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The Cherokee Freedmen Dispute: Legal Background, Analysis, and Proposed Legislation

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Summary

Several bills pending in the 110th Congress have the potential to affect a dispute between two groups within the Cherokee Nation (the Tribe): the "Blood" Cherokee and the Cherokee Freedmen. This dispute, which is also the subject of litigation in both federal and tribal courts, centers on whether the Cherokee Nation's sovereign right to define its own membership has been diminished by a treaty with the federal government. In this suit, the Cherokee Freedmen allege to be "direct descendants of former slaves of the Cherokees, or free blacks who intermarried with Cherokees, who were made citizens of the Cherokee Nation in the Nineteenth Century." The Cherokee Nation, a federally recognized Indian tribe headquartered in Oklahoma, has, over the past several years, through both tribal legislation and constitutional amendment, attempted to expel this particular group of its citizens. The Cherokee Freedmen obtained their Cherokee citizenship pursuant to the terms of an 1866 treaty with the United States, under which two groups of people — former slaves of the Cherokee Nation and "all free colored persons" — either residing in Cherokee territory when the Civil War began or who returned within six months, and the descendants of such persons, were guaranteed "all rights of native Cherokees." In response to the efforts to deny them citizenship rights, the Cherokee Freedmen have turned to litigation in both federal and tribal court, claiming that the action of the Cherokee Nation conflicts with the treaty and violates equal protection. The Cherokee Nation's arguments are grounded on the premise that the authority of Indian tribes to define membership is inherent. Any attempt by the Cherokee Nation to act on its measures to disenroll the Cherokee Freedmen has been enjoined in tribal court while federal litigation proceeds.

Although determination of membership is one of the fundamental powers of an Indian tribe, Congress may define tribal membership for federal purposes. The current Cherokee Nation membership roll dates back to membership lists compiled in 1907 by the Dawes Commission pursuant to congressional direction to allot the lands of the Cherokee, Choctaw, Creek, Chickasaw, and Seminole tribes of Oklahoma. There are at least three bills in the 110th Congress that contain provisions that would withhold specific federal benefits from the Cherokee Nation if the Cherokee Freedmen are not fully recognized as citizens of the Tribe: H.R. 2786, H.R. 2824, and H.R. 3002.

This report will continue to be updated based on future legislative activity or judicial action.

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The Cherokee Freedmen Dispute: Legal Background, Analysis, and Proposed Legislation

Introduction

Several bills pending in Congress have the potential to affect a dispute between two groups within the Cherokee Nation (the Tribe): the "Blood" Cherokee and the Cherokee Freedmen. This dispute, which is also the subject of litigation in both federal and tribal courts, centers on whether the Cherokee Nation's sovereign right to define its own membership has been diminished by a treaty with the federal government.[1] Specifically, the Freedmen, who largely trace their descent from the former slaves of the Cherokee Nation, have sought to prevent attempts by certain members of the Tribe to expel them from the tribal membership. Although Indian tribes have traditionally held the authority to determine their own makeup, Congress holds near plenary authority over Indian affairs and may circumscribe tribal sovereignty through legislation.

Historical Background

Origins of the Dispute. The Cherokee Freedmen, in a suit filed in federal district court, claim to be "direct descendants of former slaves of the Cherokees, or free blacks who intermarried with Cherokees, who were made citizens of the Cherokee Nation in the Nineteenth Century."[2] Their claim for tribal membership is based on an 1866 treaty between the Cherokee Nation and the federal government, which provides, *inter alia*, that the Freedmen and their descendants shall have the same rights as native Cherokees.[3] However, even after the federal government and

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[1] See, "Powers of Indian Tribes," 55 I.D. 14, I Opinions of the Solicitor, Department of the Interior, Indian Affairs 445-456 (October 25, 1934), discussing "The Power of An Indian Tribe to Determine Its Membership" and the authority exercised by Congress to define membership for various federal purposes.

[2] Vann v. Kempthorne, 467 F. Supp. 2d 56, 60 (D.D.C. 2006); *See also* Angie Debo, And Still The Waters Run 10 (University of Oklahoma Press 1984) (1940) [hereinafter, Debo].

[3] Treaty with the Cherokee, 1866, art. IX, (July 19, 1866) 14 Stat. 799 ("[A]ll freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees...").

Cherokee Nation enacted the treaty, the native Cherokees contested the Freedmen's membership in the Tribe.[4]

In 1896, Congress created the Dawes Commission (Commission) to catalogue the members of the Cherokee Nation.[5] The Commission[6] accomplished this by compiling separate "rolls" of Cherokees: the "Freedmen Roll," comprising the Freedmen, and the "Blood Roll" consisting of other Cherokee members.[7] Although these rolls were originally created to enable the Commission to allot reservation lands among tribal members by determining and recording the membership of the Tribe,[8] they later became the exclusive means to establish tribal membership.[9] Eventually, the creation of two separate rolls formed the basis of the dispute between the "Blood" Cherokees and the Freedmen. This dispute has continued to this day, with both the Freedmen, the federal government, and the Cherokee Nation seeking to assert control over the composition of the tribal membership.

Tribal Legislation to Disenroll Freedmen. In 1976, the Cherokee Nation ratified a constitution which provides that tribal membership must be "proven by reference to the Dawes Commission Rolls."[10] The terms of the constitutional provision made no distinction between the Freedmen or Blood Rolls.[11] The constitution also required the Bureau of Indian Affair's (BIA) approval of any future constitutional amendment.[12] Subsequently, however, the Cherokee Nation passed legislation[13] which required descent from a person on the Blood Roll to establish

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[4] Debo, at 135, n.1.

[5] *Id.* at 45-47.

[6] The Dawes Commission, named for its first chairman, Henry L. Dawes, was established by the Act of March 3, 1893, ch. 209, §§ 15-16, 27 Stat. 612, to allot lands of the Five Civilized Tribes in Indian Territory, selling surplus lands to the United States with the ultimate goal of creating a state (Oklahoma). The Dawes Commission was directed to create the membership roles of the Five Civilized Tribes of Oklahoma, which include the Cherokee Nation, by the act of June 10, 1896, ch. 398, 29 Stat. 321, 339.

[7] Kent Carter, The Dawes Commission 113-114 (Ancestry.com, Inc.1999); Debo, at 47, n. 1.

[8] Lydia Edwards, Comment, *Protecting Black Tribal Members: Is the Thirteenth Amendment the Linchpin to Securing Equal Rights Within Indian Country?*, 8 Berkeley J. Afr.-A. L. & Pol'y 127 (2005).

[9] 1976 Cherokee constitution, art. III § 1. The constitution can be found at [http://thorpe.ou.edu/constitution/cherokee/index.html].

[10] *Id.*

[11] *Id.*

[12] *Id.* at art. XV § 10 ("[N]o amendment or new Constitution shall become effective without the approval of the President of the United States or his authorized representative.").

[13] 11 C.N.C.A. § 12, quoted in Allen v. Cherokee Nation Tribal Council, JAT 04-09 (Cherokee Nation Jud. App. Trib., March 7, 2006) ("Tribal membership is derived only through proof of Cherokee blood based on the Final Rolls.").

tribal membership.[14] Because the Freedmen can only trace descendants from the Freedmen Roll, this law, if enforced, would have effectively expelled the Freedmen from the Tribe. The Tribe's highest appellate court responded in March 2006 by striking down this law and holding that changes in the tribal membership criteria can only be made by an amendment to the Tribe's constitution.[15]

Alleged Disenfranchisement of the Freedmen. The Cherokee Nation organizes its government through procedures outlined in the Principal Chiefs Act, a law passed by Congress authorizing the Cherokee Nation to elect a "principal chief" to lead their tribal government.[16] Under the Principal Chiefs Act, the Secretary of the Interior must approve the election procedures of a Cherokee Nation chief before the election's final results become effective.[17] The BIA, as the principal agency within the Department of the Interior responsible for Indian affairs, exercises this power in the Secretary's stead.

On May 24, 2003, Cherokee elections for Principal Chief and other officers were held. Following the 2003 election, several Freedmen made allegations to the BIA, claiming that they were not permitted to vote in this election. They also alleged that, as a matter of policy, the Cherokee Nation was denying membership to Cherokees whose ancestry can be traced only to the Freedmen Roll. Nonetheless, the BIA approved the results of the election;[18] thereupon the Freedmen filed a federal law suit against the Secretary of the Interior in the U.S. District Court for the District of Columbia, *Vann v. Kempthorne*, which sought a declaratory judgment under the Administrative Procedure Act that the election was invalid.[19] Other Freedmen also filed a similar challenge to the election in tribal court.[20] In light of this controversy, the Chief Judge of the Cherokee District Court temporarily restored the tribal membership and voting rights of the Cherokee Freedmen until the cases in both the federal and tribal courts are fully adjudicated.[21] Pursuant to this order, several Freedmen have allegedly been able to participate in elections held in June and July of 2007.[22]

In *Vann*, the Freedmen argued that the Secretary of the Interior acted in an "arbitrary and capricious" manner when he approved the May 2003 election because

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[14] *See Allen*, JAT 04-09.

[15] *Id.*

[16] Principal Chiefs Act of 1970, P.L. 91-495, 84 Stat. 1091.

[17] *Id.*

[18] *See Vann,* 467 F. Supp. 2d. 56.

[19] *Id.*

[20] *See* Nash v. Cherokee Nation Registrar, Temporary Order and Temporary Injunction (May 14, 2007).

[21] *See* Nash v. Cherokee Nation Registrar, Temporary Order and Temporary Injunction (May 14, 2007); Teddye Snell, *Tribe allows Freedmen temporary citizenship*, Tahlequah Daily Press, May 15, 2007.

[22] *See* Memorandum in Support of the Cherokee Nation Defendants' Motion to Dismiss, 7-8.

the Cherokee Nation excluded the Freedmen from the vote in violation of the Thirteenth Amendment to the U.S. Constitution and the 1866 Treaty.[23] Thus, the election should not have been approved. The Cherokee Nation, however, countered that it was a "necessary and indispensable party" to the suit, but because sovereign immunity shielded the Cherokee Nation from having to participate, the suit should be dismissed.[24] The Freedmen responded by filing an amended complaint naming the Cherokee Nation and several tribal officers as defendants.

In a preliminary ruling, the District Court held that both the Thirteenth Amendment to the U.S. Constitution and the 1866 Treaty abrogated tribal sovereign immunity with respect to the suit filed by the Freedmen; thus, the court granted the Freedmen's motion to file its amended complaint which named the Cherokee Nation and the tribal officers as defendants. Important to the court's reasoning was the long history of "Federal Protections for the Freedmen," which it gleaned from the Freedmen's complaint.[25] The Cherokee Nation subsequently filed an interlocutory

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[23] Vann v. Kempthorne, No. 07-5024, slip op. at 3-4.

[24] *Id.* at 4.

[25] The history provided to the court in the Freedmen's complaint and summarized by the court is as follows:

> In 1883, the Cherokee Tribal Council passed legislation excluding the Freedmen and other tribal citizens without Cherokee blood (such as a Shawnees, Delawares, and intermarried whites) from sharing in tribal assets....In response, Congress enacted a law requiring the Cherokee Nation to share its assets with the Freedmen and other tribal members. *See* An Act to secure to the Cherokee Freedmen and others their proportion of certain proceeds of lands, Oct. 19, 1888, 25 Stat. 608. In 1890, the Congress further authorized the U.S. Court of Claims to hear suits by the Freedmen against the Cherokee Nation for recovery of proceeds denied them. *See* An act to refer to the U.S. Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, Oct. 1, 1890, 26 Stat. 636. A trustee was appointed to assist the Freedmen in securing their claims and, in 1895, the Court of Claims held that the Freedmen were entitled to share in the Tribe's proceeds and that the Cherokee Nation's sovereignty could not be exercised in a manner that breached the Nation's treaty obligations to the United States. *Whitmire, Trustee for the Cherokee Freedmen v. Cherokee Nation*, 30 Ct. Cl. 138, 150-51 (Ct. Cl. 1895).
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> In 1906, the Supreme Court confirmed that the Freedmen are citizens of the Cherokee Nation entitled to the same property rights as other members of the Nation under the Treaty of 1866. *Red Bird v. United States*, 203 U.S. 76, 84, 27 S. Ct. 29, 51 L. Ed. 96, 42 Ct. Cl. 525 (1906). A year later, the federally-appointed Dawes Commission finished compiling authoritative membership rolls for the so-called "Five Civilized Tribes" in Oklahoma....The Dawes Commission created two separate categories of Cherokee citizens: the "Freedmen Roll" for the Black Cherokee, and the "Blood Roll" for the other Cherokees....An individual possessing any African blood was placed on the Freedmen Roll, whereas an individual possessing any Indian blood was placed on the Blood Roll, as long as that individual did not possess any African blood. For example, an individual who was half Black and half Cherokee was placed on the Freedmen Roll, whereas an individual who was one-quarter Indian but three-quarters White was designated Cherokee by blood. No record of the

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appeal of this preliminary ruling to the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit).[26]

The D.C. Circuit ruled on July 24, 2008, that the sovereign immunity of the Cherokee Nation was not abrogated by the Thirteenth Amendment or the 1866 Treaty. However, the court also held that tribal sovereign immunity does not bar a suit that seeks to enjoin the officers of the Cherokee Nation from violating the Thirteenth Amendment and 1866 Treaty rights of the Cherokee Freedmen.[27] The court first reasoned that, although Congress has the power to abrogate tribal sovereign immunity, neither the Thirteenth Amendment nor the 1866 Treaty contains express and unequivocal language which would indicate an intent to effect such an abrogation. Absent such language, the court concluded that it could not infer that Congress chose to exercise this power.[28]

On the other hand, the court noted that sovereign immunity does not necessarily shield the tribal officers from litigation. Rather, the court extended the doctrine of *Ex parte Young*[29] to tribal sovereign immunity. This doctrine allows a federal court to enjoin state officers from either violating the federal Constitution directly or acting contrary to federal statute or regulation, even when sovereign immunity prevents the state itself from being sued.[30]

According to the court's reasoning, if the tribal officers were attempting to violate rights ensured by either the Thirteenth Amendment or the 1866 Treaty, they would be acting outside their official capacities as representatives of the Tribe.[31] Since such actions would be considered to have been conducted in the officers' individual capacities, the officers would not be sheltered by the Tribe's sovereign immunity despite the fact that the Tribe authorized these acts.[32] However, even though the court ruled that the suit may commence against the officers, the court remanded the case so that the district court could determine whether the suit could continue without the Cherokee Nation as a party to this litigation.[33]

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[25] (...continued)

> quantum of Indian 'blood' of the Freedmen was kept....Although the Dawes Commission created the separate rolls, it declared that those on the Freedmen Roll were on 'equal footing' with those on the Blood Roll. *Vann*, at 62 (citations to plaintiffs' complaint omitted).

[26] Vann v. Kempthorne, No. 07-5024, slip op. at 5 (D.C. Cir. July 29, 2008).

[27] *Id.* at 2.

[28] *Id.* at 11.

[29] 209 U.S. 123 (1908).

[30] *Vann*, No. 07-5024, slip op. At 12.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 25-26 (noting that the District Court determined that the Cherokee Nation was a necessary and indispensable party to this litigation when it granted the Tribe's joinder to the suit pursuant to Rule 19(a) of the Federal Rules of Civil Procedure).

Because the Cherokee Nation lost its interlocutory appeal in *Vann*, the case will most likely proceed to its merits. The District Court will most likely address an array of issues. These issues might include matters that may require extensive examination of the history of U.S. dealings with the Cherokee Nation and complex issues of federal Indian law, such as: (1) the extent of the Tribe's associational rights in regulating its own membership;[34] (2) whether the United States abrogated the 1866 Treaty, such as through allotment; (3) whether the treaty should be treated like a contract and the issue of breach considered;[35] (4) whether the abrogation would constitute a material breach of the treaty;[36] (5) whether material breach would provide the Tribe the option of rescission from its own treaty obligations; and (6) assuming the treaty provisions are enforceable, what remedies would be available for the Cherokee Freedmen if the membership rights were vindicated.

Amendments to Tribal Constitution. There are currently two amendments to the 1976 Cherokee constitution that have been passed by referendum votes: one, passed on March 3, 2007, would exclude the Freedmen from tribal membership;[37] while the other, passed on June 23, 2007, would remove the requirement for BIA approval of constitutional amendments.[38] Though the BIA has approved the amendment removing federal oversight, in doing so, the BIA has made clear that the approval should not be construed as an endorsement of any violation of federal law.[39] The BIA has not approved the amendment excluding the Cherokee Freedmen from the Tribe.

Analysis

This situation involves the ongoing friction that exists between tribal sovereignty and the federal plenary power over Indian affairs; specifically, whether the Cherokee Nation can exercise its sovereign right to define its own membership in the face of constraints on that right imposed by treaty by the federal government.[40]

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[34] *See* Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

[35] *See* Charles F. Wilkinson and John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" — How Long a Time Is That?*, 63 Cal. L. Rev. 601 (1975) (comparing Indian treaties with contracts of adhesion).

[36] "A substantial breach of contract, usu[ally] excusing the aggrieved party from further performance and affording it the right to sue for damages." Black's Law Dictionary 183 (7th ed. 1999).

[37] "Congressional Black Caucus backs Freedmen," [http://www.indianz.com], March 14, 2007.

[38] "Cherokee Nation holds election amid national scrutiny," [http://www.indianz.com], June 25, 2007.

[39] Letter from Asst. Secretary Carl J. Artman to Chief Chadwick Smith (August 9, 2007). [http://www.cherokee.org/docs/news/BIA_ltr_Artman_080920007_readable.pdf].

[40] See, "Powers of Indian Tribes," 55 I.D. 14, I Opinions of the Solicitor, Department of the Interior, Indian Affairs 445-456 (October 25, 1934), discussing "The Power of An Indian Tribe to Determine Its Membership" and the authority exercised by Congress to define (continued...)

Tribal sovereignty predates the U.S. Constitution and survives in part even after a tribe's incorporation into the United States.[41] To this day, tribes largely retain their inherent sovereignty over their own internal affairs.[42] However, tribal sovereignty has been viewed by the federal courts as limited, in view of the tribes' status as domestic dependent nations,[43] and is subject to the near plenary power of Congress.[44]

Congressional Power Over Indian Affairs. Tribes generally have the power to determine their own membership.[45] However, Congress has the power to define membership differently from the tribe when necessary for administrative purposes.[46] Furthermore, various treaties contain provisions which define a tribe's membership by establishing procedures to enroll certain categories of people within a tribe regardless of actual ethnic origin.[47] Such a provision can be found in the 1866 Treaty with the Cherokee Nation requiring membership for the ancestors of the Freedmen. Much like the provisions in international treaties, the provisions in treaties with Indian tribes are the supreme law of the land, preempting any inconsistent state or tribal law.[48] While Congress has discontinued the practice of treaty-making with Indian tribes, it has also expressly continued the effectiveness of existing treaties that were previously in force.[49]

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[40] (...continued)
membership for various federal purposes.

[41] Felix S. Cohen. Handbook of Federal Indian Law 205 (Nell Jessup Newton ed. 2005). *See also* Worcester v. Georgia, 31 U.S. 515, 559 (1832) (characterizing Indian tribes as "distinct, independent political communities") [hereinafter, Cohen].

[42] *See* United States v. Wheeler, 435 U.S. 313 (1978).

[43] *See* Cherokee Nation v. Georgia, 30 U.S. 1 (1831); *Worcester*, 31 U.S. 515.

[44] For an analysis of retained tribal sovereignty, *see* Duro v. Reina, 495 U.S. 676 (1990); Montana v. United States, 450 U.S. 544 (1981).

[45] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 39, 72 n. 32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."); Cherokee Intermarriage Cases, 203 U.S. 76 (1906).

[46] Delaware Tribal Bus. Comm. V. Weeks, 430 U.S. 73, 84-86 (1977). *See also* Cohen, at 182.

[47] *See* Act of July 1, 1902, §§ 27-35, 32 Stat. 641 (rules for enrollment of Choctaw and Chickasaw citizens and Freedmen); Treaty with the Osages, Sept 29, 1865, 14 Stat. 687; Treaty with the Chippewas, February 22, 1855, Art. 5, 10 Stat. 1165, 1169; Treaty with the Wyandots, Senecas, Delawares, Shawanese, Potawatomees, Ottawas, and Chippeways, September 29, 1817, Art. 7, 7 Stat. 160, 163.

[48] *See Worcester,* 31 U.S. 515; Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. M'Intosh, 21 U.S. 543 (1823). *See also* U.S. Const. art. V. § 1, cl. 2; Missouri v. Holland, 252 U.S. 416 (1920) ("[t]reaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land.").

[49] Act of March 3, 1871, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71).

The treaty provision enrolling Freedmen within the Cherokee Nation was made as a condition of the government-to-government relationship between the United States and the Cherokee Nation.[50] Whether or not the court would find that provision to continue in force might require extensive examination of the long subsequent history of U.S. relations with the Cherokee Nation including later treaties, laws, and executive actions. The subsequent history of other treaty provisions might have an impact on whether a court would hold the Cherokee Nation to be presently bound by the membership provision.

Potential Enforcement of the 1866 Treaty Provisions. Enforcement of the membership requirements in the 1866 Treaty might be problematic, assuming that the membership provision remains viable, because the treaty contains no explicit mechanism for enforcement by federal officials or by aggrieved tribal members. Nonetheless, despite the absence of an express enforcement mechanism, there have been some examples of enforcement in the federal courts. For example, several cases challenging Cherokee Nation distributions of property in violation of a treaty provision were brought under specific statutes providing federal court jurisdiction over claims of the Freedmen.[51] One case invalidated, as contrary to Article IX of the 1866 Treaty, a Cherokee Nation Council action denying the Freedmen pecuniary benefits owed to all Cherokee Nation members.[52] In another decision, the U.S. Supreme Court ruled that even though the Cherokees have broad powers to deny membership rights, they cannot deny individuals those rights which were secured by a treaty.[53]

One possible method of enforcement could be the ability of the BIA to refuse to certify Cherokee procedures for electing a Principal Chief if the Cherokee constitution is amended to disenfranchise the Freedmen.[54] Until August 2007, there was another avenue available to the BIA — rejecting any amendment to the Cherokee constitution that would disenroll the Freedmen.[55] On August 9, 2007, however, the BIA approved a constitutional amendment which eliminated the requirement for BIA

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[50] Similar conditions were imposed upon other tribes. *See* Treaty with the Seminole Nation, 1866, art. 2, 14 Stat. 756.

[51] *See, e.g.,* Act of October 1, 1898, ch. 1249, 26 Stat. 636 (referring to the claims, filed to the Court of Claims by the Cherokee Freedmen, among others, for the recovery of their share of funds which the Cherokee Nation was required by law to distribute on a per capita basis).

[52] Whitmire v. Cherokee Nation, 30 Ct. Cl. 138, 156-157 (1895).

[53] *Cherokee Intermarriage Cases*, 203 U.S. at 84 (holding that the Cherokee could expel from the tribe whites who intermarried with Cherokee women since no law passed by the Cherokee or the federal government granted the whites any property rights owed to members, while also expressly distinguishing the "intermarried whites" from Freedmen, because Freedmen rights were secured by the 1866 treaty).

[54] Under the Principal Chiefs Act of 1970, P.L. 91-495, 84 Stat. 1091, the Secretary of the Interior or his representative must approve the election procedures of the principal chiefs of the Cherokee, Choctaw, Creek, and Seminole Tribes of Oklahoma and the governor of the Chickasaw Tribe of Oklahoma. The effects of non-certification, however, are unknown.

[55] 1976 Cherokee constitution, art. XV § 10.

approval of future constitutional amendments.[56] This would thereby eliminate the need for BIA approval of any amendment denying membership to the Freedmen.

Vann v. Kempthorne represents another potential method to enforce the 1866 Treaty membership provisions: private litigation.[57] Although the doctrine of tribal sovereign immunity would normally bar individual members from filing suit against their tribe,[58] the U.S. Court of Appeals for the District of Columbia has ruled that the doctrine of *Ex Parte Young* allows tribal officials to be enjoined from violating Freedmen membership rights that are protected by the 1866 Treaty and the Thirteenth Amendment to the U.S. Constitution.[59] This ruling appears to conflict with the holding of the U.S. Court of Appeals for the Tenth Circuit in a similar case involving the Cherokee Freedmen.[60] In that case, the Tenth Circuit ruled that the 1866 Treaty did not constitute a waiver of tribal sovereign immunity and, therefore, the Freedmen could not sue either the Tribe or tribal officials in their official capacities under federal civil rights laws.[61]

Other possible enforcement mechanisms which might be used to compel the Cherokee Nation to preserve the Freedmen's membership rights would require specific legislation. Congress may do so by calling upon its power over Indian affairs, which stems from various provisions of the U.S. Constitution, including the Treaty Clause[62] and the Indian Commerce Clause.[63] This power, which the Supreme Court has characterized as "plenary"[64] but not absolute, can provide Congress with many options to address this issue. For example, one aspect of this near plenary power is Congress's ability to terminate the government-to-government relationship and thereby, depending on the language of the legislation,[65] eliminate all or some of the

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[56] Letter from Asst. Secretary Carl J. Artman to Chief Chadwick Smith (August 9, 2007), [http://www.cherokee.org/docs/news/BIA_ltr_Artman_080920007_readable.pdf].

[57] *Vann*, 467 F. Supp. 2d at 14. *See also* Edwards, *supra* 122, n. 7.

[58] Under the concept of tribal sovereign immunity as recognized by the Supreme Court, Indian tribes are immune to unconsented suit unless the immunity is waived by federal legislation or by the tribe itself. *See Santa Clara Pueblo*, 436 U.S. 39; Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977); United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940).

[59] *Vann*, No. 07-5024 (D.C. Cir. July 29, 2008).

[60] Nero v. Cherokee Nation, 892 F.2d 1457 (10th Cir. 1989).

[61] *Id.* at 1461. ("We are not persuaded that [the treaty's] language constitutes an 'unequivocal expression' of waiver by the Cherokee Nation of its sovereign immunity.").

[62] U.S. Const., art. II, § 2, cl. 2.

[63] U.S. Const., art. I, § 8, cl. 3.

[64] United States v. Lara, 541 U.S. 193, 200 (2004); Washington v. Yakima Indian Nation, 439 U.S. 463, 470 (1979).

[65] *See* Menominee Tribe v. United States, 179 Ct. Cl. 496, 500-501 (1967) (concluding that termination legislation did not abolish the tribe or its membership, but merely terminated federal supervision for the property and members of the tribe). *See also* Joint Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (noting that an absence of

(continued...)

special benefits conferred onto the Tribe, including federal supervision of the property of the Tribe and its members.[66] Alternatively, Congress may, through legislation, recognize the Cherokee Freedmen as a separate tribe.[67] It is also possible that, in view of the historical context of the 1866 Treaty and its temporal proximity to the adoption of the Thirteenth Amendment to the U.S. Constitution, any legislation requiring implementation of the membership criteria could be based on the protections afforded in that amendment.[68]

Several other approaches might be considered. For example, legislation may be passed to preclude the Cherokee Nation from ratifying a constitutional amendment affecting membership criteria, absent approval from the BIA. Congress may also create a federal cause of action that would authorize the Freedmen to file a civil suit in federal court and specify the standards to be applied as well as the remedies to be ordered. Alternatively, federal funding of the Cherokee Nation may be made contingent on the Freedmen retaining their tribal membership.

Legislation

So far, three separate bills have been introduced addressing this matter. The first bill, H.R. 2824, would sever the Cherokee Nation's government-to-government relationship with the United States until the Freedmen's tribal membership is restored. This would result in ending all federal Indian funding to the Cherokee Nation. Moreover, the Cherokee Nation would incur the additional sanction of having its authority to conduct gaming under the Indian Gaming Regulatory Act[69] suspended. The bill would also create a private cause of action for the Freedmen to pursue claims in federal court alleging violations of the Indian Civil Rights Act,[70] Thirteenth Amendment, or the Treaty of 1866.[71]

There are also provisions added in an amendment to H.R. 2786 that would end funding to the Cherokee Nation under the Native American Housing Assistance and Self-Determination Act (NAHASDA) if the Freedmen lose their tribal membership. However, funding will continue so long as the tribal court injunction restoring the

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[65] (...continued)
federal dealings with a tribe does not necessarily mean that there is doubt as to the genuineness of the tribe).

[66] *See* Menominee Tribe v. United States, 391 U.S. 404, 412 (1968) (holding that the Termination Act did not abrogate the Menominee Tribe's treaty fishing and hunting rights).

[67] *See* Federally Recognized Indian Tribe List Act of 1994, P.L. 103-454, §103(3), 108 Stat. 4791. *See also* United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 547 (10th Cir. 2001). For an example of legislation that would recognize a subgroup of a tribe as a separate tribe, see P.L. 106-568, 114 Stat. 2868, § 701 (2000), recognizing the Shawnee Tribe as distinct from the Cherokees.

[68] U.S. Const. amend. XIII, § 2.

[69] *See* 25 U.S.C. § 2701 *et seq.*

[70] 25 U.S.C. §§ 1301-1303.

[71] H.R. 2824, § 5(b), 110th Cong. (2007).

Freedmen's membership rights remains in effect. Moreover, the provision to end funding will cease to be effective if the Freedmen prevail in their efforts in tribal and federal courts to vindicate their tribal membership and overturn the March 3, 2007, referendum excluding them from the Tribe.[72] The House of Representative would later include this language in a House-passed engrossed amendment to S. 2062, the Senate version of NAHASDA.[73]

Finally, H.R. 3002, the Native American Economic Development and Infrastructure for Housing Act of 2007, was amended to establish a program that would authorize the Secretary of Housing and Urban Development to guarantee obligations issued by Indian tribes to finance community and economic development activities.[74] The act as reported has a clause that will deny the expenditure of funds appropriated under the act for the benefit of the Cherokee Nation until it is certified that the Cherokee Nation is in compliance with the Treaty of 1866 and recognizes the Cherokee Freedmen as citizens of the Cherokee Nation.[75]

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[72] Native American Housing Assistance and Self-Determination Reauthorization Act of 2007, H.R. 2786, § 2(b), 110th Cong. (2007).

[73] Native American Housing Assistance and Self-Determination Reauthorization Act of 2007 (Engrossed Amendment as Agreed to by House of Representatives), S. 2062, 110th Cong. (2008).

[74] Native American Economic Development and Infrastructure for Housing Act of 2007, H.R. 3002, 110th Cong. (2007).

[75] H.R. 3002, §2(h)(2), 110th Cong. (2007).