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The Cherokee Tribal Court: Its Origins and Its Place in the American Judicial System

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The Cherokee Tribal Court: Its Origins and Its Place in the American Judicial System

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I. INTRODUCTION

The history of the Cherokee judicial system harkens back to centuries of history and tradition, but in ways that may be foreign to readers. Before the adoption of various tribal statutes and a constitution in the early decades of the 1800s, the Cherokee legal system adjudicated disputes through the clan system.[1] Clans were "asked to decide on causation, to offer forgiveness, or to accept compensation."[2] The seven Cherokee clans maintained the fabric of Cherokee society, and it "was from the strength of the clans that Cherokee laws received their force and energy."[3] It appears the primary goal of Cherokee law was harmony.[4] That constant desire for harmony "meant that many domestic injuries would be overlooked, forgiven, or mediated; the honorable man did not seek revenge, he sought harmony."[5] Thus, punishment in early Cherokee life has been described as "a loose form of ostracism."[6] "Public opinion backed by fear of shame and disgrace" was the manner in which laws were enforced in the Cherokee towns, which lacked any central authority or enforcement agencies.[7]

With the tribe confronted by the challenges of the new United States government and its policies, the Cherokee developed a court system. Due to these events, the Cherokee adopted a constitution in 1827, and with that adoption the Cherokee established a more formal court system modelled directly on the American framework.[8] Soon thereafter, however, the Cherokee were removed to the west with the passage and ratification of the Indian Removal Act of 1830.[9] The history behind how the Cherokee court system came to be is a fascinating story worth telling, and it is a history that must be appreciated by practitioners litigating in western North Carolina. The first part of this Article will explore that history, and the second part will explain the doctrine of tribal court exhaustion that has resulted from that history.

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1. JOHN PHILLIP REID, A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION 233 (2006).

2. *Id.*

3. *Id.* at 234.

4. *Id.* at 236.

5. *Id.*

6. *See* Fred Gearing, *Priests and Warriors: Social Structures for Cherokee Politics in the 18th Century*, 64 no. 5 pt. 2 AM. ANTHROPOLOGIST 109 (1962).

7. REID, *supra* note 1, at 244.

8. *See Laws of the Cherokee Nation: Adopted by the Council at Various Periods* 118–30 (1852), https://www.loc.gov/law/help/american-indian-consts/PDF/28014183.pdf [https://perma.cc/7W5R-C2F3] [hereinafter *Laws of the Cherokee Nation*].

9. Indian Removal Act, 4 Stat. 411 (1830).

II. THE CHEROKEE COURT

A. The Cherokee Court Established in 1820

In its effort to remain in the Southeastern United States and avoid the loss of its lands and forcible removal to the west, the Cherokee tribe organized its government and court system on the United States' three-branch political structure. The first Cherokee tribal court, created under the new judicial branch, was established on October 20, 1820, to convene "councils to administer justice in all causes and complaints that may be brought forward for trial."[10] That same year, the Cherokee court heard its first case in November of 1820.[11] "All in all, the Cherokee Supreme Court heard 237 cases from 1823 to 1835, 213 civil matters and twenty-four criminal ones."[12] On July 26, 1827, the Cherokee tribe created a constitution which not only organized the Cherokee government and provided for individual rights, but also created a separate and independent judicial branch.[13] Article V of the Cherokee Constitution established a Supreme Court and lesser trial courts, thereby creating an independent, co-equal judicial branch of government.[14]

In the 1820s and 1830s, "[t]he original Cherokee Supreme Court was a symbol of idealism, relevance, and defiance."[15] The Cherokee courts were accepted by many citizens and even some government agents while other states and their political leaders contemporaneously took a hostile view of the Cherokee government.[16] One example that illustrates recognition of the Cherokee court system is when the United States, through its agents,

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10. *Laws of the Cherokee Nation*, *supra*, note 8 at 11.

11. J. Matthew Martin, *Chief Justice Martin and the Origins of Westernized Tribal Jurisprudence*, 4 ELON L. REV. 31, 37 (2012) [hereinafter *Chief Justice Martin*] (citing John Louis Dickson, The Judicial History of the Cherokee Nation from 1721 to 1835 (1964) (unpublished Ph.D. dissertation, University of Oklahoma)).

12. *Id.* at 39.

13. *See Laws of the Cherokee Nation*, *supra* note 8, at 118–30.

14. *See id.* at 126.

15. *Chief Justice Martin*, *supra* note 11, at 52.

16. *See* George Gilmer, *Correspondence between the Gov. of Georgia and the Sec. of War*, CHEROKEE PHOENIX & INDIANS' ADVOCATE (New Echota), Oct. 22, 1831. ("Meetings of the Indian people have been called in most of their towns, at which their chiefs have used these [Supreme Court] opinions to convince them that their rights of self-government and soil were independent of the United States and Georgia, and would be secured to them through the Supreme Court, and the change (which they represent to be certain) in the administration of the General Government.") (sharing his disapproval of the Cherokee legal system).

appeared before the tribal courts in 1829, thereby submitting the United States to the jurisdiction of the Cherokee tribe.[17]

The Cherokee court system from 1823 to 1835 was a valid and honorable court system accepted by the United States, even if the individual states felt otherwise.[18] Recognition of the Cherokees' forward thinking and establishment of a legal system dependent upon the rule of law is found even earlier in the Cherokee Nation Treaty of Hopewell from the late 1700s.[19] The progressive attitude adopted by the Cherokee has been described by one scholar as follows:

> [T]he Cherokees seem to have possessed to a larger degree than any other important Indian nation—an ability to accept new law and forget old ways. During the early decades of the nineteenth century, they would discard all their primitive customs, turn their back on their legal past, create a new judicial system borrowed almost entirely from their American neighbors, and do so with a success that would make them both the leaders and the envy of their fellow Indians.[20]

Forward thinking and a willingness to change and acculturate proved to be inadequate. The politics of the day, and an insatiable desire for land, would result in the treaty of New Echota and the removal of the Cherokee to Oklahoma. The Trail of Tears ended the Cherokee court in the Southeastern states. The Cherokee Tribal Court would rest dormant for the next 165 years until the Eastern Band of Cherokee Indians would re-establish a Cherokee tribal court. Before discussing the Cherokee court of today,

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17. *See* J. Matthew Martin, *The Nature and Extent of the Exercise of Criminal Jurisdiction by the Cherokee Supreme Court: 1823–1835*, 32 N.C. CENT. L. REV. 27, 57–59 (2009) [hereinafter *Exercise of Criminal Jurisdiction*] ("[The case of Thomas Ligon, occurring on April 11, 1829,] and the set of documents which memorialize it, demonstrate that the Federal government was willing to use the resources of the Tribal Courts, including the services of two Judges of the Cherokee Supreme Court, to further the interests of the United States.").

18. *See Exercise of Criminal Jurisdiction*, *supra* note 17, at 59 ("On the frontier, access to the Courts of the United States might involve a journey of days or even weeks. That agents of the United States government would seek out respectable Cherokee Judges for assistance in an urgent situation reflects the pragmatism of the frontier. But it reflects something else, too. This reaching out also underscores that, to the Indian Agent, the Cherokee Court system was recognized as honorable and trustworthy. It also appears that its jurisdiction was satisfactory to the United States. If it were not, the Agents would doubtless have turned elsewhere.").

19. *See* Matthew L.M. Fletcher, *A Perfect Copy: Indian Culture and Tribal Law*, 2 YELLOW MED. REV. 95, 103 (2007) [hereinafter *A Perfect Copy*] ("The Cherokee Nation long has had a tribal court system from the Treaty of Hopewell period from the late 1700s to the Removal era, and then again from the early 1840s until the United States terminated the Nation.").

20. REID, *supra* note 1, at 272.

however, we must learn how the courts of the Eastern Band of Cherokee Indians functioned between 1835 and 1999 in North Carolina.

B. Courts of Indian Offenses in Indian Country

The remnants of the Cherokees who stayed behind in western North Carolina formed what later became known as the Eastern Band of Cherokee Indians; the federal government recognized the North Carolina Cherokees as an Indian tribe in 1924.[21] The Eastern Cherokee worked closely with local law enforcement and cooperated with state prosecutions of crimes that occurred on the Cherokee tribe's lands.[22] The concepts of a modern court, based upon the three-branch federal system, continued to find acceptance with the majority of the Cherokee people. This is understandable because for 100 years there was an ongoing question of whether the Cherokee who remained in the state were a separate Indian tribe, and thus non-citizens, or citizens of North Carolina. The Cherokee who refused to relocate to Oklahoma under the Treaty of New Echota faced a nearly insurmountable task. While the historical reasons are numerous and complex, being a Cherokee in North Carolina after 1838 meant there were no tribal lands for tribal members, and without a tribe there was no tribal court. Navigating this existence was a difficult experience, made more challenging with the destruction brought by the Civil War in the 1860s.

Following the Civil War, renewed questions about the legal status of the Cherokee in North Carolina arose.[23] Adding to these external events wrought with confusion was the additional uncertainty pertaining to the legal title of most Cherokee lands, which at that time were titled in the name of William Holland Thomas.[24] When, after the Civil War, Colonel Thomas became mentally ill and was committed to a mental asylum; ownership and title questions to these same Indian lands abounded with no forthcoming answer.[25] History and circumstances of simple survival may, in the end,

21. *See* Act Providing for the final disposition of the affairs of the Eastern Band of Cherokee Indians of North Carolina, ch. 253, 43 Stat. 376 (1924), *repealed by* Pub. L. 106-462, title I, § 106(a)(1), 114 Stat. 2007 (2000).

22. *See* Articles of a treaty, concluded at New Echota in the State of Georgia on the 29th day of Decr. 1835 by General William Carroll and John F. Schermerhorn commissioners on the part of the United States and the Chiefs Head Men and People of the Cherokee tribe of Indians, Art. XII, Cherokee-U.S., Dec. 29, 1835, 7 Stat. 478 [hereinafter Treaty at New Echota].

23. *See* United States v. Wright, 53 F.2d 300 (4th Cir. 1931).

24. *See* E. STANLEY GODBOLD, JR. & MATTIE U. RUSSELL, CONFEDERATE COLONEL AND CHEROKEE CHIEF: THE LIFE OF WILLIAM HOLLAND THOMAS 138, 138–39 (1990).

25. *See id.*

explain why the Eastern Band of Cherokee were so adaptable to new legal institutions and the doctrines upon which they rested.

The first organized court of the Eastern Band of Cherokee Indians, after their removal, was the Cherokee CFR court, which came into existence on July 28, 1980.[26] However, before discussing that court, it is important to understand the story behind the Courts of Indian Offenses that were popping up throughout the rest of the country nearly a century prior.

In 1849, Congress moved the Bureau of Indian Affairs (BIA) into the newly created Department of the Interior as one of its founding agencies.[27] From the new Department of the Interior arose the Court of Indian Offenses. The creator of the Courts of Indian Offenses was Henry Moore Teller,[28] a former Colorado Senator. Prior to the establishment of these courts, which brought an adversarial court system based upon the English-American adversarial model, the tribes primarily used their own internal laws and customs for dispute resolution. Teller advised Hiram Price, the Commissioner of Indian Affairs, that there existed a "great hindrance to the civilization of the Indians" if they continued to use custom and tribal ceremonies.[29] Teller also observed that if these native customs, practices, and rituals continued, "it [would] be extremely difficult to accomplish much towards the civilization of the Indians while these adverse influences are allowed to exist."[30] Teller created these administrative courts to assuage his concern that "civilization and savagery cannot dwell together."[31] Therefore, the stated purpose of the Courts of Indian Offenses was to "accomplish the ultimate abolishment of the evil practices" by Indians and tribes.[32] To achieve that purpose, these courts would create a unique set of rules, which would apply throughout all of these courts in Indian country.[33] These new rules were approved by Secretary Teller on April 10, 1883, and the Court of Indian Offenses was established with both criminal and civil codes and accompanying rules of procedure under the Code of Federal Regulations

26. *See* Wildcatt v. Smith, 316 S.E.2d 870, 871 n.1 (N.C. Ct. App. 1984).

27. *See* Act of Mar. 3, 1849, 9 Stat. 395 (codified as 43 U.S.C. § 1451).

28. *See* WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL 107 (William H. Goetzmann et al. eds., 1966).

29. FRANCIS P. PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 159 (Francis P. Prucha ed., 3d ed. 2000); *see also* HAGAN, *supra* note 28, at 107–08.

30. *See* PRUCHA, *supra* note 29, at 160; *see also* HAGAN *supra* note 28, at 108–09.

31. REPORT OF THE SECRETARY OF THE INTERIOR, H.R. EX. DOC. NO. 48-1, pt. 5, at III (1883).

32. HAGAN, *supra* note 28, at 109.

33. *See id.*

("CFR").[34] Under the CFR, federal officials have continued to modify, amend, and supplement these same rules and regulations of the CFR courts since 1883.

The CFR courts functioned as the adjudicative body on tribal lands from 1883 onwards. The judge of the courts was appointed by the federal Indian Agent for that particular tribe.[35] These Indian Agents, located on each reservation, undertook the task of criminalizing cultural practices, dances, certain actions of tribal governments, and ceremonies deemed unacceptable.[36] Soon after the CFR courts were established, a case was brought seeking to ascertain the legality of the Courts of Indian Offenses. The United States federal courts found the CFR Courts lawful in *United States v. Clapox*.[37] The *Clapox* Court, bending to then-existing Indian policy and using eerily similar language as that used by Secretary Teller to create the Courts of Indian Offenses in the first instance, ruled that the Department of Interior possessed the authority to establish CFR courts.[38] The Court stated:

> "[C]ourts of Indian offenses" are not the constitutional courts . . . but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes . . . . for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.[39]

Examples of punishments in 1892, as provided by the rules of the Courts of Indian Offenses, included "up to five days' imprisonment for failure to do road work and up to six months for medicine men convicted a second time of interfering with the civilization programs."[40] While these CFR courts claimed to be forums to adjudicate disputes, their true insidious purpose was to destroy Indian cultural practices such as dancing, self-governance, consultation with medicine people, and the very fabric of the cohesive bond

34. *See id.*; Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 335–43 (2013). *See generally* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 175 (1994) (explaining the Court of Indian Offenses was established using the Code of Federal Regulations and for this reason these courts are commonly referred to as "CFR Courts"); MATTHEW FLETCHER, AMERICAN INDIAN TRIBAL LAW 68 (Vicki Been et al. eds., 2011); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 70 (West Academic ed., 5th ed. 2009).

35. Creel, *supra* note 34, at 340.

36. *See id.*

37. United States v. Clapox, 35 F. 575, 577 (D. Or. 1888).

38. *See id.*; HAGAN, *supra* note 28, at 148.

39. *Clapox*, 35 F. at 577.

40. HAGAN, *supra* note 28, at 120.

found among members of an Indian tribe.[41] The laws developed and enforced in the Courts of Indian Offenses provide "an excellent illustration of how the government hoped to use the power inherent in the Indian police and Courts of Indian Offenses to coerce acculturation."[42]

Soon, however, the policy of the United States changed. "The decline in importance of Indian courts and Indian police stemmed directly from the impact of the Dawes Act of 1887."[43] With the desire to terminate tribes and distribute all of their lands, the need to develop and operate CFR courts correspondingly diminished. Other reasons causing the decline in Courts of Indian Offenses in the late 1800s were expanding federal court jurisdiction on Indian lands following passage of the Major Crimes Act,[44] upholding the Major Crimes Act as a lawful exercise of Congressional authority over Indians and Indian tribes;[45] and increasing the number of states admitted to the Union.[46]

Over time, the Courts of Indian Offenses became "fixtures" in tribal communities.[47] However, at the time of their creation, the Courts of Indian Offenses were only established where they were considered to be practical and desirable; this excluded the Five Civilized Tribes, the Indians of New York, the Osage, the Pueblos, and the Eastern Cherokees.[48] These tribes were excluded because each had recognized tribal governments and were capable of handling the issues of law enforcement through their own governmental systems.[49] Thus, Cherokee, North Carolina, never established a Court of Indian Offenses despite federal Indian policy in the 1880s. One explanation for the decision to not create a CFR court in Cherokee at that time may primarily be attributed to the fact that North Carolina, due to the continuing and unresolved issue of citizenship of Cherokee tribal members, was prosecuting tribal members in its state courts for crimes which occurred on Cherokee tribal lands.[50]

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41. *See id.* at 104–25.

42. *Id.* at 120.

43. *Id.* at 141.

44. *See* 18 U.S.C. § 1153 (2018).

45. *See* United States v. Kagama, 118 U.S. 375, 385 (1886).

46. HAGAN, *supra* note 28, at 141–42 ("But the courts of these Indians had been diminishing in importance for several years as new federal courts had been established or the jurisdiction of courts in nearby states expanded.").

47. *Id.* at 149.

48. *Id.* at 109.

49. *See id.*

50. *See* State v. Ta-Cha-Na-Tah, 64 N.C. 614, 615 (1870) ("[A]ll persons within the State are subject to its criminal law and within the jurisdiction of its courts; if any exception

C. The Establishment of the CFR Court in Cherokee

As the United States reexamined the policies related to Indians and Tribes, Congress passed the Indian Reorganization Act of 1934 ("IRA") under President Franklin D. Roosevelt.[51] The IRA "was the culmination of the reform movement initiated in the 1920s."[52] Popular opinion and governmental policy in the 1930s underwent reexamination and sought to embrace and foster tribal sovereignty following the catastrophic results reaped under the Dawes Act of 1887.[53] If Tribes could create their own internal, self-sufficient governments and stabilize their land holdings, then it was hoped economic development and cultural preservation would take root and thrive.[54] Economic development would foster employment, and fight poverty, which had always been acute on reservations and was exacerbated during the dark days of the Great Depression. The IRA encouraged Tribes to create new constitutions for their governance.[55] The Cherokee tribe of North Carolina voted on December 21, 1934, to organize their tribe under the IRA, with 700 voting in support of the reorganization and 101 voting against it.[56] However, when the time came to vote and approve the new proposed IRA constitution in August 1935, the vote failed with a tally of 484 against adoption, and 382 for adoption.[57] Based upon these facts, the Eastern Band has never adopted an IRA constitution but rather has been initially governed by the 1897 North Carolina Act Related to the Charter of the Eastern Band of Cherokee Indians[58] and subsequently by the 1986 Charter and Governing Document of the Eastern Band of Cherokee Indians.[59] The Charter and Governing Document of 1986 continues in effect today and functions as the Eastern Cherokee Constitution.

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exists, it must be shown."); State v. Wolf, 59 S.E. 40, 42 (N.C. 1907) (asserting North Carolina criminal jurisdiction over offenses committed on Cherokee lands).

51. 25 U.S.C. §§ 5105–5144 (2018).

52. HAGAN, *supra* note 28, at 150–51.

53. General Allotment Act of 1887, Pub. L. No. 49-2, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. § 331 (repealed 2000)). *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1 (1995).

54. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04 at 254 (Nell Jessup Newton ed., 2012 & Supp. 2019) [hereinafter COHEN'S HANDBOOK].

55. *See* JOHN R. FINGER, CHEROKEE AMERICANS: THE EASTERN BAND OF CHEROKEES IN THE TWENTIETH CENTURY 90 (Purdue et al. eds., 1991).

56. *See* Charles J. Weeks, *The Eastern Cherokee and the New Deal*, 53 N.C. HIST. REV. 303, 312 (1976).

57. *See* FINGER, *supra* note 55, at 90.

58. 1896 N.C. Sess. Laws 418.

59. CHEROKEE, N.C., RES. NO. 132 (May 8, 1986).

Decades after the failed IRA Constitution vote of 1935, the Cherokee tribal government embarked upon a path to re-establish the Cherokee court following its destruction in 1835. With legislation promulgated by Cherokee Tribal Council in 1978, a Cherokee CFR court was created.[60] The language of this enacting legislation was as follows:

> Cherokee Council House
>
> Cherokee, North Carolina
>
> Resolution No. 200 1978
>
> Whereas, the United States Supreme Court in June of 1978 decided United States v. John, which ruled that federal courts had exclusive jurisdiction over Indians violating the Major Crimes Act within "Indian Country;" and
>
> Whereas, the North Carolina Attorney General and department of the Interior have ruled that the ruling of United States v. John was applicable to North Carolina and the Eastern Band of Cherokees; and
>
> Whereas, serious jurisdictional problems have arisen from the disclaimer of jurisdiction by the State of North Carolina, and the unavailability of federal law enforcement personnel for the Cherokee Indian Reservation; and
>
> Whereas, it is the opinion of Tribal officials that law enforcement responsibilities will have to be assumed by the Tribe; and
>
> Whereas, the proper enforcement of laws on the Reservation will require the establishment of a court system within the Reservation;
>
> NOW THEREFORE, BE IT RESOLVED, By the Tribal Council, in annual Council assembled, with a quorum present, that a CFR Court be established for and on the Cherokee Indian Reservation, and that the Superintendent of the Cherokee Agency be directed to formally request the creation of a CFR Court on the Cherokee Indian reservation from the Secretary of the Interior.[61]

Resolution 200 passed unanimously. The passage of Resolution 200 created the first court of the Eastern Band of Cherokee Indians in Cherokee, North Carolina. The exact political reasons that led to the establishment of the CFR court in 1978 have been lost to time. However, it can be fairly surmised from the language in the Resolution that the decision in *United States v. John* was the primary legal reason for creating a new court in Cherokee.[62]

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60. CHEROKEE, N.C., RES. NO. 200 (1978).

61. *Id.*

62. *See generally* David B. Sentelle & Melanie T. Morris, *Criminal Jurisdiction on the North Carolina Cherokee Indian Reservation—A Tangle of Race and History*, 24 WAKE FOREST L. REV. 335 (1989) (discussing criminal laws as they apply to crimes committed on

In *United States v. John*, the issue was about the status of the Choctaw reservation in Mississippi and whether the reservation was Indian country, which would determine whether the state courts had jurisdiction over the criminal charges brought against John.[63] The removal history of the Choctaw tribe in Mississippi was similar to that of the Eastern Cherokee in North Carolina.[64] The *John* court confronted the same question regarding the status of the Indian lands where, similar to the status of the Cherokees' land in North Carolina, a tribe was removed from their lands by treaty, but some tribal members remained.[65] Subsequently, those remnants of the Choctaw tribe were eventually, through administrative agency actions and court decisions, treated and recognized by the federal government as Indians residing on Indian lands.[66] The *John* Court held that the Choctaw lands in Mississippi were Indian country as defined by federal law, and as such, the Major Crimes Act[67] applied to crimes committed by the Choctaw on their lands.[68] The Cherokee tribe concluded that Cherokee lands in North Carolina were also Indian lands.[69] If Cherokee lands, applying the legal reasoning from the *John* decision, were Indian lands, then the State of North Carolina could no longer assert jurisdiction over tribal defendants.

The *John* decision was correct, and Cherokee governmental leadership understood the *John* opinion and how its legal reasoning applied to them. Moreover, it is equally important to note that the *John* opinion, authored by Justice Blackmun, specifically cited *United States v. Wright,* which in 1931 determined that the Eastern Band of Cherokee Indians was a federally recognized Indian tribe.[70] Thus, it follows from these decisions that the state courts of North Carolina would no longer have jurisdiction over crimes committed by Cherokee Indians on Cherokee lands.

From 1980 onwards, the CFR court heard cases and resolved matters that daily impacted the lives of Cherokee tribal members. While the CFR court was incredibly important and provided a forum for the resolution of disputes in a safe and dedicated judicial forum, the very nature of a CFR court had weaknesses. Primarily, a CFR court is a court of limited jurisdiction. A

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the Cherokee Reservation in North Carolina and how the *John* decision impacted prior precedent).

63. *See* United States v. John, 437 U.S. 634, 635 (1978).

64. *See, e.g.*, ARTHUR H. DEROSIER, JR., THE REMOVAL OF THE CHOCTAW INDIANS (1981).

65. *See John*, 437 U.S. at 638–47.

66. *See id.* at 653–54.

67. 18 U.S.C. § 1153 (2018).

68. *See John*, 437 U.S. at 649.

69. *See* CHEROKEE, N.C., RES. NO. 200 (1978).

70. *John*, 437 U.S. at 653 (*citing* United States v. Wright, 53 F.2d 300 (4th Cir. 1931)).

tribal court, conversely, is a court founded on the inherent sovereignty of a tribe. Soon, the Cherokee of North Carolina would address these shortcomings and embark upon an ambitious endeavor to create a Cherokee tribal court.

D. The Reestablishment of the Cherokee Tribal Court

Following the sad history of the Courts of Indian Offenses, Congress is now supportive of tribe-created tribal courts based upon their inherent tribal sovereignty.[71] Under the terms of the CFR, when a tribe establishes a tribal court by operation of law, it supersedes any existing CFR court.[72] That is what happened in Cherokee. In the late 1990s, with the increased visitors and accelerated involvement of the tribe in commerce that accompanied the introduction of casino gaming to Cherokee, the Eastern Band established a tribal court. Or maybe it is more accurate to say that the Cherokee Tribal Court was reestablished, if we remember that it first existed from 1820 to 1835.[73] Notwithstanding the unfathomable events that befell the Cherokee people in the 1830s, some 165 years later, the Eastern Band of Cherokee Indians emerged steadfastly proud and unrepentant, as manifested in the creation of the new Cherokee Tribal Court.

The modern Cherokee Tribal Court was reestablished in 1999. The Eastern Band of Cherokee Indians' Tribal Court began operation in 2000. The original process of creating the Tribal Court and drafting legislation was set in motion by Chief Joyce Dugan, who began the 638 compacting process.[74] Chief Leon Jones, following his election, finalized the legislation

71. *See* 25 U.S.C. § 3601(4)–(6) (2018) ("(4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems; (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments; (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights . . . ."); 25 U.S.C. § 3651(5)–(7) (2018). ("(5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments; (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands; (7) enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency.").

72. *See* 25 C.F.R. § 11.104(a)(2) (2008); Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 225 (2013) [hereinafter *Indian Courts*].

73. *See supra* notes 10–15 and accompanying discussion.

74. CHEROKEE, N.C., RES. NO. 631 (June 28, 1999) (authorizing Principal Chief Dugan to submit an application to contract the court system under a Public Law 93-638 contract

for the Tribal Court.[75] Six hundred thirty-eight contract funds allocated to the CFR court are now used to support the salaries and operating expenses associated with the Tribal Court.[76] On October 12, 1999, Ordinance No. 29 was submitted to the Tribal Council.[77] The Tribal Council passed an amended version of Ordinance No. 29, creating a Tribal Court in Cherokee on January 6, 2000.[78] In creating a tribal court, the Cherokee tribe also created a new Judicial Code, which was subsequently adopted and codified under Cherokee Code Chapter 7.[79] The Cherokee tribe was a leader in the law and courts for the whole United States in the 1800s. What occurred in 2000 was simply a thoughtful and concerted effort to draw from the tribe's history and reestablish those principles long ago deemed sacrosanct by the Eastern Band of Cherokee Indians.

Today, the Tribal Court is composed of two divisions: trial and appellate.[80] In the trial division, all types of cases are heard, including criminal, civil, domestic, and juvenile matters. Most matters in the trial division are adjudicated by bench trials if the defendant elects to waive a jury trial.[81] If the defendant exercises their right to a trial by jury, then, in accordance with both the Indian Civil Rights Act and Cherokee law,[82] a six-person jury will hear the offense charged and render a verdict.[83] The appellate division consists of a Supreme Court, which sits in a panel of three justices to hear appeals from the trial division.[84] All tribal judges are required to have a North Carolina attorney license.[85] With the creation of a tribal court and a tribal judiciary, the Eastern Band of Cherokee Indians' Tribal Court is recognized as a leader in all of Indian country.

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effective October 1, 1999, or as soon thereafter as the transition might occur) (on file with author).

75. *See* CHEROKEE CODE § 7-15 (2000).

76. *See Id.* (The effective date of the Indian Self-Determination and Educational Assistance Act, Public Law 93-638 Contract for the tribal court was April 1, 2000.)

77. Eastern Band of Cherokee Nation, N.C., Ordinance No. 29 (Jan. 6, 2000). [Editors' Note: Because of COVID-19 restrictions, *Campbell Law Review* was unable to review this source.]

78. *Id.* This new legislation passed, with 63 votes for, 31 votes against, and 6 votes absent.

79. *See* CHEROKEE CODE ch. 7 (2000).

80. *See* CHEROKEE CODE § 7-1(a) (2000).

81. *See* CHEROKEE CODE § 15 app. A, R. 8 (2020).

82. *See* CHEROKEE CODE § 15-7 (2000) (incorporating the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303).

83. *See* CHEROKEE CODE § 15, app. A, R. 9(e) (2015).

84. *See* CHEROKEE CODE §§ 7-1(b), -2(e), -5 (2000).

85. *See* CHEROKEE CODE § 7-5(c) (2000).

The grant of jurisdiction to the Cherokee Tribal Court is broad: "The Judicial Branch shall not have jurisdiction over matters in which the exercise of jurisdiction has been specifically prohibited by a binding decision of the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit or by an Act of Congress."[86] Thus, the only test that should be applied by the Cherokee tribal court is whether jurisdiction exists under Cherokee law and is not otherwise prohibited by the federal courts or Congress.[87]

Today, the Cherokee Tribal Court functions consistently with the historical norms and traditions of the Cherokee tribe. As one of the first tribes to establish a formal court system in the early 1800s, the Cherokee have a long tradition of using an independent judicial model based on the American system. The modern Cherokee Tribal Court is also consistent with the customs of the Cherokee prior to the establishment of the formal court system. While it is true the Cherokee Tribal Court no longer enforces the law of vengeance,[88] and retribution is not meted out with the execution of one clan member for the life of a member of another clan, there exist aspects of the modern Cherokee Tribal Court that honor and respect the traditional ways of the Cherokee people. "Protection of the people from crime is one of the core functions of government. Without safety, individuals cannot flourish, seek education or pursue other life goals."[89] The Cherokee tribal government must protect all its members and make Cherokee lands safe for everyone. And in providing a forum for dispute resolution, this important civic function is accomplished. Historically, the Cherokee handled these transgressions—which we categorize today as criminal violations—through the clan system. The nature of the clan system was such that it afforded the clans a speaker on their behalf. Any resulting resolutions achieved during clan negotiations ensured fairness. This dispute forum is the essence of the Cherokee Tribal Court today. Those called to the court have a voice, and should they desire, they also have access to assistance from someone trained in the law who can speak on their behalf. Individuals know that when the matter concludes, regardless of the outcome, everyone will have had a fair hearing and opportunity to discuss their grievances. These same principles were used by the Cherokee in its clan system even before the United States existed.

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86. CHEROKEE CODE § 7-2(c) (2000).

87. *See* CHEROKEE CODE §§ 7-2(a)–(c) (2000).

88. *See* REID, *supra* note 1, at 73–84.

89. Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1597 (2016) (citing Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 352–56 (2004)).

III. TRIBAL COURT EXHAUSTION

With the reestablishment of the Cherokee Tribal Court, a modern forum now exists to resolve disputes. The Cherokee court system today possesses many aspects and attributes that benefit the public. Principles of full faith and credit and comity, as well as the ability to transfer cases between the Cherokee and North Carolina state courts, are desirable, time-saving, and cost-efficient doctrines. Additionally, the doctrine of tribal court exhaustion is of paramount importance to the daily operation of tribal courts. As one ruminates over these rich tableaux of doctrines and policies that is the modern-day lifeblood of tribal courts throughout the United States, the doctrine of tribal court exhaustion can best be described as first among equals. A thorough discussion of this doctrine and its effect on the Cherokee Tribal Court is therefore the next topic of this Article.

A. The Doctrine of Tribal Court Exhaustion

The rule of tribal court exhaustion is a judicially created policy from the United States Supreme Court. This judicial rule is grounded in the theory of comity and arises when a matter involves both the federal and tribal sovereigns, and both court systems share concurrent jurisdiction over the claim.[90] The general concept of tribal court exhaustion requires that all remedies be fully pursued in tribal court before litigants may seek redress in the federal court system. In turn, the federal courts will decline to hear cases until after a final tribal decision and decisions on any appeals are entered. Allowing the tribal court the ability to review the case completely through the doctrine of exhaustion affords the tribal court the opportunity "to rectify any errors it may have made."[91]

In *National Farmers Union*, the Supreme Court first held that non-tribal members must exhaust tribal remedies before bringing a federal claim against the tribal court.[92] The Supreme Court expanded that exhaustion doctrine in *Iowa Mutual Insurance Co. v. LaPlante*.[93] In *Iowa Mutual*, the Court suggested that tribal court jurisdiction over nonmembers for cases arising on tribal lands was "presumptive."[94] That case involved the question

90. *See* Hunter Cox, *ICRA Habeas Corpus Relief: A New Habeas Jurisprudence for the post-*Oliphant *World?*, 5 AM. INDIAN L.J. 596, 625 (2017) (citing Nat'l Farmers Union Ins. v. Crow Tribe of Indians, 471 U.S. 845, 847 (1985)).

91. Valenzuela v. Silversmith, 699 F.3d 1199, 1206 (10th Cir. 2012) (quoting Nat'l Farmers Union Ins., 471 U.S. at 857).

92. *See Nat'l Farmers Union Ins.*, 471 U.S. at 856–57.

93. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

94. *See Iowa Mut. Ins. Co.*, 480 U.S. at 18; Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 103 (2012) [hereinafter *Tribal Consent*].

of whether, as a matter of comity, defendants should exhaust tribal court remedies when a case has already begun in tribal court and the defendants filed suit in federal court.[95] Also, in *Iowa Mutual* the Supreme Court directed that the tribal appellate courts must be involved in any meaningful final decision. "At a minimum . . . tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts" before either party can seek to invoke federal jurisdiction.[96] After exhaustion, a party may challenge the tribal court jurisdiction in the federal court.[97] This clarification that tribal appellate courts should complete their process of review, and not just the cessation of litigation at the trial level in the tribal forum, provided much needed guidance to the practitioner. Therefore, should a litigant, in a claim arising out of events on tribal land, wish to seek review in the United District Court for the Western District of North Carolina, they must first wait for and pursue their appeal to the Cherokee Supreme Court.

Moreover, what is equally important about tribal court exhaustion is that federal courts are required to defer to the determination of the meaning and interpretation of tribal law once the decision by the tribal court has been made.[98]

> Just as state courts are the final arbiters of the meaning of state law, so are tribal courts the final arbiters of the meaning of tribal law. While the Supreme Court has held that the breadth of tribal court jurisdiction is a federal question, it is for the tribal court to determine both what its law is and the scope of its own jurisdiction.[99]

It follows that if the tribal court has jurisdiction, the exhaustion doctrine will not allow for the merits of the case to be re-litigated in the

95. *See Iowa Mut. Ins. Co.*, 480 U.S. at 16–17.

96. *Id.* at 17; *see also* Elliott v. White Mountain Apache Tribal Ct., 566 F.3d 842, 847 (9th Cir. 2009) (exhaustion required full trial and appeal); Davis v. Mille Lacs Band of Chippewa Indians, 193 F.3d 990, 992 (8th Cir. 1999) (plaintiff's failure to exhaust appellate review was due to failure to timely appeal tribal court decision).

97. *See* Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After* National Farmers Union *and* Iowa Mutual*: Toward A Consistent Treatment of Tribal Courts by the Federal Judicial System*, 75 MINN. L. REV. 259, 299–306 (1993).

98. *See Iowa Mut. Ins. Co.*, 480 U.S. at 19; *see also* Prescott v. Little Six, Inc., 387 F.3d 753, 756–57 (8th Cir. 2004); Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe, 117 F.3d 61, 66 (2d Cir. 1997).

99. COHEN'S HANDBOOK, *supra* note 54, at § 7.04[3]; *see also* Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc., 462 N.W.2d 164, 169 (N.D. 1990) (holding that once a tribe renders a legal determination directly addressing an issue of tribal law, state courts are not permitted to review that decision in a subsequent proceeding).

federal court.[100] Also, the doctrine of exhaustion of tribal court remedies is not simply limited to challenges to the jurisdiction of a tribal court.[101] The Ninth Circuit uses an expansive interpretation of tribal court exhaustion in all cases where issues that include tribal affairs of any kind are present.[102] What is interesting about the Ninth Circuit approach is that its expansive approach is also used for off-reservation and outside Indian country cases.[103] Moreover, like some circuits, there need not be a pending tribal court proceeding before exhaustion is required, provided a reasonable argument can be made that the tribal court has jurisdiction.[104] It should be noted that the Tenth Circuit uses a similarly broad interpretation of tribal court exhaustion, holding *National Farmers* "almost always" requires tribal court exhaustion when a case arises from events which occurred on an Indian reservation.[105]

The tribal exhaustion rule applies to cases involving breach of contract,[106] trespass,[107] tort,[108] hazardous construction against a tribal housing authority,[109] the scope and application of the Tribe's legislative jurisdiction,[110] and cases that challenge the scope and applicability of a tribe's sovereign immunity.[111] Some courts have even sent the United

100. *See Iowa Mut. Ins. Co.*, 480 U.S. at 19; Burell v. Armijo, 456 F.3d 1159, 1168 (10th Cir. 2006).

101. *See* COHEN'S HANDBOOK, *supra* note 54, at § 7.04[3].

102. *See* Grand Canyon Skywalk Dev., L.L.C. v. 'Sa' Nyu Wa Inc., 715 F.3d 1196, 1200 (9th Cir. 2013); *see also* Marceau v. Blackfeet Hous. Auth., 540 F.3d 916, 920–21 (9th Cir. 2008); Stock West Corp. v. Taylor, 964 F.2d 912, 919–20 (9th Cir. 1992); Wellman v. Chevron U.S.A., Inc., 815 F.2d 577 (9th Cir. 1987).

103. *See Grand Canyon Skywalk Dev., L.L.C.*, 715 F.3d at 1200; *Marceau*, 540 F.3d at 920–21; *Stock West Corp.*, 964 F.2d at 919–20.

104. *See Grand Canyon Skywalk Dev., L.L.C.*, 715 F.3d at 1200; *Marceau*, 540 F.3d at 920–21; *Stock West Corp.*, 964 F.2d at 919–20.

105. *See* Texaco, Inc. v. Zah, 5 F.3d 1374, 1378 (10th Cir. 1993).

106. *See* Fid. & Guar. Ins. Co. v. Bradley, 212 F. Supp. 2d 163 (W.D.N.C. 2002); *see also* Colombe v. Rosebud Sioux Tribe, 747 F.3d 1020 (8th Cir. 2014); *Grand Canyon Skywalk Dev., L.L.C.*, 715 F.3d at 1196; A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411, 1413–16 (9th Cir. 1986); Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Rsrv., 27 F.3d 1294, 1299–1300 (8th Cir. 1994); *Texaco, Inc.*, 5 F.3d at 1375.

107. *See* United States v. Tsosie (*Tsosie II*), 92 F.3d 1037 (10th Cir. 1996); *see also* United States v. Turtle Mountain Hous. Auth., 816 F.2d 1273, 1275–77 (8th Cir. 1987).

108. *See* Whitebird v. Kickapoo Hous. Auth., 751 F. Supp. 928, 930 (D. Kan. 1990).

109. *See Marceau*, 540 F.3d at 920.

110. *See* Middlemist v. Sec'y of the U.S. Dep't of Interior, 824 F. Supp. 940, 944 (D. Mont. 1993), *aff'd* 19 F.3d 1318 (10th Cir. 1994).

111. *See* Sharber v. Spirit Mountain Gaming, 343 F.3d 974, 976 (9th Cir. 2003); *see also* Davis v. Mille Lacs Band Chippewa Indians, 193 F.3d 990, 992 (8th Cir. 1999). *See*

States to tribal court when issues arose where the Federal Government sought to enforce federal law against a tribal member.[112] The doctrine of tribal court exhaustion has also been held to apply to cases and controversies which arose in off-reservation disputes and actions.[113] Exhaustion was also required over a case involving a non-Indian who challenged the authority of the tribe to regulate her on-reservation business even though the business owner was non-Indian.[114] Tribal taxation and employment preference have also been subject to tribal court exhaustion.[115]

Some actions can have concurrent state and tribal jurisdiction. As explained by Justice Blackmun, "[T]he Court has recognized coextensive state and tribal civil jurisdiction where the exercise of concurrent authority does not do violence to the rights of either sovereign."[116] *Jackson County ex rel. Annette Jackson v. Swayney* exemplifies this—the Supreme Court of North Carolina found that the state court had concurrent jurisdiction for recoupment of child support payments made on behalf of the Department of Social Services for past public assistance even though the parties were all members of the tribe and resided on the Cherokee Indian Reservation.[117] Because the requirement of the child support enforcement program under 42 U.S.C. § 602(27) was mandatory against everyone in the state, the Supreme Court of North Carolina concluded they could exercise concurrent

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generally Malaterre v. Amerind Risk Mgmt., 373 F. Supp. 2d 980, 981–82 (D.N.D. 2005) (holding the doctrine of tribal court exhaustion applies to cases that involve reservation affairs which are brought under the Declaratory Judgment Act, 28 U.S.C. § 2201); *but see* Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 29 (1st Cir. 2000).

112. *See* United States v. Plainbull, 957 F.2d 724, 728 (9th Cir. 1992) (trespassing on tribal lands alleged to have violated federal trespass statute); United States v. Tsosie (*Tsosie I*), 849 F. Supp. 768, 769 (D.N.M. 1994) (ownership of land at issue under the General Allotment Act).

113. Bank of Okla. v. Muscogee (Creek) Nation, 972 F.2d 1166, 1168 (10th Cir. 1992) (requiring tribal court exhaustion where interpleader of bank in contract dispute between tribe and management company, even though all banking activities occurred off the reservation); Stock West Corp. v. Taylor, 964 F.2d 912, 919–20 (9th Cir. 1992) (requiring exhaustion in case involving legal malpractice claim where action occurred off-reservation but directly dealt with reservation matters).

114. *See* Kaul v. Wahquahboshkuk, 838 F. Supp. 515, 518 (D. Kan. 1993; *see also Middlemist*, 824 F. Supp. at 947 (supporting tribe enforcement of tribal conservation ordinance on lands owned by non-Indians but located within the boundaries of the tribal reservation).

115. Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Rsrv., 27 F.3d 1294, 1300–01 (8th Cir. 1994).

116. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 466 (1989).

117. *See* Jackson Cnty. *ex rel.* Jackson v. Swayney, 352 S.E.2d 413, 414, 418 (1987).

state court jurisdiction over these matters on the grounds that federal law applied to all citizens.[118]

B. The Cherokee Tribal Court & The Principles of Tribal Court Exhaustion

1. Tom's Amusement Co. v. Cuthbertson *(1993): Abstention*

The first Cherokee case in federal court to address tribal court exhaustion was *Tom's Amusement Co. v. Cuthbertson* in 1993.[119] In *Tom's* the action arose out of a claim and delivery for slot machines where the creditor claimed nonpayment by the debtor.[120] Tom's, a Georgia Corporation, leased gaming machines to Cuthbertson, who through a contractual agreement operated a bingo hall pursuant to federal law and a Cherokee tribal management agreement on Cherokee lands.[121] Cuthbertson failed to make payments and agreed that Tom's could collect the machines.[122] Tom's alleged that they were told by the Cherokee Police Department that, before they collected the machines, they would need to adhere to the "legal process."[123] However, Tom's elected to bring their suit in the federal court, which found that "[t]he case at hand involve[d] a contract dispute between two non-Indians operating a gaming establishment on the Eastern Band of Cherokee Indian Reservation pursuant to a gaming license and ordinances established by the Tribe."[124] The court then observed that Cuthbertson operated gaming at this establishment under Cherokee law, that Cuthbertson was a disclosed agent for the tribe, that this issue had a "direct impact on Indians or their property," and, "[t]herefore, the fact that the contractual parties are non-Indians is not dispositive of the jurisdictional issue."[125] Importantly, the court emphasized that "the fact that the dispute

118. *See id.* Note that in the opinion of the author, the *Swayney* decision is now questionable because the discussion of jurisdiction was based on the grant of civil jurisdiction in a CFR court under federal law and not a tribal court based upon inherent tribal sovereignty which exists today. Also, the misapplication of the Supreme Court of North Carolina in undertaking an analysis of a Public Law-280 state's jurisdiction over the Cherokee tribe when, in fact, North Carolina has never been a Public Law-280 state is dubious. *See* Act of Aug. 15, 1953, ch. 85, 98 Stat. 342 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–1326).

119. Tom's Amusement Co. v. Cuthbertson, 816 F. Supp. 403 (W.D.N.C. 1993).

120. *See id.* at 404.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 405.

125. *Id.*

at hand involve[d] non-Indians d[id] not prohibit the tribal court from exercising civil jurisdiction over this matter."[126]

The court, having found that the Cherokee CFR court had civil jurisdiction because gaming directly impacted the economic function of the tribe, examined Cherokee Code section 1-2(d)(e) to determine whether the Cherokee tribe and its court intended to exercise civil jurisdiction over such matters.[127] The federal court then found that Tom's had contractually "engaged in commerce" on the Cherokee lands "and thus ha[d] subjected itself to the civil jurisdiction of the tribal court."[128] Additionally, the federal court found that it had federal jurisdiction under both diversity jurisdiction and federal question bases.[129] Notwithstanding this determination, Judge Voorhees then engaged in an analysis of the doctrine of tribal court exhaustion.[130] "Nonetheless, the Court will abstain at this time from an exercise of its jurisdiction. The Supreme Court has developed the doctrine of abstention of federal jurisdiction pending exhaustion of tribal remedies 'to further the longstanding federal policy of encouraging tribal self-government, in which tribal courts play a vital role.'"[131] With his decision the court stayed the federal action and sent the matter to the tribal court for disposition.[132]

It should also be noted that there was not a pending action in the CFR court at the time of the decision. Chief Judge Voorhees explained:

> The Court notes it is unaware of any pending action involving these parties before the tribal court. Nonetheless, the Court finds its review of cases involving concurrent jurisdiction over civil matters arising from business relations on Indian land dictates abstention pending a determination by the tribal court on the issue of whether it has jurisdiction over this civil proceeding.[133]

Tom's established the principle that the Cherokee tribal court should hear the matters that directly impact the tribe—regardless of tribal

126. *Id.*

127. *See id.* at 405–06.

128. *Id.* at 406.

129. *Id.* (citing 28 U.S.C. § 1331).

130. *Id.* at 406–07.

131. *Id.* at 406 (quoting Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla., 788 F. Supp. 566, 569 (S.D. Fla. 1992)).

132. *See id.* at 407.

133. *Id.*; *see also* Crawford v. Genuine Parts Co., 947 F.2d 1405, 1408 (9th Cir. 1991) (deciding the district court improperly denied transfer to the tribal court where the dispute "arose on the reservation" and one of the *National Farmers* exceptions did not apply).

membership—and that deference from the federal court is warranted.[134] Supporting tribal court exhaustion is further buttressed when a party clearly demonstrates consent to do business on Cherokee lands and, in doing so, submits themselves to the jurisdiction of the Cherokee tribal court.

2. Warn v. Eastern Band of Cherokee Indians *(1994): Inherent Sovereign Power of the Cherokee Tribe*

Another case involving the Eastern Band of Cherokee Indians directly addressed the issue of tribal court exhaustion in 1994.[135] In *Warn v. Eastern Band of Cherokee Indians*, husband and wife lessees, the Warns, operated the "Yogi in the Smokies" campground, which was located on Cherokee tribal lands in the Big Cove community.[136] The Warns signed a lease with the Eastern Band of Cherokee Indians in 1985.[137] The lease was thereafter approved by the Bureau of Indian Affairs, and the language of the lease specifically provided that the parties would settle all disputes in the Cherokee court system and that the parties would "subject themselves to the jurisdiction of the Cherokee Indian Tribal Court."[138] Soon thereafter, a dispute arose between a neighboring enrolled member, which ultimately resulted in the Cherokee tribe banishing both Richard and Leah Warn from Cherokee lands.[139] The Warns sued in federal court, claiming breach of contract, violation of the Indian Civil Rights Act, and violation of 42 U.S.C. § 1983.[140] The federal court determined it had subject matter jurisdiction over the contract claims because diversity of parties existed, with the Cherokee tribe being federally recognized as sovereign, and the issues before the court directly impacting Indians and tribal lands.[141] However, after examining the two claims based upon breach of contract, the federal court dismissed these causes of action against the tribe and its council members under the doctrine of sovereign immunity[142]—there was no express waiver of sovereign immunity in the lease by the Eastern Band of

134. *See* Elliott v. White Mountain Apache Tribal Ct., 566 F.3d 842, 848–49 (9th Cir. 2009) (discussing direct impact to a tribe where a nonmember set a forest fire that burned thousands of acres of tribal lands).

135. *See* Warn v. E. Band of Cherokee Indians, 858 F. Supp. 524 (W.D.N.C. 1994).

136. *Id.* at 525.

137. *Id.*

138. *Id.*

139. *Id.* at 525–26.

140. *Id.* at 526.

141. *Id.*

142. The sovereign immunity doctrine immunizes a government from suit without its consent. Kawananakoa v. Polyblank, 205 U.S. 349, 350 (1907).

Cherokee Indians.[143] Tribes, as distinct and independent sovereigns that existed prior to the establishment of the United States, enjoy sovereign immunity and "have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."[144]

Regarding the other defendants named in their individual capacities, the federal court abstained from exercising jurisdiction based upon the doctrine of tribal court exhaustion.[145] The court, in discussing the doctrine of tribal court exhaustion, explained:

> [A]lthough this Court has jurisdiction over the causes of action based on breach of contract, it will abstain from exercising that jurisdiction pending the exhaustion of Tribal Court remedies. "Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'" *Iowa Mut. Ins. Co.*, 480 U.S. at 16, 107 S. Ct. at 976 (citations omitted). The parties contracted that disputes over the lease agreement would be resolved in the Tribal Court forum. The fact that the Plaintiffs are non-Indians does not prohibit the Tribal Court from exercising civil jurisdiction over this matter. *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992) . . . . The Plaintiffs have actively engaged in commerce with the [Eastern Band of Cherokee] Tribe and have subjected themselves to the civil jurisdiction of the [Cherokee] tribal court. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943, 111 S. Ct. 1404, 113 L. Ed. 2d 459 (1991).[146]

Based on this reasoning, the court dismissed the individual contract claims "on the grounds of abstention, the Plaintiffs having failed to exhaust Tribal Court remedies."[147] In so doing, the matter was properly placed back in the Cherokee tribal court for a determination by the tribal court, with deference and respect to the sovereignty of the Eastern Band of Cherokee Indians. The unique sovereign status of the Cherokee tribe played an important role in the disposition of this case. Moreover, the federal court

143. *See Warn*, 58 F. Supp. at 553.

144. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (citing Turner v. United States, 248 U.S. 354, 358 (1919); United States v. U.S. Fid. and Guar., Co., 309 U.S. 506, 512–13 (1940); Puyallup Tribe v. Wash. Dep't of Game, 433 U.S. 165, 172–73 (1977)).

145. *See Warn*, 858 F. Supp. at 527.

146. *Id.*; *see also* Ford Motor Co. v. Todecheene, 488 F.3d 1215 (9th Cir. 2007) (finding exhaustion was required in the Navajo Nation Tribal Court over non-Indian defendant because the conduct at issue directly impacted the welfare and economic security of the Navajo Nation); *accord* Ford Motor Co. v. Kayenta Dist. Ct., No. SC-CV-33-07, 2008 Navajo Sup. LEXIS 8, at *1–2 (Navajo Dec. 18, 2008) (resulting opinion from the Navajo court in *Todecheene* after declination by the federal court).

147. *Warn*, 858 F. Supp. at 528.

recognized that self-governance and the ability to resolve disputes in the Cherokee court is simply one facet of Cherokee tribal sovereignty. The Warns voluntarily elected to do business on Cherokee lands; in doing so, they expressly subjected themselves to the civil jurisdiction of the tribal court. It was incumbent, therefore, for the federal court to abstain from exercising federal court jurisdiction over the issues and, under the doctrine of tribal court exhaustion, allow the matters to be fully litigated in the Cherokee tribal court.

3. Fidelity & Guaranty Insurance Co. v. Bradley *(2002): The Principle of Comity*

The next Cherokee case where tribal court exhaustion arose was in *Fidelity & Guarantee Insurance Co. v. Bradley*.[148] In that case, the defendant was sued in the tribal court for breach of contract over a tribally initiated construction project on tribal lands to which Fidelity stood as surety on a performance bond.[149] While the suit was pending in the tribal court, Fidelity filed the cause of action in the federal court.[150] Bradley sought dismissal of the federal action under the doctrine of tribal court exhaustion because it appeared from the posture of the case that the issues of indemnification were also pending in the tribal court suit.[151]

The federal court first found that the tribal court had jurisdiction over the matter even though Fidelity was a non-Indian entity.[152] The court explained:

> The Tribal Court clearly has jurisdiction over the dispute at issue; a dispute between a non-Indian which entered into a consensual contractual relationship with an Indian for a performance bond to cover the construction of the Cherokee Ceremonial Grounds Entrance on tribal land and for the benefit of the Tribe.[153]

Turning next to the issue of tribal court exhaustion, Judge Lacy Thornburg wrote that "[t]he Magistrate Judge found that this Court should not abstain in favor of tribal exhaustion primarily because there is no pending action in tribal court between Fidelity and Bradley. The case law, however, mandates that this court do so."[154] After review of *National Farmers* and *Iowa Mutual*, the court explained:

148. Fid. & Guar. Ins. Co. v. Bradley, 212 F. Supp. 2d 163 (W.D.N.C. 2002).
149. *Id.* at 164.
150. *Id.*
151. *Id.*
152. *Id.* at 165.
153. *Id.*
154. *Id.* at 166.

> [N]othing in the facts here presented . . . would excuse the longstanding policy of tribal court exhaustion. The construction project was on land owned by the Tribe; indeed, the initial construction contract was between Bradley and the Tribe. Tribal funds were used to pay for the construction and thus, any alleged breach thereof would directly impact tribal economic security and health. And, Fidelity entered into a consensual commercial relationship with a member of the Tribe.[155]

Even though there was no pending suit directly between Bradley and Fidelity in tribal court, it was nevertheless obvious that, because Fidelity had indemnified Bradley as the builder, the same issues of fact would be litigated between Bradley and the Tribe in its breach claim.[156] If Bradley did not breach the contract, the question would then arise as to whether Fidelity was reasonable in its decision to take over the project and complete the construction.[157] To proceed in federal court prior to the resolution of the contract breach in tribal court could lead to contradictory results. The court stated:

> The tribal exhaustion doctrine is not jurisdictional in nature, but, rather, is a product of comity and related considerations. Where applicable, this prudential doctrine has force whether or not an action actually is pending in a tribal court. Moreover, the doctrine applies even though the contested claims are to be defined substantively by state or federal law.[158]

Today, whether a court will follow the exhaustion doctrine when no case is pending in the tribal court finds divergent views among the federal circuits. The Second Circuit requires that there be an active suit pending in the tribal court before tribal court exhaustion doctrine will be applied.[159] However, this approach is in the minority. The Eight, Ninth, and Tenth Circuits require tribal court exhaustion even if there is no pending action in the tribal court.[160] Considering the decision in *Tom's* and the language in *Bradley*, which cites *United States v. Tsosie*,[161] even though the issue has not

155. *Id.*

156. *See id.*

157. *See id.*

158. *Id.* at 166–67 (quoting Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 31 (1st Cir. 2000)).

159. *See* Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 80 (2d Cir. 2001).

160. *See* Marceau v. Blackfeet Hous. Auth., 540 F.3d 916, 921 (9th Cir. 2008); United States v. Tsosie (*Tsosie II*), 92 F.3d 1037, 1042–43 (10th Cir. 1996); Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Rsrv., 27 F.3d 1294, 1300 (8th Cir. 1994); Stock West Corp. v. Taylor, 964 F.2d 912, 919–20 (9th Cir. 1992) (en banc); Brown v. Washoe Hous. Auth., 835 F.2d 1327, 1328 (10th Cir. 1988); Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 673–74 (8th Cir. 1986).

161. *Tsosie II*, 92 F.3d at 1041.

been addressed by the Fourth Circuit, tribal court exhaustion should apply to the Cherokee tribal court even when there is no pending lawsuit in the tribal court. This deference to tribal sovereignty allows the tribal courts to hear these cases and more robustly develop tribal law and precedent that benefits both federal and tribal court systems and the attorneys who practice in the field of Indian law.

Bradley recognized that, while there was not an action pending between the same parties, there did exist a suit in the tribal court dealing with similar, associated claims.[162] Thus, recognizing the importance of the doctrine of comity in *Bradley*, the federal court avoided the possibility of inconsistent judgments.[163] This same adherence to tribal court exhaustion bestowed deference and respect on the Cherokee tribal court and recognized that the issues directly impacted the tribe's interests since the land, monies, and project were on Cherokee lands, and Fidelity consented to do business in Cherokee on a Cherokee tribal project. Simultaneously, Judge Thornburg's thoughtful and correct decision has the added benefit of promoting judicial economy.

C. Exceptions to the Doctrine of Tribal Court Exhaustion

The doctrine of tribal court exhaustion is not absolute and exceptions exist to the rule, including: when the actions of the tribal court harass the party or jurisdiction is claimed in bad faith;[164] when a tribal court asserts jurisdiction in violation of an express legal jurisdictional prohibition assumed by the federal government such as issues associated with nuclear power;[165] or when appellate review would be futile because there is no forum, the relief sought is unavailable in that forum, or the reviewing forum

162. *See Bradley*, 212 F. Supp. 2d at 164.

163. *See id.* at 167; *see also* Drumm v. Brown, 716 A.2d 50 (Conn. 1998) (demonstrating conflicting applications of comity by a state court in staying a suit brought against the tribe under the tribal court exhaustion doctrine). *But see* Meyer & Assocs. v. Coushatta Tribe of La., 992 So. 2d 446 (La. 2008) (declining to dismiss contract action against tribe based on exhaustion doctrine where the specific terms of the contract required that the contract be construed according to the laws of Louisiana, the tribe expressly waived its sovereign immunity, and the suit dealt with a commercial matter and not the internal, political integrity of the tribe).

164. *See* Nat'l Farmers Union Ins. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21 (1985).

165. *See id.*; *see also* El Paso Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 487–88 (1999) (finding damages sought based upon a claim arising out of "nuclear incidents" fell under the Price-Anderson Act, 42 U.S.C. § 2210); Blue Legs v. U.S. Bureau Of Indian Affs., 867 F.2d 1094, 1098 (8th Cir. 1989) (finding that Congress intended for federal court to be the exclusive forum for violations of the Resource Conservation and Recovery Act).

is biased.[166] Also, in subsequent rulings, the Supreme Court has added a fourth exception. Where it is clear the tribal court lacks jurisdiction, as established in the *Strate v. A-1 Contractors* and *Nevada v. Hicks* line of decisions, tribal court exhaustion is unnecessary since "exhaustion . . . would serve no purpose other than delay."[167] Following the decisions in *Strate* and *Hicks*, lower courts have carved out an additional exception to tribal court exhaustion—when they determine that there is no "colorable" claim of tribal jurisdiction.[168]

Only one exception has been found to affect the Eastern Band of Cherokee Indians—futility. In *Wildcatt v. Smith*, the North Carolina state court asserted jurisdiction over a child support contempt proceeding that resulted in the father, who was an enrolled member of the Eastern Band of Cherokee Indians, being jailed for child support arrearages.[169] After review, the North Carolina Court of Appeals held that the continued exercise of state jurisdiction unduly infringed upon the sovereignty of the Cherokee Tribe when the determination of parentage and child support was at issue in a civil action between two tribal members, living on tribal lands, over a matter fundamental to the integrity of the tribe—the support of minor enrolled children of the tribe.[170] When the default judgment was entered against the defendant on July 15, 1980, adjudging the defendant to be the father of the minor child, the tribal court did not exist.[171] The Cherokee CFR Court came into existence on July 28, 1980, approximately two weeks after the *Wildcatt* default judgment was entered in the Swain County District Court.[172] Because there was no tribal court when the default judgment was entered, the North Carolina Court of Appeals analyzed the unique facts in this case and determined that "Congress ha[d] not preempted the field of state court assumption of subject matter jurisdiction over tribes which are without their own court system."[173] The lack of a tribal court forum is a correct statement

166. *See Nat'l Farmers Union Ins.*, 471 U.S. at 856 n.21.

167. Strate v. A-1 Contractors, 520 U.S. 438, 459–60 n.14 (1997); *see also* Nevada v. Hicks, 533 U.S. 353, 369 (2001).

168. Jackson v. Payday Fin. L.L.C., 764 F.3d 765, 785–86 (7th Cir. 2014) (finding exhaustion to not be required when there was no "colorable" claim of tribal jurisdiction over borrowers who were located off the reservation); *see also* Elliot v. White Mountain Apache Tribal Ct., 566 F.3d 842, 847–48 (9th Cir. 2009); Burrell v. Armijo, 456 F.3d 1159, 1168 (10th Cir. 2006).

169. *See* Wildcatt v. Smith, 316 S.E.2d 870, 872–73 (N.C. Ct. App. 1984).

170. *See id.* at 877.

171. *See id.*

172. *See id.*

173. *Id.*

of the law and the futility exception nearly always finds its footing when a tribe lacks a valid and working court system.[174]

What is equally interesting about *Wildcatt* is how the North Carolina court then addressed the ancillary issues which arose. On September 5, 1980, the plaintiff applied to the new CFR court for enforcement of the state court order, and the Cherokee CFR court domesticated the Swain County judgment.[175] Subsequently, the decision to afford full faith and credit to the Swain County judgment was reversed by the Indian Appeals Court.[176] During that time, the respective parties sought to resolve their dispute but were unsuccessful. Finally, a motion for contempt was filed in Swain County state court, and a hearing was held on May 3, 1983.[177] The trial judge in 1983 found the defendant in contempt, calculated his arrears at $6,500.00, and ordered him jailed.[178]

The North Carolina Court of Appeals, when looking at this second phase of the litigation, correctly noted that in 1983 the CFR court in Cherokee was functioning. Because the CFR court existed, the North Carolina Court of Appeals explained that the further exercise of state jurisdiction over the *Wildcatt* issues in 1983 did, in fact, unduly infringe upon the sovereignty of the Cherokee tribe.[179] Considering how decisions of the North Carolina state courts would interfere upon the sovereignty of the Cherokee tribe and the function of Cherokee court, the North Carolina Court of Appeals declared that further involvement by the state court in the continuing *Wildcatt* issues was impermissible. The North Carolina Court of Appeals declared, "It is clear that any exercise of [North Carolina] state power after the creation of the [Cherokee] Indian court system would unduly infringe upon the tribe's asserted right of self-government."[180] With this decision, the trial court's judgment from May 3, 1983, was reversed and remanded.[181]

The *Wildcatt* decision was correct in the analysis applied to the facts and in the conclusions reached. While there was no tribal court in early

174. *See* Colombe v. Rosebud Sioux Tribe, 747 F.3d 1020, 1025 (8th Cir. 2014) (finding that the tribal appeals court declining to hear the appeal does not give rise to the futility exception); *see also* Comstock Oil & Gas, Inc. v. Ala. & Coushatta Indian Tribes, 261 F.3d 567, 572–73 (5th Cir. 2001); Krempel v. Prairie Island Indian Cmty., 125 F.3d 621, 622 (8th Cir. 1997).

175. *Wildcatt*, 316 S.E.2d at 872.

176. *Id.*

177. *Id.*

178. *Id.*

179. *See id.* at 877.

180. *Id.*

181. *Id.* at 877–78.

1980, there was a CFR court in 1983. Today the Cherokee Tribal Court, which is the successor court to the Cherokee CFR court, handles these types of disputes on a daily basis. Any attempt by North Carolina to assert civil jurisdiction in such cases today would be erroneous. Allowing the Eastern Band of Cherokee Indians to regulate their domestic relations is of paramount importance. Any attempt to interfere with the self-governance of the Cherokee tribe by the state would be unreasonable, and the *Wildcatt* court recognized this important and sacrosanct principle of Indian law.

D. Treatment of the Tribal Courts in the Federal Courts

Also notable is how a federal court would treat a tribal court decision if, in fact, it engaged in a post-exhaustion review. When asked to review a dispute between a non-Indian employer and the tribal employment rights office, the standard applied to the appellate decision from the Shoshone-Bannock Tribes Court was articulated by the Ninth Circuit Court of Appeals.[182] The tribal appellate court affirmed the tribal court order, which found that non-Indian owned businesses on the Fort Hall reservation in southeast Idaho were required to adhere to the tribal ordinance that mandated hiring preferences for Indians under tribal law.[183] The non-Indian defendant sought relief and asked for review by the federal court of the tribal court decision.[184] In its opinion, the Ninth Circuit announced what the standard of review would be in cases of post-exhaustion review of a tribal court decision.[185] The findings of fact made by a tribal court are reviewed under this new test on a "clearly erroneous standard" while the conclusions of law are scrutinized under the *de novo* standard of review.[186] More recently, this same test has been adopted by the Tenth Circuit in *Mustang Production Company* when the court explained, "We are persuaded by the Ninth Circuit's analysis [in *FMC v. Shoshone-Bannock Tribes*]. We hold that when reviewing tribal court decisions on jurisdictional issues, district courts should review tribal courts' findings of fact for clear error and conclusions of law de novo."[187]

Thus, a tribal court decision from the Cherokee Tribal Court should be reviewed under this standard. Even though there is no case from the Fourth Circuit Court of Appeals, this standard is a reasonable compromise. The fact finder is given broad deference in their analysis of the facts and a *de novo*

182. *See* FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313–14 (9th Cir. 1990).
183. *See id.* at 1312.
184. *See id.* at 1313.
185. *See id.* at 1313.
186. *See id.*
187. Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1384 (10th Cir. 1996).

review of the conclusions of law limits the invasive nature of the review, respects tribal court jurisdiction, and does not compromise the legitimate exercise of tribal sovereignty. This limited review also allows for added acceptance of the final outcome by the parties. Finally, knowing this standard encourages the litigants in the tribal court to fully and completely develop their issues and evidence so that the Cherokee trial and appellate courts may make the most insightful and robust findings possible.

CONCLUSION

The story of the establishment of the Cherokee court in the 1800s and its re-birth some 165 years later is replete with both history and relevance to litigation in the Cherokee, North Carolina, and Federal court systems today. Helping the practitioner and the public better understand this history is important. Of possibly greater import, however, is understanding the importance of how tribal court exhaustion requires that deference and like considerations which are also bestowed upon its sister courts be shown to the Cherokee tribal court. Woe betide the slacker who enters into litigation in the Cherokee court without fully appreciating the importance of the Cherokee court in particular, tribal courts in general, and how deference to the Cherokee court profoundly affects the progression of a tribal cause of action. It is hoped that this Article will assist the practitioner and in turn better serve the interests of justice, promote judicial economy, reduce litigation costs, and bring cases to a quicker resolution. With these estimable goals foremost in the minds of everyone, it is hoped that all who seek redress within the Cherokee court will benefit in the end.