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THE NATURE AND EXTENT OF THE EXERCISE OF CRIMINAL JURISDICTION BY THE CHEROKEE SUPREME COURT: 1823-1835

J. MATTHEW MARTIN*

INTRODUCTION

Following independence, the nascent American republic grappled almost immediately with the status of the Indian Tribes and its own insatiable hunger for land. John Gast's "American Progress," that 19th Century angelic archetype of hemispheric American imperialism, "appeared as an angel of another sort" to Native Americans.¹ Ironically, at the very moment that popular democracy began its explosive rise, not only as a doctrine but also as a "style of politics," the United States "engorged" Indian lands in an insatiable westward encroachment, subjugating, stealing, and slaying.²

The victors then pushed the vanquished aside. Those who regretted the violence wished the process of dispossession to proceed as painlessly as possible. Jefferson captured this humanitarian impulse in comments to a gathering of Native Americans at the end of his presidency: 'We wish you to live in peace, to increase in numbers . . . In time you will be as we are; you will become one people with us: your blood will mix with ours.'³

That the fledgling democracy would crush indigenous peoples seemed to outrage only a small minority of American citizens.⁴ Instead, "against the background of Americans' self-perceived vocation as torchbearers of republicanism and democracy—at a time when democracy was still unique to their own country and the world still

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1. FELIPE FERNÁNDEZ-ARMESTO, *MILLENNIUM: A HISTORY OF THE LAST THOUSAND YEARS* 360-61 (1995).

2. *Id.* at 359-61.

3. MICHAEL H. HUNT, *THE AMERICAN ASCENDANCY* 1, 15 (2007).

4. *Id.* at 15.

seemed far from safe for republicanism—the apparent paradox made perfect sense.”⁵

Conquest, of both nature and the natives within it, thus served as a feature of the “moral unity of Atlantic civilization.”⁶ The will to dominate received legitimacy from “faith in a progressive human drama to be played out on the North American continent.”⁷ Dominance by conquest rooted itself in 19th Century American consciousness.⁸ But regardless of the moral foundations of the new nation and its Manifest Destiny, American Indians fought vigorously in various ways, including passive resistance, negotiation, cultural assimilation and open warfare.⁹

Governmental efforts to remove South Eastern Indians beyond the Mississippi River in the 1820’s and 1830’s can be seen first as a natural consequence of the concept of conquest, coalescing into an organized policy response to the clamor of the frontier.¹⁰ During the 19th Century, American Indians were never fully conquered despite the dedication of the full resources of the new American republic to their subjugation, including what can only be described as germ warfare, ethnic cleansing and genocide.¹¹

Not surprisingly, the Supreme Court turned to the concept of dominance by conquest when pressed to explain the legalities of land titles regarding tracts occupied by American Indians in a way that the increasingly dominant culture could understand.¹² In a remarkably open decisional process, Chief Justice Marshall admitted that the Court was, in the absence of Constitutional direction, making up the law as it went along:

That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable.¹³

These two sentences, perhaps more than any others, accurately describe the development of Federal Indian Law over the past two centuries.¹⁴

5. FERNÁNDEZ-ARMESTO, *supra* note 1, at 359.

6. *Id.* at 360.

7. HUNT, *supra* note 3, at 34.

8. *Id.* at 15.

9. *Id.* at 15, 34.

10. *Id.* at 15-16.

11. *Id.* at 16.

12. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 589 (1823) (“Title by conquest is acquired and maintained by force.”).

13. *Id.* at 591.

14. See, e.g. David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1575 (1996) (“[O]pinions in this field

The notable resilience of American Indians, and indeed their very survival, often leads to confusions of jurisprudence at the federal level as Congress and the Supreme Court struggle to explain exactly their legal status, the “actual state of things” or “the current state of affairs” implicit within our Constitutional framework.¹⁵ Indian people survived various attempts at extirpation¹⁶ and they persist—now fully American, but also situated uniquely within the fabric of the Republic.¹⁷

The decades following the removal of many of the South Eastern Indians to Arkansas and what would become Oklahoma were marked by struggles to survive and adapt both to a rapidly changing world and to Congressional policies that sought to accomplish Jefferson’s dream of assimilation.¹⁸ Congressional policy intended to eradicate “Indianness” by forcing boarding school education to inculcate the dominant culture, by eliminating Indian lands and by encouraging the mixing of blood.¹⁹ Efforts to eradicate established Tribal systems of justice continued as well.²⁰ If *Ex Parte Crow Dog* reflected the Supreme Court’s late 19th Century desire to wash its hands of Tribal Court issues²¹, then *Talton v. Mayes* demonstrated, before the end of the 19th Century, that questions surrounding Tribal Court jurisdiction would continue nonetheless to reach the high Court.²² The Cherokee Nation’s judicial branch closed as a result of the implementation of the Curtis Act²³ in 1898.²⁴

have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but have rather sought to discern what the current state of affairs ought to be by taking into account all legislation, and the congressional ‘expectations’ that it reflects, down to the present day.”(quoting April 4, 1990 Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr., regarding *Duro v. Reina*, 495 U.S. 676 (1990), in Papers of Justice Thurgood Marshall (reproduced from the Collections of the Manuscript Division, Library of Congress))).

15. “The United States has always recognized tribal sovereignty but has swung between periods when that recognition was strong and periods in which the federal government sought to limit or even abolish tribal sovereignty. This vacillation has led to conflicting lines of precedent and to limitations on tribal sovereignty resulting from past intrusions.” FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 1376 (Nell Jessup Newton ed., LexisNexis Matthew Bender 2005) (1941); *But see* Matthew L. M. Fletcher, *Same Sex Marriage, Indian Tribes and the Constitution*, 61 U. MIAMI L. REV. 53, 63 (2006)(“The text [of the Constitution] does not appear to recognize tribal sovereignty except in an implicit fashion, although the evidence of that recognition is as close to conclusive as possible.”).

16. HUNT, *supra* note 3, at 17.

17. *Id.* at 35.

18. *Id.* at 15.

19. RENNARD STRICKLAND, *FIRE AND THE SPIRITS* 180 (1975). *See also* COHEN, *supra* note 15, at 81-82.

20. *Id.* at 175-76.

21. *See Ex parte Crow Dog*, 109 U.S. 556 (1883).

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

23. Curtis Act, ch. 517, 30 Stat. 496 (1898).

24. STRICKLAND, *supra* note 19, at 176.

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During the first few decades of the 20th Century, for most American Indians, tribal governmental structures, including notions of jurisprudence, necessarily took a back seat to a more desperate concern: survival.²⁵ In 1917, the Commissioner of Indian Affairs was “finally able to declare that more Indians were being born than were dying[.]”²⁶

Undoubtedly, traditional methods of problem solving continued—disputes had to be addressed. The early 20th Century saw the renaissance of the Navajo Courts—in which ancient, venerable institutions evolved into recognizably modern tribunals, paving the way for other Tribal Courts.²⁷ This development, coupled with the evolution of a new, late 20th Century Congressional policy towards American Indians - neither fully enlightened nor even benign, but thankfully no longer openly genocidal - led to new pressures for the Supreme Court.²⁸ These pressures include how to define the jurisdiction of the various Indian Tribes over Indian Country and the roles of the Tribal Courts in exercising that jurisdiction.²⁹

In a series of cases beginning in 1978 with *Oliphant v. Suquamish Indian Tribe*³⁰, the Supreme Court repeatedly returned to the foundation laid by Chief Justice Marshall, reiterating the notion that “the tribes were incorporated into the territory of the United States and accepted the protection of the Federal Government- . . .”³¹ Therefore, the logic went, the Tribes “necessarily lost some of the sovereign powers they had previously exercised.”³²

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing primeval powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.³³

This analysis led the Supreme Court to hold that Tribal judicial power is constrained to the extent that it must be consistent with the Tribe’s dependent status.³⁴

25. HUNT, *supra* note 3, at 17.

26. COHEN, *supra* note 15, at 1377.

27. DUANE CHAMPAGNE, SOCIAL CHANGE AND CULTURAL CONTINUITY AMONG NATIVE NATIONS 93 (2007).

28. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 23 (1987).

29. COHEN, *supra* note 15, at 756-57.

30. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

31. *Duro v. Reina*, 495 U.S. 676, 698 (1990) (Brennan, J., dissenting).

32. *Id.*

33. *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (citations omitted).

34. *Id.*

Today “dependent status” remains a shifting term in assessing the sovereignty of the Indian Nations.³⁵ For example, when the Navajo Tribal Courts punish Tribal members for violating the Tribe’s criminal laws, the Tribal Courts are exercising a “part of the Navajo’s primeval sovereignty, [which] has never been taken away from them, either explicitly or implicitly - . . .”³⁶

On the other hand, the Supreme Court has also determined that Tribal Courts may not attach criminal jurisdiction over non-Indian citizens of the United States.³⁷ In reaching this conclusion, the Court broadly surveyed treaties between the various Indian Nations and the United States, analyzed Congressional policy and determined that prosecution of non-Indian citizens is inconsistent with dependent sovereign status.³⁸ Following *Oliphant*, the Court and the Congress have struggled with each other over the question of whether Tribal Courts may prosecute non-Tribal member Indians.³⁹

Since 1978, *Oliphant* and its progeny have created a thirty year long schism during which the Supreme Court has constrained the exercise of Tribal sovereignty.⁴⁰ This is, arguably, contrary to Congressional policy, in that it restricts the jurisdiction of Tribal justice systems in criminal and civil cases, as well as administrative matters.⁴¹ This extraordinary series of cases creates a situation whereby Tribal Courts have general subject matter jurisdiction over their territory, but restricted personal jurisdiction, particularly in criminal cases.⁴² The ultimate effect of this federal common law created by the Supreme Court has been the evolution of a deadly paradox—a recognition of territo-

35. The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term foreign nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

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

36. *Wheeler*, 435 U.S. at 328.

37. *Oliphant*, 435 U.S. at 209-210.

38. *Id.* at 208.

39. *Compare* *Duro v. Reina*, 495 U.S. 676 (1990) (holding that the exercise of criminal jurisdiction over anyone other than a Tribal member was inconsistent with Tribal dependent status) *with* *United States v. Lara*, 541 U.S. 193 (2004) (Congress may modify federal common law by removing restrictions on Tribal inherent authority without vesting the Tribes with federal power) and 25 U.S.C. § 1301(2) (2007) (as modified with the *Duro* fix).

40. *See, e.g., Nevada v. Hicks*, 533 U.S. 353 (2001); *Lara*, 541 U.S. 193; *Plains Commerce Bank v. Long Family Land & Cattle Co.*, ___ U.S. ___, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008).

41. *See* STRICKLAND, *supra* note 19, at 176; *see also, e.g. Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nevada*, 533 U.S. 353; *Plains Commerce Bank*, ___ U.S. ___, 128 S. Ct. 2709, 171 L. Ed. 2d 457.

42. *Montana*, 450 U.S. 544.

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ries that are sovereign yet effectively lawless, at least for some individuals.⁴³

An almost annual uncertainty prevails, as practitioners and jurists in Indian Country await the latest pronouncements from the Supreme Court. At least in part, the Supreme Court has been unable to formulate a reliable set of assumptions as to what Tribal Court actions are consistent with a particular Tribe's dependent status.⁴⁴ All of this judicial wrangling results from the faulty premise of *Oliphant* that the Indian Nations did not historically exercise jurisdiction, as it is understood in the modern context, over white citizens of the United States.⁴⁵

The Supreme Court of the United States has missed an opportunity to evaluate "the actual state of things" as articulated by Chief Justice Marshall.⁴⁶ Because neither *Oliphant* nor its progeny reference the operation of the Cherokee Supreme Court from 1823-1835,⁴⁷ the Court has understood neither the weight nor significance of Tribal Court jurisprudence in the early 19th Century.⁴⁸ This has resulted in a failure by the Supreme Court to appreciate the precedents of early 19th Century Tribal Courts with regard to the calculations of *Oliphant*.⁴⁹

The Cherokee Supreme Court was created by the Cherokee Nation's laws and incorporated later into its 1827 Constitution.⁵⁰ The Cherokee Supreme Court lent sophisticated stability to the Nation's "social order [which] was more advanced than that of many of the

43. Amnesty Int'l USA, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* (2007), <http://www.amnestyusa.org/violence-against-women/maze-of-injustice/the-report/page.do?id=1021167>.

44. One commentator has suggested that a cause of the Supreme Court's inability to hew a straight line on jurisdictional issues in Indian Country is because the Court itself, as the slowest branch of the Federal government, continues to examine historical events through a policy lens of Jeffersonian assimilation, not through the more modern Congressional policy framework. Kevin Sobel-Read, *Still Punching Holes in Tribal Sovereignty: How Modern Supreme Court Policy is to Indian Jurisdiction what Allotment was to Tribal Land* (Fall 2007) (unpublished paper, on file with author).

45. *Oliphant*, 435 U.S. at 210.

46. *Johnson*, 21 U.S. at 591.

47. The Supreme Court did look at the original Choctaw Tribal Court. See *Oliphant*, 214 U.S. at 197-199. However, one of the source materials relied upon for support by the majority in *Oliphant* is the Opinion of the Attorney General. See also 7 Op. Att'y Gen. 174, 15-16 (1853) (concludes that the Choctaw and Chickasaw lacked jurisdiction over non-Indians but nevertheless construes the so called Treaty of New Echota to contain "the most unequivocal recognition of the right of persons not Cherokees to be aggregated to the Cherokee nation, and subject to its laws"). This portion is unmentioned in the opinion. One of *Oliphant*'s many flaws is a lack of complete resort to the full historical record.

48. *Oliphant*, 214 U.S. at 197-199.

49. *Plains Commerce Bank*, ___ U.S. ___, 128 S. Ct. at 2719, 171 L.Ed. 2d at 471.

50. LAWS OF THE CHEROKEE NATION 89-90 (spec. ed., Legal Classics Library 1995)

rude white settlements around [it].”⁵¹ Other than treaties, the decisional history of the work of the Cherokee Supreme Court and its constituent lower Courts is the only direct indicator, the only substantive evidence, of the exercise of criminal jurisdiction, as we understand it in the modern context, by an Indian Tribe prior to the removal of most South Eastern Tribes to the Indian Territories. An analysis of the nature and exercise of criminal jurisdiction by the Cherokee Supreme Court prior to removal thus provides compelling evidence, within a formalistic rubric familiar to the modern lawyer or jurist, of the sovereign judicial power retained by the Cherokees to this day.⁵²

In *Cherokee Nation v. Georgia* (1831), the Supreme Court of the United States determined that the various Indian Nations were “dependent sovereign nations.”⁵³ But at the very time *Cherokee Nation v. Georgia* was written, the Choctaw and Cherokee Court systems exemplified the actual exercise of constitutional judicial power by a dependent Tribal sovereign.⁵⁴ Thus, when the Supreme Court today investigates what jurisdictional powers, consistent with their status as dependent sovereign nations, have been retained by the various Tribes—Tribes in general, Cherokees in particular—it should look to the example of the Cherokee Judges of the early 19th Century. It has not.⁵⁵

The best evidence of retained Tribal sovereignty involving the judicial power is not a survey of treaties (honored more in the breach than act by the United States government), but rather the historical record of the actual exercise of judicial power by the Tribal Courts themselves. Careful analysis of this exercise of judicial authority discloses that the Cherokee Supreme Court possessed all of the attributes of complete criminal jurisdiction as we understand it today.⁵⁶ Analysis of the “actual state of things”⁵⁷ leads inexorably to reasonable claims about “what the current state of affairs ought to be.”⁵⁸

This paper serves as an historical survey of all criminal appeals adjudicated by the Cherokee Supreme Court during its existence prior to removal (1823-1835). It pays particular attention to the type of

51. William C. McLoughlin, *Thomas Jefferson and the Beginning of Cherokee Nationalism, 1806 to 1809*, 32 THE WILLIAM AND MARY QUARTERLY, 547 (Oct., 1975).

52. This does not pre-suppose that the banging of the gavel in the Tribal Supreme Court on October 9, 1823 constituted the beginning of Cherokee law, only that antecedents might be more accessible to anthropologists, historians and ethnographers rather than lawyers. For an excellent analysis of aboriginal Cherokee law, see JOHN PHILLIP REID, *A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION*, (New York University Press 1970).

53. *Cherokee Nation*, 30 U.S. at 17.

54. *Id.* at 2.

55. See Oliphant, 214 U.S. at 196.

56. *LAWS OF THE CHEROKEE NATION*, *supra* note 50, at 90.

57. Johnson, 21 U.S. at 591.

58. *Id.*

case, nature of the prosecution, result and, most importantly, aspects of the exercise of the Court's jurisdiction. Equally important, the paper reviews other criminal cases tried before the lower Tribal Courts, of which there is a record, to illustrate the nature and circumstances within which the Cherokee Nation's judicial branch operated.

Careful analysis of the exercise of criminal jurisdiction by the Cherokee Supreme Court and lower Courts from 1823 to 1835 demonstrates the extent of those Courts' retained primeval power, and clearly shows that such authority is the equivalent of Chief Justice Marshall's "actual state of things."⁵⁹ As evidenced by its operation of its own judicial systems, as well as by approving actions of agents of the United States, the Cherokee Nation's exercise of criminal jurisdiction during the existence of its original Supreme Court remained consistent with the Cherokees' dependent status. Prior to removal, the Cherokee Courts exercised full criminal jurisdiction historically consistent with the dependent status of the Cherokee Court system.

I. "A RECORD BOOK OF THE PROCEEDINGS OF THE SUPREME COURT OF THE CHEROKEE NATION-"⁶⁰ AND THE *CHEROKEE PHOENIX*⁶¹.

In an attempt to place into context the Court's exercise of its criminal jurisdiction, this paper examines certain primary historical documents. The minute book of the Clerk of the Cherokee Supreme Court, mislabeled by historical scholars as the "docket" of the Cherokee Supreme Court, is the primary source for the study of the Court's exercise of criminal jurisdiction.⁶² The manuscript itself is titled "A Record Book of the Proceedings of the Supreme Court of the Cherokee Nation."⁶³ I shall refer to the document as the "Court Minute Book."

The manuscript contains a record of the work of the Cherokee Supreme Court for twelve years: 1823 to 1835.⁶⁴ The organization and content of the Court Minute Book is consistent with the November 8, 1822 law enacted by the Cherokee National Council⁶⁵: "[t]hat the Judges of the District Courts, shall keep a record of the proceedings of

59. *Id.*

60. A Record Book of the Proceedings of the Supreme Court of the Cherokee Nation (unpublished document, on file with University of Tennessee Institute of Museum and Library Services) [hereinafter Court Minute Book].

61. *CHEROKEE PHOENIX* (New Echota).

62. THEDA PERDUE, *CHEROKEE WOMEN: GENDER AND CULTURE CHANGE, 1700 TO 1835* 231 n.87 (1998).

63. Court Minute Book, *supra* note 60.

64. *Id.*

65. LAWS OF THE CHEROKEE NATION, *supra* note 50, at 26.

all causes, evidences and decisions”⁶⁶ The Court Minute Book was written by various hands in thick, black ink.⁶⁷ Although its pages are not all filled in, the writing typically is cramped, generally suggesting frugality.⁶⁸ Some of the entries are boldly written, with such effusion that the ink bled into the opposite pages.⁶⁹

The Court Minute Book is located in the repository of the Tennessee State Archives in Nashville, Tennessee. It is remarkable and a gift to the Cherokee people and scholars that the Court Minute Book has survived removal and the “Trail of Tears,” when so much else from the Cherokee Nation was lost.

The manuscript was apparently removed to Oklahoma with the papers of Principal Chief John Ross. According to Malone, Mrs. Penelope J. Allen of Chattanooga, Tennessee obtained the manuscript in a collection of “many valuable items” from Robert Ross, a grandson of John Ross.⁷⁰ Mrs. Allen subsequently sold the materials to the State of Tennessee for permanent preservation in the Tennessee State Archives.⁷¹

No Tribe has been more studied than the Cherokees. Previous scholars have reviewed the actions of the Cherokee Supreme Court, primarily in an attempt to document the Cherokees’ remarkable transformation of their culture from a clan-based society to a society grounded in the modern concept of rule of law as they sought to retain territory and avoid removal.⁷² Historians have, however, juxtaposed the Court’s work with the fast moving legal and political events ongoing in both the state and federal courts of the time, as well as in state and federal governments.⁷³ Both Malone and Strickland have categorized the decisions of the Cherokee Supreme Court.⁷⁴ No one has yet definitively investigated the Court’s exercise of its criminal jurisdiction.

66. *Id.*

67. Court Minute Book, *supra* note 60.

68. *Id.*

69. *Id.*

70. HENRY T. MALONE, *CHEROKEES OF THE OLD SOUTH* 212-213 (1956); JOHN L. DICKSON, *THE JUDICIAL HISTORY OF THE CHEROKEE NATION FROM 1721 TO 1835* at 316, n.4 (1964).

71. Interview with Tennessee State Archive Staff (Dec. 29, 2003). *See also* HENRY T. MALONE, *CHEROKEES OF THE OLD SOUTH* 212-213 (1956).

72. *See* Alice T. Colbert, *Cherokee Adaptation to the Ideals of the American Republic 1791-1838: Success or Failure?*, 12 *PROC. AND PAPERS OF THE GA. ASS’N OF HISTORIANS* 41-56 (1992); Michelle Daniel, *From Blood Feud to Jury System: The Metamorphosis of Cherokee Law from 1750 to 1840*, 11 *AMERICAN INDIAN QUARTERLY*, 97-125 (1987); DICKSON, *supra* note 70; CHARLOTTE H. PELTIER, *THE EVOLUTION OF THE CRIMINAL JUSTICE SYSTEM OF THE EASTERN CHEROKEES 1580-1838* (1982); REID, *supra* note 52; MALONE, *supra* note 70; STRICKLAND, *supra* note 19; PERDUE, *supra* note 62, at 145, 150, 153, 175.

73. *See* STRICKLAND, *supra* note 19, at 73-102; MALONE, *supra* note 70, at 82-90; PELTIER, *supra* note 72 at 156-175.

74. STRICKLAND, *supra* note 19; MALONE, *supra* note 70.

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From 1823 to 1835, the Cherokee Supreme Court addressed a grand total of 252 matters.⁷⁵ To reach 252 matters, I have counted all matters that came before the Court, even when they did not require Court action, such as the filing of a will or a bill of sale for slaves or an emancipation of a slave. I found a total of 15 such matters. Excluding these, the Court considered a total of 237 cases: 24 criminal and 213 civil.⁷⁶ The criminal cases account for 9.5% of the total number of matters and 11.2% of the actual cases and controversies.⁷⁷ If a case was set over until another term of Court, I counted it again in the subsequent year. During the operation of the Court, no criminal cases were heard in 1823, 1830, 1831,⁷⁸ 1832 and 1833.⁷⁹

It should be noted that my tally differs from tallies reported by other researchers. Malone writes “246 cases came up for settlement.”⁸⁰ He has almost certainly miscounted. For example, it is very likely that, in the year 1823, Malone has counted one case twice—*John Walker v. Joseph Rogers*, which was heard on Monday, October 13, 1823 and reopened on Saturday, October 18, 1823, when it was captioned *Joseph Rogers v. John Walker* and continued to 1824.⁸¹ This was in the nature of a petition for a re-hearing of the same case⁸² and should only be counted once. Strickland and Dickson followed Malone’s tabulations.⁸³ The hand written tabulations have been open to some interpretation over the years. For example, Perdue counts 270 cases.⁸⁴

One reason for the discrepancies is that the cases are difficult to decipher. Unlike their State Court brethren, Cherokee Supreme Court Judges did not author written opinions.⁸⁵ Instead, the Court operated to afford both review of lower Court proceedings and trial *de novo* before a jury; dispositions were noted by the Clerk rather than by the Court itself.⁸⁶ To determine the nature of the case in question, the researcher must analyze a notation form rather than a formal order of the Court. A typical Court Minute Book entry in a criminal case is represented as follows:

75. See Court Minute Book, *supra* note 60.

76. See *id.*

77. See *id.*

78. There were no entries all for the year 1831. It is very possible that cases that year were recorded in another fashion and have been lost. See generally *id.*

79. See generally *id.*

80. MALONE, *supra* note 70, at 83.

81. Court Minute Book, *supra* note 60.

82. See *id.*

83. STRICKLAND, *supra* note 19, at 74; DICKSON, *supra* note 70, at 318.

84. PERDUE, *supra* note 62, at 231, n. 87.

85. See Court Minute Book, *supra* note 60.

86. *Id.*

Cherokee Nation)	
)	Purchasing spiritous liquor from
vs.)	a Citizen of the U. States
)	
Elijah Hicks)	

The Court decide that the defendant is guilty of the breach of Cherokee Law—

Although this style of Court minute entry does not match the style of written opinions by the State Supreme Courts of the time, it clearly resembles the notations in 18th Century records of colonial North Carolina's Salisbury District Superior Court, e.g.:

"No. 105

HUGH MONTGOMERY VS. DANIEL BOONE

Debt.

Judgment Con___ by Avery for sum of 61.13.2 proc.

Money & interest from the 20th March

1770 till paid 7 Costs—"87

Thus the records in the Court Minute Book look more like trial Court notations from the late 18th Century rather than State Supreme Court opinions from the early 19th Century.

After July of 1827, crimes alleged to have been committed within the Cherokee Nation were defined constitutionally and can be recognized by their own lawful definitions.⁸⁸ They are clearly labeled with the Cherokee Nation as the plaintiff.⁸⁹ However, between 1823 and 1827, identification is slightly more problematic because the Court Minute Book is a little oblique in certain cases as to whether the case is a crime or a tort.⁹⁰

For example, it might be tempting to label *James Foster v. Jesse Vann*, by his administrator, as the first criminal case to come before the Cherokee Supreme Court on October 16, 1823, "for a crime of grand larceny."⁹¹ But such a conclusion would lead to a quirk: a criminal action apparently not abating with the death of the offender and thus being prosecuted against his estate in the manner of a bill of attainder.⁹² However, this case resulted in an action that has to charm the modern practitioner—it was continued.⁹³

87. ROBERT MORGAN, BOONE 91 (2007) (citing the North Carolina State Archives).

88. See, e.g., LAWS OF THE CHEROKEE NATION, *supra* note 50, at 104.

89. See Court Minute Book, *supra* note 60.

90. *Id.*

91. *Id.* at October 16, 1823.

92. *Id.*

93. *Id.*

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The case returned to the docket four years later, on Monday, October 29, 1827, with a slightly different caption: *James Foster v. The Peacock, Exec. of Jesse Vann, Decd.*⁹⁴ Here we learn that the case was actually for “[r]ecovery of stolen cattle”.⁹⁵ Since by this time criminal cases were clearly running in the name of the Nation, this case is actually a civil claim upon a decedent’s estate.⁹⁶

To ensure that only criminal cases from the Court Minute Book were analyzed, it might have been tempting to compare the Cherokee Supreme Court cases with cases from the neighboring state Supreme Courts. But those Courts’ criminal cases will appear more familiar to the modern reader simply because the protection of the grand jury was hardwired into the state constitutions from the outset.⁹⁷ Furthermore, as today, many crimes against the state may also suffice to be torts, by which private individuals may bring civil actions. Thus, in this analysis each entry regarding a matter before the Cherokee Supreme Court, particularly those prior to the enactment of the Constitution of 1827, was examined to determine whether the facts disclose the elements of a crime or the punishment of one, even if the subject matter of the case appears to be a private wrong, such as “pleas of defraud” or hog stealing.

A printing press was established at the Cherokee Nation’s capitol of New Echota in what is now North Georgia.⁹⁸ Following the inception of the syllabary by Sequoyah, enormous strides in literacy were achieved in the Cherokee Nation by the close of the 1820’s.⁹⁹ The *Cherokee Phoenix*, later the *Cherokee Phoenix and Indians’ Advocate*, the national newspaper for the Cherokee Nation, was ingeniously printed in multi-column format, often with one column in English, another in Cherokee, albeit mostly in English.¹⁰⁰

The *Cherokee Phoenix* was internationally read and became a major organ for the Cherokee Nation’s public relations effort with regard to the clamor for removal.¹⁰¹ The *Cherokee Phoenix* covered legal matters, including crimes occurring in the Nation.¹⁰² Although the *Cherokee Phoenix* did not comment directly on the work of the Court,

94. *Id.* at October 29, 1827.

95. *Id.*

96. *Id.*

97. N.C. CONST. art. 1, § 22; GA. CONST. art. 1, § 11(c); S.C. CONST. art. 1, § 11; TENN. CONST. art. 1, § 14.

98. GRANT FOREMAN, SEQUOYAH 14 (1938).

99. See DOUGLAS L. RIGHTS, THE AMERICAN INDIAN IN NORTH CAROLINA 208 (2d ed. 1957). (“Within a few months [of the introduction of the syllabary] thousands of illiterate Cherokees were able to read and write their own language, teaching each other in cabins and along the roadside.”); FOREMAN, *supra* note 98, at 23-39.

100. MALONE, *supra* note 70, at 158-59; FOREMAN, *supra* note 98, at 15.

101. MALONE, *supra* note 70, at 157-58, 167.

102. MALONE, *supra* note 70, at 137-165.

reference to the newspaper brings a rich tableaux providing context to the Cherokee Supreme Court's decisions.¹⁰³ Additionally, other historical records, including the records of the Indian Agents of the United States Secretary of War, offer insights into the activities of the Tribal Judges of the period.

II. THE ORIGINS OF THE CHEROKEE SUPREME COURT AND TRIBAL CRIMINAL PROCEDURE ON THE FRONTIER, 1823-1835.

The Cherokee Nation had its own lawmakers, laws, a tripartite system of government, and beginning in the 1820's, Western style Courts.¹⁰⁴ Naturally, the existence of the Cherokee Supreme Court has been seen by historians as a manifestation of the desire to resist further encroachment by the citizens of the United States on the territory of the Cherokee Nation:

The Cherokees had long realized the relationship between their laws and the central issue of tribal politics, the retention of national land and tribal status. The legal system had been used as an instrument in preservation of tribal lands almost as long as the pressures from white men had forced the Cherokees to guard their shrinking domain.¹⁰⁵

Creation of the Cherokee judicial system began with Judges who presided over "councils to administer justice in all causes and complaints that may be brought forward for trial . . ."¹⁰⁶ The original trial Court sessions began on November 2, 1820.¹⁰⁷ By law, the Nation was divided into eight Districts for the administration of justice:

- 1st District— Chickamaugee;
- 2nd District—Challoogee;
- 3rd District— Coosewatee;
- 4th District— Amoah;
- 5th District— Hickory Log;
- 6th District— Etowah;
- 7th District— Tahquohee; and
- 8th District— Aquohee.¹⁰⁸

Under the 1820 law, four Circuit Judges were statutorily created to preside over Circuits made up of clusters of two Districts and to consult with the District Judges.¹⁰⁹ The Circuit Judges were assigned more expensive and complicated cases, including murder, leading one

103. See *Generally id.*

104. See *LAWS OF THE CHEROKEE NATION*, *supra* note 50, at 15-18.

105. *STRICKLAND*, *supra* note 19, at 76.

106. *LAWS OF THE CHEROKEE NATION*, *supra* note 50, at 11.

107. *DICKSON*, *supra* note 70, at 303 n.51 (citing *MALONE*, *supra* note 70, at 198 n.13).

108. *LAWS OF THE CHEROKEE NATION*, *supra* note 50, at 15-18.

109. *Id.* at 11-12.

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commentator to analogize the District Judges to Justices of the Peace and the Circuit Judges to general jurisdiction Judges.¹¹⁰

The Supreme Court was created on November 12, 1822 by statute.¹¹¹ It was originally denominated as “a superior court, to be held at New Town, during the session of each National Council, to be composed of the several Circuit Judges, to determine all causes which may be appealed from the District Courts- . . .”¹¹² Although the National Council and Committee continued to refer to the high Court as the Superior Court as late as 1824, from the time it began the Court referred to itself as the Supreme Court of the Cherokee Nation.¹¹³ The Supreme Court of the Cherokee Nation commenced the disposition of business on October 9, 1823.¹¹⁴

The first Judges were John Martin, James Daniel, Richard Walker and James Brown.¹¹⁵ “None of these early lawyers had Office or Inns of Court education.”¹¹⁶ Lionized over eighty years later as the history making “noble knights of the Bar of the East Side,” they and their successors on the Cherokee Supreme Court comprised the vanguard of a Native bar that continues to this day.¹¹⁷

These legal minds and others drafted a Constitution in a continuing effort to establish a sovereignty recognizable to the Americans.¹¹⁸ The concept of the state as sovereign was alien to the Cherokees, but with the dawn of the 19th Century “the Cherokees would take the next tentative step and begin to recognize the binding force of the sovereign’s will. It would not be a sudden leap forward but one pursued cautiously by a people who realized that times had changed, and that necessity demanded new ways and new laws.”¹¹⁹ “The adoption of a constitution in 1827 was the climax in the establishment of a republic.”¹²⁰ As part of this effort, in 1827 the Court changed from a statutorily created body to a constitutionally authorized Court.¹²¹

Article V of the Cherokee Constitution vested the judicial powers in a new Supreme Court and “such Circuit and Inferior Courts as the General Council may, from time to time ordain and establish.”¹²²

110. DICKSON, *supra* note 70, at 303-05.

111. LAWS OF THE CHEROKEE NATION, *supra* note 50, at 28.

112. *Id.*

113. *Id.* at 32; Court Minute Book, *supra* note 60, at October 9, 1823.

114. Court Minute Book, *supra* note 60, at October 9, 1823.

115. STRICKLAND, *supra* note 19, at 121.

116. *Id.*

117. William P. Thompson, *Courts of the Cherokee Nation*, 2 CHRONICLES OF OKLAHOMA 64 (1924).

118. STRICKLAND, *supra* note 19, at 121.

119. REID, *supra* note 52, at 274-75.

120. MALONE, *supra* note 70, at 84.

121. *Id.* at 83-86.

122. LAWS OF THE CHEROKEE NATION, *supra* note 50, at 126.

Section 8 of the Article provided that “[t]he Judges of the Supreme Court and Circuit Courts shall have comple[te] criminal Jurisdiction in such cases and in such manner as may be pointed out by law.”¹²³

The nature of criminal prosecution in the Tribal Courts was different in some ways from that with which we are familiar in the modern context. For one thing, “[g]rand juries and tribal prosecution by an official solicitor were not introduced into the Cherokee legal system until after the Civil War. Until that time criminal indictment was essentially a private procedure instituted by a wronged individual”¹²⁴ Prosecutors do appear in the record, however, as appointed counsel, and were required to post a bond for their services.¹²⁵ Punishments included “confiscation, fines,” and “corporeal punishment,” including flogging, “ear cropping and death,” typically by hanging.¹²⁶

In these new laws, however, there were many rights and protections instantly familiar to modern Americans: a due process right, a right to a remedy at law, a right of confrontation, a right to speedy and public trial, a right to trial by jury, a right to bail, a right to have compulsory process, a prohibition of compulsory self-incrimination, a prohibition of unreasonable searches and seizures, a prohibition of general warrants, and a prohibition of double jeopardy.¹²⁷

An additional protection for the accused included trial by indictment.¹²⁸ Under Article V, Section 11 of the Cherokee Constitution of 1827, indictments were to “run in the name of the Cherokee Nation.”¹²⁹ Indictments were to include allegations of the date, defendant and crime.¹³⁰ Additionally, indictments included constitutionally compulsory, conclusory language that the alleged crime was “against the peace and dignity” of the Nation.¹³¹

III. CASE ANALYSES: THE EXERCISE OF CRIMINAL JURISDICTION IN THE CHEROKEE NATION, 1823-1835.

In eleven of the twenty four criminal appeals heard by the Cherokee Supreme Court, no charge is specified other than a usual, but not completely consistent, notation: “breaking” or “violating the Chero-

123. *Id.* at 127.

124. STRICKLAND, *supra* note 19, at 83, 146.

125. LAWS OF THE CHEROKEE NATION, *supra* note 50, at 99.

126. DICKSON, *supra* note 70, at 309.

127. PELTIER, *supra* note 72, at 158-159; DICKSON, *supra* note 70, at 317-318.

128. DICKSON, *supra* note 70, at 333.

129. *Id.*

130. *Id.*

131. *Id.*

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kee Law.”¹³² These otherwise undistinguished cases nevertheless offer glimpses into the processes of the Cherokee Supreme Court.

The first criminal appeal taken up by the Cherokee Supreme Court was *Cherokee Nation vs. Elisha Dyer*, heard on November 1, 1824.¹³³ In this case, the Supreme Court found “no bill” and apparently dismissed the case.¹³⁴ The Court clearly determined that it had the authority to look into the sufficiency of the charges and to adjudicate accordingly.¹³⁵ Similarly, on October 26, 1825, in *Thomas Fields v. Cyrus Blanks*, on a charge of “violation of the Cherokee Law,” the Court found “no bill.”¹³⁶ Finally, in the first murder case the Court adjudicated, *Cherokee Nation v. Gah Co We*, an “indictment for murder of Ezthral Wright, Kingstick’s brother, we the judges of the supreme court find no bill against the dft Gah Co We.”¹³⁷ Thus the Court did not hesitate to dismiss a case, even one as serious as murder, if it concluded that the foundational charging document was insufficient.¹³⁸

The Cherokee Supreme Court did not hesitate to dismiss other criminal cases as well, displaying somewhat of a reluctance to show any favoritism for the new republic.¹³⁹ For example, despite the hazards of frontier travel, and the indisputable fact that the Court itself had been continued on more than one occasion when judges were missing, the Court was swift to dismiss the case of *Cherokee Nation v. Edward Crittinton Taluskee*, on October 28, 1826, when “no prosecutor” was present.¹⁴⁰ No Judge rose to intercede on behalf of the Nation.¹⁴¹ Modern practitioners of criminal defense might find such judicial restraint refreshing. Incidents like this may have led to the November 8, 1828 passage of a law requiring prosecutors to post a bond:

Whereas, much inconvenience (sic) is experienced by the courts in this Nation, in the trial of criminal cases, in consequences of prosecutors not being bound for the prosecution of such criminal cases, therefore, Resolved by the Committee and Council, in General Council convened, That after the passage of this act, any person or persons, not a public officer, who shall undertake to prosecute any criminal or criminals shall be, and he, she, or they are hereby required to give

132. See Court Minute Book, *supra* note 60.

133. Court Minute Book, *supra* note 60, November 1, 1824.

134. *Id.*

135. *Id.*

136. Court Minute Book, *supra* note 60, October 26, 1825.

137. Court Minute Book, *supra* note 60, October 21, 1825.

138. See *id.*

139. Court Minute Book, *supra* note 60, October 28, 1826.

140. *Id.*

141. *Id.*

bond and security, in a sum double the amount of such prosecution, for the faithful performance of prosecuting the criminals, who may be arrested and brought to trial.

Be it further resolved by the authorities aforesaid, That it shall be the duty of such prosecutors to give bond and security previous to their receiving warrants for the arresting of such criminals.¹⁴²

Other undocumented alleged crimes illustrate the fact that the Court served as a *de novo* tribunal, not merely as a court of appeals and errors.¹⁴³ On October 24, 1825, John Miller was acquitted by the Court of “violating the Cherokee Law.”¹⁴⁴ The next day, the case of *Archy Foreman v. William Blyth* came on for trial before a jury.¹⁴⁵ The case spilled over into the following day at which time “the jury found that he did not violate the Cherokee Law.”¹⁴⁶ This power to try cases *de novo* was recognized in law on October 18, 1828, when the National Council enacted a statute providing, among other things, that:

the Supreme Judges elected agreeably to the Constitution, shall compose the Supreme Court, and shall have full power to try, and decide all cases upon the Supreme Court docket, that remain untried, which may come under the jurisdiction of the laws of the Nation, and shall have complete cognizance of all cases appealed from the several circuit Courts, as may be pointed out by law. The Supreme Court shall also have power to act and decide upon criminal cases without reference to appeals from the Circuit Courts.¹⁴⁷

An appeal to the Supreme Court thus offered litigants not only a second bite at the apple, but also the possibility of a completely different jury pool; these appellate cases, heard in New Town in what is now north Georgia, were often far removed from their original venues.¹⁴⁸

We do not know and cannot tell from the Court Minute Book what processes triggered the opportunity for a jury trial *de novo*.¹⁴⁹ In 1825 in *Thomas Fields v. John Miller*, the Court decided the case without input from the jury, holding: “[i]t is the opinion of the Court that the

142. CHEROKEE PHOENIX (New Echota), January 14, 1829.

143. 5 C.J.S. *Appeal and Error* § 886 (2009).

144. Court Minute Book, *supra* note 60, at October 24, 1825.

145. *Id.* at October 25, 1825.

146. *Id.* at October 26, 1825.

147. Cherokee Phoenix and Indians' Advocate (New Echota), Jan. 7, 1829.

148. New Echota Historic Site: About North Georgia (October 22, 2009), http://ngeorgia.com/ang/New_Echota_Historic_Site.

149. Malone and Dickson assert that “a jury was required to bring in the court’s verdict.” MALONE, *supra* note 70, at 83; DICKSON, *supra* note 70, at 315 (citing CHEROKEE PHOENIX, April 10, 1828). However, I can find no support for this proposition. And, in any event, review of the Court Minute Book discloses that jury trials were not afforded in every case before the Supreme Court.

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defendant be fined \$5.00“ for this violation of the Cherokee Law.¹⁵⁰ Similarly, in *Cherokee Nation v. Brice Martin* the “Court found for defendant” without referring the matter to the jury.¹⁵¹ Likewise, the Court found the prisoner guilty in the case of *Cherokee Nation vs. Jesse Ratley*.¹⁵² The Court minute indicates that Ratley was a prisoner who was incarcerated.¹⁵³ There was no national prison; instead, defendants were kept under guard.¹⁵⁴ Upon finding himself under guard at the time he came before the Court, Ratley perhaps sought an expeditious disposition in a bench trial rather than awaiting the arrival of the jurors.

In *Archey Foreman for Cherokee Nation vs. William M.J. Evnkize*, a finding for the defense left no culpable party to pay the \$9.75 witness fee for twelve days of inconvenience on the part of Major Martin.¹⁵⁵ It is unknown whether the exonerated defendant was required to pay the witness fee nonetheless.

A finding of guilt was not specifically rendered for a particular “felony” in *Cherokee Nation vs. John Fields*, where the Clerk noted that “[t]he Court decide that the defendant pay to the Nation three dollars, considered to be the per Cent due, & two dollars to the plaintiff for damages.”¹⁵⁶ Likewise, in another case “for breaking the Cherokee Law”, *Archie Foreman vs. Richard Huffacre*, the Clerk noted that the defendant confessed judgment in the sum of ten dollars and that the Court awarded the costs of the lawsuit in the amount of \$4.50.¹⁵⁷ These two cases show that the Court dipped into its reservoir of equitable powers in assessing restitution and approving the defendant’s admitted amount of damages.¹⁵⁸

“Horse theft thus appears to have been the most common crime in the first quarter of the 19th Century and the most difficult to restrain among the Cherokees and whites.”¹⁵⁹ “More enforcement machinery [was] directed [towards it] than any other one crime.”¹⁶⁰ The crime

150. Court Minute Book, *supra* note 60.

151. *Id.* at October 16, 1827.

152. *Id.* at October 20, 1827.

153. *Id.*

154. LAWS OF THE CHEROKEE NATION, *supra* note 50, at 111.

155. Court Minute Book, *supra* note 60, at November 13, 1827.

156. *Id.* at Oct. 23, 1827

157. *See id.* at October 21, 1825.

158. *Id.*; *See* Court Minute Book, *supra* note 60, at October 23, 1827.

159. PELTIER, *supra* note 72, at 137.

160. Thomas Lee Ballenger, *The Development of Law and Legal Institutions Among the Cherokees* 44 (1938) (unpublished Ph.D. dissertation., University of Oklahoma)

grew to include more than the theft of horses: enterprising criminals began a brisk business in selling stolen stock.¹⁶¹

The *Cherokee Phoenix* reprinted an article from the *Southern Advocate* which described how horse theft had morphed into organized crime:

Pony Club in Carroll County, Georgia. We are informed by a gentleman who has recently passed through that place, of indubitable credibility, that there is a CLUB, who make a profession of stealing horses as well from their own citizens as from strangers. Their plans, from their contiguity and intercourse with the Cherokees, have been so judiciously executed as to elude detection. They do not we understand, profess to take the life of a traveller, but only his horse, in order, it may be presumed, that in cases of conviction, their punctilious clemency may establish a contested principle in penal law, that there is a distinct and tangible difference in value between property and life. This policy reminds us of the reply of Judge Burnet, to the horse-stealer, who upon being asked what he had to say, why judgment of death should not be passed upon him, and answering, "that it was hard to hang a man for only stealing a horse," was told by the Judge, 'Man, thou art not only to be hanged for stealing a horse, but that horses may not be stolen.' That punishments should be proportioned to offences (sic) is just and politic we admit, but that there is a lamentable deficiency in the justice and morality of this new country overlooking the *alieni appetens* which is so manifestly a nuisance to their neighbors and strangers, is equally notorious.

We have frequently heard of this pony club.- It is said by a Traveller who passed this place some time since directly from Carroll, that this stealing association has become so dexterious (sic) in its profession, that if the d___l had been in the shape of a pony, he would ere this have fallen a prey to its agility. "Pony club" is but a limited name and will by no means give a correct idea of this neighboring combination-"cow club," "hog club," &c. may properly be added.¹⁶²

The "Pony Club" continued to plague the Cherokee Nation throughout the late 1820's:

Another racer gone to the Poney (sic) Club Carroll County, Georgia, or to some other place of similar distinction. On Tuesday or Wednesday last was taken without my leave, a small dark chesnut (sic) sorrel Mare, blazed face, all feet white, her fore legs white nearly to the knees, bare-footed all round, and rather wild when handled by a stranger particularly and mane very short, owing to her having the Lampers.

161. William Lesley, *Ten Dollars Reward*, *CHEROKEE PHOENIX* (New Echota) Oct. 29, 1828 (explaining that William Lesley offered a \$10.00 reward for the residence of one William Stone, who sold Lesley a mount which later proved to be stolen).

162. *SOUTHERN ADVOCATE*, *CHEROKEE PHOENIX* (New Echota), Sept. 24, 1828, (citing from *Southern Advocate*).

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There is some reason to suspect a lurking kind of white man, who left this place about that time on his way to Marion Co. Ten. or Jackson Co. Alabama. Friends to the suppression of such villainy, are earnestly requested in all the adjacent states, to keep a sharp look out. I will give ten dollars for the delivery of the thief & mare to me at this place, or five for the mare alone if caught in the Nation.

ISAAC H. HARRIS.

Nov. 5th, 1828¹⁶³

The existence of organized crime made it a relatively simple matter to use the criminal racket for political purposes as well.¹⁶⁴ The “Pony Club” was suggested to be at the forefront of a wave of intruders into the Nation who, “[i]nstead of stealing,” began to shoot the horses and cattle of the Cherokees.¹⁶⁵ Theft or destruction of horses, the main method of transport across the vast distances of the Cherokee Nation, affected commerce, communication and travel.¹⁶⁶ Also, the destruction of cattle eliminated food stores.¹⁶⁷

When the United States government proved unable to protect the boundaries of the Indian Nation, the National Council was forced to take action, even though the Cherokees had not expelled intruders before:

[o]ne group of about twenty families, members of a gang of horse thieves called the Pony Club, had squatted along the main road to Alabama, and the Council was afraid that the Cherokees would be blamed for their crimes. The Council appointed Major Ridge, a prominent figure with a distinguished record as war leader and public servant, to lead a troop of Light Horse, the national police force, to evict the intruders. They did so, burning out the families, who later testified that they were terrified by Ridge, who wore a buffalo skull headdress complete with horns, and his men, painted for war. A posse from Carroll County tracked the Cherokee Light Horse and captured four, one of whom they beat to death. The others they carried off to jail. On the way, two escaped, but the third, Rattling Gourd, they held. Hugh Montgomery, the federal agent assigned to the Cherokee Nation, got him released with the argument that he was not an officer in the Light Horse, made no decisions, and was simply following orders. The central question, the right of the sheriff of Carroll County, Georgia, to enter the Cherokee Nation and arrest four Cherokees (not to mention

163. Isaac H. Harris, *A Little Too Friendly*, CHEROKEE PHOENIX (New Echota), Nov. 5, 1828.

164. CHEROKEE PHOENIX AND INDIANS' ADVOCATE (New Echota), Feb. 11, 1829.

165. *Id.*

166. *Id.*

167. *Id.*

killing one of them) for acting in accordance with a treaty provision, remained unanswered.¹⁶⁸

With no answer to the central question of the competing attempts by Georgia to exercise criminal jurisdiction within the Cherokee Nation, the issues were destined to repeat themselves.¹⁶⁹ The varieties were almost without limit.¹⁷⁰ In 1827, a Cherokee citizen named Old Man was charged in Carroll County, Georgia with the murder of a citizen of Georgia, one Dennis May.¹⁷¹ Old Man had been arrested by Georgia authorities, but while crossing the Chatahoochee River, he dove in the water and escaped in the darkness.¹⁷² Believing the fugitive to have fled to the Cherokee Nation, the Governor of Georgia demanded that Indian Agent Hugh Montgomery assist in the extradition.¹⁷³ The Cherokees responded to Montgomery that they would assist in locating and apprehending Old Man, but insisted that he be tried in the United States District Court as provided, for example, by Article VI of the Treaty of Hopewell, November 28, 1785.¹⁷⁴ Fulminating, the Governor of Georgia dashed off a curt reply to Montgomery on December 12, 1827:

The place where, and the court, by whom he will be tried are matters to be settled, here, in settling these questions we shall not consult Mr. Hicks or pay any respect either to his wishes or opinions. You will no doubt conceive it to be your duty, however, to instruct the Cherokees that Justice will be done and a fair trial had, whether the State[']s Judges or the United States Judges preside at it.¹⁷⁵

Several times Georgia and Tennessee exercised criminal jurisdiction over Cherokee Indians for crimes allegedly occurring within the Cherokee Nation.¹⁷⁶ Indeed, this was the basis for Georgia's notorious

168. THEDA PERDUE & MICHAEL D. GREEN, *THE CHEROKEE NATION AND THE TRAIL OF TEARS* 73-74 (2007).

169. Letters Received by the Office of Indian Affairs 1824-1881 Cherokee Agency, East, *microformed on M-234*, reel 72, at 642-55.

170. *Id.*

171. *Id.* at 643-44.

172. *Id.* at 645.

173. *Id.* at 649.

174. *Id.* at 652.

175. Records of the Cherokee Indian Agency in Tennessee, 1801-1835, *microformed on M-208*, reel 10.

176. "Under the new state laws, Cherokees were frequently arrested and detained in the Hall County Jail." TIM A. GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL* 111 (2002); *see also* *State v. Foreman*, 16 Tenn. 256 (1835) (holding that the murder of a native Cherokee by a native Cherokee on Cherokee land was subject to the jurisdiction of Tennessee courts); *but see* *State v. Ross*, 15 Tenn. 74 (1834) (holding that Tennessee did not have the right to tax or regulate residents of the Cherokee Nation); *Cornet v. Winston's Lessee*, 10 Tenn. 143, 146 (1826) (holding that Cherokees "are in truth a nation of people under the tutelage of the Government of the United States"); *Blair v. Pathkiller's Lessee*, 10 Tenn. 407 (1830) (holding that a fee estate taken by Tennessee from the United States remained subject to the rights of an individual Cherokee and was thus encumbered).

challenge to the supremacy of the United States Constitution through the State's infamous lynching of George Tassell, hung by the State before the Supreme Court of the United States could hear his plea.¹⁷⁷

Georgia did not limit itself to asserting jurisdiction over the Cherokees—it attempted to assert criminal jurisdiction over United States soldiers operating in the Cherokee Nation under orders of the Federal government.¹⁷⁸ On October 14, 1824, James Williams wrote the Secretary of War to report on his actions, along with Col. Archibald Turk's company, in removing intruders from Cherokee lands.¹⁷⁹ In particular, he enclosed a Bill of Indictment from Hall County, Georgia in which he, Col. Turk and others were indicted on August 11, 1824 for the murder of James Dickson, an illegal white settler in Cherokee Nation lands “not having the fear of God before their eyes, but being moved and instigated by the devil. . .”¹⁸⁰ On January 6, 1825, Col. Turk wrote the Secretary, requesting his assistance for the upcoming trial.¹⁸¹

While Georgia sought to exercise jurisdiction over Cherokees, one case documents the Cherokee Nation's judicial branch of government exercising criminal jurisdiction over a white citizen of Georgia.¹⁸² On September 19, 1829, Jesse Stancell, a “white man,” was arrested within the Cherokee Nation at Elejay and charged with horse stealing.¹⁸³ Stancell was detained “in close custody for the space of thirty hours” during which time he was tried by a jury.¹⁸⁴ George Saunders, who the Court Minute Book reveals had previously served as Foreman of Cherokee Supreme Court juries, served in the same capacity on Stancell's jury.¹⁸⁵ Stancell was sentenced “to receive fifty stripes on the bare back, which was fifty less than what [was] common . . . for such offence.”¹⁸⁶ His captors “stripped [him], tied [him] up to a tree” and executed the sentence upon him.¹⁸⁷ Saunders averred that “[w]e acted agreeably to the laws of our country in punishing the man.”¹⁸⁸

177. GARRISON, *supra* note 176, at 111-124.

178. *Id.*

179. Letters Received by the Office of Indian Affairs 1824-1881 Cherokee Agency, East, microformed on M-234, reel 71, at 452-60, 457 (identifying letter of James Williams to the Secretary of War John Calhoun, October 14, 1824).

180. *Id.*

181. *Id.*; Letters Received by the Office of Indian Affairs 1824-1881 Cherokee Agency, East, microformed on M-234, reel 71, at 683-86 (identifying letter of Col. Archibald Turk to the Secretary of War John Calhoun, January 6, 1825).

182. George Saunders, Letter to the Editor, CHEROKEE PHOENIX AND INDIANS' ADVOCATE, Dec. 10, 1829, at 2.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

Crossing back into Georgia following this indignity, Stancell immediately made his way to the chambers of the Honorable Augustin S. Clayton, "Judge of the Supreme Courts of the western Circuit of" the State of Georgia and judicial nemesis of the Cherokees.¹⁸⁹ Stancell's affidavit before Judge Clayton omitted the stolen horse and his jury trial.¹⁹⁰ The affidavit characterized him not as a thief, but as a victim "to the great effusion of his blood, the laceration of his back and sides, leaving deep wounds, gashes and bruises on the same. . ."¹⁹¹

Judge Clayton issued criminal process for the arrest of Saunders, who reported to the *Phoenix* as follows:

the officers of that state sent armed men to take all the Indians that were concerned in whipping him. I understood that they were on their way, and went to the Long Swamp to meet them. They met me there. I there gave them my bond and security for my appearance at court at Gainsville in Hall County.¹⁹²

The case continued to simmer for the next year. In his Annual Message to the people on October 16, 1830, Principal Chief John Ross commented on "the case of Judge Sanders for punishing a whiteman under the laws of the nation, for the crime of horse stealing;" as part of a litany of complaints against the Georgia Judiciary in general and Judge Clayton in particular.¹⁹³ Georgia responded in part by passing a statute in 1830 which provided in part:

Sec. 3. And be it further enacted by the authority aforesaid. That after the time aforesaid, it shall not be lawful for any person or persons, under colour, or by authority, of the Cherokee tribe, or any of its laws or regulations, to hold any court or tribunal whatever, for the purpose of hearing and determining causes, civil or criminal; or to give any judgment in such causes, or to issue, or cause to issue any process against the person or property of any of said tribe. And all persons offending against the provisions of this section, shall be guilty of a high misdemeanor, and subject to indictment, and on conviction thereof shall be imprisoned in the penitentiary at hard labour for the space of four years. . . .¹⁹⁴

189. *Id.*; see also GARRISON, *supra* note 176, at 111-112 (explaining Judge Clayton's adversarial relationship with the Cherokees).

190. Saunders, *supra* note 182.

191. *Id.*

192. *Id.*

193. John Ross, "Annual Message," *CHEROKEE PHOENIX AND INDIANS' ADVOCATE*, October 16, 1830; see also GARRISON, *supra* note 176, at 266-267 (discussing John Sanders). Garrison lists Saunders as "John Sanders", perhaps getting the misspelling from Ross's Annual Message or confusing George Saunders for Judge John Sanders, the elected District Judge of the Coosewaytee District in 1828. It must be the same person, unless the scenario repeated itself. Further, Garrison indicates that Sanders/Saunders was jailed by Judge Clayton, however, Saunders' own account to the *Phoenix* notes that he posted bond at the side of the road.

194. MONROE E. PRICE, *LAW AND THE AMERICAN INDIAN* 39 (1973).

This example exposes the exercise of criminal jurisdiction over a citizen of the United States by the Tribal Court. Such action is seen to be in the continuum of push and pull on the frontier between the States and the Cherokee Nation, with the Nation seeking a successful mechanism of enforcement of law in order to maintain stability.¹⁹⁵ In this context, the Nation's exercise of enforcement machinery is both understandable and legitimate; it also reflected the actual state of affairs.

Despite the ravings of Georgians, the Cherokee Nation prosecuted Cherokee Indians for horse theft in the Tribal Courts.¹⁹⁶ In the first Cherokee Supreme Court case specifically denominated as horse theft, David Quinton, Sr. was acquitted on Saturday, October 21, 1826.¹⁹⁷ On Wednesday, May 21, 1828, the *Phoenix* reported on a trial of Cherokees who were convicted of stealing horses from whites in neighboring Carroll County, Georgia:

At the last Circuit Court held in Hightower, three persons were convicted for stealing horses out of Carrol [sic] Co. & were sentenced to receive fifty lashes each. These persons, we are told, stole upon the principle of rendering evil for evil. How backward some of our neighboring whites may be to do justice to the Indians, *we confess we feel a*

195. The protection of the Courts and the struggle for jurisdiction was not limited to the Cherokee Nation and the neighboring States. Before asserting criminal jurisdiction over non-Indians, the Cherokees "pressed very hard to institute a suit in the Federal Court against a white man charged with having robbed, or stolen two slaves from a native." Records of the Cherokee Indian Agency in Tennessee, 1801-1835, *microformed on* M-208, reel 9 (Letter from Indian Agent McMinn to the Secretary of War, June 24, 1823). Agent McMinn refused this request and instructed the Cherokees to gather their evidence whilst he awaited instructions from the Secretary. *Id.* When the Indians protested that the previous Agent, Col. Return J. Meigs, would never have waited for instructions in such circumstances, McMinn reminded the Cherokees that "they were in quite solvent circumstances, and able to support the suit, which they admitted"
 196. *Id.* The Cherokees continued that if the Government was willing to pay the expenses of suit, why should their Agent oppose the request? *Id.* Agent McMinn advised them that the "Government had determined to curtail its expenses, that it became my duty to aid in lessening expenses" *Id.* In particular, McMinn stated:

That during their minority, they had a just claim upon the resources of the Govt of the U.Sates, but that this claim would diminish in the precise ratio, that their Nation, would approximate toward a State of Civilized life, and as a proof, that they were advancing with great rapidity, I referred them to the organization of their nation by which they created laws, and held Courts, and appointed civil officers to carry those laws into execution.

Id. McMinn had already investigated one State Court trial involving the murder of a Native that year and delegated a subordinate to sit through another. Records of the Cherokee Indian Agency in Tennessee, 1801-1835, *microformed on* M-208, reel 9 (Letter from Indian Agent McMinn to the Secretary of War, March 6, 1823); Records of the Cherokee Indian Agency in Tennessee, 1801-1835, *microformed on* M-208, reel 9 (Letter from Indian Agent McMinn to Joseph Rogers, May 4, 1823). Thus, in order to avoid the floodgates of litigation and, typically, to save money, the United States, through its own Agent, told the Cherokees to use their own Courts. Records of the Cherokee Indian Agency in Tennessee, 1801-1835, *microformed on* M-208, reel 9 (Letter from Indian Agent McMinn to the Secretary of War, June 24, 1823). No surprise, then, that they did.

196. Court Minute Book, *supra* note 60, at October 21, 1826.

197. *Id.*

*pleasure in noticing this instance of the impartiality of our courts. It would be well if the authorities of Carrol [sic] County (Gov. Forsythe's [sic] Ministers) will look about and punish their offending citizens. It would be a sweeping work if they were to begin. So much "for the success of the new Constitution."*¹⁹⁸

It is possible that one of those three persons tried in Hightower, John C. Bird, appealed to the Cherokee Supreme Court. On October 28, 1828, in *The Nation vs. John C. Bird*, the defendant entered a guilty plea to horse stealing and was sentenced to receive 100 lashes, fifty more than the number imposed at the Circuit Court level earlier that year.¹⁹⁹

Other theft crimes occupied significant portions of the Cherokee Supreme Court's docket.²⁰⁰ Friday, October 24, 1828, saw two cases of alleged stealing.²⁰¹ In *Cherokee Nation v. Robert Saunders & Wayahuttah*, the defendants were acquitted of stealing money, despite the efforts of a prosecutor named Wolf.²⁰² In the next case, Beaver Carrier was convicted of theft and sentenced to receive 75 lashes.²⁰³ In 1827, Bledsoe Gore was acquitted of theft.²⁰⁴ The final criminal case heard by the Cherokee Supreme Court was a multi-defendant jury trial for hog stealing.²⁰⁵ In a mixed verdict the six man jury found Choo Noo Las Kee guilty and fined him \$10.00, but acquitted Rain Crow and Sleeping Rabbit.²⁰⁶

A delightful piece of ephemera is laid into the Court Minute Book—the closing argument of an attorney in a hog stealing case. Although we do not know whether the document is connected to any of the reported cases, it gives some insight into the court rhetoric of the period:

May it please the Court

While Bonaparte is marching his army from Elba to Paris and from Paris back to Elba inundating the whole country in blood I stand here the humble advocate of this notorious hog thief. The goats may climb to the summit of those mountains. The sheep may feed on the fields

198. CHEROKEE PHOENIX (New Echota), May 21, 1828.

199. Court Minute Book, *supra* note 60, at October 28, 1828.

200. Thievery was also a focus of the *Cherokee Phoenix*. See generally, CHEROKEE PHOENIX (New Echota), July 9, 1828 (noting the occurrences of breaking and entering, larceny and possession of a stolen horse); and George Harlin, *Pocket Book Lost*, CHEROKEE PHOENIX (New Echota), Aug. 13, 1828 (noting an occurrence of pickpocketing).

201. Court Minute Book, *supra* note 60, at October 24, 1828. .

202. *Id.*

203. *Id.*

204. *Id.*, at October 23, 1827.

205. *Id.*, at October 30, 1834.

206. *Id.*

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below and the cattle may graze the grass off the meadow but my client are no more guilty of stealing than a hog than a toad got no tail.²⁰⁷

The dockets of the lower Courts also exhibit multiple cases of theft: “We understand that two thieves were lately tried at Coosewaytee. One was a very noted one, whose name we have the honor of publishing in our paper. Both were found guilty. The principal one received one hundred lashes on the bare back, and the other fifty.”²⁰⁸

Murder was the most serious crime to come before the Cherokee Supreme Court. Willful murder in the Cherokee Nation was punishable by death.²⁰⁹ Three documented murder cases came before the Cherokee Supreme Court during its existence.²¹⁰ None of the three cases resulted in a conviction before the Court.²¹¹ As noted above, in the first murder case, the Court found the indictment to be defective.²¹² In the third murder case, a twelve person jury found The Broom not guilty on Wednesday, October 29, 1834.²¹³

The second murder case reviewed by the Supreme Court, *Cherokee Nation v. Noo Cha Wee*, is intriguing in that it anticipates the frantic efforts of modern capital counsel to litigate on multiple fronts at the last minute.²¹⁴ It also demonstrates an assumption of criminal jurisdiction by the legislative and executive branches.²¹⁵

The case was heard by the Court on October 19, 1829 and reported on October 21, 1829.²¹⁶ Noo Cha Wee, “a criminal, who had been condemned to die on that day by the circuit court of Aquohee District for the murder of Ahmahyouhah,” requested that the sentence imposed be suspended.²¹⁷ After some deliberation, marked in the Court Minute Book by the scratching out of initial rulings, the Court held: “The sentence having been [im]posed in the Circuit Court, this Court decide that they have no power of suspending the sentence of said Circuit Court.”²¹⁸ Here, therefore, we find an example of the Court declining criminal jurisdiction, which might affect the sentence in a

207. See generally Court Minute Book, *supra* note 60.

208. CHEROKEE PHOENIX AND INDIANS' ADVOCATE (New Echota), Mar. 18, 1829.

209. LAWS OF THE CHEROKEE NATION, *supra* note 50, at 104.

210. Court Minute Book, *supra* note 60, at October 21, 1825; October 21, 1829; October 29, 1834.

211. *Id.*

212. Court Minute Book, *supra* note 61, at October, 21, 1825.

213. *Id.*, at October 29, 1834; See generally LAWS OF THE CHEROKEE NATION, *supra* note 50, at 103 (stating that murder cases required twelve jurors).

214. Court Minute Book, *supra* note 60, at October 21, 1829.

215. *Id.*; CHEROKEE PHOENIX AND INDIANS' ADVOCATE (New Echota), Feb. 24, 1830 (stating that the National Council provided that “a respite of five days shall be allowed to the criminal after sentence of death shall be passed, before he shall be executed. . .”).

216. See Court Minute Book, *supra* note 60.

217. *Id.*; CHEROKEE PHOENIX AND INDIANS' ADVOCATE (New Echota), Oct. 21, 1829.

218. CHEROKEE PHOENIX AND INDIANS' ADVOCATE (New Echota), Oct. 21, 1829.

homicide case.²¹⁹ The decision is notable for its deference to the authority of the lower Court, recognizing the appellate court's proper role reviewing errors or trying cases where it had original jurisdiction.²²⁰ In this declination, the Court foreshadowed the trend of modern courts to avoid re-litigating homicide cases.²²¹

Noo Cha Wee and his supporters were not quite finished, though. Moving swiftly, at two o'clock that afternoon, the day of his scheduled execution, Noo Cha Wee appeared before the Clerk of the National Council with a petition containing "upwards of fifty signatures, praying" for a reprieve of his death sentence.²²² The National Committee immediately took the matter up and considered a special law, "discharge[ed] from the sentence of death that was pronounced against him by the Circuit Judge, Daniel M'Coy. . ." ²²³

[a]fter short addresses, the question was put, shall the prisoner be reprieved of (sic) not?—yeas 31 Nays.3 A resolution for the reprieve of the prisoner was then drawn and signed and sent to the principal Chief for his approval. He being absent, the Assistant principal Chief put his signature to the instrument. The prisoner was then set at liberty.²²⁴

In this instance, the National Council stepped in where the Court would not.²²⁵ The *Cherokee Phoenix* explained the extenuating circumstances: "It appeared from the evidence by which he was convicted that the murder was not premeditated or willful. The criminal did the fatal deed under mitigating circumstances."²²⁶ The restraint of

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. LAWS OF THE CHEROKEE NATION, *supra* note 50, at 133.

224. CHEROKEE PHOENIX AND INDIANS' ADVOCATE (New Echota), Oct. 21, 1829.

225. In another example of the Nation's exercise of criminal jurisdiction over citizens of the United States, the Committee of the National Council completely pre-empted the Court system in the case of James Pettit. Bigamy was illegal in the Nation, and it was specifically illegal for white men to have more than one Cherokee wife. LAWS OF THE CHEROKEE NATION, *supra* note 50, at 57. On Wednesday, October 28, 1829, on motion of James Martin, the Committee issued a warrant directing the Marshal to arrest and bring James Pettit, a white man, before the body where he was arraigned on charges of bigamy and mistreating his Cherokee wife, Elizabeth. CHEROKEE PHOENIX AND INDIANS' ADVOCATE (New Echota), Nov. 4, 1829. A trial before the Legislative Council immediately ensued, whereupon "it was decided that Mrs. Pettit had a sufficient provocation to leave Mr. Pettit's house," Pettit was fined \$500.00, and ordered removed from his plantation in favor of Elizabeth. *Id.* Acting swiftly, the Marshal had Pettit's crops up for sale to satisfy the fine, which was to enure to the benefit Mrs. Pettit. *Id.* On February 19, 1830, Principal Chief John Ross reported to Col. Montgomery, the Agent for the United States, that Pettit had reconciled with his wife and was back on his former lands, making improvements. Despite the reconciliation, the Principal Chief considered Pettit to be an intruder and requested that he be dealt with accordingly. Letters received by the Office of Indian Affairs, Cherokee Agency East, 1824-1881, *microformed on* M-234, reel 74, at 240-43 (identifying letter of John Ross to Hugh Montgomery, February 19, 1830).

226. CHEROKEE PHOENIX AND INDIANS' ADVOCATE (New Echota), Oct. 21, 1829.

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the Court, then, resulted in the National Council assuming jurisdiction to consider evidence of the crime, which is a judicial function.²²⁷

The lack of murder convictions in the Supreme Court does not indicate that the crime was taken lightly, however. On May 28, 1828, the *Phoenix* covered an execution:

Mr. Boudinott:- Perhaps the communication of Mr. Huss, (The Spirit,) contained in your paper of May 14, including the last words of the man who was executed for murder near Chickamauga Court House, may not be uninteresting to your English readers. I have, (with assistance,) prepared a translation, which I offer for insertion. W.

TRANSLATION.

I here transcribe the addresses of the man who was executed at Crawfish-town a few days since. The first address, which I give below, he requested me to write for him, when he was about to be executed. In the morning, while the sun was yet low, I penned it for him, on the same day on which he was to be hung at noon, April 18, 1828.

These are his words: "This day I address you, my Uncles, that you may abandon the practice of drunkenness. Forsake all evil, ye whom I leave behind. I desire you to believe that the practice of drunkenness which you follow is evil. Follow that which is good. Abandon drunkenness. If you believe, we shall meet again. I have relinquished my sins to God, who only, I believe, is able to save me. Do ye also the same. Truly drunkenness is exceedingly evil, for you see before you the end of my life; my intemperance is the cause of it. Therefore it is that I request you to forsake it. Do not fail to regard what I say, now that I am delivering to you my last words; for this day I shall leave my present life.

To you also, my brothers, I say, follow that which is good. Regard my words. This also I say to you respecting our aged parents, still provide for their support. Do not injure them, for I had promised to support them, and this is my end; forsake them not, but support our parents as long as they live.

Let this be all my address."

The following address also he made when he was just about to be executed.

"I have thought I will speak this day—let them remember my last words. My prayers only are present to my mind [literally cleave fast to

227. Intervention of the National Council on behalf of a criminal defendant was not unprecedented, despite a law enacted on October 17, 1823 which attempted to channel litigation into the Courts and away from the Council and National Committee. *LAWS OF THE CHEROKEE NATION*, *supra* note 50, at 31-32. On October 27, 1825, the Committee agreed with the Council and enacted a special law on behalf of Samuel Henry, remitting his Court imposed fine for introducing brandy into the Nation. *Id.* at 49.

me,] I cannot put them away. I endeavor only after that which was spoken to us yesterday.* There is nothing in my heart which does not accord with that place of destination of which they speak. Should that be my destination, we shall meet again, if you believe. Now we are met for the last time. Truly the drunkenness which prevails is a great evil. Forsake it. Follow that which is good. Keep in mind such things as these.

I have also made a request to those who are left behind [my relatives] to forsake the evil of drunkenness. I wish they may regard it. But here is one standing by-he see us. This is all I can now say no more."

Friends, Brethren; Let us read and meditate upon the addresses delivered at Crawfishtown, which are here printed. In his first address, made to his relations, his object evidently is to persuade them to forsake the evil of drunkenness and to regard the commands of our maker. And again in his second address he exhorts us all to forsake the evil of drunkenness. Thus it is that when God directs his mercy towards any individual, he is then desirous of forsaking sin, and such is the language which he uses. For it is manifest, that he must forsake sin who would obtain the mercy of God; for God has said in his word. For the language of the beloved Son of God is such as this; "Forsake your sins, and I will give you eternal life and peace." But all the unbelieving our Maker will banish into hell. When we read, let us remember what God has said, that if we believe it will be well with us.

This also let us remember, that in truth drunkenness is exceedingly evil:- that which he [the criminal] especially exhorts us to forsake. For it is manifest that the great prevalence of drunkenness amongst us is the source of multiplied evils. For this man, who was executed, explicitly states that his intemperance was the cause. And it may easily be perceived, that, as drunkenness increases in our country so the instances multiply in which men do injury to each other. This is our greatest enemy. Manifold are the evils of which drunkenness is the source. I also, therefore, entreat you to forsake this creator of mischief.

JOHN HUSS.

May 3, 1828.

*I suppose Mr. Huss had made an address, after the trial on the preceding day²²⁸

Huss later served as a Judge on the Cherokee Supreme Court, so his comments may be seen as part of a broader concern on his part to deter law breaking in general and the tragedy of alcohol abuse in particular.

228. John Huss, Letter to the Editor, *CHEROKEE PHOENIX* (New Echota), May 28, 1828.

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Ardent spirits were also asserted as causation for “a murder . . . committed not far from Crutchfield’s mill, by one O-lah [in Cherokee] who in a fit of intoxication thrust a butcher knife into the temple of another, Ah-ne-yvng-le, [in Cherokee].”²²⁹ Another case provided “a melancholy comment on the evils of intemperance and Sabbath breaking.”²³⁰ George Chapman and Daniel Wright “(both excessively intemperate drinkers),” ended a session of inebriation with Wright dying from being smitten with a shovel and Chapman “awaken[ing] to a sense of the horrid deed he had perpetrated and to the inevitable doom which awaits him.”²³¹ Sway Back was hung following conviction for killing one Murphy with “a large oak stick” while in “a state of extreme intoxication.”²³²

Alcohol abuse remains a serious topic today in Indian Country.²³³ In the lands of the Eastern Band of Cherokee Indians, the sale of alcohol is still prohibited except on its casino property, although the lure of the money it can fetch provides political pressure for its allowance.²³⁴

The Cherokee Supreme Court addressed two alcohol cases. In the first, Samuel Henry was convicted by the jury of selling spiritous liquor and fined one hundred dollars.²³⁵ In the second, Elijah Hicks, a major figure in Cherokee history, was found guilty of purchasing spirits from a U.S. citizen and given the same fine, which was mandatory, along with \$6.00 in costs.²³⁶ The fine was extracted from Mr. Hicks the following year.²³⁷

Booze typically made its way into the Cherokee Nation via the machinations of citizens of the U.S. Peddling liquor was only one of many problems posed by United States citizens within the Cherokee Nation. For example, George Harlan was fined \$10.00 by the Supreme Court for hiring an American citizen.²³⁸

The Cherokee executive and legislative branches used the criminal justice system to enforce a code of morality, including suppression of “the great variety of vices emanating from dissipation, particularly from intoxication and gaming at cards”²³⁹ In addition to its cases

229. Unknown Author, *Unknown Title*, CHEROKEE PHOENIX (New Echota), Sept. 17, 1828.

230. CHEROKEE PHOENIX (New Echota), Aug. 27, 1828.

231. *Id.*

232. CHEROKEE PHOENIX (New Echota), Apr. 24, 1828.

233. Scott McKie B.P., *Alcohol Vote Could Occur as Early as June*, THE CHEROKEE ONE FEATHER (Cherokee), Dec. 24, 2008 at A1, A5.

234. *Id.*

235. Court Minute Book, *supra* note 60, at October 21, 1825.

236. *Id.*, at November 3, 1826; LAWS OF THE CHEROKEE NATION, *supra* note 50, at 104.

237. Court Minute Book, *supra* note 60, at October 18, 1827.

238. Court Minute Book, *supra* note 60, at October 22, 1829.

239. LAWS OF THE CHEROKEE NATION, *supra* note 50, at 26.

regulating alcohol, on October 30, 1829, the Cherokee Supreme Court was called upon to fine Thomas J. Pack for “gaming at cards.”²⁴⁰

One case exemplifies the Cherokee’s declining criminal jurisdiction in favor of delivering a suspect to the custody of the United States Agent where the United States had an over-arching interest—the alleged crime of counterfeiting U.S. bank notes.²⁴¹ The Cherokees used United States currency as their own.²⁴² Swindlers, cheats and forgers found their way into the Cherokee Nation with counterfeit currency.²⁴³

Some of our neighbors have such a contemptible opinion of us, that they must need not only abuse, but attempt to cheat us, by circulating among us counterfeit money. Their failure in this piece of villainy, however, proves their own ignorance. We have just seen one of these men in the custody of a gentleman from Hightower—he has been arrested for having counterfeit bills. He no doubt, times being very hard in Walton County, Georgia, came to make a fortune upon the ignorance of the Indians, for a large bundle (quite an unaccountable thing these times) of these bills was found in his possession. But the Cherokees are not such fools as that comes to this man was found out in his first attempt at speculation, and is now taken to the agent to receive his reward.²⁴⁴

Whether deferring a prosecution from the Tribal justice system for prosecution in the courts of the United States was an exception or the rule is difficult to know.

Cherokee Nation v. Georgia demonstrates that the Cherokees were well aware of, and sophisticated litigants within, the courts of the United States.²⁴⁵ Likewise, it is indisputable that the Secretary of War, and thus the government of the United States, was well aware of the existence of the Cherokee Court system.²⁴⁶

Not only was the government aware of the Cherokee Tribal Court, its Agent sought the assistance of the Court and the sub-Agent appeared before it in the investigation of a criminal case in which a citizen of the United States claimed he was robbed by several

240. Court Minute Book, *supra* note 60, at October 30, 1829; LAWS OF THE CHEROKEE NATION, *supra* note 50, at 96 (noting that gaming at dice, roulette or thimbles was also prohibited).

241. CHEROKEE PHOENIX AND INDIANS’ ADVOCATE (New Echota), Feb. 24, 1830.

242. *Id.*

243. *Id.*

244. *Id.*

245. Cherokee Nation, 30 U.S. at 1.

246. On January 6, 1830, Agent Hugh Montgomery advised the Secretary of a claim by one Henry Gill against the Cherokee Nation for the theft of money by some unknown Cherokee. Included in the materials submitted were two depositions made by white men before “one of the Indian Judges.” Letters received by the Office of Indian Affairs, Cherokee Agency East, 1824-1881, *microformed on* M-234, reel 74, at 212-13 (identifying letter from Indian Agent Montgomery to the Secretary of War, January 6, 1830).

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Cherokees.²⁴⁷ On April 11, 1829, Thomas Ligon was traveling on the road from Alabama towards Georgia in a two horse carriage along with a young slave.²⁴⁸ The road passed through the Cherokee Nation, and in this place was a turnpike—a toll road.²⁴⁹ A heated dispute arose between Mr. Ligon and a number of Cherokees, including one Captain White, regarding payment of the pikeage, or toll.²⁵⁰ When the dispute ended, Mr. Ligon rode off in his wagon and sought refuge nearby at the residence of one Jacob West, a white man, where he reported that the Cherokees had stolen \$1,500.00 from him, a very large sum of cash for the times.²⁵¹

After taking Captain White's statement, Agent Montgomery sent a memo to Judge John Martin, one of the original Judges of the Cherokee Supreme Court, asking that he "please lend his aid & influence" in obtaining the return of the stolen money.²⁵² The matter came before Judge Walter Adair, another Cherokee Supreme Court Judge, sitting as the Circuit Judge for the Hightower District of the Cherokee Nation.²⁵³ On May 14, 1829, Judge Adair wrote a note that Captain White had appeared and denied the crime, but since no Agent "or other person for him" could attend, he deferred the investigation.²⁵⁴ The case came back for investigation on September 17, 1829, at which time Mr. William Thompson was present as "Agent for Co. Hugh

247. Letters received by the Office of Indian Affairs, Cherokee Agency East, 1824-1881, *microformed on* M-234, reel 73, at 767-85 (identifying multiple court documents, including the following: Cherokee Circuit Court records from the Hightower District, September 17, 1829; Statement of Thomas Ligon to Agent Hugh Montgomery, April 16, 1829; Memorandum of Agent Hugh Montgomery to Judge John Martin, April 16, 1829; Memorandum of Judge Walter Adair, May 14, 1829; letter from ___ Vann to Judge Walter Adair, September 16, 1829).

248. Letters received by the Office of Indian Affairs, Cherokee Agency East, 1824-1881, *microformed on* M-234, reel 73, at 767-71 (letter identifying statement of Thomas Ligon to Agent Hugh Montgomery, April 16, 1829).

249. *Id.*

250. Letters received by the Office of Indian Affairs, Cherokee Agency East, 1824-1881, *microformed on* M-234, reel 73, at 767-85 (identifying multiple court documents, including the following: Cherokee Circuit Court records from the Hightower District, September 17, 1829; Statement of Thomas Ligon to Agent Hugh Montgomery, April 16, 1829; Memorandum of Agent Hugh Montgomery to Judge John Martin, April 16, 1829; Memorandum of Judge Walter Adair, May 14, 1829; letter from ___ Vann to Judge Walter Adair, September 16, 1829).

251. Letters received by the Office of Indian Affairs, Cherokee Agency East, 1824-1881, *microformed on* M-234, reel 73, at 767-71 (letter identifying statement of Thomas Ligon to Agent Hugh Montgomery, April 16, 1829).

252. Letters received by the Office of Indian Affairs, Cherokee Agency East, 1824-1881, *microformed on* M-234, reel 73, at 771 (citing from the Memorandum of Agent Hugh Montgomery to Judge John Martin, April 16, 1829).

253. Letters received by the Office of Indian Affairs, Cherokee Agency East, 1824-1881, *microformed on* M-234, reel 73 (citing from the Memorandum of Judge Walter Adair, May 14, 1829).

254. *Id.*

Montgomery.”²⁵⁵ Judge Adair then received testimony from Ah Da Ka Ha Gee, Captain White and Black Fox.²⁵⁶ Each witness was then questioned under oath in Court by Mr. Thompson.²⁵⁷

This striking case and the set of documents which memorialize it, demonstrate that the Federal government was willing to use the resources of the Tribal Courts, including the services of two Judges of the Cherokee Supreme Court, to further the interests of the United States. It demonstrates as well that the interests of the United States and that of the Cherokee Judicial Branch coincided. Nothing about the set of documents demonstrates that this “actual state of things,”²⁵⁸ agents of the Federal government seeking out and appearing before Cherokee Supreme Court Judges in a criminal investigation where a citizen of the United States was the alleged victim, was extraordinary. Rather, documents in this case seem to be consistent stylistically with other sworn statements preserved in the Court Minute Book.²⁵⁹

On the frontier, access to the Courts of the United States might involve a journey of days or even weeks. That agents of the United States government would seek out respectable Cherokee Judges for assistance in an urgent situation reflects the pragmatism of the frontier. But it reflects something else, too. This reaching out also underscores that, to the Indian Agent, the Cherokee Court system was recognized as honorable and trustworthy. It also appears that its jurisdiction was satisfactory to the United States. If it were not, the Agents would doubtless have turned elsewhere.

These actions on the part of the Agent of the United States were not unique. As early as June of 1824, Agent McMinn advised the Secretary of War that he had turned a white man over to the Cherokee Light Horse²⁶⁰ for criminal punishment.²⁶¹ McMinn did not possess

255. Letters received by the Office of Indian Affairs, Cherokee Agency East, 1824-1881, *microformed on M-234*, reel 73, at 774-85, 779 (citing from the Cherokee Circuit Court records from the Hightower District, September 17, 1829).

256. Letters received by the Office of Indian Affairs, Cherokee Agency East, 1824-1881, *microformed on M-234*, reel 73, at 774-85 (citing from the Cherokee Circuit Court records from the Hightower District, September 17, 1829).

257. *Id.*

258. Johnson, 21 U.S. at 589.

259. Court Minute Book, *supra* note 60, at October 30, 1829.

260. The Cherokee Light Horse had existed since the turn of the 19th Century as a kind of mobile police/paramilitary force. By the time of Agent McMinn's letter to the Secretary of War the law provided for “one company of light-horse to accompany each circuit judge on his official duties, in his respective districts, and to execute such punishment on thieves as the judges and Council shall decide, agreeably to law. . . .” *CHEROKEE PHOENIX* (New Echota), March 27, 1828; THEDA PERDUE & MICHAEL D. GREEN, *THE CHEROKEE NATION AND THE TRAIL OF TEARS* 36 (2007).

261. Letters received by the Office of Indian Affairs, Cherokee Agency East, 1824-1881, *microformed on M-234*, reel 71, at 260-66 (identifying the letter from Indian Agent McMinn to the Secretary of War John Calhoun, June 9, 1824).

sufficient evidence to bind the defendant, Daniel Rash, over for trial in Knoxville on charges of accessory to robbery because two witnesses would not leave the Cherokee Nation and be subjected to Court order to attend in Knoxville.²⁶²

Stymied, McMinn

replied that Rash was a proper subject of their laws, and had a right to receive the same penalties that would be inflicted on one of their own proper for a similar offence, the Marshal then observed that by the laws of the Cherokee Nation he would at least be whipped, and asked if I would make any objections (sic) [Upon being told that the Agent] would not, the light horse then agreed, and gave him so well as I recollect about 39 lashes laid on with a very tender hand as, I understood.²⁶³

The significance of this incident should not be underestimated. The Agent of the Secretary of War of the United States of America specifically transferred custody of a citizen of the United States to the Cherokee Nation for punishment for a crime committed within the jurisdiction of the Cherokees.²⁶⁴ The Supreme Court of the United States has yet to analyze Tribal Court criminal jurisdiction in conjunction with this evidence from the historical record.²⁶⁵

ANALYSIS

Although this paper is an historical survey, its topic is as current as today's headlines. Today's judiciary struggles with many of the same issues; in particular, whom does the judicial system serve? As a function of Tribal self-determination, the restraints on Tribal exercise of criminal jurisdiction hinder the sovereign functions of the Indian Nations.²⁶⁶ One scholar has construed an aspect of these restraints, the Major Crimes Act,²⁶⁷ as an example of "colonization" and called for the Act's repeal.²⁶⁸

262. *Id.*

263. Letters received by the Office of Indian Affairs, Cherokee Agency East, 1824-1881, *microformed on M-234*, reel 71, at 260-66, 263 (identifying the letter from Indian Agent McMinn to the Secretary of War John Calhoun, June 9, 1824); One of the Marshal's duties was "to execute the decisions of the judges in their respective districts." See generally *CHEROKEE PHOENIX* (New Echota), March 27, 1828.

264. Letters received by the Office of Indian Affairs, Cherokee Agency East, 1824-1881, *microformed on M-234*, reel 71, at 260-66 (identifying the letter from Indian Agent McMinn to the Secretary of War John Calhoun, June 9, 1824).

265. See Johnson, 21 U.S. 543; *Ex Parte Crow Dog*, 109 U.S. 556; Talton, 163 U.S. 376; Oliphant, 435 U.S. 191; *Duro*, 496 U.S. 676; Wheeler, 435 U.S. 313; Cherokee Nation, 30 U.S. 1; *Lara*, 541 U.S. 193; Montana, 450 U.S. 544; Strate, 520 U.S. 438; Nevada, 533 U.S. 353; Plains Commerce Bank, ___ U.S. ___, 128 S. Ct. 2709.

266. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779 (2006).

267. 18 U.S.C. § 1153 (2000 & Supp. 2004).

268. Washburn, *supra* note 266, at 842-849.

Full criminal jurisdiction encompasses the ability of a tribunal to exercise jurisdiction over people (and subject matter) who allegedly commit crimes within a certain territory or enclave.²⁶⁹ Today, as a result of *Oliphant* and its progeny, Tribal Courts do not possess full criminal jurisdiction.²⁷⁰ Lack of full criminal jurisdiction in Indian Country today “effectively denies the Indian community an important outlet for self-determination and self definition.”²⁷¹

The creation of the Cherokee Constitution of 1827 was nothing less than an act of self-determination and self definition. The original Cherokee Court system was clearly intended to possess full criminal jurisdiction.²⁷² Article V, Section 8 of the Cherokee Constitution of 1827 was explicit in that regard: “The Judges of the Supreme Court and Circuit Courts shall have comple[te] criminal Jurisdiction in such cases and in such manner as may be pointed out by law.”²⁷³ So were other laws: the District Court “shall have complete criminal jurisdiction, (except in cases of murder). . .”²⁷⁴

Certain laws passed by the National Council specifically criminalized the behavior of white people, i.e. United States citizens.²⁷⁵ For instance it was a crime for white persons who were not citizens of the Cherokee Nation to bring spiritous liquor into the Nation.²⁷⁶ Similarly, a white man who married a “negro woman slave” within the Nation was subject to flogging.²⁷⁷

As we have seen, Georgia and, to a lesser extent, Tennessee, attempted to and occasionally succeeded in imposing their criminal jurisdiction over Cherokees for actions allegedly occurring within the Cherokee Nation during this period.²⁷⁸ However, exclusive jurisdiction is not the same as full jurisdiction. No State possesses exclusive jurisdiction even today—the Federal government exercises jurisdiction in each State.²⁷⁹ Those States with Tribal Courts or reservations do not have full jurisdiction over Indian Country, even in those Tribal

269. *Ex Parte Crow Dog*, 109 U.S. 556.

270. *Oliphant*, 435 U.S. 191.

271. Washburn, *supra* note 266, at 842.

272. *LAWS OF THE CHEROKEE NATION*, *supra* note 50, at 127.

273. *Id.*

274. *Id.* at 97.

275. *Id.* at 39.

276. *Id.*

277. *Id.* at 38.

278. *Cherokee Nation*, 30 U.S. at 18; GARRISON, *supra* note 176, at 111-124; Foreman, 16 Tenn. 256.

279. U.S. CONST. art. III, § 2.

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areas covered by P.L. 83-280,²⁸⁰ where the States have criminal jurisdiction over crimes committed in Indian Country.²⁸¹

The revelation that the Cherokee Nation exercised complete criminal jurisdiction over its territory prior to removal presents an opportunity for a re-appraisal of the very bedrock assumptions of *Oliphant* in light of the existing historical record. The operation of the Tribal Court during this time period provoked an outraged response from the State of Georgia, and no doubt was one of the many impetuses for the ultimate removal of the Cherokee Nation.²⁸² Still, the historical record contains a number of definitive examples of the exercise of criminal jurisdiction over citizens of the United States by the Cherokee Nation during the period 1823 to 1835.

The Cherokee Nation's exercise of criminal jurisdiction was consistent with the dependent status of the Cherokee Nation as it was explained by the Supreme Court of the United States in *Cherokee Nation v. Georgia*.²⁸³ The "actual state of things"²⁸⁴ as revealed by the Court Minute Book and other historical records is not so cut and dried as *Oliphant* presumes.²⁸⁵ The Cherokee Supreme Court stood at the pinnacle of a vibrant and robust judicial branch of government, marked by appropriate protections of due process and judicial review. By acknowledging and participating in the Cherokee Tribal Courts, by handing a United States citizen over to authorized agents of the Courts of the Cherokee Nation, the Agents of the United States conferred the imprimatur of legitimacy upon the criminal proceedings occurring within the Cherokee Nation. These acts of legitimization are powerful evidence of the "actual state of things."²⁸⁶ The "actual state of things"²⁸⁷ included the exercise of criminal jurisdiction over citizens of the United States.²⁸⁸

280. 18 U.S.C. § 1162 (2000 & Supp. 2004); 25 U.S.C. §§ 1321-1326 (2000 & Supp. 2003); 28 U.S.C. § 1360 (2000 & Supp. 2003).

281. 25 U.S.C. §§ 1321-1326 (2000 & Supp. 2003).

282. "Jurisdictional issues regarding the authority of the state to retrieve fugitive or stolen slaves or alleged fugitive criminals within Cherokee territory became more threatening to neighboring states after the creation of the Cherokee Supreme Court and the adoption of a constitution which declared the Cherokee to be a sovereign, independent government with jurisdiction over its own lands." PELTIER, *supra* note 72, at 162.

283. Although the Supreme Court of the United States never reached the ultimate question in *Cherokee Nation v. Georgia* as to the legality of Georgia's brazen attempt to enforce its criminal laws it nevertheless observed that "[in] considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbours, ought not to be entirely disregarded." *Cherokee Nation*, 30 U.S. at 18. This hearkens back to the "actual state of things" of *Johnson v. M'Intosh*. *Johnson*, 21 U.S. at 589.

284. *Johnson*, 21 U.S. at 589.

285. *Oliphant*, 435 U.S. 191.

286. *Johnson*, 21 U.S. at 589.

287. *Id.*

288. *Id.*

The historical foundations of *Oliphant* are suspect, at best, and should be reevaluated in the light of the operation of the Supreme Court of the Cherokee Nation. The following question should be presented to the Supreme Court of the United States: Consistent with their dependent status, do the Cherokee Indians retain the sovereign power, which they previously exercised, to try and punish non-Indian citizens of the United States for violations of their laws?

At this time, there are 564 federally recognized Indian Tribes.²⁸⁹ What is consistent with one Tribe's dependent status may be very different from the nature of the retained sovereignty of another.²⁹⁰ Yet in *Oliphant*, the Supreme Court of the United States painted with a broad brush, flatly denying Tribal Court criminal jurisdiction over non-Indians in a conclusion binding upon each of the Indian Nations.²⁹¹ *Oliphant* then treats all Indian Tribes, no matter how different, no matter how tangled their histories are with the government of the United States, in the same rigid way.²⁹²

Data which suggest the kinds of jurisdiction retained by one Tribe might assist in similar assessments of the judicial powers of others. If the Supreme Court of the United States comes to recognize "the actual state of things"²⁹³ in light of the operation of the original Cherokee Supreme Court and its constituent tribunals, then the "current state of affairs"²⁹⁴ might be adjusted accordingly to permit the exercise of full criminal jurisdiction within the Cherokees' spheres of Indian Country. This can lead to a comparison with the legal history of other Indian Tribes—the Navajos and Choctaws are prime candidates. In this way, the unique primary materials left by the Cherokee Judges of the early 19th Century will continue to reverberate.

Perhaps the exercise of criminal jurisdiction by some Tribes might be inconsistent with their dependent status at this time. Nevertheless, the historical record suggests that the time has come for another look at *Oliphant*, at least in the light of Cherokee Tribal Court jurisdiction.

289. Bureau of Indian Affairs, *Services Overview*, <http://www.bia.gov/WhatWeDo/ServiceOverview/index.htm> (last visited Oct. 23, 2009).

290. "Each tribe has a unique relationship with the United States, often reflected in particular treaties or statutes. Thus, the law affecting one tribe may not necessarily affect all tribes. On the other hand, federal policy and laws too often have treated tribes as if they were all the same." COHEN, *supra* note 15, at 2.

291. *Oliphant*, 435 U.S. 191.

292. *Id.*

293. *Johnson*, 21 U.S. at 589.

294. April 4, 1990 Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr., regarding *Duro v. Reina*, No. 88-6546, in *Papers of Justice Thurgood Marshall* (reproduced from the Collections of the Manuscript Division, Library of Congress).

Originally designed as “an instrument . . . to serve the needs of the small group of wealthy”²⁹⁵ Cherokees, the Cherokee Tribal Court system and the Constitution that incorporated the Court into the fabric of a new American Indian Republic, swiftly grew into something more, both symbolic and significant: “a token of nationalistic defiance—and it probably contributed greatly to an increased resolution on the part of surrounding state governments to remove the Indians.”²⁹⁶ It also grew into an idea—that Indian Tribes can maintain fully operational and respected judicial systems and that justice in Indian Country, as understood by Westerners, can be a reality. Ideas are hard to kill.

The fact that the Cherokee Supreme Court operated at all is extremely significant, regardless of broader concerns. That it continued cases, adjudicated hog stealing, inquired into the circumstances of convicted murderers and redressed wrongs demonstrates conclusively that, within their dependent status, the Cherokees historically and successfully operated a constitutionally based judicial branch of government, topped by a Supreme Court whose measured actions disclose the hands of jurists engaging the levers of sovereignty. The legacy of those judges continues today among the Tribal Court judges and justices in Tahlequah, Oklahoma and Cherokee, North Carolina.

295. STRICKLAND, *supra* note 19, at 73.

296. MALONE *supra* note 70, at 84.