

Overcoming the Politics of Reform: The Story of the 1999 Cherokee Nation of Oklahoma Constitutional Convention

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Abstract: A pressing international challenge is developing processes of constitution-making that manage the politics of reform and produce legitimate and effective constitutions. This challenge is of special concern for numerous American Indian nations that have been embroiled in dual governments and constitutional crises over the past several decades. This article traces the recent constitutional reform process of the second largest Indian nation in the United States, the Cherokee Nation of Oklahoma. During the middle of its own constitutional crisis in 1999, the Nation formed an independent constitution commission and held a nine day constitutional convention. The inclusiveness and independence of these two institutions – combined with innovative strategies for achieving maximum citizen education and participation in the reform process – provide a model for other nations interested in pursuing constitutional reform. In addition, Convention debates over the boundaries of citizenship, patterns of political representation and methods for achieving separation of powers reflect the substantive challenges faced by Indian nations as they have diversified and assumed greater governmental responsibilities over the past several decades.

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On a cold night in February, 1999, 79 citizens of the Cherokee Nation of Oklahoma gathered in the auditorium of a local university for the first day of the Nation's Constitutional Convention. The gathering was historical not only because it was the Nation's third Constitutional Convention and first since 1839. More importantly, it was taking place during the tail end of a constitutional crisis that had ripped the Nation in two. For two years, the Nation had suffered through a series of events leading to the existence of dual governments, complete with two courts and two police forces. A split Tribal Council had stopped conducting regular business for almost a year. Skirmishes between sides loyal and opposed to the Principal Chief had led to violence and arrests at the Nation's courthouse. For a period of time, the incumbent administration had fired the editor of the Nation's newspaper. The New York Times and the Washington Post had reported on the crisis, the FBI had begun an investigation of the Principal Chief and three Oklahoma lawmakers had called for additional federal investigations.² In the middle of everything, the warring sides somehow had agreed to a process bringing together 79 delegates to review the Nation's constitution. As the delegates sized each other up on the Convention's first night, feelings "ranged from mutual respect and admiration to loathing and even outright fear."³

Exploring how the Nation moved from crisis to convention to a proposed new constitution provides an important window into many questions faced by the large number of American Indian nations engaged in constitutional reform. Stories of intra-tribal conflicts, dual governments, and constitutional crises have been well-documented in Indian Country.⁴ This government instability has often been attributed to outdated, western-introduced, tribal constitutions – documents that to varying extents lack both legitimacy within tribal communities as well as the institutional foundations necessary for the effective exercise of government action.⁵ A host of tribal leaders and scholars have called for tribal nations to revise their constitutions and government institutions as an essential first step in strengthening government stability, exercising greater political sovereignty and enhancing prospects for increased political and economic development.⁶

Although many tribal nations have decided to reexamine their constitutions, the process of reform has proven incredibly difficult. First, tribal nations' historical relationships with the United States complicate the nature of the questions tribal nations are seeking to answer through constitutional reform. Unlike the Founding Fathers of the United States Constitution, tribal nations do not have the luxury of coming to agreement on the political "rules of the game" within well-accepted political and cultural norms. Rather, they are engaged in a fundamental rethinking over how to balance entrenched, western institutions with often competing traditional, cultural and political values. Moreover, centuries of physical separations, cultural fragmentation and various degrees of assimilation have

diversified cultural and political viewpoints *within* tribal communities. This, in turn, has made the process of finding constitutional consensus – always a difficult proposition – even more elusive.

In addition to these unique constraints, American Indian nations also confront universal challenges associated with the politics of reform – challenges that often hinder the launching and development of constitutional reform processes. Like all societies, tribal nations must accommodate the priorities of competing stakeholders, prevent reform from becoming subject to the self-interest and control of incumbent institutions, and obtain the participation and consent of the general population. Therefore, American Indian nations interested in constitutional and governmental reform face the critical challenge of first developing reform processes that create the necessary political space within which leaders and citizens can develop stronger, more accountable and more culturally-matched governments.

To date, there has been relatively little written of how tribal nations have navigated this difficult, layered process of constitutional reform.⁷ Unlike countries engaged in post-colonial constitution-making in Eastern Europe and Africa, most tribal nations have traveled along their own roads of reform in a context of informational isolation. While the reform priorities of American Indian nations vary by political circumstance, history and culture, examining the reform processes of individual tribal nations can identify common issues, provide interested tribal nations with insights and ideas for their own reform processes, and lay the groundwork for more in-depth comparative analysis.

The Cherokee Nation of Oklahoma is a good case study for two reasons. First, it demonstrates the power of tribal institutions to catalyze legitimate processes of reform. Specifically notable is the Nation's creation of an independent Cherokee Nation Constitution Commission that was successful both in overcoming biases toward the political status quo and engaging widespread citizen participation in the reform process. Perhaps most important is the Commission's success in organizing the Cherokee Nation Constitution Convention – a sovereign arena where deep issues of governance could be legitimately raised, debated and decided. Second, the Nation's substantive debates at the Constitution Convention, such as blood quantum requirements for candidates for Principal Chief, judicial restructuring, and representation for off-reservation residents, reflect many of the substantive reform challenges faced by tribal nations as they have assumed ever greater governmental responsibilities over the past 25 years. Together, the work of the Commission and the debates at the Convention provide a unique window into one Nation's successful process for addressing fundamental questions of governance.

The first part of this paper will give a brief sketch of the Nation's history, including a short discussion of the origins and structure of its current 1976 Constitution. The second part will pull together newspaper accounts, transcripts, and personal interviews to describe in detail how the Nation engaged in a legitimate process of constitutional reform during the middle of a searing political crisis. It will examine how the Nation formed an independent Cherokee Nation Constitution Convention Commission representative of the Nation's warring political factions. It will also

examine the Commission's intensive approach to obtaining widespread citizen participation in all stages of the reform process and its unique method for choosing Convention delegates. The third part will highlight some of the major debates that took place during the Nation's nine day Constitutional Convention, including arguments over bicameralism, citizenship and blood quantum, political representation for off-reservation residents, and judicial restructuring. The fourth part will discuss obstacles to the ratification and adoption of the Convention's proposed constitution, including internal debates within the Nation over the proper scope and purpose of a constitution and the Nation's ongoing struggles to obtain approval of the proposed constitution from the Bureau of Indian Affairs. The fifth part will offer concluding thoughts.

I. Background

The original members of the Nation resided in the foothills of the Appalachian Mountains in Georgia and Tennessee. Political decision-making was decentralized to largely autonomous local villages and towns, which encountered problems with white settlers almost immediately.⁸ By the early 19th century, the Nation began altering its traditional government structures and adopting U.S.-style governing institutions as a defensive strategy to ward off accusations that it was barbarous and unfit to keep its land.⁹ In 1827, the Nation elected delegates to a constitutional convention and adopted its first constitution, complete with a three branch government, a bicameral legislature, and a bill of rights.

Notwithstanding the Nation's best efforts, relations with the U.S. Government soon reached its historic low point. In 1839, Andrew Jackson ordered the infamous "Trail of Tears" removal of thousands of Cherokees to Oklahoma. Upon arrival in Oklahoma, a dominant Cherokee faction organized another constitutional convention and drafted the Nation's second constitution, based to a large extent on the earlier 1827 Constitution written in Georgia.

Although suffering in the 1840s from a period of internal conflict – exacerbated in part because of the exclusion from the 1839 constitution-making process of several Cherokee political factions – the Nation soon entered into what is commonly known as its "Golden Age." The Nation established over 100 college-level and public schools, a tribal newspaper, and an economy that made poverty "practically unknown."¹⁰ The Nation's Golden Age ended abruptly with the U.S. Civil War. Its 1866 Reconstruction Treaty with the victorious Union forced the Nation to surrender land and open its territory to railroads.¹¹ During the 1880s and 1890s, the United States placed increasing pressures on the Nation to sell land to burgeoning railroads and, later, to incorporate the Nation into a territory of the U.S. Government.¹² In 1893, the U.S. Government formed the Dawes Commission to create a roll of citizens of five Oklahoma tribes, including the Nation, for the purpose of dividing up the Nation's land into individual allotments. In 1898, the U.S. Congress passed legislation accelerating the process of allotment and formally mandating the abolition of the Cherokee government by 1906.¹³

From 1907 through 1970, the Cherokee Nation functioned without a government. During this time, the U.S. government appointed a Principal Chief, who did little more than approve leases and sign documents transferring out the last of the allotments. More than 60 years later, the Nation reconstituted itself and obtained recognition by the U.S. Government in 1970. The intervening decades without a functioning government, however, had taken its toll. Through a combination of allotment forgeries, embezzlements, misuse of notary seals, and other crimes, the overwhelming majority of land allotted to Cherokee citizens fell into white hands.¹⁴ The Nation's population had fallen to only 40,000 citizens and federal agencies of the U.S. Government had taken over responsibility for delivering services to individual Cherokee allottees.

Current 1976 Constitution

Before serving as Principal Chief of the Nation from 1975 to 1985 and heading the U.S. Department of Interior's Bureau of Indian Affairs in the Reagan Administration, Ross Swimmer played a large role in helping to construct the Nation's modern government. With the beginning of the U.S. Government's policy of self-determination in the mid 1970s, Swimmer and other Cherokee leaders began looking for ways to access the new inflow of federal funds into tribal communities. Swimmer saw federal funds as a "a big impetus" for the Nation to organize its government and adopt a new constitution.¹⁵ By the time Swimmer was elected Principal Chief in 1975, a cluster of community representatives had already been working on a new constitution for over ten years.¹⁶ According to Swimmer, the process of reform "was all over the place" with some people "wanting to recreate the 1839 constitution." Soon after being sworn in, Swimmer, frustrated at the slow pace of reform, decided to form a small group that would push through with completing work on a new constitution.¹⁷

The Nation's current 1976 Constitution supersedes completely the 1839 Constitution. It divides the Cherokee government into three branches. The legislature consists of a single-body Tribal Council, composed of 15 members elected at large from the Nation's 14 districts.¹⁸ Executive power is vested in a Principal Chief and a Deputy Principal Chief, elected to four-year terms of office. The Deputy Principal Chief also serves as President of the Council with the power to cast tie-breaking votes.¹⁹ The Judiciary is comprised of a three-member Judicial Appeals Tribunal (the Nation's Supreme Court) and other courts that the Council may choose to establish.²⁰ The Constitution incorporates the protections of the 1968 Indian Civil Rights Act and contains provisions for referendum and initiative.

Swimmer says he viewed the Cherokee Nation "not necessarily as a government but as an organization. Sort of between a non-profit and a profit-making business that was there for a specific purpose and that was to enhance the living conditions of the people."²¹ He therefore based the Constitution on "a corporate model" with Council members serving in positions akin to members of a Board of Directors.²² In Swimmer's view, a bicameral legislature, discussed at length in discussions leading up to the new Constitution, would have been too "unwieldy" and not useful for the quick receipt and disbursement of federal funds:

"[A bicameral legislature] would have meant about 60 or 75 people in the government of the tribe, and it was a personal privilege. I didn't like that. I thought we'd never get anything done. And so I said let's cut that out and let's just have a tribal council to act as a legislature. And we pegged the number at 15. There wasn't a lot of thought that went into that, but we decided on 15 as a good number."²³

Swimmer grounds his preference for a unicameral, corporate form of government in the context of the time. For almost 70 years, the Nation had had no enrollment and no government. Services were delivered directly from the U.S. government to individual Cherokee allottees. Swimmer says that before the era of self-determination, he never could have imagined that the Nation would one day exercise taxing powers or have a court system that could incarcerate Cherokee citizens and handle adoption cases. Instead of creating a government, Swimmer simply wanted to organize a system for the improvement of the delivery of services to individual Cherokees:

The court, for instance, its only purpose at the time was to handle disputes between the executive and legislative bodies. It had no outside function. It was going to be an internal court. The legislative body was there to review programs and sign off for the most part on federal programs and appropriations to the tribe. And, of course, the executive body was to administer those programs that came in and do whatever it could to improve the living conditions of Cherokees in eastern Oklahoma."²⁴

Two specific provisions in Article XV of the 1976 Constitution later proved to play key roles in the Nation's recent constitutional reform process. Article XV, Section 9 requires that the question of a proposed constitutional convention be submitted to the members of the Cherokee Nation at least once every 20 years.²⁵ Article XV, Section 10 requires that any new constitution or amendment receive the approval of the President of the United States or his authorized representative. While Section 9 helped to launch the Nation's process of political reform, Section 10 has been responsible for the Nation's difficulty in holding a referendum to approve the proposed constitution adopted by convention delegates.

1997-1999 Constitutional Crisis

It would have been very difficult to predict in the early 1990s the emergence of the Nation's constitutional crisis several years later. With approximately 200,000 members, the Cherokee Nation of Oklahoma is the second largest American Indian nation in the United States. From the mid 1970s through the mid 1990s, the Nation prospered under its 1976 constitution and enjoyed a reputation as one of the most stable and autonomous nations in Indian Country. Swimmer served as Principal Chief for ten years before becoming the head of Department of Interior's Bureau of Indian Affairs in 1985. His successor, Wilma Mankiller, became the Nation's first woman Principal Chief, also served for ten years, and became a prominent national woman leader.

The Nation's stability began to unravel in the 1995 election for Principal Chief. Mankiller's choice as her successor was disqualified by the Nation's election board and, in a runoff election, Joe Byrd was elected as Principal Chief with less than 5,000 votes. The real trouble, however, began in February of 1997, when the Nation's highest court authorized Cherokee marshals to search Byrd's offices for evidence of illegal activity. In retaliation, Byrd and half of the Council impeached all three justices, replaced the Nation's marshal service with a private security force, and forcibly overtook the Nation's courthouse.²⁶ The crisis became a national affair when a melee erupted as the fired marshals and justices tried to retake the courthouse in August, 1997.²⁷ With the threat of Congressional intervention hanging over them, the two sides reluctantly agreed to a settlement mediated by Interior Secretary Bruce Babbitt in the summer of 1997.²⁸ But the truce did not last long. In the early months of 1998, Byrd moved the district court – responsible for hearing obstruction of justice charges against him – out of the tribal courthouse and into the tribal administration building near his office.²⁹ Beginning in April, 1998 six Council members boycotted scheduled Council meetings for over a year to prevent a quorum and official Council actions until the district court was moved back to the courthouse.³⁰

II. Launching a Process of Constitutional Reform

Creation of Independent Constitution Convention Commission

In early 1999, during the middle of the crisis that was tearing the Nation apart, a group of 79 Cherokee citizens were spending nine days at a local university trying to lay a foundation for putting it back together. How the Nation pulled together a true cross-section of Cherokee citizens to serve in a full-fledged Constitutional Convention in the middle of a political crisis is a powerful story and one that dates back several years before the crisis.

The year 1995 marked the twentieth anniversary of the Nation's present constitution. Pursuant to Article XV, Section 9, it also marked the constitutional 20-year deadline for asking the Cherokee citizenry to vote on the question of a constitution convention. In the summer of 1995, Cherokee voters at a special election overwhelmingly approved the calling of a convention.³¹ Importantly, although the Constitution required a vote on calling a convention, it did not specify when the convention actually needed to take place. For three years, the tribal administration did not take any action to plan a Convention and the issue faded off of the political map.³²

As the years slowly crept by, the Cherokee voters' mandate for a convention collided with the Nation's political crisis. At various points during the crisis, several individuals on both sides of the political fence began pushing the Nation's government to begin work on the convention. Charles Gourd, a member of the Byrd administration, and Troy Wayne Poteete, the Chair of the Council's Rules Committee, along with others ultimately were successful in getting the Rules Committee to begin laying the groundwork for the convention.³³

Planning a convention in the middle of a constitutional crisis was no easy feat. Poteete, the point person on the Rules Committee, was most concerned about the political challenges of beginning the reform process. The difficulty lay in obtaining Council approval for launching a constitutional reform process without letting the process become subject to the same political forces associated with the crisis. Faced with the monumental nature of the task, Poteete and others reached out to a variety of outside experts before finally deciding to form a Constitution Convention Commission.

In March, 1998 each of the three branches of government appointed two representatives to serve on a newly-formed Cherokee Nation Constitution Convention Commission. The six commissioners then collectively chose a seventh member.³⁴ The selection process was modeled on that of the Nation's election commission.³⁵ Byrd appointed two representatives from the executive branch, whose interests were countered by the judiciary's two representatives. A Council split between Byrd supporters and opponents named the remaining two representatives. By allowing for appointees from each branch of government, both the pro and anti-Byrd camps thought that they could gain something from inclusion on the Commission.³⁶ At the same time, the Commission's structure allowed it to operate without being unduly influenced and controlled by either side.

In order to reinforce the perception of political neutrality, Commission members were sworn in at Sequoyah High School, and not at the tribal administration building.³⁷ After creating the Commission, the Council left it up to the Commissioners to develop their own empowering legislation.³⁸ Assuaging their own mutual mistrust and signaling their credibility as a body, the Commissioners decided collectively to take an oath of political neutrality, refrain from holding political office, hold open meetings and act only upon unanimity.³⁹

Almost immediately, the Commissioners, compensated with a stipend of \$250 per month, began asserting their independence. When representatives from the Bureau of Indian Affairs tried to persuade the Commission to amend the Constitution under the Oklahoma Indian Welfare Act, Commission members refused.⁴⁰ The real test of the Commission's strength, however, came in the summer of 1998 when it sought Council ratification of its enabling legislation. The Commissioners not only had to call the divided Council together for a special meeting to approve the legislation (no easy task during the period of Council meeting boycotts by six of its members), but also had to break free from the Council's oversight. At first, the Council initially wanted to limit the Commission's authority to that of a recommending body.⁴¹ Poteete admits he was "a little apprehensive" about an independent commission and initially asked that the Commission "go out to the public, get their feelings, report back to Council, tell us what is legislative (should be put in ordinance), what should be in the Constitution and we'll decide what to put on the ballot." By this time, however, the Commission had already an established an identity of its own. After earlier agreeing to an oath of political neutrality, the seven Commissioners responded to the Council with an ultimatum: "We stay independent or we walk".⁴²

After what one Commission member described as a "dogfight" to preserve the Commission's independence, the Council eventually approved the Commission'

enabling legislation in 1998.⁴³ The legislation contained language confirming the Commission as “an independent commission” whose authority “shall not be subject to direction or supervision by the executive, legislative or judicial branch of the Cherokee Nation government.”⁴⁴ It granted the Commission “sole responsibility and explicit authority for the conduct of the Constitution Convention” and allowed the Commission to place a new constitution or set of amendments directly on the ballot for a referendum vote by the citizens of the Nation.⁴⁵ Importantly, the Council eventually allocated the Commission an initial budget of \$250,000 to begin its work. Cumulatively, the combination of a willful Commission, a weak Council and a perception by both political sides of potential benefits from reform contributed to securing the Commission’s independence.

Engaging and Informing the Public

The enabling legislation placed an overarching priority on the Commission’s responsibility for educating Cherokee citizens about the initiation of the Nation’s constitutional reform and achieving widespread citizen participation in the process. The Commission’s first step was to foster a culture of openness, which the commissioners felt was essential due to the crisis atmosphere at the time. The Commission made this commitment concrete by publishing a schedule of all of its meetings and making them open to everyone, including non-tribal media sources.⁴⁶ Later, the Commission made the Convention open as well.

The heart of the Commission’s outreach efforts, however, consisted of a well-planned series of public hearings, both within and outside the reservation. From September, 1998 through January, 1999 the Commission held approximately 20 public hearings, providing citizens with the opportunity to provide both written and oral testimony expressing their views on constitutional changes. A critical decision, and one that would later have a significant impact on the Convention itself, was the Commission’s commitment to hold several public hearings outside of the historical boundaries of the reservation, home to approximately 40% of the Nation’s citizens.⁴⁷ The Commission held public hearings in several cities, including Tulsa, Dallas, Houston, Los Angeles and Sacramento..

Altogether, attendance at the public hearings ranged from two to 200 people and generated over 800 pages of testimony.⁴⁸ To ensure consistency, the Commission developed and published rules for the taking of testimony, required the presence of at least three commissioners at each hearing, and determined hearing locations based on voter precinct locations established by the Election Commission.⁴⁹ The Commission made use of both direct mail pieces and media releases to publicize awareness of the hearings and kept a permanent record of all testimony.⁵⁰

The Commission supplemented its public hearings with innovative uses of the Nation’s website – posting testimony from public hearings, providing status reports of the Commission’s work on a periodic basis, and establishing a chat room for citizens to post additional suggestions and reactions about proposed constitutional revisions.⁵¹ The Commission later posted on the website the transcripts from the nine day Convention itself.

The Commission made use of the testimony from the public hearings and other sources of community input to develop and disseminate an “issues list” for focusing additional debate and discussion.⁵² Ultimately, the Commission concluded that the public comments were too wide-ranging, diverse, and in some instances contradictory, to be translated into amendments to the Nation’s current Constitution. Instead, the Commission used the “issues list” to draft a proposed new Constitution that would serve as the basis of debate at the Convention.

Choosing Convention Delegates

The most difficult task faced by the Commission was determining a method for choosing delegates to the Convention, a process that Poteete described later as “an opportunity to undo ourselves.”⁵³ A formidable challenge under any circumstance, the ongoing political crisis involving all three branches placed an even higher premium on developing a process that all sides would accept as legitimate.

The Commission decided against the traditional practice of electing Convention delegates for several reasons, including the logistical and financial difficulties of determining nominating processes, apportioning delegates by electoral districts, and holding an election. Instead, the Commission developed an original and multi-faceted method for choosing the 79 Convention delegates. The first 24 delegates were composed of eight appointees from each of the three branches of government. The Commission then selected the second 24 delegates from a pool of citizens who had given testimony at public hearings. The Commission chose the third set of 24 delegates by lottery from a pool of applicants. The drawing was held in an open meeting with considerable media attendance. The seven Commission members themselves filled the final remaining delegate seats.

The Commission’s method ensured representation in the Convention of all political parties. Not surprisingly, executive branch delegates were pro-Byrd, judicial appointees were Byrd opponents, and legislative branch delegates – like the Council itself – were split between pro and anti-Byrd delegates. As Poteete said, we “had every faction represented.”⁵⁴ The delegates to the Constitutional Convention comprised a cross-section of Cherokee society, one whose members diverged by age, degrees of Cherokee blood quantum, and educational and occupational background.⁵⁵ While a few delegates were current or former elected tribal officials, most had no previous political experience.⁵⁶ Only 14 of the 79 citizen delegates were lawyers and 17 delegates resided outside of the historic boundaries of the Nation.⁵⁷

Overview and Ground Rules of Constitutional Convention

On February, 26, 1999, the 79 delegates to the Cherokee Nation Constitution Convention assembled for the first day of a nine day convention at Northeastern State University, just outside the Nation’s capitol in Tahlequah, Oklahoma.⁵⁸ One delegate described the tension “between the pro and anti-Byrd administration delegates” as “so thick you could cut it with a knife” and said that there “were times... when it was just downright hard to breathe.”⁵⁹ Consistent with its approach

throughout the reform process, the Commission opened the Convention proceedings to non-delegates, including non-tribal media sources.⁶⁰ In order to accommodate the views of 79 delegates in a finite amount of time, the Commission introduced Roberts' Rules of Order, which the delegates voted to accept as the Convention's procedural ground rules.⁶¹

Just as the Commissioners had asserted their independence from the Council, the delegates quickly asserted their independence from the Commission. The very first motion replaced the Commission's choice for Convention Chair – seen as too closely aligned with Byrd – with Jay Hannah, another Commission member and an Oklahoma banker seen as more politically neutral.⁶² The delegates then moved to amend the ground rules for raising and debating constitutional amendments during the Convention. Feeling that limiting debate only to the Commission's proposed constitution would undercut the Convention's autonomy and range of options, the delegation voted to allow any delegate to introduce proposed new language.

Convention delegates agreed to vote to approve or disapprove proposed amendments to the Nation's current constitution on a section by section basis. When voice votes were inconclusive, the convention utilized standing votes and roll call votes. Once the convention worked its way through the entire 1976 Constitution in this fashion, a final vote was to approve the proposed new constitution in its entirety.⁶³

Finally, although never explicitly addressed, the 14 delegates who were also Cherokee lawyers were treated just like the other 65 delegates. In the vast majority of instances, the delegation suggested, discussed and debated proposed new constitutional language as a group. For certain sections with legal "terms of art", particularly sections pertaining to the powers of the judiciary, lawyer-delegates took a leading role in suggesting, defining and clarifying proposed language.⁶⁴ In other instances, lawyers joined non-lawyers in small break-out groups to draft language that they then reported back to the Convention as a whole for further discussion and debate. On one occasion, lawyer-delegates even passed around copies of Black's Law Dictionary so that other delegates could review definitions of legal terms. At least one delegate reported that the Convention's "lawyers helped with the proper phrasing of amendments even if they didn't agree with its substance."⁶⁵

III. Major Areas of Reform Debated at Constitution Convention

Topics dominating discussion at the Commission's public hearings and the Convention itself fell into two broad categories. The first set consisted of concrete proposals for strengthening the accountability and effectiveness of the Nation's government. Many of these concerns were raised in direct response to the Nation's crisis. During the Commission's public hearings, citizens called for procedures allowing for the recall of elected officials, the holding of mandatory community meetings by Council members in their respective districts, open financial records of the Nation's government, publication of the Nation's laws, the creation of an independent election commission, and better publicized notices of open Council meetings.

Many of these concerns subsequently were addressed at the Convention, with delegates voting to create a permanent record of the Nation's laws, remove language requiring their approval by the Bureau of Indian Affairs, stagger terms and implement term limits for Council members, create an independent election commission, and remove the Deputy Principal Chief from service as President of the Council.

A second set of reform proposals stemmed from the growing disconnect between the constitution's corporate model of government and the Nation's phenomenal growth in population, diversity and assumption of governmental responsibilities over the past three decades. Between 1970 and 1999, the Nation's population had grown from 40,000 to over 200,000. The government had contracted or compacted with the U.S. Government in a host of different areas, including housing, health, economic development, elderly programs, education, and environmental management. As a result, the Nation's budget had ballooned from \$10,000 to \$192 million. This change in the size of the Nation's government matched an equally dramatic change in the Nation's demographics. The absence of a blood quantum requirement in the constitution and the passing of a generation had combined to lower the average blood quantum of the Nation's citizenry by the time of the Convention. The Nation's citizens, once concentrated in Oklahoma, were increasingly living in places as far-flung as Texas and California.

In the minds of many citizens, Swimmer's 1976 constitution simply could not keep up with the Nation's increased governmental responsibilities and the competing demands of a larger and more diverse citizenry – one whose interests diverged by residency, blood quantum and culture. These pressures manifested themselves in debates over a return to a bicameral form of government, a stronger and more independent judiciary, political representation for Cherokee citizens living off-reservation, and minimum blood quantum requirements for candidates for Principal Chief exemplify. The following sections briefly summarize the Convention debates of these four topics. To varying extents, they reflect similar discussions engaged in by other tribal nations. They also serve as important bridges to larger questions of American Indian citizenship, governance, and nationhood. Collectively, they demonstrate how the difficult task of reforming entrenched governmental institutions can be achieved.

Bicameralism

One of the first major convention debates involved whether Nation should return to the bicameral form of government of the Nation's 1827 and 1839 constitutions. Across Indian Country, the overwhelming majority of tribal governments concentrate legislative power in unicameral tribal councils. During the nineteenth century, the U.S. Government – frustrated at tribes' slow, consensus-oriented method of political decision-making -- began pressuring tribes to form small tribal bodies capable of quickly approving treaties and agreements. The trend became entrenched with the adoption by almost 100 tribes of generic constitutions developed under the 1934 Indian Reorganization Act. IRA constitutions generally follow a similar format, including the vesting of legislative power in unicameral tribal councils that often consist of less than 15 members.

Tribal councils were never intended to reflect and balance socio-cultural groupings within tribes, such as family allegiances, clans or bands. Nor were they intended to allow for the efficient operation of sovereign tribal governments. Like Swimmer's 1976 Constitution, the motivation for unicameral councils was to facilitate the receipt and disbursement of federal funds through a corporate structure. Underscoring the point, may IRA constitutions include "bylaws" naming and describing the duties of individual members of the Council as President, Secretary, and Treasurer. Relative to other branches of government, most tribal councils have vast and relatively unchecked powers.

The limitations of tribal councils have been exacerbated as tribal nations have grown and diversified. Noting the need for more responsive, capable and culturally-grounded institutions, Indian scholar Duane Champagne has underlined the ability of bicameral legislatures to both enhance government stability and give formal political recognition to socio-political groupings within tribes.⁶⁶

On the second day of the convention, John Keen introduced a motion for the Convention to consider a return to bicameralism. Keen argued that the Nation's current unicameral form of government had allowed nine persons – the Principal Chief and eight Council members – to control the Nation's entire government and only six boycotting Councilors to bring the Nation's government to a halt. Keen's motion called for a lower house (tribal council) apportioned by district population and an upper house (senate) apportioned by one delegate per district. The move to two houses of government would increase the total number of legislators from 15 to 33 and reduce the ratio of legislators to citizens from 1:12,000 to 1:5,500.⁶⁷

Quoting James Madison's *Federalist No. 51*, Keen argued that a bicameral legislature's dual legislative track structure and form of election as well as its increased size would prevent a small bloc of united Council members from controlling the levers of the Nation's government. A supporter of the motion said the lower house could address local concerns while the upper house would provide a "balance" and "stability" by ensuring that the legislature did not get bogged down in debates over local issues. Another argument raised in favor of Keen's bicameral

proposal was its consistency with the Nation's bicameral system of government in the 1827 and 1839 constitutions.

In response, several delegates proffered a series of counter-arguments against the adoption of a bicameral legislature. Some feared that two houses of government would double the potential for stonewalling and make it more difficult for the Nation to reach consensus. Another delegate argued that, unlike the Founding Fathers of the U.S. Government, who wanted to develop a mechanism for distributing power among states of unequal population, the Nation did not have a problem with regard to unequal power among its districts. Several members of the Convention Commission reported that bicameralism had been raised during public hearings but felt that such a change would present too many practical difficulties.⁶⁸ Commission members said they were "stymied" in their attempt to figure out a way to implement a bicameral legislature without affecting other constitutional provisions.⁶⁹ The Nation's Chief Justice quickly and forcefully denounced the Commission's concerns, describing it as "mindboggling" that the leaders at the Convention couldn't figure out how to form a bicameral legislature.⁷⁰

Surprisingly, the argument that appeared to seal victory for opponents of a bicameral legislature was the simple one of cost. Numerous delegates felt that the Nation's \$150 million annual budget should be spent on delivering services to Cherokee citizens rather than creating a bigger government. Although several delegates said the issue was important enough to justify a fuller examination of structure, powers, and cost, the delegation ultimately voted down the proposal.

Judiciary

Much focus at the Convention was spent on restructuring the Nation's judiciary. The provisions in the 1976 constitution concerning the judiciary had not kept up with the spectrum of civil jurisdiction powers available to Indian nations under federal law. The corporate model of the constitution vested the Nation's three-member Judicial Appeal Tribunal with powers only "to hear and resolve any disagreements arising under any provisions of this Constitution or any enactment of the Council." In addition to strengthening its powers, the delegates were concerned about the Judiciary's independence. Great concern was placed on preventing a reoccurrence of the impeachments, standoffs, lockouts, dual court systems and other problems between the judiciary and the other two branches that had taken place during the crisis.

To strengthen the powers of the Judiciary, the delegates agreed to a two tiered court system consisting of a Supreme Court (formerly the Judicial Appeals Tribunal) and such lower district courts as the Council shall from time to time establish. The proposed constitution vests the Nation's district courts with original jurisdiction to hear and resolve disputes arising under the laws or constitution of the Nation, whether criminal or civil in nature.⁷¹ It vests the Supreme Court with powers of original jurisdiction over all cases involving the Nation or its officials named as a defendant and with exclusive appellate jurisdiction over all district court cases.⁷² To

improve the scope and depth of decision-making of the Supreme Court, the proposed constitution raises the number of justices from three to five.⁷³

The delegates also took a series of steps to strengthen the judiciary's independence while providing checks on the exercise of its powers. To protect the Judiciary's independence from various interest groups, delegates voted to have judges and justices appointed by the Principal Chief rather than elected. Under the proposed constitution, the judge and justices also serve longer terms (10 years for Supreme Court justices) and cannot have their salaries diminished during their terms.⁷⁴ In a measure to prevent court-stacking, the proposed constitution staggers the terms of the judges and justices so that they do not overlap with the terms of the Principal Chief more than twice in any five year period.

At the same time, the proposed constitution contains several checks. First, it keeps judges and justices subject to removal by the Council for specified causes. The most innovative check, however, is the proposed constitution's Court on the Judiciary. After suffering through the recent impeachment of the entire judiciary by the Principal Chief and Council, the delegates wanted to preserve the judiciary's integrity without allowing it to police itself entirely. Similar to the discipline-keeping role of European-style Constitutional Courts, the Court on the Judiciary is a seven-member panel vested with powers of suspension, sanction, discipline and recommendation of removal of judges and justices.⁷⁵ Borrowed from a similar body in the Oklahoma Constitution, the Court is composed of two appointees from each of the Nation's three branches of government, who collectively appoint a seventh. One of the two appointees of each branch must be a member of the Cherokee Nation Bar Association and the other a non-lawyer.⁷⁶

Representation on Tribal Council for Off-Reservation Residents

Mandatory federal relocation programs, forced removals, a lack of well-paying jobs on many reservation lands, and routine migration has left many American Indian nations with high numbers of its citizens living outside of historical reservation boundaries. The situation is especially pronounced for American Indian nations lacking well-paying reservation-based jobs for all of their citizens. With approximately 40% of its 200,000 citizens living off-reservation, the Cherokee Nation is at the forefront of this trend of dispersed Indian citizenry.

The Nation's current 1976 Constitution does not provide for specific representation on its Tribal Council for off-reservation residents. Instead, off-reservation residents select a district or precinct within the Nation's historical boundaries for purposes of registration and voting. Off-reservation residents have claimed that this has led many candidates to solicit their votes before elections and ignore them afterwards.⁷⁷

Gaining representation on the Council proved to be the foremost priority of the 14 Convention delegates residing off-reservation. Julia Coates Foster, a Cherokee citizen living in New Mexico, organized a meeting of all 14 off-reservation delegates on the night before the Convention's first day to develop a strategy for gaining

representation. An initial step in the strategy was to become “better able to identify those delegates who were players on both sides of the crisis troubles.”⁷⁸

On the Convention’s second day, Foster introduced a motion requesting representation for off-reservation residents. Foster’s motion called for 20% of Council seats to be reserved for representation of the Nation’s off-reservation residents. If off-reservation were included as delegates to the Convention, she asked, why shouldn’t they have a seat at the legislative table? Foster argued that representation would provide off-reservation residents with the information necessary to advocate for Cherokee issues against outside public and private interests. She also pointed to the need for stronger bonds among Cherokee’s diverse citizenry. “Our land base is minimal but in some sense our Nation exists from coast to coast and border to border because our Nation exists in our people, our citizens and our citizens are everywhere.”⁷⁹

Opposition by delegates residing within the reservation’s boundaries was swift. Delegate David Cornsilk reminded delegates that off-reservation citizens were not subject to the laws of Nation.⁸⁰ Contrasting Foster’s view of the Nation being made up of its citizens, wherever they were, Cornsilk countered that the “Cherokee Nation is a real place, that it is here. That it is within the exterior boundaries of the Cherokee Nation as described in the treaties, and that the focus of the people who live outside the Cherokee Nation should be to strengthen the Nation, the place here.”⁸¹ Other delegates argued that the Nation’s current system of having off-reservation residents choose a district within which to register and vote was sufficient. Couldn’t a group of off-reservation residents simply form an organization and agree to register in the same district as a bloc?⁸²

The tide turned when a well-respected current Council member, Barbara Starr-Scott, unexpectedly stood up in support off-reservation representation with the simple declaration that “when everybody represents you, nobody represents you.”⁸³ The motion then became renamed the Starr-Scott proposal.⁸⁴ Eventually, the two sides reached a compromise calling for the Council to be expanded from 15 to 17 members, with the additional two at-large seats reserved for representing off-reservation residents.

Blood Quantum Requirements for Candidates for Principal Chief

At the end of the nineteenth century, the U.S. Government terminated its official recognition of the Nation’s government. To transfer land out of the Nation’s ownership, the U.S. Government created the Dawes Commission to create a list of individual Cherokees eligible to receive individual land allotments. Under the Nation’s current constitution, citizenship is granted to any descendant by blood of a Cherokee originally listed on the Dawes Commission Rolls. By 1999, the descendancy test, along with time and intermarriage, had allowed the Nation to grow to almost 200,000 citizens. These same forces had also worked to greatly lower the Indian blood quantum of the Nation. At the time of the Convention, approximately 90% of the Nation was 1/4 Indian blood or less, with the most common degree of blood quantum being 1/16 or 1/32.⁸⁵

The tension between full-blooded and lower-blooded Cherokees manifested itself on the Convention's fifth and sixth day, when delegates introduced motions to establish a minimum blood quantum requirement for candidates for Principal Chief. The first motion was for candidates to be citizens by 1/16 of greater blood quantum and be bilingual in Cherokee and English. The motion was immediately and strongly opposed by several delegates. One, referring to the low blood quanta of the Nation's citizenry argued:

"If we put this kind of limitation on ourselves, we are simply saying that we don't trust ourselves to lead our own Nation. We're trying to say that that the people, our own children, our own grandchildren, at some point are not capable of leading this Nation simply because they have some federally imposed degree of Indian blood"⁸⁶

A second delegate opposed the motion with a warning for the future:

"We're saying that we're going to put a time and date on the existence of the Cherokee Nation. If we put a grade of Indian blood on it... we're saying that in a hundred years or two hundred years, that we will cease to exist as a people, at least with a leader."⁸⁷

The motion was quickly voted down.⁸⁸ The next day, however, the issue was raised again, this time through a motion presented on behalf of a bloc of non-delegates calling for a ¼ blood quantum for candidates for Chief.⁸⁹ The sponsor based the motion on the "pride of not one day seeing a blond-haired, blue-eyed Chief representing me."⁹⁰ Supporters of the motion associated low blood quantum Cherokees with dominating the Convention by talking in fast "legalese" that they couldn't understand.⁹¹ One grounded his desire for a blood quantum requirement as a way to maintain "integrity of the Cherokee Nation."⁹² Another felt that a blood quantum requirement for Chief would serve as an important symbol for Cherokee children: "... I would like for our Cherokee children, our dark-skinned Cherokee children to able to look at their Chief and see someone like them. I think that's essential for their self-esteem."⁹³

In opposition, delegates argued along several lines: the blood quantum requirement could not stand up against the test of time and the Nation's ever decreasing native bloodlines;⁹⁴ citizens' opportunities to run for office should not be limited by their blood; those favoring higher blood quantum could express their desire for such a candidate at the ballot box;⁹⁵ blood quantum is a non-traditional value introduced by the federal government and not an appropriate criterion for determining the Nation's Chief;⁹⁶ the Dawes Commission made mistakes in its original blood quantum determinations, therefore making it inherently inaccurate,⁹⁷ and blood quantum is not a perfect match for "Indianness".⁹⁸ A final argument was that such a change would never be approved by Cherokee voters at a referendum.⁹⁹

In the end, the delegates voted to reject a minimum blood quantum requirement for candidates for Principal Chief

IV. Prospects for Ratification

Overall, reform leaders on both sides of the aisle affirm the legitimacy of the Nation's constitutional revision process, and especially praise the role of the Commission. Even Swimmer, the primary author of the current constitution, agrees that "the constitution convention and the product they developed seems to be pretty well accepted by most people."¹⁰⁰

At the same time, several high-ranking officials lawyers in the Nation's current administration feel that the proposed constitution contains "too much legislation."¹⁰¹ Citing the document's mandate of attendance at Council meetings and the "unwieldy" language concerning representation for off-reservation residents, they express concern that the proposed constitution's specificity will work to constrain effective government action.¹⁰² These arguments are usually wrapped up in a larger preference for limited, framework-based constitutions that serve primarily to outline institutional arrangements.¹⁰³

Other delegates defend the proposed constitution's "legislation" as necessary. Foster feels "there was much legislation in the document because it was written during a crisis. The more words, the hotter the issue."¹⁰⁴ Indeed, transcripts from the convention reveal a frustration with the Nation's minimalist, framework-oriented constitution. Simply charging the Council to implement legislation, some delegates argued, is not sufficient when the Council has not acted in the past.¹⁰⁵

In addition to debates over constitutional "legislation", a second concern revolves around the decision of the Commission and Convention delegates to replace the current constitution in a wholesale manner, rather than by a series of amendments. David Mullen, general counsel for the Nation, worries that the Commission's introduction of a replacement constitution presents a "big target" for opposition, where individual opposition to a single proposed provision can lead to a vote against the constitution as a whole.¹⁰⁶ Others, including a present Supreme Court Justice, fear that the wholesale replacement of the Nation's current constitution will lead to the loss of the precedential value of the Nation's entire body of case law.

The Commission defends its decision as necessary, arguing that the shear amount of recommended changes brought forth by Cherokee citizens during the public hearings and comment period precluded revising the current constitution by amendment. Citing the Nation's need for the significant amount of changes in the proposed constitution, Hannah expresses concern about individuals wanting to "throw the baby out with the bathwater".

So far, the biggest threat to the Nation's proposed constitution has not been its reception by the Cherokee citizenry but rather by the U.S Department of Interior's Bureau of Indian Affairs. Because the Cherokee Nation did not organize its government pursuant to the Indian Reorganization Act, it is not required by U.S. law to obtain BIA approval for new or amended constitutions. However, the Nation chose in Article 15, Section 10 of its 1976 Constitution to include language requiring that any amendment or new constitution be approved by the "President of the

United States or his authorized representative.” Swimmer said he included the language as a defensive measure to ensure the recognition of the Nation’s 1976 constitution by the U.S. Government:

“We were trying to adopt a constitution in place of the 1906 Act (terminating the Nation) and we felt that if we didn’t have the federal imprimatur on this constitution that the BIA could come back and say well you’re violating the 06 Act. You’re constitution doesn’t mean anything. By getting the signature of the Secretary of Interior on our constitution, it meant to us that we would have to recognize this as the governing document of our tribe”

Because of the approval language in the Nation’s current constitution, the Commission sought BIA approval of the proposed constitution adopted by delegates to the Convention. After not hearing from the Bureau for several months, the Commission began to lobby the Bureau with calls and letters from September through December, 1999.¹⁰⁷ After nine months of review by two separate field offices, the Solicitor’s office, and several internal levels in the Bureau’s Washington central office, the Bureau finally decided on December 14, 1999 not to approve the Convention’s proposed constitution.¹⁰⁸ In a lengthy disapproval letter to the Nation, the Bureau delivered a series of mandated and recommended changes to specific articles of the proposed constitution.

On February 26, 2000, the Nation’s Tribal Council responded to the Bureau’s decision by proposing a single amendment to the 1976 Constitution striking the requirement to obtain U.S Government approval.¹⁰⁹ This amendment would render moot the Nation’s “self-imposed constitutional [approval] requirement” and would allow for the revised constitution to be placed immediately before the Cherokee people for ratification.

Since February 26, 2000, the Nation has sought approval from the Bureau of this single amendment. To date, the Nation has been unsuccessful in its efforts. Due to the Nation’s struggles with the Bureau, more than two years have passed since the last day of the Convention and the Nation’s citizens have not yet voted on its proposed constitution. Ironically, Swimmer, who inserted the approval clause in the constitution 26 years ago, has joined others in calling for the Nation to proceed with its special election on the proposed constitution:

There’s no reason for the [the Bureau] to have to approve any provision. If there’s a provision in the constitution that violates the ICRA [Indian Civil Rights Act] or that violates any provision of federal law then it’s not going to be effective. The tribe can’t do that. But it’s not up to the Bureau to tell us what their opinion is of it. It’s going to be up to the courts. Somebody will bring it up and challenge the constitution’s authority in that particular area if that’s what the issue is.”¹¹⁰

For its part, the Commission has decided not to spend \$350,000 on a special election on the proposed constitution only to be told subsequently by the U.S. Government that it is null and void. At least one member of the Commission has expressed concern that governing under a constitution not recognized by the U.S. Government

may lead the BIA to cease its recognition of Council actions and jeopardize the Nation's operation of its federally-funded government programs. A precedent for such action occurred just last year with the Seminole Nation of Oklahoma, another nation with a constitution requiring approval by the U.S. Government.

Regardless of debates over strategy, the end result has been almost three years of the status quo. New Principal Chief Chad Smith has received high marks for his current administration of the Nation. The Nation's government is stable and its budget deficit has been erased. Smith's positive leadership has, in some sense, defused the strident calls for reform heard in 1999. But the limitations of the Nation's current constitution remain; and every day that the Nation waits for U.S. approval lowers the probability that the Convention's proposed constitution ultimately will be ratified by the Cherokee citizenry.

Concluding Thoughts

It is difficult to draw conclusions from the experiences of one nation. However, some tentative lessons can be drawn from the Nation's story. Specifically, it reveals how a well-designed process can manage the politics of reform sufficiently enough to create a forum within which deep questions of governance can begin to be addressed.

Throughout the world, a central concern of political reformers has revolved around discussions of how best to prevent incumbent institutions and officeholders from directing reforms to their own self-interests. From Africa to Eastern Europe to individual American states, stories abound of parliaments and congressional bodies seeking to maintain the status quo by either refusing to heed calls for reform, assuming complete control over the reform process, or creating commissions and other reform bodies that serve at their pleasure.

A central question is how nations can engage in governmental and constitutional reform when those currently holding political power control the levers of change. This inquiry applies just as forcefully to Indian Country, where political power is often concentrated in small tribal councils and where constitutional reform realistically cannot take place without Council approval. While a political or economic crisis can certainly help catalyze reform, there still remains the question of how to engage in a process of reform that is not overly influenced by the incumbent government.

The Nation's story is important because it demonstrates the power of institutions to catalyze and legitimize reform processes. On a first cut, the provision in Article XV, Section 10 of the Nation's current constitution requiring periodic referenda for the calling of a constitutional convention allowed for the crucial introduction of citizen voices demanding change.¹¹¹ To fulfill the will of the Cherokee voters, however, the Nation still had to develop a reform process viewed as legitimate and independent from the incumbent government. Somewhat counterintuitively, the Nation created an independent Constitution Commission by *including* appointees from all three branches of government. This allowed incumbent officeholders the comfort of having representation on the Commission while at the same time preventing any single government body from controlling it. The Nation then lent teeth to the

Commission's independence by granting the Commission exclusive authority over the reform process and investing it with the power to place its proposed reforms directly on a referendum without the requirement of initial approval by any branch of government.

Together, the constitutional language for the "automatic referendum" every 20 years and the independent nature of the Commission allowed the Nation to begin a legitimate process of reform at a time of widespread mistrust and heightened instability. The Commission's method of engaging public input and support for its work, as well as its inclusive method for choosing Convention delegates, added the crucial final steps. Cumulatively, they led to the creation of a legitimate and accepted forum – the Convention – within which to debate complex and often divisive issues of governance.

The substance of the Convention debates themselves are enlightening for revealing how the Nation pursued reform in two distinct areas. The Nation desired not only to create stronger and more accountable governmental institutions (e.g. debates over bicameralism, separation of powers, and judicial reform) but also to address primary questions of citizenship and national identity (e.g. representation for off-representation residents and blood quantum requirements for citizens and candidates for Principal Chief). This dual track nature of constitutional reform most likely will resemble the reform processes of other tribal nations as they continue to assume governmental responsibilities from the U.S. Government, have their populations geographically and demographically diversify, and face cultural, political and economic pressures to confront issues of citizenship.

Therefore, analyzing how the Commission and the Convention delegates resolved such issues is relevant to a larger number of American Indian nations.

Procedurally, the Commission's included delegates from a wide cross-section of political and demographic stripes. The adoption of Roberts Rules of Order then allowed all for the input of all 79 delegates. While this led to instances of intense debate it also vested the delegates' decisions with legitimacy. For especially controversial or technically complex proposed amendments, the Convention formed caucuses to hammer out agreements. Together, these procedural devices helped the Nation create a sovereign arena within which to plan the government of its future.

A broader observation from the convention concerns the method by which delegates addressed substantive constitutional concerns. Invariably, delegates moved from discussions of immediate and pressing concerns to more general and deeper issues of governance. The demands by off-reservation residents for political representation, for example, evolved into debates over whether Cherokees were "members of a tribe" or "citizens of a nation." Calls for blood quantum requirements for the Principal Chief led to deeper questions of citizenship and the definition of who is a Cherokee. Ultimately, the delegates didn't resolve these issues at the Convention. Nonetheless, this pattern of discussion exemplifies how preliminary discussions of concrete problems of governance may be necessary lead-ins to reaching larger questions of governmental transformation and national identity.¹¹²

To the extent that Cherokee's story is representative, tribal nations are engaged in a process of creating more effective and legitimate constitutions. However, instead of re-envisioning their governing institutions or refashioning their national identities out of whole cloth, they are grounding their discussions of reform against the backdrop of tangible concerns associated with day-to-day government operations. In the end, the Nation's story demonstrates how a well-designed, inclusive, and politically independent constitutional reform process can help achieve the monumental task of transforming such concerns into the development of new constitutions and governing institutions.

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² See Anne Farris, *Controversy over Tribal Funds Splits Cherokee Nation Into Warring Camps; BIA Called In For Law Enforcement Duty After Marshals Fired*, Washington Post, July 5, 1997 at A6; Sam Howe Verhovek, *Cherokee Reopen Courthouse in Step to Resolve Crisis*, New York Times, August 28, 1997 at A24.

³ Martha Berry, delegate to 1999 Cherokee Nation of Oklahoma Constitution Convention, Address at John F. Kennedy School of Government Symposium on American Indian Constitutional and Governmental Reform (April 2, 2001) (transcript on file with author)

⁴ For examples, see Sean Paige, "Rewriting Tribal Law," *Insight Magazine*, May 29, 2000; Jeff Hinkle, "Constitutional Crisis: Can Tribal Governments Take the Heat," *American Indian Report*, May 2000; Ian Wilson Record, "Broken Government: Constitutional Inadequacy Spawns Conflict on San Carlos," *Native Americas*, Spring 1999, pp. 10-16; Robert B. Porter, "Strengthening Tribal Sovereignty Through Government Reform: What are the Issues," 7 *Kan. J.L. & Pub. Pol'y* 72 (1997).

⁵ See Duane Champagne, "Renewing Tribal Governments: Uniting Political Theory and Sacred Communities," *Wicazo Za Review* (forthcoming); Robert Porter, "Strengthening Tribal Sovereignty Through Government Reform: What are the Issues?" 7 *Kan. J.L. Pub. Pol'y* 72 (1997)

⁶ For arguments tying strengthened governmental institutions to greater stability and the exercise of increased political sovereignty see *Id.* For a connection between strengthened American Indian governmental institutions and enhanced economic development, see Stephen Cornell and Joseph P. Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today," (cite American Indian Culture and Research Journal),

⁷ One exception is Ian Wilson Record, "Broken Government: Constitutional Inadequacy Spawns Conflict on San Carlos," *Native Americas* (Spring, 1999), pp 10-16.

⁸ For an in-depth historical analysis of Cherokee politics and government, see Duane Champagne, *Social Order and Political Change: Constitutional Governments among the Cherokee, the Choctaw, the Chickasaw and the Creek*. Stanford, California, Stanford University Press, (1992).

⁹ See Duane Champagne, *American Indian Societies: Strategies and Conditions of Political and Cultural Survival*, Cultural Survival Report 32 (1989) 42.

¹⁰ Rennard Strickland and William Strickland, Beyond the Trail of Tears: One Hundred Fifty Years of Cherokee Survival, in *Cherokee Removal: Before and After 1838* 115 (William L. Anderson, Ed., University of Georgia Press, 1991).

¹¹ Id. at 117.

¹² Morris L. Wardell, *A Political History of the Cherokee Nation, 1838-1907* 255-355 (University of Oklahoma Press, 1938)

¹³ 30 Stat. 495 (1898).

¹⁴ Records from 1985 from the Bureau of Indian Affairs show that fewer than 65,000 acres of the 20 million allotted Cherokee citizens remain in tribal hands. Strickland, *supra* note 10 at 126.

¹⁵ “A lot of federal help was being given to tribes in the west, but none in Oklahoma, because again we didn’t have organized tribes. This was also an impetus, a big impetus, for the adoption of a constitution. I saw this opportunity with the federal money that was coming in that we could use that and turn it into a useful tool that we could do some things in Eastern Oklahoma.” Interview with Ross Swimmer, former Principal Chief of the Cherokee Nation of Oklahoma (September 4, 2000).

¹⁶ “In 1967 or ‘68, Bill Keeler had assembled a group of Cherokees in Eastern Oklahoma to look at the formation of a constitution, not necessarily, I think, with the idea in mind of a governing document but something that would, from a social point of view, give more people the opportunity to focus on the services, the Indian health services, the BIA services, and provide some input to the leadership, to the chief, for how those services could be better delivered to tribal members.” Ross Swimmer, former Principal Chief of the Cherokee Nation of Oklahoma, Address at John F. Kennedy School of Government Symposium on American Indian Constitutional and Governmental Reform (April 2, 2001) (transcript on file with author)

¹⁷ “At that time we had all these myriad of drafts, we’ve been holding public hearings, we’ve gone through the community representatives and it had just seemed like that we just weren’t going to get there. So I had several people that I gathered together and we sat down and drafted a final version of the constitution and said ‘this is it.’ And we put it out for a vote and it got passed.” Swimmer Interview (September 4, 2000). Swimmer said later in a separate context: “And then there were a couple of other things that needed some revision, I felt, from what the constitutional committee had been putting together. I had some opposition and people said well, it’s not ready yet, you can’t do this, one thing after another. I went ahead and took it to the Bureau of Indian Affairs, we got them to sign off on it, and in 1976 we took it to a vote and it was overwhelmingly adopted. I don’t think the people had a clue as to what they were voting on. They accepted that we needed something, but they still, you can imagine, I mean up until that time the only government the Cherokee people were aware of in Eastern Oklahoma was county, state, city and local government.

They were totally under the law of the state. They were totally under county police jurisdiction, that kind of thing. And in fact, in 1975 if somebody had suggested to me that the Cherokee Nation had tax powers, or that I, as principal chief, had the opportunity to incarcerate my fellow Cherokees for crimes they might commit, I would have said they were crazy. I would have said there is no such thing. We don't have that kind of sovereignty. In fact, as I recall, we were operating a restaurant and a motel and we were still collecting sales taxes to send to the state. That went on for several years until I finally woke up and said well why are we doing this." Ross Swimmer, Address at John F. Kennedy School of Government Symposium on American Indian Constitutional and Governmental Reform (April 2, 2001) (transcript on file with author)

¹⁸ Cherokee Nation of Oklahoma Constitution, art. V, § 3.

¹⁹ Cherokee Nation of Oklahoma Constitution, art. VI, § 11.

²⁰ In 1990, the Nation passed legislation creating a District Court with one or more judges.
20 Cherokee Nation Code § 11.

²¹ Swimmer said that in Oklahoma, "there's such an assimilation that we look to the local, state, county, federal governments for primary services and the Cherokee Nation sort of then overlaps all of these services yet they have to be careful where they go because their jurisdiction is only over certain areas. It's real complicated. And that's why I had not envisioned, and perhaps I was being shortsighted, I don't know, but when we adopted the constitution I said it was more of a corporate document, a development authority. I mean our job was to help improve lives. It wasn't to create a government. I never envisioned having two or 3,000 people working for the government. I envisioned them working and I always thought at some point we would reach a peak and then we would start declining in employment because we would be able to say, "we have created the result that we want, people are working, we don't need to be there any longer. We can have fewer social workers than we had yesterday." Interview with Ross Swimmer (September 4, 2000).

²² "I think actually I was probably thinking again of a corporate model. I was thinking more of a Board of Directors. And the rest of it, the executive branch and the judicial branch is pretty straightforward. It was mainly in the legislative arena that I suggested we make those changes and make it a 15 member council." Interview with Ross Swimmer (September 4, 2000).

²³ "The final document that was being considered as I recall would have two houses of the legislature and we would wind up electing around 100 people. And that's the part that I took out. I just said, "look, we're not going to do that". Interview with Ross Swimmer (September 4, 2000).

²⁴ Interview with Ross Swimmer (September 4, 2000). Swimmer said in a different context that he wanted to "give more people the opportunity to focus on the services (delivered by HIS and BIA) and provide some input to the leadership, to the Chief, for how those services could be better delivered to tribal members." Ross Swimmer, Address at John F. Kennedy School of Government Symposium on American Indian Constitutional and Governmental Reform (April 2, 2001) (transcript on file with author)

²⁵ Swimmer said he had come across a similar provision in another state or tribal constitution. Ross Swimmer, Address at John F. Kennedy School of Government Symposium

on American Indian Constitutional and Governmental Reform (April 2, 2001) (transcript on file with author)

²⁶ Rob Martindale, *Tribal Foes Talk After Big Ruckus*, Tulsa World, August 15, 1997.

²⁷ Id.

²⁸ The sides agreed to accept the opinion of an independent investigation into the constitutionality of the impeachment of the justices, the reopening of the Nation's courthouse, and a moratorium on all legal action related to the crisis. Jim Myers and Rob Martindale, *Cherokee Negotiations Break Down; Byrd Refuses to Recognize Justices, Official Says*, Tulsa World, August 23, 1997 at A1.

²⁹ Rob Martindale, *BIA Chief Vows to Help Forge Resolution to Cherokee Crisis*, Tulsa World, June 9, 1998

³⁰ Associated Press, *Judge Orders Boycotting Cherokee Council Members to Attend Meetings*, June 14, 1999

³¹ Jay Hannah, The 1999 Constitution Convention of the Cherokee Nation: Process of a Sovereign People, (March, 2000) (unpublished paper on file with author).

³² Poteete said "I don't remember any political focus on the question. I don't remember so much as a press release or a footnote to a memorandum." Poteete believes that the three year delay was due to other pressing priorities. The government was tackling election and campaign contribution law reforms and was also deeply involved in negotiations with the Delaware and Shawnee Indians over their desire to separate from the Nation and form their own independent nations. For all of these reasons, Poteete said the "Constitution Convention... it could wait. It kept getting pushed back." Interview with Troy Wayne Poteete (September 2, 2000).

³³ Interview with Charles Gourd, Member, Cherokee Nation Constitution Commission (June 25, 2000).

³⁴ Hannah Paper, *supra* note 31.

³⁵ Interview with Troy Wayne Poteete, Former Chair, Cherokee Nation of Oklahoma Tribal Council Rules Committee (September 2, 2000) (Commissioner Marion Hagerstrand said, in reference to the system of appointment: "That's the way Cherokees do things.")

³⁶ As Swimmer, said "the move was on both sides" to begin the process of reform. Interview with Ross Swimmer, September 4, 2000.

³⁷ Interview with Jay Hannah, Member, Cherokee Nation Constitution Commission (June 25, 2000).

³⁸ "While the Rules Committee of the Tribal Council had promulgated the creation of the Commission and outlined its primary mission, empowering legislation was left to the newly appointed commissioners to write and to submit to the Tribal Council for approval." Hannah Paper.

³⁹ Interview with Jay Hannah, Member, Cherokee Nation Constitution Commission (June 25, 2000).

⁴⁰ Interview with Jay Hannah, Member, Cherokee Nation Constitution Commission (June 25, 2000).

⁴¹ Interview with Charles Gourd, Member, Cherokee Nation Constitution Commission (June 25, 2000).

⁴² Interview with Jay Hannah, Member, Cherokee Nation Constitution Commission (June 25, 2000).

⁴³ As recalled by Commisioner Charles Gourd, it was a “dogfight to keep the Commission completely independent from the three branches of government and make it a citizen’s Commission.” (Gourd Interview, June 25, 2000).

⁴⁴ Council of the Cherokee Nation, “An Act Creating a Constitution Convention Commission, May 15, 1998, at § 4A.

⁴⁵ Id. at §§ 4A, 4D

⁴⁶ Id.

⁴⁷ The Commission’s enabling legislation required public hearings in all out-of-state area major metropolitan centers having more than 500 Cherokee citizens. Id. at § 4(d)(6).

⁴⁸ One commissioner attributed the low numbers at several meetings to a lack of access to mailings list of tribal members and a lack of funds to perform targeted mailings. He believes that attendance could have been improved with improved cooperation with the Nation’s newspaper and website.

⁴⁹ Id. at § 4(d)(4).

⁵⁰ Id. at § 4(d)(8)

⁵¹ Even with all of the Commission’s efforts to reach out to Cherokee citizens through public meetings, newsletters, and website materials, however, certain individuals have criticized it for not sufficiently reaching out to all Cherokees, including those residing in the Nation’s more traditional communities. In response, one commissioner attributed the low numbers at several meetings to a lack of access to mailings list of tribal members and a lack of funds to perform targeted mailings. He said that attendance could have been improved with improved cooperation with the Nation’s newspaper and website.

⁵² Hannah, 116

⁵³ Interview with Troy Wayne Poteete, Former Chair, Cherokee Nation Tribal Council Rules Committee (September 2, 2000).

⁵⁴ Interview with Troy Wayne Poteete, Former Chair, Cherokee Nation Tribal Council Rules Committee (September 2, 2000).

⁵⁵ Hannah Paper, *supra* note 31

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ The Commission originally planned the Convention to last for only three days.

⁵⁹ Martha Berry, delegate to 1999 Cherokee Nation of Oklahoma Constitution Convention, Address at John F. Kennedy School of Government Symposium on American Indian Constitutional and Governmental Reform (April 2, 2001) (transcript on file with author)

⁶⁰ The Commission's Chair, Ralph Keen, Jr., said that the Commission was aware that the U.S Constitutional Convention was held in secret but "disagreed with that philosophy."⁶⁰ (Interview with Ralph Keen, Jr., June 25, 2000).

⁶¹ Hannah said Roberts Rules were "absolutely essential to success of the convention. Everyone embraced that there had to be order and structure to what we were doing." (Interview with Hannah, June 24, 2000).

⁶² Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume I, February 26, 1999.

⁶³ Another interesting and important ground rule was developed halfway through the Convention to address the problem of spectator lobbying of delegates. Delegates who smoke, for example, were lobbied consistently during breaks. One lobbyist passed out information on delegates' chairs during a break in the proceedings. Others whispered in delegates' ears during votes. Some non-delegates even tried to participate in voice votes. Some simply heckled. To counteract lobbying, Hannah required non-delegates to sit at least four rows back from delegates, hired a sergeant at arms, and moved furniture to physically separate delegates from non-delegates during breaks. June 24 interview Jay Hannah..

⁶⁴ For examples, see Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, pp. 44-46 (describing legal definitions of mandamus, habeus corpus, and quo warranto and discussion among delegates for need to use clearest possible language).

⁶⁵ Interview with Julia Coates, delegate to Cherokee Nations Constitution Convention (June 24, 2001).

⁶⁶ See Champagne, "Renewing Tribal Governments", *supra*, note 4.

⁶⁷ Keen's motion for a bicameral legislature is found in Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume II, February 27, 1999, pp. 63-64.

⁶⁸ Hannah and other Commissioners believed that a move to a bicameral legislature "would require an absolute dismemberment of the powers of the Cherokee Nation to redistribute among the two houses" Jay Hannah, Address at John F. Kennedy School of Government Symposium on American Indian Constitutional and Governmental Reform (April 2, 2001) (transcript on file with author)

⁶⁹ Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume II, February 27, 1999, p. 69.

⁷⁰ Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume II, February 27, 1999, p. 71.

⁷¹ Proposed Cherokee Nation of Oklahoma Constitution, art VII, § 5 .

⁷² Proposed Cherokee Nation of Oklahoma Constitution, art. VII, § 4 .

⁷³ Proposed Cherokee Nation of Oklahoma Constitution, art. VII, § 1. For discussion at Convention of need for additional Justices see Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume V, March 2, 1999, pp. 80-81.

⁷⁴ Proposed Cherokee Nation of Oklahoma Constitution, art VII § 6. For discussion at Convention, see Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, p. 100.

⁷⁵ Proposed Cherokee Nation of Oklahoma Constitution, art. VII, § 5a. For discussion at Convention, see Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, pp. 54-61.

⁷⁶ Proposed Cherokee Nation of Oklahoma Constitution, art. VII, § 5a. For discussion at Convention, see Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, p. 62.

⁷⁷ Martha Berry, delegate to 1999 Cherokee Nation of Oklahoma Constitution Convention, Address at John F. Kennedy School of Government Symposium on American Indian Constitutional and Governmental Reform (April 2, 2001) (transcript on file with author)

⁷⁸ Interview with Julia Coates Foster (June 24, 2000)

⁷⁹ See testimony of Delegate MacLemore: “I would like to think that the Cherokee Nation is more just its territorial boundaries. I’d like to think that the Cherokee Nation is a people, wherever we are.” Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume II, February 27, 1999, p. 102.

⁸⁰ See testimony of Delegate Cornsilk, Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume II, February 27, 1999, p. 99.

⁸¹ Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume III, February 27, 1999, pp. 99- 100.

⁸² See testimony of Delegate Meredith, Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume III, February 27, 1999, p. 103.

⁸³ See testimony of Barbara Starr-Scott, Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume III, February 27, 1999, p. 101.

⁸⁴ Martha Berry, delegate to 1999 Cherokee Nation of Oklahoma Constitution Convention, Address at John F. Kennedy School of Government Symposium on American Indian Constitutional and Governmental Reform (April 2, 2001) (transcript on file with author).

⁸⁵ Testimony of David Cornsilk, Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume V, March 2, 1999, p. 10.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume V, March 2, 1999, p. 11.

⁸⁹ Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, p. 33.

⁹⁰ Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, p. 34.

⁹¹ See testimony of Delegate Silversmith. Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, p. 85.

⁹² Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, p. 34.

⁹³ Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, p. 36.

⁹⁴ See testimony of Delegate Hembree (“let’s make this based on generations”). Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, p. 35.

⁹⁵ “Placing a blood quantum may be something we desire but we can show that desire by reflecting it at the ballot box by saying the candidate who is 1/64 Cherokee, we may not want that person. But we should not put in our constitution that we are going to discriminate on the basis of blood quantum.” Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, p. 33.

⁹⁶ See testimony of Delegate Masters: “blood quantum by the way is not a traditional value. It was imposed on the people by the government. It’s a government designation, not a tribal designation that we have had. There are many people who have bought into this government designation that they can say what a Cherokee is by the surrender documents they have held on us. But this is not a traditional value. It was imposed upon the people by the government....If we want a blood quantum, we need to go back and reconsider, a Cherokee of the Cherokee Nation must be a ¼ blood according to BIA and state standards... So what we need to do if we want blood quantum, it needs to be in the membership category, and we need to limit the CN to ¼ blood or more, according to government documents and government projects and government standards.” Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, p. 35

⁹⁷ See testimony of Delegates Clarke and Scott. Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, pp. 36-37.

⁹⁸ See testimony of Delegate Hammons: “While it makes me proud to see a leader of my Nation that looks like an Indian, I don’t think that that ought to be the standard for whether or they represent me, ladies and gentlemen. Because, unfortunately, we’ve seen in the past few years that you can look like a Cherokee, and you can talk like a Cherokee and not care

about the Cherokee people." Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, p. 37

⁹⁹ See testimony of Delegate Robinson. Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume VI, March 3, 1999, p. 33.

¹⁰⁰ Interview with Ross Swimmer, September 4, 2000.

¹⁰¹ Interview with Cherokee Associate General Counsel David Mullon and Principal Chief Chad Smith (June 23, 2000).

¹⁰² Cherokee Nation Associate General Counsel David Mullon: "The more detailed a constitution is the more of an imposition you are on the future." Interview with David Mullon, Associate General Counsel of Cherokee Nation (June 23, 2000). One delegate from the Byrd administration argues that the current administration opposes the constitution's detailed nature "because it constrains them." Interview with author (June 24, 2000).

¹⁰³ See testimony of Delegate Chad Smith Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume III, February 27, 1999, pp 32, 89 and Volume IV, March 1, 1999, p. 33.

¹⁰⁴ Interview with Julia Coates, Delegate to Cherokee Nation Constitution Convention (June 24, 2000)

¹⁰⁵ The debate in some sense mirrors that between the "framework-oriented" U.S. national constitution and many more detailed state constitutions that contain legislation and policy. Some state constitutional scholars have explained that this divergence may be explained in part by the fact that the national constitution contemplated that additional details and policies would be filled in by its express delegation of powers to individual state constitutions. See G. Alan Tarr, *Understanding State Constitutions* 10 (Princeton University Press, 1998). The drafters of state constitutions, on the other hand, do not have such an assurance that an additional document or body will fill in ambiguous mandates. The push by delegates to hold the Nation's government accountable through detailed constitutional legislation may be explained in part by similar reasoning. Tribal citizens, lacking the U.S. Government's abundance of federal regulations and long history of federal court decisions, have less avenues for "lawmaking" than states and therefore may look to a constitution as their sole guarantee of protection.

¹⁰⁶ "An organic document presents a very big target. People with nothing in common except that they're against the document." Interview with David Mullon, Associate General Counsel of Cherokee Nation (June 23, 2000).

¹⁰⁷ Hannah began attempting to contact the Bureau "on my speed dial every day". Interview with Jay Hannah, June 24, 2000.

¹⁰⁸ Constitution Convention Commission Chairman February 2000 Progress Report.

¹⁰⁹ February 15, 2000 Open Letter from Convention Chairman Jay Hannah to Convention Delegates.

¹¹⁰ Interview with Ross Swimmer (September 4, 2000).

¹¹¹ Although a strong initial catalyst, the power of such a periodic referendum to trigger reform is not absolute. As one scholar of state constitutional revision has noted, periodic referenda may be scheduled at inopportune times, when other priorities crowd out concerns for constitutional reform. Alan Tarr, *State Constitutional Reform And Its Implications For Tribal Constitutionalism*, paper presented at *Tribes Moving Forward: Engaging in the Process of Constitutional and Governmental Reform*, April 3, 2001 (copy on file with author).

¹¹² At the same time, full-fledged debates over novel ideas allowing for the expand exercise of sovereignty or the restructuring of government were often cut short. Arguments for bicameralism, additional justices, sending a delegate to Congress, and representation for off-reservation residents, for example, were all initially or ultimately met by arguments of cost. In other instances, especially early in the convention, expansive ideas for restructuring government were also objected to on the basis that they would not receive Bureau approval, a fear later born out in actuality.