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## Defeat or Mixed Blessing - Tribal Sovereignty and the State of Sequoyah

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# DEFEAT OR MIXED BLESSING? TRIBAL SOVEREIGNTY AND THE STATE OF SEQUOYAH

Stacy L. Leeds\*

## I. INTRODUCTION

American Indian legal history is replete with stories of foreseeable consequences. Most of these stories involve the United States failing to uphold treaty guarantees. In each of these stories, the United States ignores the tribal diplomatic efforts of the time, engages in unilateral federal action, and tribal autonomy is forever diminished. In these stories, history will judge the federal treaty abrogation as the catalyst for a chain of foreseeable events that renders modern tribal governments weaker than their historical predecessors.<sup>1</sup>

There are rare occasions, however, when a story of American Indian law and policy has an unforeseeable positive outcome for tribes. A story where today's tribal leaders may reflect with a sigh of relief, that the diplomatic efforts of their predecessors were ignored in the halls of Congress. Such is the story of the State of Sequoyah movement, an act of tribal diplomacy that gives life to the adage, "be careful what you wish for, it just might come true."

## II. THE STATE OF SEQUOYAH MOVEMENT

At the behest of the tribal leaders of the Five Tribes,<sup>2</sup> a constitutional convention was convened in 1905 at the town of Muskogee, Indian Territory. The convention produced the governing document for the State of Sequoyah, which, if admitted, would become the forty-sixth state within the federal union. The new state would envelope the treaty-guaranteed territorial boundaries of the Five Tribes, geographically bordered by Texas to the south, Arkansas to the east, Kansas and Missouri to the north, and the

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1. The allotment of tribal lands serves as the most notable example of a negative chain of events that started with federal treaty abrogation. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (federal unilateral abrogation of treaty rights by the allotment of lands over tribal objection); see generally Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 Idaho L. Rev. 1, 115 (2005); Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1 (1995) (discussing the aftermath of failed allotment policy).

2. Throughout the article, "Five Tribes" will be used in reference to the Cherokee, Choctaw, Chickasaw, Seminole, and Muscogee (Creek) Nation.

federal territory of Oklahoma to the west.

Following the convention, the Sequoyah Constitution was presented to eligible voters<sup>3</sup> and the measure was ratified by an overwhelming margin of 56,279 to 9,073.<sup>4</sup> Approximately 75% of eligible voters participated in the election, including citizens of the Five Tribes and other U.S. citizens residing within Indian Territory in 1905 that had not previously established tribal citizenship.<sup>5</sup>

In December of 1905, H.R. 79 was introduced in Congress “providing for the admission of the State of Sequoyah into the Union.”<sup>6</sup> The bill was sent to committee.<sup>7</sup> Two similar measures were advanced in the Senate.<sup>8</sup> Senate Document 143 was presented in January 1906<sup>9</sup> and S. 3680 was subsequently introduced the same year.<sup>10</sup> Tribal leaders actively sought congressional action, through lobbying and diplomacy efforts, but were met with opposition or indifference. While these measures were under congressional consideration, President Theodore Roosevelt stated his preference that both Oklahoma and Indian Territory be admitted as a single state.<sup>11</sup> Following the President’s remarks, no action was taken in Congress with respect to Sequoyah statehood.<sup>12</sup> The majority adopted the single state option,<sup>13</sup> and the Sequoyah movement was defeated, paving the way for Oklahoma statehood in 1907.

When Oklahoma was admitted into the union, it appeared to be the final defeat for the Five Tribes. The attempts by tribal leaders, in the shadow of impending Oklahoma statehood, to gain congressional support for the State of Sequoyah seemed an exercise in futility that would leave the Five Tribes without collective power or political influence within the new state.<sup>14</sup>

3. The electorate was comprised of males over the age of twenty-one, with no race restrictions. The electorate included Indian, black, and white citizens of the United States. Sequoyah Const. art. VI, § 1(1)–(2) (available at <http://anpa.ualr.edu/sos/constitution.html>). There is no mention of continuing tribal citizenship in the Sequoyah Constitution. Tribal citizens of the Five Tribes became U.S. citizens prior to 1905 and were not subsequently impacted by the Indian Citizenship Act of 1924.

4. J. Ruth Hegwood et al., *The State of Sequoyah Movement* 6 (Sequoyah Research Ctr. 2005).

5. *Id.* The Five Tribes had provisions within tribal law that allowed for the naturalization of non-Indian and non-tribal citizens. For example, it was common within the Five Tribes to have tribal laws extending naturalized citizenship to inter-married whites. Citizenship was also expanded to include newly freed slaves by virtue of tribal constitutional amendments following a series of post Civil War treaties. The Cherokee Nation also extended citizenship to individual Shawnee and Delaware people who otherwise had no blood ties to the Cherokee Nation.

6. 40 Cong. Rec. 47 (1906).

7. *Id.*

8. *Id.* at 783.

9. *Id.* at 1114.

10. *Id.* at 1526–27.

11. Gaston Litton, *History of Oklahoma at the Golden Anniversary of Statehood 497–98* (Lewis Historical Publg. 1957).

12. 40 Cong. Rec. at 7499–7500.

13. *Id.*

14. In contrast, the Five Tribes today exhibit substantial political influence within the State of Oklahoma, particularly in light of a recent economic development boom within the tribes. Last year, Oklahoma tribes contributed \$70.4 million to the State of Oklahoma through gaming compacts, and the economic impact of Oklahoma tribes to the local community is immeasurable. Of that amount, \$18 million came from the Chickasaw Nation, \$16.5 million from the Choctaw Nation, and \$11.5 million from the Cherokee Nation, making three of the Five Tribes the largest contributors to the state. News from Indian Country, *Oklahoma Receives \$70M in Tribal Gaming Revenue Last Year*, [http://indiancountrynews.net/index.php?option=com\\_content&task=view&id=2767&Itemid=6](http://indiancountrynews.net/index.php?option=com_content&task=view&id=2767&Itemid=6) (Mar. 2008). The Five Tribes are also currently among the largest

The only apparent option for future political influence was participation in the new Oklahoma state government, where former tribal leaders would become mere citizens of a new state, and the cycle of United States colonization in Indian country would be complete. This scenario, no matter how likely it appeared in 1907, did not come to pass. Instead, a series of unforeseeable events followed, leaving the tribal governments intact in spite of the newly formed State of Oklahoma.<sup>15</sup> The modern tribal governments, as the successors to the governments of the historic Five Tribes, stand much stronger today than they were on the eve of statehood, especially on the eve of the proposed Sequoyah statehood.

### III. THE SEQUOYAH MOVEMENT IN CONTEXT

The Sequoyah movement was an attempt, initiated by tribal leaders,<sup>16</sup> to create a new state that would serve as the successor to the former governments of the Five Tribes.<sup>17</sup> The movement was never intended to create a confederation of Indian Nations<sup>18</sup> and it was not a covert or tactical attempt to preserve tribal laws and institutions under a different name. To the contrary, the new state would have produced an abrupt transition from tribal governance based on tribal law to a new state government

employers within the State of Oklahoma, giving them substantial political leverage.

15. The Five Tribes were saved from political extinction on paper, but they were still under conditions that left the Five Tribes, for many years, as functional “paper” governments. For instance, free elections to popularly elect tribal officials remained suspended under federal law, not to be “allowed” by the federal government until the passage of the Principal Chiefs Act of 1970. Pub. L. No. 91-495, 84 Stat. 1091 (1970). During the time from 1906–1970, the federal government appointed the principal chiefs of the Five Tribes, largely for the purpose of signing leases to tribal lands.

16. Although most tribal leaders and prominent citizens of the Five Tribes played an active role in the convention, support among elected officials was not unanimous. The Chickasaw Governor opposed the state movement as a matter of poor timing. In 1905, the Chickasaw allotment deeds had not yet issued and the Sequoyah convention, if successful, would create practical problems for carrying the allotment process into effect. If statehood came to fruition, the Chickasaw Governor preferred the Oklahoma one state option over the Sequoyah proposal. Douglas Johnston, *Muskogee Democrat* (July 29, 1905). The Chickasaw Nation was, however, represented at the convention by William H. Murray. Hegwood et al., *supra* n. 4, at 4.

17. A. Grant Evans, Mar. 30, 1907 (Vertical File, Oklahoma Historical Society).

When, in 1905, the Sequoyah Constitution was being made I was asked by some of the delegates to the Convention to suggest a seal; it occurred to me at once that the Sequoyah movement was an effort to make a legitimate successor of the government of the Five Tribes. These had all been carried on under Constitutions, and each Tribe had its own official seal. It struck me that as on our flag the states of the union are represented by stars with five points, it would be appropriate to represent the new State proposed by a five pointed star, made up of the emblems upon the seals of the Five Tribes. This star left considerable vacant space between the points, and thus it seemed appropriate to fill in with forty-five small stars, indicating that the new one was the forty-sixth state of the union. Surrounding the large star, between its two upper points was a half length figure of Sequoyah, the inventor of the Cherokee Alphabet, holding in his hand a tablet with some Cherokee words on it, meaning: “We are Brethren.” The half figure rested upon a cord twisted on a three-fold strand and meant to represent the colors of red, white, and black; indicating the three races occupying the new State. Surrounding the whole was a band with the words “Great Seal of the State of Sequoyah, 1905.” This design I sketched roughly and had it drawn in somewhat careful detail by a Mr. Sawyer, living in Muskogee, who has since died.

*Id.*

18. Rennard Strickland, *Sequoyah Statehood, the Oklahoma Centennial, and Sovereignty Envy: A Personal Narrative and a Public Proposal*, 30 Am. Ind. L. Rev. 365, 366–68 (2006) (agreeing that the proposal was not intended as a confederacy of tribes but as a state of the union).

that would be “an inseparable part of the Federal Union”<sup>19</sup> bound by “the Constitution of the United States.”<sup>20</sup> Tribal law would cease to exist and federal law would become the “Supreme Law of the land.”<sup>21</sup>

Fully aware of the devastating consequences that statehood would have on tribal autonomy and survival, the tribal leaders who proposed and advocated for Sequoyah statehood did so, only when it was apparent that other viable options had been foreclosed. By a previous Act of Congress,<sup>22</sup> the tribal governments of the Five Tribes were set to expire on March 4, 1906.<sup>23</sup> Tribal leaders were dealing with an inevitable doomsday, having previously exhausted lobbying and diplomatic efforts for continued tribal autonomy.<sup>24</sup>

In the fifteen years leading up to the Sequoyah convention, the U.S. Congress had passed legislation to allot tribal lands without tribal consent, and tribal governmental institutions had been crippled, if not abolished, by unilateral federal legislation.<sup>25</sup> At the same time, the United States executive branch had begun exercising control over tribal lands without tribal consent, despite the fact that the Five Tribes held fee title to the lands within their territories.<sup>26</sup> Tribal attempts to halt the continued onslaught of federal incursion into tribal property rights and internal tribal sovereignty were unsuccessful in light of the United States Supreme Court’s rejection of tribal challenges against federal incursion.<sup>27</sup>

Under immense pressure, each of the Five Tribes eventually entered into agreements with the United States for the allotment of tribal lands, with the understanding that if the tribes did not consent to allotment, all three branches of the federal government were aligned to force allotment without tribal input. The tribal “agreements” were approved by majority votes of the tribal citizenry and subsequently memorialized in federal legislation. The legislation provided for the allotment of tribal

19. Sequoyah Const. art. I, § 31. The Sequoyah Constitution lacks any reference to continued tribal laws or tribal governance. In fact, the Five Tribes had agreed, and Congress had provided, that the tribal governments would not continue beyond March 4, 1906. Agreement with the Cherokee of July 1, 1902, § 63: “The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.” Pub. L. No. 57-241, § 63, 32 Stat. 716, 725 (1902) (also known as the Act of July 1, 1902). The Choctaws and Chickasaws agreed in 1898 that their tribal government would continue for eight more years until March 4, 1906. Atoka Agreement of April 23, 1897, Pub. L. No. 55-517, 30 Stat. 495, 505-13 (1898).

20. Sequoyah Const. art. I, § 31.

21. *Id.*

22. 32 Stat. at 716-27; 30 Stat. at 505-13.

23. Some of the Five Tribes had previously agreed to the March 4, 1906 deadline as a part of the allotment agreements. *Id.*

24. By this time, each of the tribes had entered into agreements with the United States for the allotment of their tribal lands. *See e.g.* 32 Stat. 716, ch. 1375; Act of June 28, 1898, 30 Stat. 716, ch. 517, § 11 (1898) (Choctaw Nation “Atoka” Agreement).

25. The Curtis Act of June 28, 1898, Pub. L. No. 55-517, 30 Stat. 495 (1898).

26. *Choctaw Nation v. Okla.*, 397 U.S. 620 (1970) (Arkansas River riverbed litigation discussion of land patents conveying fee title from the United States to tribes). *But see Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902) (classification of property rights as something less than fee on the grounds that the United States retained a reversionary interest should the tribes cease to exist).

27. *Lone Wolf*, 187 U.S. 553 (tribal challenge to allotment without tribal consent). *See also Cherokee Nation*, 187 U.S. 294 (failed attempt by Cherokee Nation to restrain the Secretary of Interior from leasing tribal lands without tribal consent); Symposium, *Lone Wolf v. Hitchcock, One Hundred Years Later*, 38 *Tulsa L. Rev.* 1 (2002).

land to individual tribal citizens, who became U.S. citizens, with dual tribal citizenship being phased out upon the termination of the tribal government on or before the March 4, 1906 deadline. Under these agreements, once the conveyance of allotment deeds from the tribe was finalized, it was presumed the tribal governments would have no further business to attend.<sup>28</sup>

As the March 4 deadline approached, most tribal leaders viewed the Sequoyah movement as the only viable option for the tribes to retain some political clout. If the tribes were going to become extinct and tribal citizens subjected to another system of laws, it was crucial that tribes become engaged in that political process that would shape that future.

Most commentators rightfully praise the tribal leaders for their resilience in initiating the Sequoyah movement, noting that these were true statesmen earnestly trying to do the best for their nations in light of dreadful circumstances. The pragmatic wisdom and leadership is to be commended, and the work product from the Sequoyah convention should be praised. For purposes of this article, however, I turn the attention away from defeat of the Sequoyah movement, toward a critical discussion of the future of tribal sovereignty had the Sequoyah movement been successful.

#### IV. THE "INEVITABLE" DATE THAT NEVER CAME TO PASS

Although the tribal leaders fully believed that March 4, 1906, would bring the final extinction of tribal political existence for the Five Tribes, Congress intervened prior to that date by passing legislation that continued the tribes' existence in perpetuity.<sup>29</sup> The legislation brought tribes back from the brink of extinction by revoking the March 4 deadline and stating the "Five Tribes shall continue in full force and effect."<sup>30</sup> This congressional action occurred after the defeat of the Sequoyah movement but before Oklahoma was admitted as the forty-sixth state. Therefore, the tribes' political fortunes had already begun to change for the better at the advent of Oklahoma statehood.

Although crippled by the impact of the allotment process and rebounding from the brink of political extinction, the Five Tribes began a process of slow recovery. The federal government has now re-recognized many of the inherent sovereign powers enjoyed by Oklahoma tribes on the eve of statehood. By the time of the recent Oklahoma centennial celebration, the Five Tribes had collectively become a formidable political power within the state and nationally.

In contrast to the tribal resurrection that followed Oklahoma statehood, this article, with the convenient luxury of 103 years of hindsight, considers what a successful Sequoyah statehood movement might have meant for the survival of the Five Tribes. By examining the Sequoyah Constitution, the federal laws that impacted tribal governance in the intervening century, and the evolution of modern tribal sovereignty, I conclude that the defeat of the Sequoyah movement was in fact a blessing for the tribes. The loss of the Sequoyah statehood movement led to an unforeseeable chain of events that

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28. 84 Stat. 1091.

29. Five Tribes Act, 34 Stat. 822 (1906).

30. *Id.*

actually preserved the political existence and sovereignty of tribal nations within Oklahoma. A successful Sequoyah statehood movement would have foreclosed the modern resurgence and present-day tribal stature.

At present, there are thirty-nine federally recognized tribes within the geographic boundaries of Oklahoma,<sup>31</sup> each maintaining a viable tribal government and exercising varying degrees of tribal sovereignty to the exclusion of state power. Despite the existence of Oklahoma, the Five Tribes today continue to operate within their own distinct territorial boundaries that have never been relinquished or disestablished. Each of these successes would have been foreclosed, had the tribal leaders been successful in their Sequoyah statehood advocacy.

#### V. THE STATE OF OKLAHOMA'S LEGAL IMPACT ON TRIBAL SOVEREIGNTY

Following the defeat of the Sequoyah movement, Oklahoma was admitted as the forty-sixth state of the federal union.<sup>32</sup> Oklahoma's inclusion into the United States by act of Congress was a unilateral abrogation of at least one treaty guarantee from the United States to the Five Tribes: That the tribal nations would never be a part of a State.<sup>33</sup> Although Oklahoma statehood meant that the Five Tribes would be physically and geographically included within the boundaries of the state, Oklahoma was admitted into the federal union on the condition that rights of Indian persons and property remain unimpaired,<sup>34</sup> thus leaving the Five Tribes on the legal periphery of Oklahoma.

Two important provisions of federal and Oklahoma state law serve as clear disclaimers against an intrusion into tribal sovereignty by Oklahoma's admission as a state. The federal legislation providing for Oklahoma statehood provides:

Nothing contained in said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories . . . or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which would be competent to make if this Act had never passed.<sup>35</sup>

The federal legislation preserves the on-going primacy of federal law over Indian affairs, to the exclusion of the new state. Oklahoma is admitted on the express condition that statehood would have no impact on preexisting treaty rights and that the federal-tribal relationship would continue as if no state had come into being.

The Oklahoma Constitution further confirmed that the rights of individual Indians and tribal nations were preserved post-statehood, and that the United States preemption

31. The updated list of federally recognized tribes is available at 73 Fed. Reg. 66 (Apr. 4, 2008).

32. Oklahoma Statehood Act of June 16, 1906, Pub. L. No. 59-234, 34 Stat. 267 (1906).

33. Article 4 of the Choctaw Treaty of Dancing Rabbit Creek guarantees that "no part of the land granted [to the tribe] shall ever be embraced in any Territory or State." *Treaty with the Choctaws* (Sept. 27, 1830), 7 Stat. 333, 333-34. See also *Choctaw Nation*, 397 U.S. at 627. Other tribes had similar provisions guaranteeing that no future state would encompass their territory. *Treaty of New Echota* (Dec. 29, 1835), 7 Stat. 478. Similar guarantees were made to the Creek and Seminole tribes when it was guaranteed that the tribes would have full jurisdiction inside their territorial boundaries. *Treaty with Creeks and Seminoles* (Aug. 7, 1856), 11 Stat. 699.

34. 34 Stat. at 267-78.

in Indian affairs continued:

The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.<sup>36</sup>

The state constitutional language, coupled with the federal legislation authorizing statehood, failed to terminate the political existence of the tribes in Oklahoma. In fact, the provisions expressly preserved both a tribal and federal presence that Oklahoma could not deny.

The Five Tribes, although crippled by allotment, officially continued as tribal governments by narrowly avoiding their scheduled termination date of March 4, 1906.<sup>37</sup> Federal legislation approving Oklahoma statehood came less than ninety days later,<sup>38</sup> and Oklahoma statehood became effective in November 1907. Statehood did not terminate or otherwise alter the rights of the Five Tribes.<sup>39</sup> Statehood merely provided a new political adversary for the Five Tribes to serve as an obstacle as they began their slow recovery, and eventual reorganization.

One of the most substantial obstacles the Five Tribes had to overcome, and are still addressing today, is the ill-conceived perception of the Oklahoma leaders and the general public. Although lacking in legal authority, Oklahoma leaders presumed that the governments of the Five Tribes went out of existence with the advent of Oklahoma and that the reservation boundaries failed to survive statehood. Although this viewpoint is inconsistent with the Oklahoma disclaimer clauses, and multiple court cases,<sup>40</sup> it is well-rooted in Oklahoma folklore and is still a widely held assumption today.<sup>41</sup>

In fact, when Oklahoma had a window of opportunity in the 1950s to extend state law into Indian country through federal legislation known as Public Law 280,<sup>42</sup> Oklahoma failed to take advantage of the federal legislation based on the misconception

36. Okla. Const. art. I, § 3.

37. Five Tribes Act of April 26, 1906, Pub. L. No. 59-129, 34 Stat. 137 (1906). *See also supra* n. 15 and accompanying text.

38. *See* 34 Stat. 267 (Oklahoma Statehood Act).

39. For additional historical discussion, see Dennis W. Arrow, *Oklahoma Tribal Courts: A Prologue, the First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 Okla. City U. L. Rev. 5, 15–17 (1994); F. Browning Pipestem & G. William Rice, *The Mythology of the Oklahoma Indians: A Survey of the Legal Status of Indian Tribes in Oklahoma*, 6 Am. Indian L. Rev. 259 (1978).

40. Courts have clarified that neither the existence of a state nor the allotment of tribal lands necessarily leads to the disestablishment of reservation boundaries. To the contrary, there must be a clear intention of Congress to disestablish reservation boundaries, regardless of the land tenure structure inside those boundaries. *DeCoteau v. Dist. Co. Ct. of the Tenth Jud. Dist.*, 420 U.S. 425, 443 (1975). *See also Seymour v. Superintendent of Wash. St. Penitentiary*, 385 U.S. 351 (1962); *U.S. v. Celestine*, 215 U.S. 278, 285 (1909).

41. In all fairness, the presumption that there are no reservation boundaries in Oklahoma still persists, not just among Oklahoma leaders and the general public, but even among some tribal officials. *See* Kirke Kickingbird, "Way Down Yonder in the Indian Nations, Rode My Pony Cross the Reservation!" from "Oklahoma Hills" by Woody Guthrie, 29 Tulsa L.J. 303, 304 (1993).

42. Pub. L. No. 83-280, 67 Stat. 588 (1953). This federal law was passed during a time when the federal policy favored the eventual termination of tribal jurisdiction and political existence. The law allows for the extension of state civil and criminal jurisdiction within Indian country. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535, 540–45 (1975).



that Oklahoma had already obtained full jurisdictional powers everywhere within the state.<sup>43</sup>

With the reorganization of the Five Tribes' governments in the modern era, federal courts have continued to uphold the inherent rights of the Five Tribes, not just to exist despite Oklahoma statehood, but to exercise authority to the exclusion of state interference. Tribes have won several legal battles against Oklahoma's assertions that Oklahoma is somehow different than other states, having broader powers inside Indian country. Tribes have been successful in conflicts with the State of Oklahoma with respect to tribal property rights,<sup>44</sup> state and tribal taxation authority,<sup>45</sup> and in the exercise of tribal police powers to the exclusion of state criminal jurisdiction.<sup>46</sup>

In short, the legal impact on tribes of Oklahoma statehood alone, is minimal. Cyclical changes in federal policy have had both positive and negative consequences for Oklahoma tribes over the last century. At times, negative federal policy has impacted Oklahoma tribes at the urging of Oklahoma leaders.<sup>47</sup> However, it is not inconsequential that Oklahoma leaders continue to petition Congress when they see their interests collide with tribal interests. If there are troubled days ahead for Oklahoma tribes, it will be because Congress takes action to deprive tribal sovereignty. Oklahoma laws, or the existence of Oklahoma as a state, did not, and cannot, lead to tribal termination.

#### VI. THE STATE OF SEQUOYAH'S LEGAL IMPACT ON TRIBAL SOVEREIGNTY

In contrast to the Five Tribes' continued existence within the new State of Oklahoma, a successful Sequoyah statehood movement would not have bode well for the continued existence of the Five Tribes. The leaders of the Five Tribes, presuming a March 4, 1906, termination of tribal governments, lobbied Congress for statehood in late 1905 and early 1906 on the belief that Sequoyah would be the successor to the tribal governments. The nature of their lobbying left no room for a dual existence between the new state and the tribes.

Had Sequoyah been admitted to the union, there would be no grounds for criticism that statehood constituted a unilateral treaty abrogation by the United States. Unilateral treaty abrogation presumes that the offending sovereign is acting over the protest of the prejudiced sovereign. In the Sequoyah movement, most of the tribal leaders and the majority of tribal legislatures, played active roles in the initiation and formation of the statehood movement. The tribal advocacy to Congress, urging the admission of

43. See Kickingbird, *supra* n. 41, at 330-31 (noting that the Oklahoma governor assumed that tribes merged with Oklahoma at the time of statehood).

44. *Choctaw Nation*, 397 U.S. 620 (tribes retain ownership interest in Arkansas River bedlands despite Oklahoma statehood); *Indian Country U.S.A. v. Okla. Tax Commn.*, 829 F.2d 967 (10th Cir. 1987) (tribal property survived Oklahoma statehood and continued under tribal control despite fee status of land).

45. *Okla. Tax Commn. v. Sac & Fox Nation*, 508 U.S. 114 (1993); *Okla. Tax Commn. v. Citizen Band Potawatomi*, 498 U.S. 505 (1991); *Okla. Tax Commn. v. Chickasaw Nation*, 515 U.S. 450 (1990) (limiting state taxation of tribal member income for off-reservation residences).

46. *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990).

47. For example, Oklahoma legislators have been successful in obtaining federal legislation that limits the rights of Oklahoma tribes, as compared to tribes in other states. For instance, Oklahoma congressmen were successful in advancing federal legislation that deprives Oklahoma tribes the opportunity to be approved for

Sequoyah, would have been deemed consent to treaty abrogation. It could also be argued that the tribe's participation in a successful Sequoyah movement constituted bilateral treaty abrogation.

Unlike the federal legislation and state constitution that governed Oklahoma's admittance into the United States, the Sequoyah Constitution fails to disclaim any negative impact on tribal rights. To the contrary, the Sequoyah Constitution, by its own terms, leaves no room for on-going tribal existence, within the new state.

Treaty rights are hardly mentioned in the voluminous document. The first reference to treaties is found in the preamble: "Invoking the blessing of Almighty God and reposing faith in the Constitution and Treaty obligations of the United States, we, the people of the State of Sequoyah, do ordain and establish this Constitution."<sup>48</sup> This preamble mentions treaty obligations, not as an argument for the continued existence of tribal governments, but as federal law, that should afford the United States citizens of Sequoyah the same rights to form a government and petition for inclusion in the United States as other citizens of the United States.

The only other references to treaties in the Sequoyah Constitution appear for the purpose of recognizing that federal law will continue to exempt the properties of some individual Indians from state taxes,<sup>49</sup> but only until those lands become freely alienable.<sup>50</sup> Treaties are never mentioned in the Sequoyah Constitution as a collective tribal right. Treaties are only referenced for the purpose of individual Indian properties that would continue under federal oversight on a temporary basis only. The Oklahoma Constitution, on the other hand, specifically mentions Indian tribes or nations as entities with on-going existences.<sup>51</sup>

A common theme that permeates the Sequoyah Constitution, that is inconsistent with the continued existence of tribal governments and the on-going application of tribal laws within the state, is the supremacy of federal law. The Sequoyah Constitution notes that the new state would become an "inseparable part of the Federal Union, and the Constitution of the United States is the Supreme Law of the Land."<sup>52</sup>

The oaths of office that will be taken by the newly elected leaders pledge the supremacy of the United States Constitution and the laws of the State of Sequoyah with no reference to tribes or treaties.<sup>53</sup>

The provision within the Sequoyah Constitution that could best be argued as a disclaimer clause, preserving the rights of tribes and individual Indians, follows:

The provisions of this Constitution are *not intended to conflict with*, nor shall they ever be construed as conflicting with, *the Constitution of the United States, or with any right, or privilege, as to person or property, enjoyed or secured to any Indians or to the citizens of the Five Civilized Tribes, or their descendants, or to citizens of the Quapaw Agency, by any law or existing treaty between the United States and said Indians or tribes of Indians,*

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48. Sequoyah Const. preamble.

49. *Id.* at art. XIII, §§ 1, 3.

50. *Id.* at art. XIII, § 22.

51. Okla. Const. art I, § 3.

52. Sequoyah Const. art. I, § 31.

53. *Id.* at art. VI, § 7.

and particularly as to homesteads, exemptions, and taxation.<sup>54</sup>

This provision, read in isolation, appears to rival the disclaimer clause of the Oklahoma Constitution. On more careful examination, compared with the Oklahoma disclaimer clause, the Sequoyah Constitution falls short.

The Sequoyah Constitution lacks a disclaimer that lasts “forever” and merely mentions that the Sequoyah Constitution is not meant to conflict with preexisting property rights of individuals. The Sequoyah Constitution limits the discussion to rights and privileges “as to person or property,” making particular mention of lands for homesteading and taxation purposes. The Sequoyah Constitution does not mention lands that would continue to be held by tribal nations, nor does it mention a continued federal presence or federal jurisdiction in Indian country.

The Oklahoma Constitution’s disclaimer, by comparison, is a permanent disclaimer that mentions continuing rights of tribal nations, not just individuals.

The people inhabiting the [State of Oklahoma] do agree and declare that they *forever disclaim all right and title* in or to any unappropriated public lands lying within the boundaries thereof, and to *all lands* lying within said limits *owned or held by any Indian, tribe, or nation*; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States.<sup>55</sup>

The remaining provisions of the Sequoyah Constitution resolve any doubt as to a continuing existence of tribal governments. The terms of the Sequoyah Constitution provide for a transfer of power from the tribes to the new state. First, the Sequoyah Constitution includes a schedule for transition from the “present governments in force in Indian Territory” to the new state.<sup>56</sup> The governments in force on the eve of adoption of the Sequoyah Constitution were the Five Tribes and territorial federal officials exercising federal jurisdiction pursuant to legislation passed in the late 1800s.

The Sequoyah Constitution provided that laws that were in force at the time the Sequoyah convention concluded would remain in effect until they expire.<sup>57</sup> If this provision is referencing tribal governments and tribal laws, it appears to be contemplating the March 4, 1906, termination of the Five Tribes as a matter of course in the Sequoyah Constitution. In the event that Sequoyah not be ratified or admitted into the federal union, the constitution provides for a default back to the agreements with the Five Tribes.<sup>58</sup> If the Sequoyah movement proved successful, however, the only valid government officials would be state officers.<sup>59</sup> The remaining transitional provisions in the Sequoyah Constitution provide for the actual transfer of tribal cases to newly created state courts,<sup>60</sup> leaving no room for the existence of multiple sovereigns within the new

54. *Id.* at art. XVI, § 17 (emphasis added).

55. Okla. Const. art. I, § 3 (emphasis added).

56. Sequoyah Const. art. XVIII, § 1.

57. *Id.* at art. XVIII, § 3.

58. *Id.* at art. XVIII, § 5.

59. *Id.*

state.<sup>61</sup>

## VII. CONCLUSION

Given the fact that the Sequoyah Constitution made such detailed provisions for the transfer of power from the tribes to the new state, it is inconceivable that the tribal leaders expected a continued dual political existence. They fully expected the complete eradication of their tribal governments and in fact, petitioned Congress to facilitate the final transition from tribal to state governance. If lobbying efforts had been successful, it is doubtful that a tribal resurgence could have followed. Unlike the Oklahoma model which conditioned statehood on surviving tribal rights, the State of Sequoyah would have come into the union on the understanding that the Five Tribes would no longer exist as political entities. The only surviving tribal rights in the State of Sequoyah would have been individual Indian property rights with temporary restrictions against alienation.

It is likely that a successful Sequoyah movement would have had negative impacts on the future of other tribal governments as well. The allotment and assimilation policies of the federal government<sup>62</sup> were premised on the idea that Indians could be successfully brought within the mainstream, as full citizens of the United States, leaving no need for a continued tribal existence.<sup>63</sup> A primary tool of “civilization” was the allotment process, where tribal land bases would be divided and parceled out to individual Indians, who would then become agriculturalists and tribal governments would cease to exist.

A Sequoyah movement would have provided a perfect example for the perceived wisdom of the allotment and assimilation policies. There would be a success story to demonstrate that tribal governments could be terminated and that former tribal citizens could become citizens of the United States, fully participating in American democracy. Such a story would have certainly impacted federal Indian policy, making it harder for

61. The pragmatic wisdom and leadership is to be commended, and the work product from the Sequoyah convention should be praised. The Sequoyah Constitution is a well drafted populist document that, compared to the surrounding governing documents, protects individual rights with skepticism against corporations and big government. Among the interesting provisions concerning individual rights in the Sequoyah Constitution: (1) The protection of the right to bear arms for the purposes of a militia for the common defense, but not the right to concealed weapons, Sequoyah Const. art. I, § 21; (2) An express prohibition against slavery within the state, *id.* at art. I, § 26, a provision that is not found in other proposed constitutions of the time; and (3) An express policy of separate but equal funding for schools for children of African descent, *id.* at art. VII, § 4.

With respect to voting rights, although not initially extended to males serving in the military, *id.* at art. VI, § 1, or females in general, the issue of female suffrage was constitutionally mandated to be taken up in the first legislative session, *id.* at art. V, § 3. This was progressive for the times and likely reflected the tradition among some tribes to afford women more rights than their counterparts in other jurisdictions. The constitution also provided for the individual right of women to own and convey property without the consent of their spouse. Sequoyah Const. art XVI, § 6.

With respect to property rights, the Sequoyah Constitution has a narrow view of state eminent domain powers. *Id.* at art. I, §§ 22–23. No private property can be taken for private use without the consent of the owner, and there is a constitutionally mandated requirement of a public use finding prior to the exercise of eminent domain. *Id.*

Children’s rights and public education were priorities in the Sequoyah Constitution. Education was to be partially funded by imposition of a poll tax. *Id.* at art. VII, § 3. Child labor laws are found in two separate provisions, placing age and hour restrictions on child labor. *Id.* at art. VIII, § 9, XVI § 11.

62. General Allotment Act of 1887, 24 Stat. 388, ch. 119 (codified at 25 U.S.C. §§ 331–381 (1887)); Felix S. Cohen, *Handbook of Federal Indian Law* 84 (Nell Newton ed., Lexis 2005).

other tribes to demand recognition of continued tribal autonomy.

In the end, the demographics of the State of Sequoyah would have likely mirrored present day Oklahoma, leaving former tribal citizens in a weak political position. Today, American Indians represent only eleven percent of the state's total population.<sup>64</sup> If Indians in Oklahoma exercised only the political rights of individual citizens within the state, they would have very little political power and they would have been relegated to a minority group,<sup>65</sup> both in terms of racial classification and as a voting block in state elections. Instead, current citizens of the Five Tribes today exercise the privileges of dual citizenship and have the opportunity to participate in state and federal elections, in addition to tribal participation. Because of the continued existence of tribal governments, the current political influence of Indians inside the state far exceeds the power of a minority voting block. Tribal political strength, however, would have been a relic of the past, in the State of Sequoyah.

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64. U.S. Census Bureau, *Facts for Features*, <http://www.census.gov/Press-Release/www/2001/cb01fff15.html> (Oct. 22, 2001).

65. Tribal citizens have a special legal and political status based on their ties to tribal governments that goes beyond a minority group status. See *Morton v. Mancari*, 417 U.S. 535 (1974). This political status is, however, premised on federal recognition of the tribal government. Where federal recognition ceases to exist, as it would have following a successful Sequoyah movement, non-Caucasian former tribal citizens would be considered members of a minority class only. See *Arce v. Cuero*, 528 U.S. 495 (2000).