Supplementary Material

Chapter 7: The Republican Era—Equality/Native Americans

Talton v. Mayes, 163 U.S. 376 (1896)

Bob Talton was a Cherokee Indian who was indicted by a grand jury of five persons and charged with murdering another Cherokee on Cherokee lands. A Cherokee court convicted Talton and sentenced him to death. Talton filed a federal habeas corpus suit against Wash. Mayes, his jailor and the high sheriff of the Cherokee Nation. Talton claimed that his indictment by a five-person grand jury violated both the grand jury clause of the Fifth Amendment and the due process clause of the Fifth Amendment. The federal district court rejected that claim. Talton appealed to the Supreme Court of the United States.

The Supreme Court ruled that Talton could be constitutionally executed. Justice White's majority opinion ruled that the Cherokee courts did not have to respect the Bill of Rights. Why did Justice White reach that conclusion? Is that conclusion correct? Justice Harlan dissented without opinion. Based on what you have read in other Harlan opinions, why might he have dissented?

JUSTICE WHITE delivered the opinion of the court.

. . .

By treaties and statutes of the United States the right of the Cherokee Nation to exist as an autonomous body, subject always to the paramount authority of the United States, has been recognized. And from this fact there has consequently been conceded to exist in that Nation power to make laws defining offenses and providing for the trial and punishment of those who violate them when the offenses are committed by one member of the tribe against another one of its members within the territory of the Nation.

The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee Nation is, therefore, clearly not an offense against the United States, but an offense against the local laws of the Cherokee Nation. Necessarily, the statutes of the United States which provide for an indictment by a grand jury, and the number of persons who shall constitute such a body, have no application, for such statutes relate only, if not otherwise specially provided, to grand juries impaneled for the courts of and under the laws of the United States.

The question, therefore, is, does the fifth amendment to the constitution apply to the local legislation of the Cherokee Nation so as to require all prosecutions for offenses committed against the laws of that Nation to be initiated by a grand jury organized in accordance with the provisions of that amendment? The solution of this question involves an inquiry as to the nature and origin of the power of local government exercised by the Cherokee Nation, and recognized to exist in it by the treaties and statutes above referred to Since the case of *Barron v. City of Baltimore* (1833), it has been settled that the fifth amendment to the constitution of the United States is a limitation only upon the powers of the general government; that is, that the amendment operates solely on the constitution itself by qualifying the powers of the national government which the constitution called into being. . . .

The case, in this regard, therefore depends upon whether the powers of local government exercised by the Cherokee Nation are federal powers created by and springing from the constitution of the United States, and hence controlled by the fifth amendment to that constitution, or whether they are local powers not created by the constitution, although subject to its general provisions and the paramount

authority of congress. The repeated adjudications of this court have long since answered the former question in the negative. . . .

It cannot be doubted, as said in *Worcester v. Georgia* (1832), that prior to the formation of the constitution treaties were made with the Cherokee tribes by which their autonomous existence was recognized. And in that case Chief Justice Marshall said:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights. . . .

True it is that in many adjudications of this court the fact has been fully recognized that, although possessed of these attributes of local self-government when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States. But the existence of the right in congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers federal powers arising from and created by the constitution of the United States. It follows that, as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the fifth amendment, which, as we have said, had for its sole object to control the powers conferred by the constitution on the national government. . . .

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JUSTICE HARLAN dissented