a part of the matter ceded.

It may be suggested that they were uniformly cessions of land without inhabitants, and therefore words competent to make a cession of sovereignty were unnecessary. This, however, is not a full answer, since soil, as well as people, is the object of sovereign action, and may be ceded with or without the sovereignty, or may be ceded with the express stipulation that the inhabitants shall remove. In all the cessions to us from the civilized states of the old world, and of our transfers among ourselves, although of the same property, under the same circumstances, and even when occupied by these very Indians, the express cession of sovereignty is to be found.

In the very treaty of Hopewell, the language or evidence of which is appealed to as the leading proof of the existence of this supposed State, we find the commissioners of the United States expressing themselves in these terms.

> The commissioners plenipotentiary of the United States give peace to all the Cherokees, and receive them into the favour and protection of the **[p23]** United States on the following conditions.

This is certainly the language of sovereigns and conquerors, and not the address of equals to equals. And again, when designating the country they are to be confined to, comprising the very territory which is the subject of this bill, they say, "Art. 4. The boundary allotted to the Cherokees for their hunting grounds" shall be as therein described. Certainly this is the language of concession on our part, not theirs, and when the full bearing and effect

of those words, "for their hunting grounds" is considered, it is difficult to think that they were then regarded as a State, or even intended to be so regarded. It is clear that it was intended to give them no other rights over the territory than what were needed by a race of hunters, and it is not easy to see how their advancement beyond that State of society could ever have been promoted, or, perhaps, permitted, consistently with the unquestioned rights of the States, or United States, over the territory within their limits. The preemptive right, and exclusive right of conquest in case of war, was never questioned to exist in the States which circumscribed the whole or any part of the Indian grounds or territory. To have taken it from them by direct means would have been a palpable violation of their rights. But every advance from the hunter state to a more fixed state of society must have a tendency to impair that preemptive right, and ultimately to destroy it altogether, both by increasing the Indian population and by attaching them firmly to the soil. The hunter state bore within itself the promise of vacating the territory because, when game ceased, the hunter would go elsewhere to seek it. But a more fixed state of society would amount to a permanent destruction of the hope, and, of consequence, of the beneficial character, of the preemptive right.

But it is said, that we have extended to them the means and inducement to become agricultural and civilized. It is true: and the immediate object of that policy was so obvious as probably to have intercepted the view of ulterior consequences. Independently of the general influence of humanity, these people were restless, warlike, and signally cruel in their irruptions during the revolution. The policy, therefore, of enticing them to the arts of peace, and to those improvements which war might lay desolate, was obvious, and it was wise [p24] to prepare them for what was probably then contemplated, to-wit, to incorporate them in time into our respective governments -- a policy which their inveterate habits and deep-seated enmity has altogether baffled. But the project of ultimately organizing them into States, within the limits of those States which had not ceded or should not cede to the United States the jurisdiction over the Indian territory within their bounds, could not possibly have entered into the contemplation of our government. Nothing but express authority from the States could have justified such a policy, pursued with such a view. To pursue this subject a little more categorically.

If these Indians are to be called a State, then,

1. By whom are they acknowledged as such?

2. When did they become so?

3. And what are the attributes by which they are identified with other States.

As to the first question, it is clear that, as a State ,they are known to nobody on earth but ourselves, if to us; how then can they be said to be recognized as a member of the community of nations? Would any nation on earth treat with them as such? Suppose, when they occupied the banks of the Mississippi or the sea coast of Florida, part of which in fact the Seminoles now occupy, they had declared war and issued letters of marque and reprisal against us or Great Britain -- would their commissions be

respected? If known as a State, it is by us and us alone, and what are the proofs? The treaty of Hopewell does not even give them a name other than that of the Indians; not even nation or state, but regards them as what they were, a band of hunters, occupying as hunting grounds, just what territory we chose to allot them. And almost every attribute of sovereignty is renounced by them in that very treaty. They acknowledge themselves to be under the sole and exclusive protection of the United States. They receive the territory allotted to them as a boon from a master or conqueror; the right of punishing intruders into that territory is conceded, not asserted as a right; and the sole and exclusive right of regulating their trade and managing all their affairs in such manner as the government of the United States shall think proper, amounting in terms to a relinquishment of all [p25] power, legislative, executive and judicial to the United States, is yielded in the ninth article.

It is true that the twelfth article gives power to the Indians to send a deputy to Congress, but such deputy, though dignified by the name, was nothing and could be nothing but an agent such as any other company might be represented by. It cannot be supposed that he was to be recognized as a minister, or to sit in the Congress as a delegate. There is nothing express and nothing implied that would clothe him with the attributes of either of these characters. As to a seat among the delegates, it could not be granted to him.

There is one consequence that would necessarily flow from the recognition of this people as a state which, of itself, must operate greatly against its admission.

Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a State? We should indeed force into the family of nations, a very numerous and very heterogeneous progeny. The Catawbas, having indeed a few more acres than the republic of San Marino, but consisting only of eighty or an hundred polls, would then be admitted to the same dignity. They still claim independence, and actually execute their own penal laws, such as they are, even to the punishment of death, and have recently done so. We have many ancient treaties with them, and no nation has been more distinctly recognized, as far as such recognition can operate to communicate the character of a State.

But secondly, at what time did this people acquire the character of a State?

Certainly not by the treaty of Hopewell, for every provision of that treaty operates to strip it of its sovereign attributes, and nothing subsequent adds anything to that treaty, except using the word Nation instead of Indians. And as to that article in the treaty of Holston, and repeated in the treaty of Tellico, which guaranties to them their territory, since both those treaties refer to and confirm the treaty of Hopewell, on what principle can it be contended that the guarantee can go farther than to secure to them that right over the territory, which is conceded by the Hopewell treaty, which interest is only that of hunting grounds. The general policy of the [p26] United States, which always looked to these Indian lands as a certain future acquisition, not less than the express words of the treaty of Hopewell, must so decide the question.

If they were not regarded as one of the family of nations at the time of that treaty, even though at that time first subdued and stripped of the attributes of a State, it is clear that, to be regarded now as a State, they must have resumed their rank among nations at some subsequent period. But at what subsequent period? Certainly by no decisive act until they organized themselves recently into a government, and I have before remarked that, until expressly recognized by the executive under that form of government, we cannot recognize any change in their form of existence. Others have a right to be consulted on the admission of new States into the national family. When this country was first appropriated or conquered by the crown of Great Britain, they certainly were not known as members of the community of nations, and if they had been, Great Britain from that time blotted them from among the race of sovereigns. From that time, Great Britain considered them as her subjects whenever she chose to claim their allegiance, and their country as hers, both in soil and sovereignty. All the forbearance exercised towards them was considered as voluntary, and as their trade was more valuable to her than their territory, for that reason, and not from any supposed want of right to extend her laws over them, did she abstain from doing so.

And, thirdly, by what attributes is the Cherokee Nation identified with other States?

The right of sovereignty was expressly assumed by Great Britain over their country at the first taking possession of it, and has never since been recognized as in them otherwise than as dependent upon the will of a superior.

The right of legislation is in terms conceded to Congress by the treaty of Hopewell, whenever they choose to exercise it. And the right of soil is held by the feeble tenure of hunting grounds, and acknowledged on all hands subject to a restriction to sell to no one but the United States, and for no use but that of Georgia.

They have in Europe sovereign and demi-sovereign States, and States of doubtful sovereignty. But this State, if it be [p27] a State, is still a grade below them all, for not to be able to alienate without permission of the remainderman or lord places them in a state of feudal dependence.

However, I will enlarge no more upon this point, because I believe, in one view and in one only, if at all, they are or may be deemed a State, though not a sovereign State, at least while they occupy a country within our limits. Their condition is something like that of the Israelites, when inhabiting the deserts. Though without land that they can call theirs in the sense of property, their right of personal self-government has never been taken from them, and such a form of government may exist though the land occupied be in fact that of another. The right to expel them may exist in that other, but the alternative of departing and retaining the right of self-government may exist in them. And such they certainly do possess; it has never been questioned, nor any attempt made at subjugating them as a people or restraining their personal liberty except as to their land and trade.

But in no sense can they be deemed a foreign state under the Judiciary Article.

It does seem unnecessary on this point to do more than put the question whether the makers of the Constitution could have intended to designate them, when using the epithets "foreign" and "state." "State" and "foreign state" are used in contradistinction to each other. We had then just emerged ourselves from a situation having much stronger claims than the Indians for admission into the family of nations, and yet we were not admitted until we had declared ourselves no longer provinces, but States, and shown some earnestness and capacity in asserting our claim to be enfranchised. Can it then be supposed that, when using those terms, we meant to include any others than those who were admitted into the community of nations, of whom most notoriously the Indians were no part?

The argument is that they were States, and if not States of the union, must be foreign states. But I think it very clear that the Constitution neither speaks of them as States or foreign states, but as just what they were, Indian tribes, an anomaly unknown to the books that treat of States, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and [p28] having neither laws or government beyond what is required in a savage state. The distinction is clearly made in that section which vests in Congress power to regulate commerce between the United States with foreign nations and the Indian tribes.

The language must be applied in one of three senses: either in that of the law of nations, or of the vernacular use, or that of the Constitution. In the first, although it means any State not subject to our laws, yet it must be a State, and not a hunter horde; in the vernacular, it would not be applied to a people within our limits and at our very doors; and in the Constitution, the two epithets are used in direct contradistinction. The latter words were unnecessary if the first included the Indian tribes. There is no ambiguity, though taken literally; and if there were, facts and circumstances altogether remove it.

But, had I been sitting alone in this cause, I should have waived the consideration of personal description altogether, and put my rejection of this motion upon the nature of the claim set up, exclusively.

I cannot entertain a doubt that it is one of a political character altogether, and wholly unfit for the cognizance of a judicial tribunal. There is no possible view of the subject, that I can perceive, in which a Court of justice can take jurisdiction of the questions made in the bill. The substance of its allegations may be thus set out.

That the complainants have been from time immemorial lords of the soil they occupy. That the limits by which they hold it have been solemnly designated and secured to them by treaty and by laws of the United States. That, within those limits, they have rightfully exercised unlimited jurisdiction, passing their own laws and administering justice in their own way. That, in violation of their just rights so secured to them, the State of Georgia has passed laws authorizing and requiring the executive and judicial powers of the State to enter their territory and put down their public

functionaries. That, in pursuance of those laws, the functionaries of Georgia have entered their territory with an armed force and put down all powers legislative, executive. and judicial exercised under the government of the Indians.

What does this series of allegations exhibit but a State [p29] of war and the fact of invasion? They allege themselves to be a sovereign independent State, and set out that another sovereign State has, by its laws, its functionaries, and its armed force, invaded their State and put down their authority. This is war in fact; though not being declared with the usual solemnities, it may perhaps be called war in disguise. And the contest is distinctly a contest for empire. It is not a case of *meum* and *tuum* in the judicial, but in the political, sense. Not an appeal to laws, but to force. A case in which a sovereign undertakes to assert his right upon his sovereign responsibility; to right himself, and not to appeal to any arbiter but the sword, for the justice of his cause. If the State of Maine were to extend its laws over the province of New Brunswick, and send its magistrates to carry them into effect, it would be a parallel case. In the *Nabob of Arcot's Case,* 4 Bro.Cha.Ca. and 1 and 2 Vesey, Jun., a case of a political character not one half so strongly marked as this, the Courts of Great Britain refused to take jurisdiction because it had its origin in treaties entered into between sovereign States -- a case in which the appeal is to the sword and to Almighty justice, and not to Courts of law or equity. In the exercise of sovereign right, the sovereign is sole arbiter of his own justice. The penalty of wrong is war and subjugation.

But there is still another ground in this case which alone would have prevented me from assuming jurisdiction, and that is the utter impossibility of doing justice, at least evenhanded justice, between the parties. As to restoring the complainant to the exercise of jurisdiction, it will be seen at once that that is no case for the action of a court; and as to quieting him in possession of the soil, what is the case on which the complainant would have this Court to act? Either the Cherokee Nation are a foreign state or they are not. If they are not, then they cannot come here, and if they are, then how can we extend our jurisdiction into their country?

We are told that we can act upon the public functionaries in the State of Georgia, without the limits of the nation. But suppose that Georgia should file a cross-bill, as she certainly may if we can entertain jurisdiction in this case, and should in her bill claim to be put in possession of the whole Indian country, and we should decide in her favour; how is [p30] that decree to be carried into effect? Say as to soil; as to jurisdiction, it is not even to be considered. From the complainant's own showing, we could not do justice between the parties. Nor must I be considered as admitting that this Court could, even upon the other alternative, exercise a jurisdiction over the person respecting lands under the jurisdiction of a foreign nation. I know of no such instance. In *Penn v. Lord Baltimore,* the persons were in England and the land within the king's dominions though in America.

There is still another view in which this cause of action may be considered in regard to its political nature. The United States finding themselves involved in conflicting treaties, or at least in two treaties respecting the same property, under which two parties assert conflicting claims; one of the parties, putting itself upon its sovereign right, passes laws which in effect

declare the laws and treaties under which the other party claims, null and void. It proceeds to carry into effect those laws by means of physical force, and the other party appeals to the executive department for protection. Being disappointed there, the party appeals to this Court, indirectly to compel the executive to pursue a course of policy which his sense of duty or ideas of the law may indicate should not be pursued. That is to declare war against a State, or to use the public force to repel the force and resist the laws of a State, when his judgment tells him the evils to grow out of such a course may be incalculable.

What these people may have a right to claim of the executive power is one thing; whether we are to be the instruments to compel another branch of the government to make good the stipulations of treaties is a very different question. Courts of justice are properly excluded from all considerations of policy, and therefore are very unfit instruments to control the action of that branch of government. which may often be compelled by the highest considerations of public policy to withhold even the exercise of a positive duty.

There is then a great deal of good sense in the rule laid down in the *Nabob of Arcot's Case,* to-wit, that, as between sovereigns, breaches of treaty were not breaches of contract cognizable in a Court of justice, independent of the general principle that, for their political acts, States were not amenable to tribunals of justice. [p31]

There is yet another view of this subject which forbids our taking jurisdiction. There is a law of the United States which purports to make every trespass set out in the bill to be an offence cognizable in the Courts of the United States. I mean the Act of 1802, which makes it penal to violate the Indian territory.

The infraction of this law is, in effect, the burden of complaint. What then in fact is this bill but a bill to obtain an injunction against the commission of crimes? If their territory has been trespassed upon against the provisions of that act, no law of Georgia could repeal that act or justify the violation of its provisions. And the remedy lies in another Court and form of action, or another branch of jurisprudence.

I cannot take leave of the case without one remark upon the leading argument on which the exercise of jurisdiction here over cases occurring in the Indian country has been claimed for the complainant. Which was that the United States in fact exercised jurisdiction over it by means of this and other acts, to punish offences committed there.

But this argument cannot bear the test of principle. For the jurisdiction of a country may be exercised over her citizens wherever they are, in right of their allegiance, as it has been in the instance of punishing offences committed against the Indians. And, also, both under the Constitution and the treaty of Hopewell, the power of Congress extends to regulating their trade, necessarily within their limits. But this cannot sanction the exercise of jurisdiction beyond the policy of the acts themselves, which are altogether penal in their provisions.

I vote for rejecting the motion.