A Historical Look At Tribal Courts

My family's Native American heritage is in the Cherokee Nation. By way of background, a brief narrative of my Cherokee history follows. It focuses on the events surrounding the removal of the Cherokees to Indian Territory — what is today known as Oklahoma.

By Gaines West and Darrin M. Walker

In the early 1800s, the Cherokee Nation was divided. This division stemmed from an internal schism over how best to react to what some Cherokees — and most Anglos — viewed as the inevitable consequence of Anglos and Cherokees living in such close proximity: the possible extinction of the Cherokees. With President James Monroe's administration came the idea that removal of the Indians living in the eastern United States to west of the Mississippi River was in their best interest.[1]

In the late 1820s, the Georgia Legislature passed a number of laws circumscribing Indian rights within that states' borders. Then in 1829, that same legislature announced its intention to assume jurisdiction over the Cherokee lands within its borders. President Andrew Jackson urged the Cherokees to emigrate and noted that, if they did not, they would become "subject to state law."[2]

The Cherokees did not respond with one voice to President Jackson's "invitation" to move west. While many chose to move voluntarily, others chose to remain on their land in spite of the rising sentiment among Anglos that removal and/or extinction was inevitable. The latter group of Cherokees were led by John Ross, the Cherokee chief. The former group came to be known as the "Treaty Party."[3]

Among those who chose to move voluntarily as part of the Treaty Party was Bluford West (my great-great-uncle). Those who moved voluntarily to Indian Territory in the West were known as "Old Settlers."

In the summer of 1837, General Winfield Scott arrived in Georgia to "carry out the benevolent intentions of the United States Government."[4] Scott established stockades, better known then as concentration camps, into which he began herding Cherokees. Meanwhile, Ross was traveling to Washington, DC attempting to gain the support of Cherokee sympathizers.[5] However, by this time it became apparent that it was too late to make changes, as even Cherokee sympathizers had begun to accept removal as the only way to preserve the "Vanishing American."[6] Nevertheless, the Cherokees who sided with and believed in Ross were intent on remaining on their land.[7]

While Ross and his followers remained in the East attempting to resist removal and retain the Cherokee lands, Bluford West was settling in Indian Territory in Oklahoma. In the area he intended to settle, the Saline District, he noticed a salt lick. Convinced that he could extract valuable salt from underground salt water, Bluford commenced digging a well. In doing so, Bluford had the help of his two slaves and, most likely, his brother John (my great-great-grandfather). Apparently, John West initially traveled west with Bluford and his family, helping with the salt lick for approximately a year before returning to Georgia, marrying, and moving to Alabama. Bluford developed an "artificial" mining operation over a 13-year period, which reportedly yielded up to 30 bushels of salt a day and sold at a price of one dollar a bushel, a magnificent sum.

In the Eastern Cherokee Nation in 1838, the Cherokees who followed John Ross were making no effort to prepare for removal. In fact, they carried on life as usual, much to the chagrin of their Anglo neighbors.[8]

Among Cherokees who remained in the East were John West, his wife, Ruth, and their two sons, William Mosley West (my great-grandfather) and George Rider West, who was an infant at the time. Also remaining in the Eastern Cherokee Nation was Jacob West, who was John and Bluford West's father. Jacob was a white man born in Virginia, the first West to marry into the Cherokee tribe. Jacob assimilated into the Cherokee way of life and lived as a Cherokee for 30 years. Ironically, all of these Wests, including Jacob, were members of the Treaty Party, but after remaining in the East, they had to endure the very hardship that their "party" had admonished the Cherokees to avoid: forced removal. Bluford, meanwhile, was doing quite well as an old settler manufacturing salt in the western Cherokee Nation.

When the forced removal began, General Scott ordered his soldiers to search out the Cherokee lands and imprison all the occupants. The soldiers came upon the Cherokees like thieves in the night, "taking women from their housework, men from their farming, and children from their play."[9]

The march west was hard, with diseases such as measles, pleurisy, and whooping cough decimating the Cherokee population.[10] In all, one quarter of the Cherokee Nation died on the forced march.[11] The West family apparently made it safely to Indian Territory. They settled with Bluford and John West became a partner of Bluford's in the salt operation.

When John Ross arrived in the western Indian Territory, he fostered a sentiment that those Cherokees who had signed

and supported the removal treaties had violated tribal laws against selling Cherokee lands, and Cherokee assassination squads hunted down and killed most of the signatories.[12]

Jacob West and his family paid the price for their Treaty Party loyalty. In 1839, the Indian Territory was under martial law to quell the hostilities between the followers of Ross and the Treaty Party. Cherokee Nation elections, proceeded peacefully as the U.S. Army maintained order. Ross, with his eastern arrivals far outnumbering the Old Settlers, won handily. The next election in 1843, however, was not so uneventful. At a polling place in the Saline District, six members of the Treaty Party became involved in an argument with members of Ross's party, and one member, was killed.

One of the Treaty Party members arrested was Jacob West. Although Jacob had lived with the Cherokees for 30 years, exercising all the rights and privileges of a member of the tribe, he claimed the immunity of a white man to the Cherokee courts. He applied for a writ of *habeas corpus* in the U.S. Court in Arkansas. The writ was denied, presumably because Jacob had lived as a Cherokee and because federal courts typically deferred to Indian sovereignty. This deference was partly out of respect of the Indian Nation and its newly drafted constitution and partly to quell disturbances in Indian Territory. The courts apparently believed that if Indians wanted to try a white man who had lived as Cherokee, they should not interfere. This policy would also have the effect of fostering better relations with Ross and the Cherokee Nation. As a result of the denial of the writ, Jacob was thereafter tried, convicted, and executed by Cherokee authorities.[13]

Jacob's son, John, was also taken into custody, but the Cherokee court exercised leniency toward him because he supported a young family. John's punishment was 100 lashes. Ross, however, was not satisfied with this punishment. At his urging, the tribal council passed a resolution confiscating most saline operations in Indian Territory, including the Wests'. This action was especially significant to the Wests since most "natural" saline operations were already owned by the Nation. Only the Wests', and one other, were considered to be "artificial" deep-boring manufacturing operations that were privately owned. It is interesting to note that John's heirs attempted as late as the early 1900s to have a bill passed to pay for the wrongful taking.

The U.S. court's deference to the tribal court in Jacob West's case is in some respects typical of the position the federal courts have taken toward tribal courts. As early as 1832, the U.S. Supreme Court held that Indian tribes are "distinct, independent political communities, retaining their original natural rights" in self-government (*Worcester v. Georgia*, 6 Pet. 515, 559 (1832)). As such, the court later held that tribes had the power to make their own substantive laws in internal matters and to enforce that law in their own forums.[14] Nevertheless, Congress clearly has the authority to legislate with regard to the powers and jurisdictions of tribal courts.[15] Thus, tribal courts, while given great deference as sovereign tribunals, nevertheless have been subject to interference from Congress.

Prior to the arrival of white people on this continent, tribal courts were arms of the tribal government that were designed to mediate social disputes to the satisfaction of the parties, rather than to assess blame. They were seen as social institutions and were largely shaped by religious traditions.[16] In the early 19th century, when the U.S. government was establishing Indian reservations, the American military policed the reservations, and the U.S. government set up Courts of Indian Offenses to assist in their administration. These courts were indicative of the increasing Anglo influence on tribal courts.[17] In 1934, Congress passed the Indian Reorganization Act, under which the Indian tribes could once again establish their own tribal court systems.[18] These new tribal courts exercised extensive civil jurisdiction and some criminal jurisdiction over reservation offenses, although much criminal jurisdiction had been preempted by the federal government.

The Major Crimes Act, passed by Congress in 1885, divested Indian tribes of their jurisdiction over major criminal offenses committed within Indian country and vested this jurisdiction in the federal government.[19] In 1968, Congress passed the Indian Civil Rights Act (ICRA). The ICRA applied many of the provisions of the Bill of Rights to Indian tribes and proceedings in tribal courts. The effect was to impose a number of non-Indian requirements on tribal courts, further anglicizing those courts. The ICRA accomplished two other significant changes: (1) it limited the criminal penalties available to tribal judges to a maximum of six months imprisonment and a $500 fine; and (2) it limited the method of federal court review of tribal policy to *habeas corpus*.[20] The supreme court interpreted this as a congressional balance between "preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people."[21]

Modern day tribal courts, as a result of this and other federal legislation, have taken on some of the characteristics of U.S. courts. However, tribal courts are generally much less formal. The judges are usually not attorneys and the courts are frequently not courts of record.[22] Although legal training and experience is frequently less important in the selection of tribal judges than familiarity with tribal custom, one commentator believes that this is a positive attribute of tribal courts:

> If attorneys were to take over the system of tribal justice, it would not be too long before Indian customs and traditions, the studied informality of the tribal courts, and the particular attention that tribal judges pay to family situations and responsibilities would be replaced by a variety of model codes written by and for the convenience of the attorneys.[23]

Indeed, the traditional role of the tribal judge as social healer is still prevalent. As Carey Vicenti, chief judge of the Jicarilla Apache Tribal Court, said at the National American Indian Court Judges Association conference in May:

> You go to law school with a sense of poetic justice and you come out with a sense of justice. The poetry has been removed. In Indian and traditional societies, the poetry remains and the judicial function is to keep that poetry in tact ... to restore social and family systems, to give a sense of society to your whole tribe.... Ultimately, you are a healer in tribal society.[24]

The U.S. justice system could glean valuable insight from the tribal court system. One of the unique aspects of the tribal system is its use of alternative dispute resolution, specifi-

cally mediation. Hailed as the "wave of the future," mediation has existed in Native American cultures for hundreds of years.[25] The U.S. Supreme Court noted in 1978:

> Traditional tribal justice tends to be informal and consensual rather than adjudicative and often emphasizes restitution rather than punishment.[26]

Though the U.S. judicial system uses mediation because of its efficiency in achieving settlement, Native Americans implemented a system of mediation for more practical reasons. In tribal cultures, the tribe's success depended in large part on the members' ability to work together and continue to work together after a dispute was resolved.[27] Thus, the tribal system of mediation fit well with the time-honored tradition among Native Americans of "peacemaking."[28]

This need for peacemaking has modern implications including solving disputes between parents, children, and school authorities; employment disputes; and commercial dealings in which the parties want to continue to do business.[29] Modern courts recognize, as did Native Americans, that certain cases require consensus-building and a more personalized process.[30] Thus, Native American tribunals have used mediation to resolve disputes from time immemorial.

Tribal courts not only preserve traditional Indian culture and attitudes, they also help alleviate some of the burden on state and federal courts. As Peter Chestnut, former chair of the New Mexico State Bar Indian Law Section stated, "[S]tructured tribal courts can help revive traditional dispute resolution processes that worked well for centuries but have fallen into disuse."[31] Judge William Canby of the Ninth Federal Circuit Court told the National American Indian Court Judges Association conference, "if the work of tribal courts were not being done, the rest of the system would be very, very overburdened. I think it would collapse...."[32]

Congress has recently taken steps to assist the tribal court system by adopting the Indian Tribal Justice Support Act. This act recognizes that tribal justice systems are "an essential part of tribal governments and ... important forums for ensuring public health and safety and the political integrity of tribal governments,[33] ... the appropriate forums for the adjudication of disputes affecting personal and property rights,[34] and essential to the maintenance of the culture and identity of Indian tribes."[35] Therefore, this act established an Office of Tribal Justice Support to "further the development, operation, and enhancement of tribal justice systems"[36] and appropriated approximately $58 million a year in support.[37] Significantly, however, Congress expressly stated that the act cannot be construed to "encroach upon or diminish in any way the inherent sovereign authority of each tribal government to determine the role of the tribal justice system within the tribal government [or to] impair the rights of each tribal government to determine the nature of its own legal system."[38]

The tribal court that executed Jacob West but spared John West seems to have been attempting to fulfill its role as societal healer by sparing John to care for his young family.

Bluford West, an "Old Settler," later served two terms as a district judge in the Cherokee tribal court. He died of pneumonia in 1845 and was buried in the Washington National Cemetery. At the time of his death, he was in Washington, DC attempting to get the Treaty of 1846 to include compensation to families whose salt operations had been confiscated.

Although I do not serve in any elected office, my work with the Texas Indian Bar Association and my service as its president gives me an opportunity to work to further the interests of Native Americans. It has been a fulfilling endeavor and, through the writing of this article, I have reached into my past and, and as a result, appreciate more fully my Indian heritage.

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1. Brian W. Dippie, *The Vanishing American* 61 (1982) (quoting James Monroe, Special Message, Jan. 27, 1825, in 2 James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1902* 281-82 (1903) (hereinafter referred to as *Messages and Papers*)).
2. *Id.* at 59 (quoting Andrew Jackson, First Ann. Message, Dec. 8, 1829, in 2 Richardson, *Messages and Papers*, *supra* note 1, at 458-59).
3. Gloria Jahoda, *The Trail of Tears: The Story of the American Indian Removals 1813-1825*, 226 (1975).
4. *Id.* at 226.
5. *Id.*
6. Dippie, *supra* note 1, at 61-65.
7. *Id.* at 71.
8. Jahoda, *supra* note 3, at 227-28.
9. *Id.* at 230.
10. *Id.* at 234.
11. *Id.* at 237.
12. Vine Deloria Jr. & Clifford Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty*, 201 (1984).
13. Grant Foreman, *The Five Civilized Tribes* 326-27 (1934).
14. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978) (citing *Jones v. Meehan*, 175 U.S. 1 (1889) and *Williams v. Lee*, 358 U.S. 217 (1959)).
15. *See Talton v. Mayes*, 163 U.S. 376 (1896).
16. Vine Deloria, Jr. and Clifford M. Lytle, *American Indians, American Justice* 111-12 (1983) (hereinafter referred to as *American Indians*).
17. *Id.* at 113-14.
18. *Id.* at 116.
19. *Id.* at 170.
20. *Id.* at 135, 175.
21. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 67-68 (1978).
22. *American Indians*, *supra* note 14, at 118-19.
23. *Id.* at 122.
24. Helen Sheppard, "Congress Addresses Future of Native Court System," *Indian Country Today*, June 8, 1994, at A8.
25. Robert D. Garrett, "Mediation in Native America," *Dispute Resolution Journal*, March 1994, at 39.
26. *Id.* (*citing United States v. Wheeler*, 435 U.S. 213, 332 n.4 (1978)).
27. *Id.* at 42.
28. *Id.* at 43.
29. *Id.*
30. *Id.* at 45.
31. Lisa Driscoll, "Tribal Courts — New Mexico's Third Judiciary." *New Mexico Bar Bulletin*, Feb. 25, 1993, at A3.
32. Sheppard, *supra* note 22, at A8.
33. 25 U.S.C.A. § 3601(5) (West supp. 1994).
34. *Id.* § 3601(6).
35. *Id.* § 3601(7).
36. *Id.* § 3611(a).
37. *Id.* § 3621.
38. *Id.* § 3631(1), (3).

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