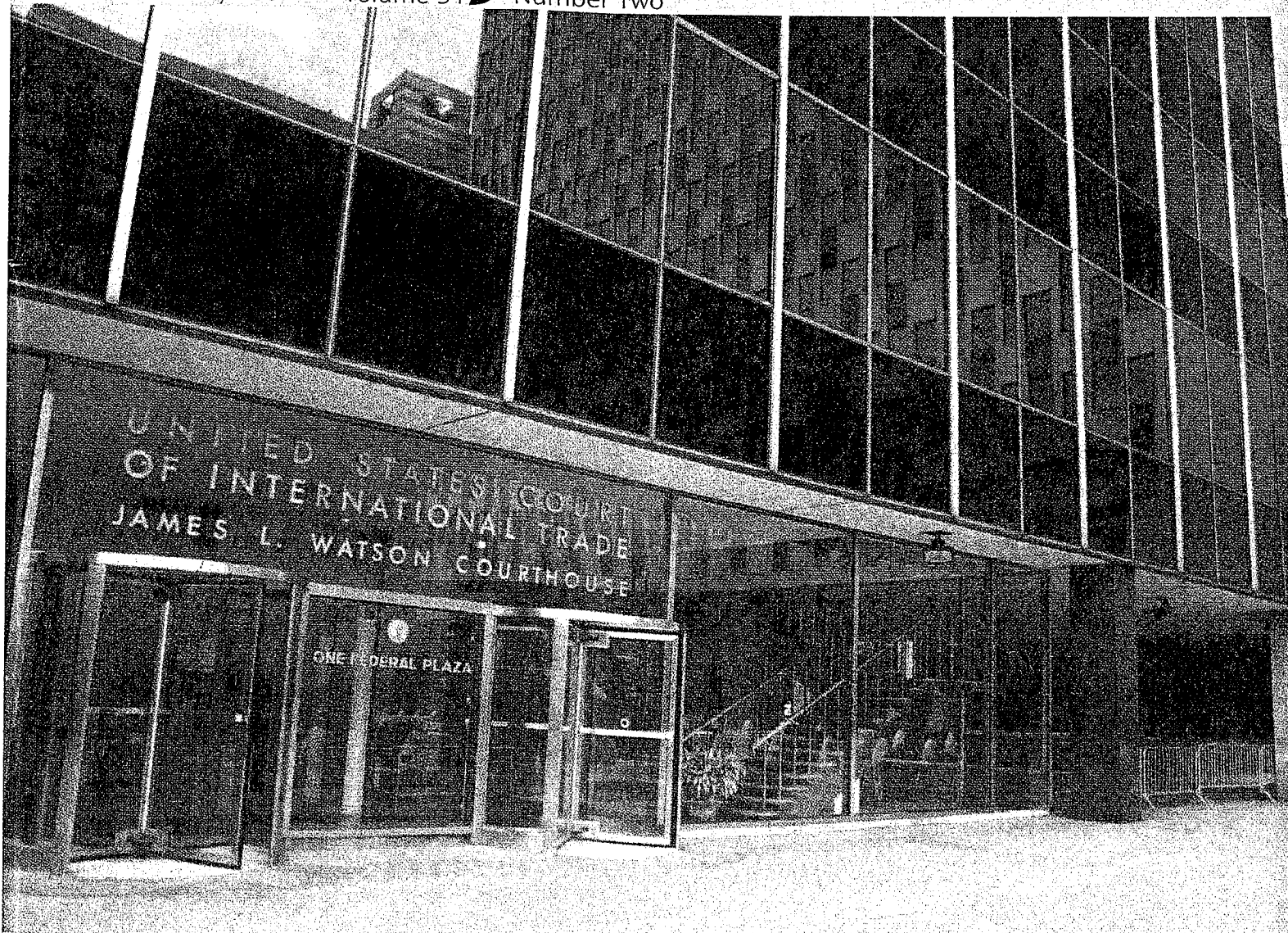


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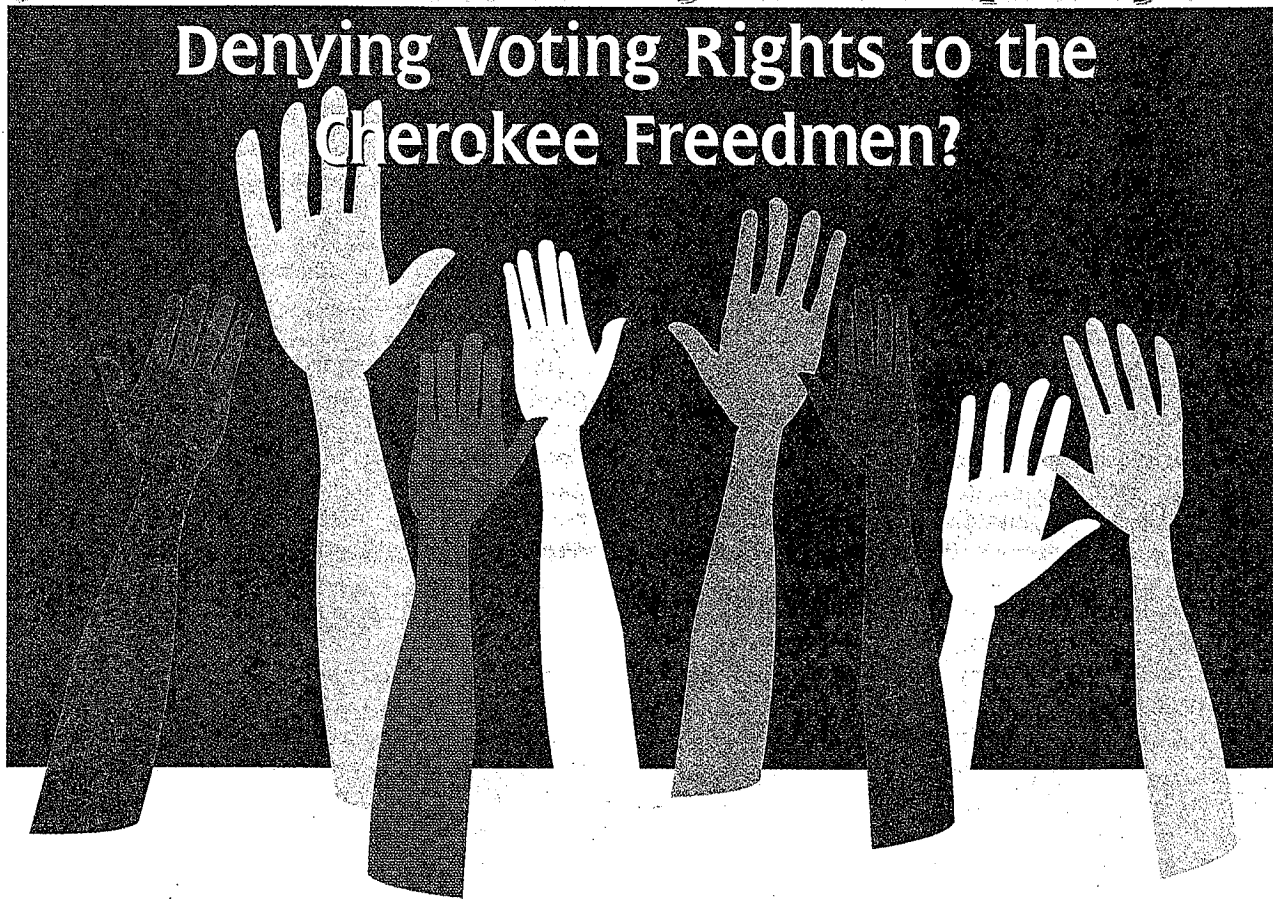
February 2007 Volume 54 Number Two

Don't Miss
MIDYEAR MEETING
SCHEDULE &
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In This Issue



A LOOK AT THE
U.S. COURT OF INTERNATIONAL TRADE
INCLUDING ITS HISTORY AND ITS
FIRST WOMAN CHIEF JUDGE

Should the United States be Fighting for Jim Crow's Survival by Its Complicity in Denying Voting Rights to the Cherokee Freedmen?



When an Indian tribe decides to deny its citizens voting rights that have been guaranteed by a treaty with the United States and are protected by the U.S. Constitution, can tribal sovereignty allow Indian nations to extinguish voting rights and the citizenship of its citizens where the basis for their exclusion is race?

By Jon Velie

Imagine today if Mississippi—or some other former slave-holding state with a history of disenfranchising its citizens—should decide to hold an election to change the state's constitution to deny the state's African-American citizens the right to vote. Because § 5 of the Voting Rights Act, 42 U.S.C. § 1971 (1965) (as amended), mandates that for Mississippi, which is covered by the act's special provisions, changes in qualifications or practices that have an impact on voting rights must pass the scrutiny of the U.S. attorney general (through the Civil Rights Division of the U.S. Department of Justice), Mississippi's African-American citizens would take comfort in the confidence that the U.S. Constitution protects their right to vote. These citizens would also expect that the United States would step in to stop the state's illegal practice under the act to protect their rights under the Thirteenth and Fifteenth Amendments.¹

That hope would turn to dismay, however, if—instead of overturning the new discriminatory state government's action—the citizens saw the federal government issue a statement that the Department of Justice will not intervene because the state of Mississippi is sovereign and the state's exclusion of African-American voters is clearly a matter of states' rights. The United States, of course, would sincerely regret the negative impact on the voting rights of Mississippi's African-Americans. Not only would the federal approval of Mississippi's new constitution enable the local effort to disenfranchise some citizens to succeed, but the thrust of federal action would also reverse one of the dominant themes of the federal victory in the Civil War—equal citizenship rights for former slaves and their descendants. Thus, it may come as a surprise to most that, since about 1980,² the U.S. government has ac-

tively supported just such a denial of voting rights to the Cherokee Freedmen—black citizens of the Cherokee Nation of Oklahoma.

Relations Between the Cherokee Nation and the Federal Government

The U.S. Treaty of 1866 with the Cherokee Nation included a provision whereby the federal government guarantees rights to the Cherokee Freedmen, including voting rights, equal to those held by all other citizens in the Cherokee Nation. Article VII of the treaty granted original federal jurisdiction over all causes involving the 1866 treaty. This original jurisdiction should, of course, include disputes between the Freedmen and the Cherokee Nation without the need for the Freedmen to go to the tribal court first. The federal government had previously enforced the Freedmen's citizenship rights as early as 1870.³ In the initial aftermath of the Civil War, the United States vigorously imposed the demand that the Freedmen receive the rights that were some of the hard-fought objectives of the Civil War. However, this is no longer the case. In each present-day election of the Cherokee Nation that the Department of the Interior's Bureau of Indian Affairs approves—most recently the May 24, 2003, Cherokee tribal election⁴—the U.S. government directly violates not only the Thirteenth Amendment of the Constitution by perpetuating “badges” of slavery but also the Fifteenth Amendment, which prohibits the United States from denying the right to vote “on account of race, color, or previous condition of servitude” by its express action in approving the discriminatory laws and practices of the Cherokee Nation that have intentionally excluded its Freedmen citizens from the voting process.

Ironically, immediately prior to the Cherokee Nation's May 2003 election, the Bureau of Indian Affairs upheld the voting rights of the Seminole Freedmen. In two cases—*Seminole Nation of Oklahoma v. Norton*, 206 F.R.D. 1 (D.D.C. 2001) (*Seminole I*), and *Seminole Nation of Oklahoma v. Norton*, 223 F. Supp. 2d 122 (D.D.C. 2002) (*Seminole II*)—the bureau refused to recognize an election that had voted to oust the black Seminoles from the tribe as well as a subsequent election that had denied the Seminole Freedmen the right to vote. In 2000 and 2002, the U.S. District Court for the District of Columbia ruled that the Seminole Treaty of 1866 was still in force, that the Freedmen could not be voted out of the tribe, and that they were entitled to vote in the tribe's elections. A vital component of the case was the U.S. government's responsibility to enforce the 1970 Principal Chiefs Act mandating that the Seminoles submit voting procedures to the Bureau of Indian Affairs for approval, which the Seminole Nation had not done. The Bureau of Indian Affairs was duty-bound to protect the rights of the Freedmen citizens as well as their voting rights within the tribe, because the discriminatory voting procedures would have violated the tribe's constitution and another 1866 treaty—one between the Seminole Nation and the United States.

In spite of the Bureau of Indian Affairs' fulfillment of its legal duty to the Seminole Freedmen, in 2003, the bureau

quickly forgot its same duty to the Cherokee Freedmen, when the Cherokee Nation decided to test its own capacity to exclude its citizens and transform its prior practice of discrimination against the Freedmen into a complete disenfranchisement codified into the Cherokee Nation's laws. The Cherokee Nation requested permission from the Bureau of Indian Affairs to amend the Cherokee constitution by removing the requirement that the secretary of the interior approve its election procedures. The Cherokee Nation's proposal also sought to remove the clause that stated that the U.S. Constitution is the “supreme law” of the land and that the tribe would not enact any law in opposition to federal law. This action would clearly allow for the exclusion of the Cherokee Freedmen from political participation without any federal oversight regarding the Cherokee Nation's power.

Recognizing the impact of the Cherokee Nation's proposal, on March 15, 2002, Neal McCaleb, the assistant secretary of the interior, responded to a letter submitted by Chad Smith, the chief of the Cherokee Nation, in which he requested permission for a referendum vote with specific requirements for the vote. According to McCaleb's response, the bureau would not object to the referendum itself—regarding the decision about eliminating the inclusion of U.S. government approval procedures in the Cherokee constitution—but, the bureau wrote, the Cherokee Freedmen must be permitted to vote in the election, and, regardless of the result, the Cherokee Freedmen could not be removed from the tribe. Assistant Secretary McCaleb wrote that the 1970 Principal Chiefs Act, Pub. L. 91-495, 84 Stat. 1091 (requiring submission of voting procedures to the Bureau of Indian Affairs) still applied.⁵ Contrary to the express instructions of the Department of the Interior, the Cherokee Nation did not submit its 2003 election procedures to the bureau for review. If allowed by the United States, those election procedures would result in the elimination of the Freedmen's voting rights as a matter of Cherokee law and, as anticipated, the Cherokee Nation did not permit its Freedmen citizens to vote in the election that was held on May 24, 2003.

In the face of defiance from the Cherokee Nation, at first the Bureau of Indian Affairs determined that it would not recognize the election of Chad Smith as chief. In a letter dated July 25, 2003, the bureau took the initial position that the situation appeared identical to the case involving the Seminole Freedmen and that the Cherokee Nation had not complied with the 1970 Principal Chiefs Act. The bureau determined that the 1970 act mandated U.S. involvement with the Cherokee Nation's election, citing *Wheeler v. Department of the Interior*, 811 F. 2d 549 (10th Cir. 1987).⁶

On Aug. 6, 2003, however, the Bureau of Indian Affairs reversed its position of disapproval to one that recognized an election even though it met none of the bureau's clearly expressed criteria. Taking a curiously bifurcated position, the bureau stated it would recognize the election for chief but withhold its approval of the proposed amendment to the constitution, again citing *Wheeler v. Department of the Interior* without mentioning or clarifying

why it no longer viewed the 1970 Principal Chiefs Act to be a specific mandate for Congress to be involved in Cherokee elections.⁷

What could possibly have led the Bureau of Indian Affairs to such a reversal—a decision that would betray the Cherokee Freedmen? What could have led the bureau to contradict its March 15, 2002, position in support of the Cherokee Freedmen's right to vote in Cherokee elections? The answer may be found in documents related to the hiring of embattled lobbyist Jack Abramoff, who was retained by Cherokee Nation Enterprises to lobby for "sovereignty issues" in the months prior to the May 2003 election.

In the Cherokee Nation's initial effort to distance itself from the Abramoff scandal, the Cherokee Nation's government officially denied that it had ever hired Abramoff, stating that the lobbyist had only solicited the Cherokee Nation as a client. To Abramoff's credit, however, in early 2003, he had complied with federal law by registering as a lobbyist for Cherokee Nation Enterprises on "appropriations and sovereignty issues." Abramoff filed a midyear 2003 report showing that he had charged Cherokee Nation Enterprises \$60,000 for his services. Abramoff reported that Cherokee Nation Enterprises had ended its relationship with him later in 2003, after he had received an additional \$60,000 from Cherokee Nation Enterprises.⁸

Was Abramoff effective enough to find someone in the House, Senate, or the Department of the Interior to prevail upon the Bureau of Indian Affairs to reverse its position and to recognize the May 24, 2003, Cherokee election in which the Cherokee Nation did not allow its Freedmen citizens to vote? In effect, did Abramoff, on behalf of the Cherokee Nation, attempt to exclude a significant number of Cherokee Nation citizens from the vote—many of whom can document their strong lines of Cherokee ancestry—and did he succeed in doing so? There is such a distinct correlation between the timing of Abramoff's contract with Cherokee Nation Enterprises to lobby for "sovereignty" issues with the bureau's about-face on the criteria it had previously expressed to the Cherokee Nation for its approval of the 2003 election that it appears that Abramoff may have been involved, either directly or indirectly, in affecting the bureau's decision. Clearly, such a Bureau of Indian Affairs determination develops from a variety of legal and political factors. To understand at least some of the elements of how the United States has come to its tragic blind spot in support of this violation of federal law, the Constitution, and its responsibility to enforce the treaty rights of the Freedmen requires a glimpse of both history and Indian law.

A Brief History of the Cherokee Freedmen's Relations with the Federal Government

Unlike the Mississippi citizens in the imaginary scenario given above, rather than receiving the guarantee through the U.S. Constitution and the long overdue Voting Rights Act, the Cherokee Freedmen received their first guarantees of equal rights through the post-Civil War Treaty of 1866—a treaty negotiated, in part, by Cherokee families from whom some of the Freedmen have descended.⁹ Under the

Supremacy Clause, U.S. Const. Art. VI, Cl. 2, treaties supersede any conflicting state laws and have the same force and effect as federal statutes do. *See, e.g., Antoine v. Washington*, 420 U.S. 194, 203–204 (1975); *see also* Felix S. Cohen, *Handbook of Federal Indian Law* 127 (1982). Also, unlike the state of Mississippi, the federal government has allowed Indian nations to determine the criteria for tribal citizenship even to the point of permitting the Cherokee Nation to deny citizenship to documented full-blooded Cherokee.¹⁰ In the case of Freedmen, the United States has, at least temporarily, allowed the Cherokee Nation to deny rights to both blood Cherokee who may also have African ancestry and Freedmen descendants who may not be able to document their Cherokee ancestry but have full rights as citizens of the Cherokee Nation via the 1866 treaty.

The Cherokee Nation was one of the few slave-holding Indian tribes. The Cherokee Nation's record of African slavery existed since the Cherokee's early contact with the British Colonists.¹¹ By 1860, the Cherokee owned more slaves than any of the other Indian nations owned. In the Civil War, the Cherokee Chief John Ross, the hero who led the Cherokee Nation west on the Trail of Tears, also led the entire Cherokee Nation's government into a treaty with the Confederacy.

Apologists for John Ross' alliance with the South claim that "circumstances" forced Ross into the Confederacy's fold. However, Charles Royce, one of the Smithsonian's foremost authorities on Cherokee history, concluded that Chief Ross had given "free expression" to his views when he called a convention in August 1861 that sought to join forces with the South. The tone of all the speeches at the convention was bitterly hostile toward the United States. Ross' speech, in particular, stated that "the Confederacy was the best thing for the Cherokees, ..." and that the Cherokee Nation should seek an alliance "without delay. ... [A]s for himself, he was and always had been a Southern man, a [s]tate[s] rights man; born in the South, and a slaveholder; that the South was fighting for its rights against the ... North, and that the true position of the Indians was with the Southern people." After Ross' speech, 4,000 male Cherokee "adopted without a dissenting voice, a resolution to abandon [Cherokee] relations with the United States and to form an alliance with the Confederacy." To underscore his resolve, after John Ross' regiment under Col. Drew fought for the South in the Battle of Pea Ridge, the U.S. Army "sent a proposition to John Ross urging that the Cherokees should repudiate their treaty with the Confederacy and return to their former relations with the United States, offering at the same time safe conduct to Ross. Ross declined peremptorily."¹²

Ross' later recantation of his Confederate stance did not change the U.S. government's post-Civil War view of Ross' disloyalty. The complexity of the Cherokee's involvement in the Civil War is reflected in the fact that the United States did consider 10,500 of the Cherokee Nation's 17,000 residents, with the exception of Chief Ross, to be loyal in spite of the fact nearly 9,000 of them had entered the war in support of the South but later switched their alliance to the

North. Much later in the war, in February 1863, the loyal Cherokee had organized a separate government under the protection of the federal military at Cowskin Prairie in what is now Delaware County, Okla. The U.S. government weighed greater responsibility on Chief Ross for his leadership role in obtaining the Southern alliance and rejected the chief's efforts to re-cast himself as being in charge of the "loyal" Cherokee. The Keetoowah faction of the Cherokee as well as many Cherokee who enlisted in the "Home Guard" in Kansas remained loyal to the Union from the beginning, but, in the U.S. government's view, this segment did not represent the official Cherokee Nation's government, which had allied with the South. The Cherokee who remained allied with the Confederacy throughout the war totaled about 6,500.¹³

In 1865, the United States, as victor in the war, made it clear that it would require special conditions within the Cherokee Nation as a result of its having joined the Confederacy.¹⁴ The United States had permitted the Cherokee Nation to regain its tribal governmental authority under a new treaty.¹⁵ In Article IX of the Treaty of 1866, the United States demanded that all persons held in bondage would be incorporated into the Cherokee Nation on an equal footing with that of the original members of the Cherokee Nation. This provision became a hollow promise on the part of the Cherokee Nation, however, as evidenced by the necessity of such lawsuits as *Moses Whitmire, Trustee for the Cherokee Freedmen v. The Cherokee Nation and the United States*, 30 Ct. Cl. 138 (1895),¹⁶ as well as the Cherokee Nation's current and continuing effort to revoke the voting and citizenship rights of Freedmen. To this day, the Cherokee Nation's government has exhibited a bitter reluctance to accept the terms agreed upon with the United States in the Treaty of 1866. The Cherokee Nation is one of an isolated few nations in Indian country that have endured to the 21st century as the last holdouts of the post-Reconstruction South.

With the initial attention to and support for the terms of the Treaty of 1866 on the part of the United States, the Freedmen voted in Cherokee Nation elections. Cherokee Freedmen even served as members of the Cherokee Nation Council as well as in local governmental positions throughout the remainder of the 19th century.¹⁷ The 1866 treaty provided a separate local governmental jurisdiction for the Freedmen in conjunction with the Southern Cherokee who had supported the Confederacy throughout the war. Combining the Freedmen and the Southern Cherokee in the Treaty of 1866 did not happen as a result of some cruel joke on the part of the federal government to bring the former slaves into common territory with some of the former slave masters. Rather, it occurred because the former slaves' homes were located on the land of the former slave owners or because the former slaves were often Cherokee siblings, cousins, or sons and daughters of the former slave owners. Indeed, even in instances in which there were no common bloodlines, mutual dependency brought about by postwar conditions of starvation in a countryside ravaged by plundering by different Cherokee factions for the benefit of both the North and the South

drove some former slaves and former slave owners together for survival.

In one of the numerous ironies of the Civil War within the Cherokee Nation, armed Cherokee forces acting on behalf of the Cherokee Nation's government—forces that the United States had placed in a trusted responsibility to carry forth the terms of the 1866 treaty—turned their guns toward former slaves—most notably in the 1866 Horse Creek incident—killing some, wounding others, and driving the former slaves away from the Cherokee Nation.¹⁸ These actions succeeded in sowing sufficient fear and terror that resulted in keeping many former slaves from returning to the Cherokee Nation and greatly reduced the numbers of former slaves to whom the Cherokee Nation would have been obligated as citizens of its tribal nation. Even at that time, those in power knew that fewer citizens meant a larger per capita distribution of property and benefits.

Those Freedmen who did return to the Cherokee Nation within the six-month limit imposed by the treaty did so with the limited refuge provided by federal troops at Fort Gibson in Indian Territory, now Oklahoma. Cherokee Freedmen such as Moses Whitmire and the Vann and Bean families, who managed to hold on to their territory as set aside by the treaty, led efforts to petition the United States to preserve their equal rights. They pressed to continue the separate governmental structure and guarantees of access to the federal court system provided for in Article IX of the Treaty of 1866 as well as the right of the Freedmen to participate in the Cherokee Nation as citizens.¹⁹ Unfortunately, as years passed, the United States neglected its responsibility to protect this separately recognized band of the Cherokee Nation, and the burden of maintaining the Freedmen's rights fell on those who were least economically able to carry that task.

The same avarice that led the Cherokee Nation to attempt to exclude its cousins, siblings, sons, and daughters in earlier years drives the current Cherokee Nation today, with some Cherokee Nation government officials irrationally fearful that the political inclusion of these Cherokee will inevitably dilute the per capita distribution of benefits to the citizens of the Cherokee Nation. The Cherokee Nation's present-day repetition of the worst of the post-Reconstruction era in the South as well as the denial of equal rights that marked the early Civil Rights era would be merely curious if the position was not so completely repugnant to the values of our modern times.

The Federal Law and the Freedmen's Rights

The existence of the shortcomings of the U.S. government in fulfilling Indian treaty obligations and fiduciary duties is an old story. Gratefully, the U.S. courts have not become tired of enforcing provisions of treaties and correcting egregious wrongs that have been inflicted on tribal minorities. Most notably, the Court prevented the Seminole Nation from excluding its citizens in *Seminole Nation of Oklahoma v. Norton*, when the Seminole Nation attempted to vote the Seminole Freedmen out of the nation by an election held for a referendum on amending its con-

stitution. The Supreme Court has declared the 1866 treaty with the Cherokee Nation that protects the Cherokee Nation's Freedmen citizens to be alive and well. *Cherokee Nation v. State of Oklahoma*, 397 U.S. 620 (1970). However, the U.S. government has frequently opted to fulfill terms of treaties only when faced with a well-financed court battle to do so. Under those circumstances, the treaties are reduced from the legal guarantees of the full force of federal law to merely cumbersome and inconvenient obstacles to the efficient imposition of a dominant majority and its monied interest groups, leaving minority interests such as the Cherokee Freedmen unprotected.

Tribal sovereignty is the basis for tribes' unrestricted power for determining citizenship. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), reiterates the basic premise that Indian nations have the right to determine who may be a citizen of the Indian nation. However, *Martinez* does not hold that tribal officials may use sovereignty as a shield that allows them to break treaties, which are recognized as equal to federal statutes. The Treaty of 1866 imposed a limitation on the sovereignty of the Cherokee Nation by mandating that its Freedmen citizens be included in the Cherokee Nation.²⁰ In 1865 and 1866, the United States had vigorously moved to eliminate slavery not just in the Cherokee Nation but among all Indian tribes. The United States also set about to make sure that the Thirteenth Amendment purged the United States as well as the Indian tribes from all residual effects of slavery, such as prohibitions that forbade the former slaves and their descendants from voting.²¹ The Cherokee Nation's sovereignty does not include the power to arbitrarily revoke citizenship in violation of the Cherokee constitution and the U.S. Constitution where there are federally mandated citizenship rights. Congress' action in passing the Thirteenth Amendment and U.S. measures taken to develop new treaties with the slave-holding tribes altered tribal sovereignty on the slavery question and related discrimination for all time and also dissolved any absolutist notion of Indian nations' ability to determine citizenship that would exclude the Indian nations' African-American citizens. Unlike the states, Indian tribes, as domestic dependent governments, possess limited sovereignty and are "subject to complete defeasance" by Congress. *Rice v. Rehner*, 463 U.S. 713, 719 (1983). When the Department of the Interior pauses for even a moment to allow exclusionary measures such as allowing the Cherokee Nation to revoke the Freedmen's voting rights, the Department of the Interior also violates the Thirteenth and Fifteenth Amendments to the U.S. Constitution. When done in the wake of *Seminole I* and *Seminole II*, the actions taken by the Department of the Interior must be considered as done with the intent to aid and abet in the disenfranchisement of the Freedmen.

The Cherokee Nation is well aware of its power to determine its citizens, as shown in that way the Cherokee have historically applied criteria for citizenship.²² It is an easy step then to revoke the rights of Freedmen—even those who can prove they have Cherokee blood—who, in the eyes of some officials of the Cherokee Nation, should be excluded if there is also any hint of African blood. The

Cherokee Nation officially denies that this is a policy, but plaintiffs in *Vann v. Kempthorne*, No. 03-01711 (D.D.C. filed Aug. 11, 2003) believe that, once allowed to have their day in court, they will be able to prove such exclusionary practices. The Cherokee Nation is also fully aware of its power to completely disregard the 1866 treaty guarantees, knowing that the executive branch of the federal government will be lax in its support for provisions of the treaty that have gone against the desires of those factions of the Cherokee Nation currently in power because they are politically allied with the current administration. The abuse of sovereignty to exclude Cherokee Freedmen becomes clearest in the Cherokee Nation's standing practice of excluding these Cherokees by blood who also may have an African ancestor—determining these individuals to be excludable as "black"—yet determining that a person with predominantly European ancestry, but for 1/2048th Cherokee blood (as in its most extreme example), to be "Cherokee" rather than white.²³

Conclusion

Whatever caused the Department of the Interior to change its direction certainly did not occur because the Cherokee Nation had suddenly reversed itself and guaranteed rights to the Freedmen. Quite the contrary, the about-face occurred because the Department of the Interior conceded its moral and legal authority to one of the most powerful tribal leaderships in the United States—a tribal leadership that evidently feels so threatened by the inclusion if all its citizens in the political process that it is prepared to embrace the embarrassment of a negative judgment of history.

Any observer of the interaction of federal and tribal law quickly notes that federal law does not stop at the border of an Indian nation. See, for example, the Major Crimes Act, 18 U.S.C. § 1153 (1885) (as amended). Federal law also dominates numerous other legal issues within Indian country, including, in some instances, tribal lands. This is not a question of whether the United States is compelled to allow this blatant discrimination for fear that the federal government might intrude on tribal sovereignty. The 1866 treaties altered those Indian nations' sovereignty in perpetuity with specific provisions on just how the Indian nations could treat their African-American citizens. Thus, there is no need to re-visit the sovereignty issue in a case in which an Indian nation has newly determined that it will defy the U.S. Constitution by denying voting rights to the descendants of their former slaves.

Even though some leaders of the Cherokee Nation might arrogantly impose an antiquated view toward its Cherokee citizens solely because they have African ancestry and therefore deny them access to the political process—as much as some of the Cherokee leadership may wish for this to be the case—this is not the pre-Civil Rights era. Should a state that had been part of the former Confederacy decide to take similar actions, the full force of the federal legal structure would immediately direct the errant government toward a corrective course with the assistance of U.S. marshals or federal troops if necessary.

The Department of the Interior may have met—with timidity—the Cherokee Nation's blatant rejection of U.S. Constitutional law and its commitments to ratified treaties, but at least the federal courts still take obligations imposed by the Thirteenth and Fifteenth Amendments to the U.S. Constitution seriously.

The states of the Deep South long ago abandoned attempts to use states' rights as a mechanism for denying rights to African-American citizens. On March 7, 2006, the Cherokee Nation's Supreme Court took a correct and courageous stand in deciding by a vote of 2-1 that Freedmen could not be excluded from tribal citizenship.²⁴ Membership in the Cherokee Nation has never been based on race to the exclusion of other citizens of the Cherokee Nation—be they Delaware, Shawnee, or, quite tellingly, the pure-blooded white citizens who were incorporated into the Dawes Roll of Cherokee citizenship.²⁵ The current drive undertaken by the executive branch of the Cherokee Nation²⁶—which seeks to hold a constitutional convention or a referendum vote to override the Cherokee Court's decision because the beneficiaries of that decision have some African ancestry—is clearly wrong both as a matter of law and conscience. The executive branch of the Cherokee Nation's government would do well to abandon using the cry of "sovereignty" as a means to implement institutionally racist political policies against the Cherokee Freedmen and join its own court as well as the now progressive state governments of the Old South in discovering the wealth of talent and resources that come about by including all their citizens in the political process.

The executive branch of the Cherokee Nation would have learned this lesson long ago but for the inexplicable complicity of the U.S. government in the abuse of the Freedmen's rights of Cherokee citizenship. The United States has exercised its authority in ultimately assuring citizenship and voting rights to African-Americans throughout the United States and, more recently, within the Seminole Nation. Now the United States must refuse to participate in the perpetuation of this outrage by taking actions that expressly approve constitutionally prohibited activity. The federal government must exercise its constitutional duty and authority to bring the Cherokee Nation and the United States itself into full compliance with the provisions of the Thirteenth and Fifteenth Amendments, respectively, and extinguish this lingering legacy of the Old South.

Postscript

On Dec. 19, 2006, while this article was being finalized, the U.S. District Court for the District of Columbia struck a major blow to the Cherokee Nation's efforts to prevent the Cherokee Freedmen from having their day in court. The Cherokee Nation had intervened in *Vann v. Kempthorne*, No. 03-01711, (D.D.C. filed Aug. 11, 2003), for the sole purpose of seeking dismissal of the suit. The Cherokee Nation first argued that the suit against the Department of the Interior could not go forward because the Cherokee Nation was a necessary and indispensable party for obtaining final relief, then claimed that the Cherokee Nation could not be joined as a party to the suit because of the

sovereign immunity of Indian tribes. In light of these two factors, the Cherokee Nation argued for dismissal. Plaintiffs countered that the Cherokee Nation could be joined in the suit, and plaintiffs moved to amend their complaint to add the Cherokee Nation as a party defendant. The D.C. District Court ruled in favor of the plaintiff's position, finding that the Cherokee Nation is subject to the proscriptions of the Thirteenth Amendment and that the Cherokee Nation's failure to allow the Freedmen to vote in the 2003 elections constituted a badge or incident of slavery. The court further found that the combination of the Thirteenth Amendment and the Treaty of 1866 effected a clear waiver of the nation's sovereign immunity from suit in federal court for enforcement of the Freedmen's right to vote.

What is not yet known is the U.S. government's position on the sovereign immunity issue this time. In *Davis v. United States*, 199 F. Supp. 1164 (W.D. Okla. 2002), the United States successfully argued that the Seminole Nation was immune from suit, therefore, the court should dismiss the case against the United States. In *Vann v. Kempthorne*, the United States "did not oppose" the Cherokee Nation's motion for dismissal. It is likely that the Cherokee Nation will appeal the ruling. A larger question remains, however: Will the United States continue to support race discrimination by the Cherokee Nation by actively opposing the joinder of the Cherokee Nation or will it do so by silence—by doing nothing? Moreover, will the United States silently stand by and allow the Cherokee Nation to vote the Freedmen out of the tribe in the special election of March 3, 2007, in opposition to the Treaty of 1866, in violation of the Thirteenth and Fifteenth Amendments, and in the face of the *Vann v. Kempthorne* decision? If silence is once again the U.S. government's choice, then such inaction recalls Dr. Martin Luther King Jr.'s often quoted wisdom from Sir Edmund Burke: "The only thing necessary for the triumph of evil is for good men to do nothing." TFL

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Endnotes

¹"Neither slavery nor involuntary servitude ... shall exist within the United States, or any place subject to their jurisdiction." U.S. Const., Amend. XIII. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race,

color, or previous condition of servitude. ..." U.S. Const. Amend. XV.

²"When the Cherokee Nation reorganized its government between 1970 and 1976 ... the Freedmen were quietly disenfranchised and denied their right to citizenship. ... These changes occurred without the knowledge or input of the Cherokee Freedmen. When Reverend Roger Nero and his companions went to vote in the Cherokee elections in 1983, they found that the definition of a Cherokee citizen had been changed to exclude them, which came as a surprise since Nero had voted in the last tribal election in 1979." Circe Sturm, *BLOOD POLITICS: RACE, CULTURE, AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA* 179, 180 (2002). See *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989). Rev. Nero sought a remedy primarily via various civil rights statutes that proved inadequate particularly after *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). However, see analysis on the 10th Circuit Court's significant omissions in its reasoning in *Nero*, in Lydia Edwards, Comment, *Protecting Black Tribal Members: Is the Thirteenth Amendment the Linchpin to Securing Equal Rights Within Indian Country?* 8 BERKELEY J. AFR.-AM. L. & POL'Y 122, 130 (2006). In addition, Nero did not assert the 1866 treaty's Article VII grant of original federal jurisdiction over all causes of action concerning the treaty.

³Treaty Between the United States of America and the Cherokee Nation of Indians, July 19, 1866, Art. IX, 14 Stat. 799, 801. "[B]locks filed ... claims to citizenship in December 1870." *Colored Persons Admitted to Cherokee to Cherokee Rights and Citizenship by the Supreme Court*, June 21, 1871; and *Applicants for Citizenship: Supreme Court Cases Admitted*, 1871, Indian Archives Division, Oklahoma Historical Society, Cherokee—Citizenship (Tahlequah). Cited in Daniel Littlefield Jr., *THE CHEROKEE FREEDMEN: FROM EMANCIPATION TO AMERICAN CITIZENSHIP* 77, 103, 104 (1978).

⁴Letter from the U.S. Department of the Interior, to Chadwick Smith, chief, Cherokee Nation (Aug. 6, 2003). Obtained via a Freedom of Information Act request to the U.S. Department of the Interior. (On file with *Vann v. Kempthorne*, No. 03-01711) (D.D.C. filed Aug. 11, 2003).

⁵Letter from Neal A. McCaleb, assistant secretary of Indian affairs, U.S. Department of the Interior, to Chadwick Smith, chief, Cherokee Nation (Mar. 15, 2002). Obtained via a Freedom of Information Act request to the U.S. Department of the Interior. (On file with *Vann v. Kempthorne*, No. 03-01711) (D.D.C. filed Aug. 11, 2003).

⁶Letter from Jeanette Hanna, regional director, Bureau of Indian Affairs, Eastern Oklahoma Regional Office, U.S. Department of the Interior, to Chadwick Smith, chief, Cherokee Nation (July 25, 2003). Obtained via a Freedom of Information Act request to the U.S. Department of the Interior. (On file with *Vann v. Kempthorne*, No. 03-01711) (D.D.C. filed Aug. 11, 2003).

⁷See *supra* note 4.

⁸*Cherokee Nation Denies Working With Abramoff*, NATIVE AMERICAN TIMES, Jan. 4, 2006, available at www.Indianz.com; see also copies of Jack Abramoff's "reg-

istration" as a lobbyist for Cherokee Nation Enterprises and two "Lobbying Reports" attachments to article by accessing sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2003/01/000/252/000252005|2; sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2003/01/000/411/000411429|3; sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2004/01/000/532/000532601|3. See also Sam Lewin, *Abramoff Pleads Guilty*, NATIVE AMERICAN TIMES, Jan. 13, 2006, at 1.

⁹As just one example, Marilyn Vann, the lead plaintiff in *Vann v. Kempthorne*, 03-01711 (D.D.C., filed Aug. 11, 2003), is a direct descendant of Rider Fields, the brother of the Cherokee Supreme Court Chief Justice Richard Fields (1855). Richard Fields served the Cherokee Nation in various other capacities, including being a prominent member of the Southern Cherokee delegation that traveled to Washington, D.C., to negotiate the 1866 treaty with the United States.

¹⁰The Cherokee Nation includes those registered as descendants from individuals listed on the Dawes Roll. "Congress established the Dawes Commission to determine and record the membership of several Indian tribes. The Commission categorized the tribes' membership on two rolls: the 'Blood Roll' for full-blooded Indians and a 'Freedmen Roll' for former slaves. Though many historians believe that a majority of the Freedmen were of mixed heritage, the Commission did not bother to quantify the percentage of ... Cherokee blood in the Freedmen. Instead the Commission essentially applied a 'one drop' rule to the Freedmen, concluding that any drop of black blood would override any Indian ancestry." Act of June 27, 1898, Pub. L. No. 55-504, 21, 30 Stat. 495 (1898) (declaring that tribal enrollment as contemplated by the Dawes Commission and as approved by the secretary of the interior has the effect of designating people and their descendants as tribal members). The act authorized the commission to "make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each said tribe. ... The rolls so made ... shall be final, and the persons whose name are found thereon with their descendants ... shall alone constitute the several tribes which they represent." Curtis Act, Pub. L. No. 55-517, 30 Stat. 503 (June 28, 1898) See Edwards, *supra*, note 2, at 23, 24. Even though the Freedmen have ancestors on the Dawes Roll, the Cherokee Nation is currently attempting to abruptly end that qualifier as it applies to the Freedmen. In addition, Cherokee who resided in the nation that refused to sign the Dawes Roll during the limited years it was open were excluded from the nation. Descendants from these Cherokee are also excluded from the nation.

¹¹National Archives and Records Administration, Microfilm M653, *Schedules of Federal Population Censuses for 1860*, at 54. Cited in Littlefield, *supra* note 3, at 13.

¹²Charles Royce, *The Cherokee Nation of Indians*, FIFTH ANNUAL REPORT OF THE BUREAU OF ETHNOLOGY TO THE SECRETARY OF THE SMITHSONIAN INSTITUTION, 1883-84, 327-330 (1887).

¹³Littlefield, *supra* note 3, at 16; and National Archives and Records Administration, Microfilm T494, *Ratified*

Treaty No. 358, Documents Relating to the Negotiation of the Treaty of July 19, 1866 with the Cherokee Indians, Roll 7, at 379–395.

¹⁴Present-day efforts within the Cherokee Nation to deny the tribal government's alliance with the Confederacy may be best illustrated by the Cherokee Heritage Center's Trail of Tears drama, in which Chief John Ross is disingenuously portrayed as magnanimously refusing to breach the loyalty he feels toward the United States. See Sturm, *supra* note 2, at 13 for Sturm's description of how the Cherokee Heritage Center Trail of Tears drama depicts John Ross' activities in the Civil War. Compare with Charles Royce's account of Chief Ross' eager effort to make an alliance with the Confederates, in Royce, *supra* note 12.

¹⁵This was not unique to the Cherokee. The United States required all Indian nations and tribes that had allied with the South to enter into new treaties since, "having entered into treaties with the so-called Confederate States, and the rebellion being now ended, they are left without any treaty whatever or treaty obligations for protection by the United States. Under terms of the treaties ... all these nations and tribes forfeited and lost all their rights to annuities and lands. ..." The tribes included the Choctaw, Chickasaw, Creek, and Seminole as well as 10 other enumerated tribes and some tribes leasing from the Wichita that were not listed in D.N. Cooley's report. D.N. Cooley, President of the Southern Treaty Commission, Report, *Office of Indian Affairs*, ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR, H.R. Exec. Doc. No. 39-105, at 480 (1866).

¹⁶In *Whitmire*, the court held that the sovereign power of the Cherokee Nation could not supersede the Cherokee Nation's 1866 treaty obligations to the United States, because those obligations applied to the Freedmen. "The Cherokee Nation has, as a sovereign power, the right to administer its own affairs in its own way, and to regulate the rights of its citizens by its own laws. But the legislative authority of the national council is not absolute, being limited and defined by the constitution, and the acts of the council can not control or abrogate the treaty obligations of the Nation to the United States." *Moses Whitmire, Trustee for the Cherokee Freedmen v. The Cherokee Nation and the United States*, 30 Ct. Cl. at 138 (1895).

¹⁷National Archives and Records Administration, Microfilm M234, *Records of the Bureau of Indian Affairs*, Rolls 107–108. The following Cherokee Nation citizens listed as "negroes" served on the Cherokee National Council: Joseph Brown (1875), Frank Vann (1887), Jerry Alberty (1889), Stick Ross (1893), Ned Irons (1895), and Samuel Stidham (1895). Emmett Starr, *HISTORY OF THE CHEROKEE INDIANS AND THEIR LEGENDS AND FOLKLORE*, at 277–283 (1921).

¹⁸Littlefield, *supra* note 3, at 29, 33.

¹⁹Letter from Arthur Bean, Committee for Colored Citizens of the Cherokee Nation, to President Chester A. Arthur (Aug. 27, 1883). The letter petitions for "cognizance" of all the "rights, privileges and immunities pledged to us in Treaty stipulations of the Treaty of 1866."

²⁰"At the close of the [C]ivil [W]ar the Cherokee country was virtually conquered territory, and the Cherokee Nation was at the mercy of the United States. As a condition to

peace and the continued existence of the nation as a government, the United States insisted ... [on certain] condition[s] ... agreed to and embodied in the treaty [of 1866]." *Whitmire*, at 143.

²¹See D.N. Cooley's Report *supra* note 15.

²²Many of the Keetoowah protested the legality of the Dawes Commission's rulings in the Cherokee Nation and refused to sign the Dawes Roll or submit to its requirements. Consequently, descendants of these nonenrolling Keetoowah cannot be citizens of the Cherokee Nation of Oklahoma (CNO), where the CNO requires that its citizens have a lineal connection to the Dawes Roll, *supra* note 10, even though there are numerous full-blooded Cherokee among the Keetoowah. For this and other historical reasons, the federal government recognized the United Keetoowah Band as its own tribal government in addition to the CNO's tribal government.

²³See Sturm, *supra* note 2, at 3.

²⁴*Lucy Allen v. Cherokee Nation Tribal Council et al.*, No. JAT-04-09 (Cherokee Nation, March 7, 2006). Because the Cherokee Nation does not appoint its judges for life, and recognizing the unmistakable zeal with which the Cherokee Nation's executive branch has supported a petition drive to amend the Cherokee constitution to exclude the Cherokee Nation's Freedmen citizens, clearly this tribal court decision does not have the potential for the longevity of a federal court decision that would uphold the Freedmen's rights under the U.S. Constitution and the Treaty of 1866.

²⁵The court record shows that in 1883 there were 2,011 "adopted whites" out of a population of 26,771 in the Cherokee Nation. At that time, there were 2,052 "negroes" in the Cherokee Nation. *Whitmire* at 180, 183.

²⁶*Cherokee Chief Wants to Reverse Landmark Decision on Freedmen*, TULSA WORLD, March 15, 2006, at A1. S. E. Ruckman, *Cherokee Chief Approves Special Vote on Membership*, TULSA WORLD, Oct. 7, 2006, at A1.