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Chief Justice of
the Cherokee
Nation
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THE FIRST FIFTEEN YEARS
OF THE
CHEROKEE NATION JUDICIAL APPEALS TRIBUNAL

BY
George N. Otey, III
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To Carol

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George N. Otey, III

Tulsa, Oklahoma

ILLUSTRATIONS



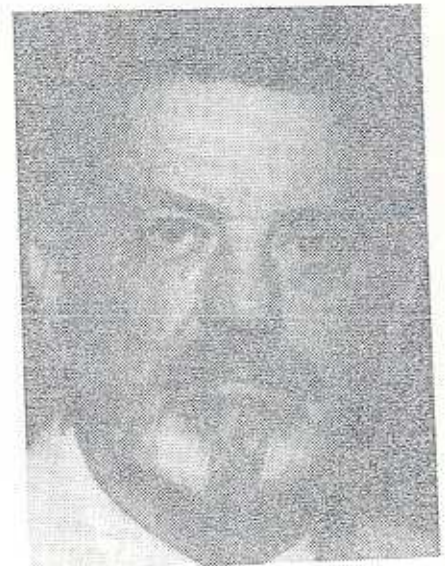
(Courtesy Cherokee
Nation of Oklahoma)
Dwight W. Birdwell



(Courtesy Cherokee
Nation of Oklahoma)
Lynn Burris



(Courtesy Dr. Mary L. Frye)
E. Moses Frye, Jr.



(Courtesy Diane McEver)
Roy Frye, Jr.



(Courtesy Philip H. Viles, Jr.)

Andrew Wilcoxon, Harvey Chaffin, and L. V. Watkins confer with Justice Lynn Burris, Chief Justice Philip H. Viles, Jr. and Justice Jack E. Rider during the 1983 Election Recount, July 8, 1983.



(Courtesy Philip H. Viles, Jr.)

Justice Lynn Burris, Chief Justice Philip H. Viles, Jr. and Justice Jack E. Rider preside over the 1983 Election Recount, July 8, 1983.



(Courtesy Philip H. Viles, Jr.)

Chief Justice Philip H. Viles, Jr. administers the oath of office to Principal Chief Ross O. Swimmer, August 14, 1983.



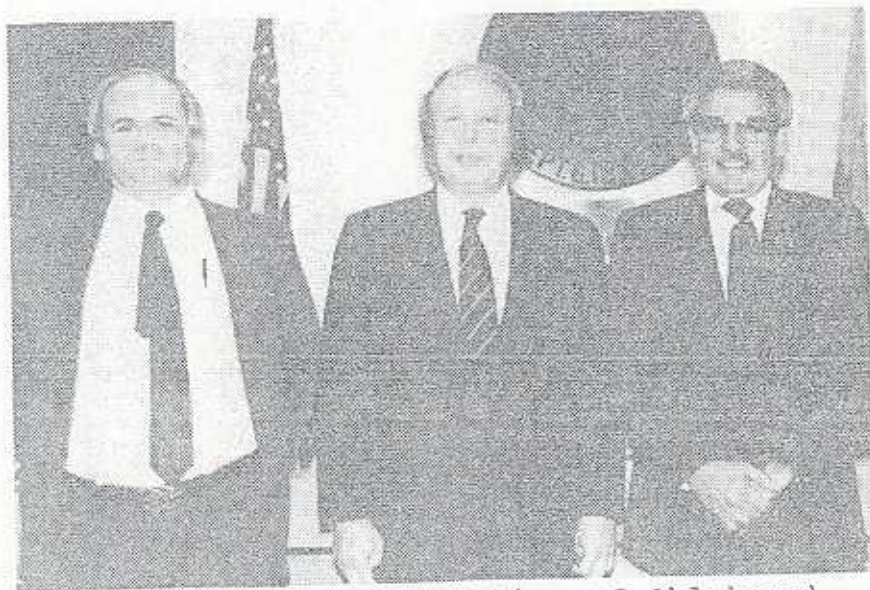
(Courtesy Cherokee Nation of Oklahoma)

Chief Justice Philip H. Viles, Jr. administers the oath of office to Principal Chief Wilma Mankiller while Associate Justice Jack E. Rider administers the oath of office to Associate Principal Chief John Ketcher, August 14, 1987.



(Courtesy Cherokee Nation of Oklahoma)

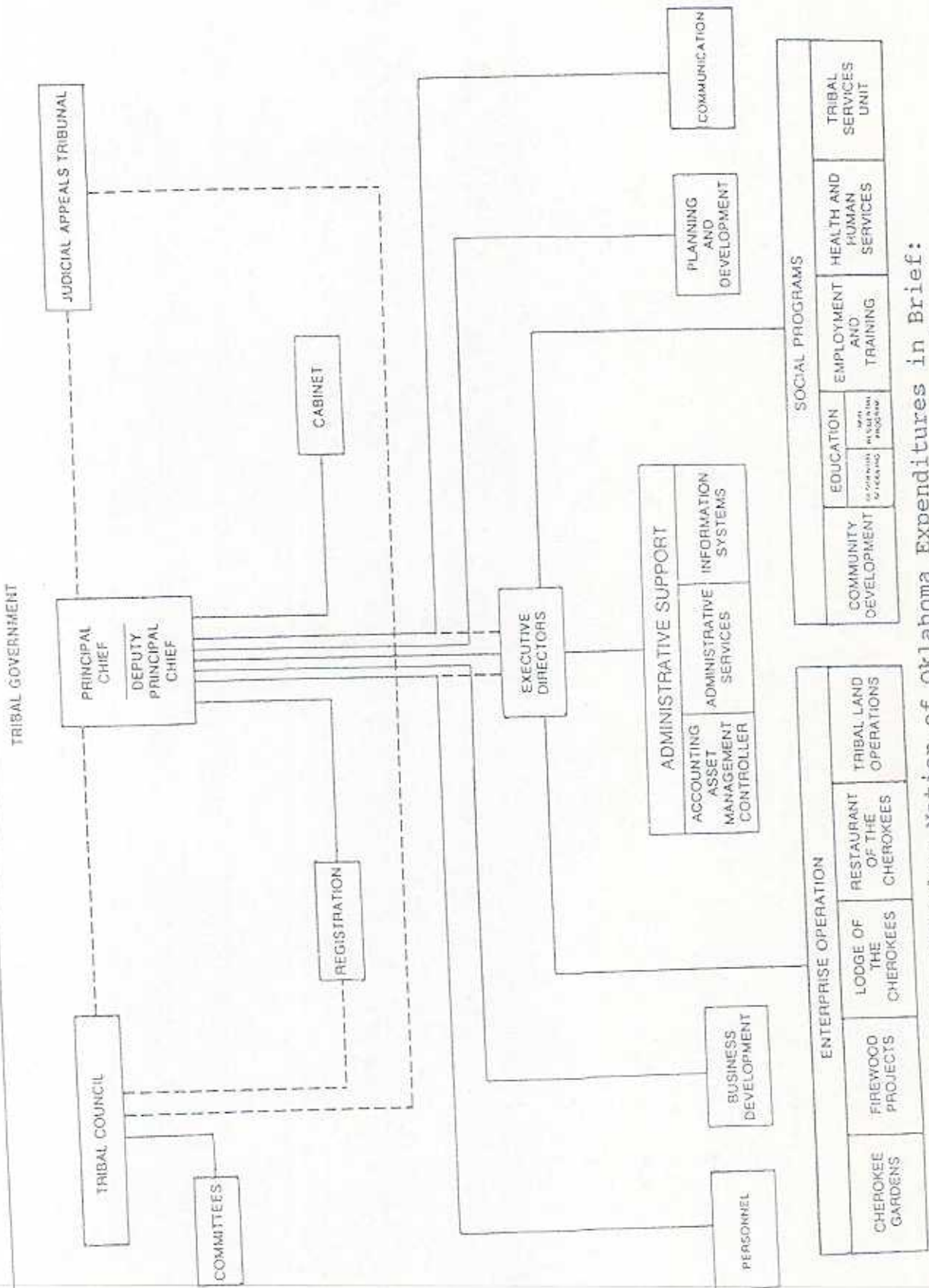
Chief Justice Philip H. Viles, Jr. administers the oath of office to Associate Justice Ralph F. Keen while Principal Chief Wilma Mankiller looks on, April 6, 1990.



(Courtesy Cherokee Nation of Oklahoma)

Associate Justice Dwight W. Birdwell, Chief Justice Philip H. Viles, Jr. and Associate Justice Ralph F. Keen, The Cherokee Nation Judicial Appeals Tribunal, April 6, 1990.

ORGANIZATIONAL STRUCTURE CHEROKEE NATION OF OKLAHOMA



Source: Cherokee Nation of Oklahoma Expenditures in Brief:
Description of Tribal Expenditures by Function,
October 1, 1985 - September 30, 1986, p. 13.

THE FIRST FIFTEEN YEARS

INTRODUCTION

The present day Cherokee Nation is one of the few tribes that has had a tradition of an organized judiciary.¹ From 1808 until the dismantling of the Cherokee Nation in 1906, the Cherokees exerted their sovereignty and expressed national awareness through an independent judiciary.² The destruction of the Cherokee court system did not eradicate the memory of a court designed to provide legal and equitable remedies for dispute resolution among tribal members. The Cherokee Constitution of 1976 included an independent judiciary as a necessary part of the national organization.³ In the brief

¹Many present day Native American court systems are unable to trace their roots to any traditional tribal judicial forum of dispute resolution. Most Indian courts, especially on reservations, are the result of an externally imposed Anglo system designed to maintain order among tribal members. National American Indian Court Judges Association, *Indian Courts and the Future: Report of the NAICJA Long Range Planning Project* (Washington, D.C.: U.S. Government Printing Office, 1978), p. 7. For further general background concerning the history of Indian courts see William T. Hagan, *Indian Police and Judges: Experiments in Acculturation and Control* (Lincoln, Neb.: University of Nebraska Press, 1966); Laurence French, ed., *Indians and Criminal Justice* (Totowa, N. J.: Allanheld, Osmun & Co. Publishers, Inc., 1982); Samuel J. Brakel, *American Indian Tribal Courts: The Costs of Separate Justice* (Chicago: American Bar Foundation, 1978); Vine Deloria, Jr. and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983); and Felix Cohen, *Handbook of Federal Indian Law*, 1982 ed. (Charlottesville, Va.: Michie Bobbs-Merrill, 1982).

²The definitive work concerning the Cherokee court system is Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court*, Norman: University of Oklahoma Press, 1975.

³Cherokee Nation of Oklahoma, Constitution, art. VII.

period since its formation, the Cherokee Nation Judicial Appeals Tribunal has provided tribal members a framework that insures due process of law as well as quick relief for their grievances.

CREATION OF THE COURT

The framers of the Cherokee Constitution envisioned the new government as a tripartite system modeled somewhat like the old Cherokee Nation but reflecting the modern realities of the tribal relationship with the federal government.⁴ The rejuvenated nation separated its powers into legislative, executive, and judicial branches. The new judiciary was not tiered as the original Cherokee system. Instead, the new charter created a single body, the purpose of which was to "hear and resolve any disagreements arising under any provisions of th[e] Constitution or any enactment of the Council."⁵

⁴The Cherokee people organized themselves as an "inseparable part of the Federal Union." Cherokee Nation of Oklahoma, Constitution, art. I. Under this article the Cherokee Nation specified the Constitution of the United States as superior to its own law should a conflict between them arise. Based on the realities of federal court decisions such as *United States v. Kagama*, 118 U.S. 375 (1886) and *Seneca Nation of Indians v. United States*, 338 F.2d 55 (2d Cir. 1964), which set out federal power over Indian affairs through the plenary power of Congress, the framers anticipated restrictive decisions like *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana v. United States*, 450 U.S. 544 (1981); and *Brendale v. Confederated Tribes and Bands of Yakima Indian*, 109 S.Ct. 2994, (1989).

⁵The framers limited the size of the judiciary as well as the scope of review:

There is hereby created a Judicial Appeals Tribunal composed of three (3) members all of whom must

With the approval of the Cherokee Constitution on October 2, 1975, the leaders of the new government concentrated their efforts on elections, establishing Tribal Council procedures, and promulgating general business practices for the Nation. Unlike the old Nation, the new Cherokee government possessed a limited amount of territory within the traditional political boundaries in eastern Oklahoma. In a wise move to streamline the government, avoid jurisdictional confrontations, and free more tribal capital for investments, the new Council did not assert any type of criminal jurisdiction for the resurrected nation. Instead, the leaders focused their attention on commercial ventures, taxation questions, water rights, and a handful of other civil matters.⁶ As such, the legislature ultimately directed the jurisdiction of the new court to limited

be admitted to practice law before the highest Court of the State of which they are residents, and all of whom shall be members of the Cherokee Nation appointed by the Principal Chief and approved by the Council for such terms as the Council may provide. The purpose of this Tribunal shall be to hear and resolve any disagreements arising under any provisions of this Constitution or any enactment of the Council. The Council shall provide for a procedure which shall insure that any litigant receives due process of law together with prompt and speedy relief, and shall generally follow that portion of the Oklahoma Statutes known as the Administrative Procedures Act, Title 75, Oklahoma Statutes, 301 et seq. The decision of the Judicial Appeal [sic] Tribunal shall be final insofar as the judicial process of the Cherokee Nation is concerned.

Cherokee Nation of Oklahoma, *Constitution*, art. VII.

⁶For a more detailed description of the general types of matters concerning the Council see Cherokee Nation of Oklahoma, *Cherokee Nation Code Annotated* (1985).

categories of civil matters.

After a year of coordinating business affairs, the Principal Chief and Council turned to the task of organizing the Judicial Appeals Tribunal. Following the constitutional directive of Article VII, Principal Chief Ross Swimmer appointed Philip H. Viles, Jr. and Roy Frye, Jr. as the first Justices of the Judicial Appeals Tribunal. Although the Constitution called for the appointment of three members,⁷ the Council felt it necessary to give effect to the third branch of government, even if temporarily incomplete. On December 4, 1976, Perry Wheeler, President of the Council, presented Resolution 3-76 for the purpose of approving the Swimmer appointments and specifically implementing Article VII.⁸ The legislation was adopted with the understanding that the third Justice would be appointed and approved at a later date.⁹

The search for the third member of the Judicial Appeals Tribunal took nearly a year to complete. In April of 1977 the Council defeated a motion to confirm the appointment of Julian

⁷Cherokee Nation of Oklahoma, Constitution, art. VII.

⁸Cherokee Nation of Oklahoma, A Resolution Approving the Appointment of a Judicial Appeals Tribunal to Implement Article VII of the Constitution and Fixing the Terms of Members, Resolution 3-76.

⁹Councilmember Thorne made the motion to adopt the resolution. Councilmember Doublehead seconded the motion and the Council adopted the legislation. Tribal Council Minutes, December 4, 1976, Minute Book of the Cherokee Nation of Oklahoma, Book 1, page 14. Tahlequah, Oklahoma.

Fite.¹⁰ After seven more months of searching, the Council finally approved the appointment of Ralph Keen on October 8, 1977.¹¹

When Philip H. Viles, Jr., Ralph Keen, and Roy Frye, Jr. took the oath of office on January 14, 1978,¹² the Cherokee Nation Judicial Appeals Tribunal became a completed reality. The tripartite framework of the Cherokee Nation was now fully operational with the exception of enabling legislation concerning the methods of court proceedings. The final organizational act occurred six months later on July 8, 1978

¹⁰Councilmember Doublehead made the motion to approve the appointment. The motion was seconded by Principal Chief Ross Swimmer but the Council defeated the motion. At this meeting a recommendation was also made for David Harris but after a lengthy discussion no action was taken. Tribal Council Minutes, April 11, 1977, *Minute Book of the Cherokee Nation of Oklahoma*, Book 1, page 24. Tahlequah, Oklahoma.

¹¹After Principal Chief Ross Swimmer submitted the nomination of Keen, Councilmember Chopper made a confirmation motion which was seconded by Councilmember Fishinghawk. Tribal Council Minutes, October 8, 1977, *Minute Book of the Cherokee Nation of Oklahoma*, Book 1, page 45. Tahlequah, Oklahoma.

¹²Tribal Council Minutes, January 14, 1978, *Minute Book of the Cherokee Nation of Oklahoma*, Book 1, Page 52. Tahlequah, Oklahoma. After the October 1977 approval of Ralph Keen, Ross Swimmer asked Philip Viles to draft an oath to be taken by the Tribunal. In replying to the Principal Chief, Viles began setting Tribunal standards by noting the "Oath set out in Article XIII of the Constitution is adequate. It is to be used for all appointed as well as elected officers." Philip H. Viles, Jr. to Ross Swimmer, December 12, 1977, in Cherokee Nation Judicial Appeals Tribunal, JAT Administrative Procedures 1978 file, Tahlequah, Oklahoma.

when the Council adopted rules of procedure for the Tribunal.¹³

DEVELOPING RULES OF PROCEDURE

After the approval of Ralph Keen to the Judicial Appeals Tribunal in 1977, he continued the task of developing Tribunal rules of procedure which Justice Philip H. Viles, Jr. had already started.¹⁴ The process of fashioning the method of court operation became drawn out over a nine month period. Because Keen and the other justices were privately employed and lived in different cities in Oklahoma, most of the work was completed over the telephone or through the mail.¹⁵

Adhering to the constitutional directive, the Justices aided the Council by modeling a set of proposed rules after part of the Oklahoma Administrative Procedures Act.¹⁶ These suggested

¹³The motion to adopt rules of procedures for the Tribunal was made by Councilmember Chopper and seconded by Councilmember Wickliffe. Tribal Council Minutes, July 8, 1978, *Minute Book of the Cherokee Nation of Oklahoma*, Book 1, page 72. Tahlequah, Oklahoma.

¹⁴The Cherokee Constitution specified that the Council would provide a court procedure that should generally follow "Title 75, Oklahoma Statutes, 301 et seq." Cherokee Nation of Oklahoma, Constitution, art. VII.

¹⁵One letter from Ralph Keen to Philip Viles, with an enclosed work copy showing corrections, is indicative of the work the Tribunal was accomplishing. Ralph Keen to Philip H. Viles, Jr., April 19, 1978, in Cherokee Nation Judicial Appeals Tribunal, JAT Administrative Procedures 1978 file, Tahlequah, Oklahoma.

¹⁶Cherokee Nation of Oklahoma, Constitution, art. VII.

rules set the term of office for each Tribunal member at six years, insured notice and a right to a recorded hearing for individual proceedings, specified rules of evidence, called for an appeals process, and gave the court direction concerning the conduct of the court membership.¹⁷

Upon completing the draft rules, Ralph Keen presented them to the Council for consideration on July 8, 1978.¹⁸ He emphasized the importance of adopting the administrative procedures in order to allow the Tribunal the necessary authority to perform its duties. Keen also suggested a Chief Justice should be named and lobbied for an allowance to cover operating expenses.¹⁹ After Keen finished explaining the contents of the proposal, the Council adopted the administrative procedures as presented and subsequently directed the Executive Committee to set a budget for the Tribunal while at the same time authorizing the expenditure of funds to defray Tribunal operating expenses.²⁰ Keen was then designated as the first

¹⁷Ibid.

¹⁸Tribal Council Minutes, July 8, 1978, Minute Book of the Cherokee Nation of Oklahoma, Book 1, page 72. Tahlequah, Oklahoma.

¹⁹Ibid.

²⁰The Council approved the rules after a motion by Councilmember Chopper received a second by Councilmember Wickliffe. [The rules were entitled CHEROKEE APPEALS TRIBUNAL, ADMINISTRATIVE PROCEDURES. Photocopies were kept by each Justice.] Councilmember Chapman then presented a motion to authorize the expenditure of necessary funds to defray operating expenses of the Tribunal. After a second by Councilmember Doublehead, the motion carried. Tribal Council Minutes, July 8, 1978, Minute Book of the Cherokee Nation of Oklahoma, Book 1,

Chief Justice of the Judicial Appeals Tribunal.²¹

The adoption of procedural rules for the Judicial Appeals Tribunal completed the process of making the Court a viable branch of the Cherokee government. It had been two years since the acceptance of the Cherokee Constitution by the Cherokee people. Now the Council had equipped the Court with the necessary tools to be the arbiter of disputes within the Cherokee Nation. Members of the tribe had already begun to inquire into the possibilities of redressing their grievances through the Court²² and soon took advantage of the due process opportunities offered by the Judicial Appeals Tribunal. The existence of the rules now gave the bench specific direction for the work of the Court.

THE FIRST DECADE

During the first ten years of its existence the Judicial Appeals Tribunal resolved issues of employment dismissals and

page 72. Tahlequah, Oklahoma.

²¹Councilmember Chopper made the motion, seconded by Councilmember Cowen. Tribal Council Minutes, July 8, 1978, *Minute Book of the Cherokee Nation of Oklahoma*, Book 1, page 73. Tahlequah, Oklahoma.

²²Records from this early period are scarce but in his presentation to the Council, Chief Justice Keen mentioned the Judicial Appeals Tribunal need of the rules of procedure to give guidance in responding to Cherokee citizens, three of whom had already brought issues before the court. Tribal Council Minutes, July 8, 1978, *Minute Book of the Cherokee Nation of Oklahoma*, Book 1, page 72. Tahlequah, Oklahoma.

disputed elections. By narrowing the type of cases it would hear, the Council had avoided the time consuming and costly possibilities of state and federal review of Tribunal decisions. This gave the Court flexibility to lay the foundation for new Cherokee common law. Eight months after the composition of the Tribunal was complete and six weeks after the adoption of the rules of procedure, the new Cherokee Court began ruling on pending cases.

The first case to come before the Judicial Appeals Tribunal was a cause of action concerning the employment termination of Charley Gourd.²³ Gourd, an employee of the Cherokee Nation, appealed his dismissal from the job he had held since 1976. In January of 1978 the Nation re-organized its administrative functions and, as a result, eliminated his job position. George Underwood, attorney for Gourd, asserted the dismissal of his client was arbitrary and capricious. Underwood based this in part on the fact that Gourd had always received a satisfactory rating for his job performance. Andrew Wilcoxon, General Counsel for the Cherokee Nation, argued the termination was without prejudice as Gourd was "subject to rehire upon application and qualification for any future opening within the Cherokee Nation."²⁴

²³Gourd v. Cherokee Nation, No. 78-1 (J.A.T. August 24, 1978).

²⁴Finding[s] of Fact, Conclusions of Law and Decree, Gourd v. Cherokee Nation, No. 78-1 (J.A.T. August 24, 1978).

In upholding the prerogative of the Nation to terminate Gourd, the Tribunal unanimously concluded there was no evidence indicating the motivation to end his employment with the Tribe was "anything other than a valid business judgment that the job function should be eliminated."²⁵ The Court then interpreted removal from employment "for cause", as used in Article XII of the Cherokee Constitution, to include the "legitimate elimination of a job function when said elimination is based upon sound business judgment."²⁶ This first decision of the Tribunal revealed an awareness on the part of the Court as to its function as interpreter within the governmental framework.

The next two causes of action brought before the Tribunal also concerned termination of employment. In May of 1978, the Cherokee Nation discharged Twyla Walker and Ed Kirkpatrick from their positions with the work program created by the Comprehensive Employment and Training Act (CETA). In August of 1978, Twyla Walker asserted her constitutional rights and appealed her dismissal.²⁷ Ed Kirkpatrick quickly followed in appealing his termination.²⁸

Both Walker and Kirkpatrick had been employed by the Tribe

²⁵*Ibid.*

²⁶*Ibid.*

²⁷Letter of petition, In re Twyla Walker, No. 78-2 (J.A.T. May 1978).

²⁸Letter of petition, In re Ed Kirkpatrick, No. 78-3 (J.A.T. May 1978).

to assist in co-ordinating CETA activities. The Tribe had dismissed each of them for allegedly falsifying and misusing CETA records, disbursing CETA funds to ineligible participants, and ignoring established policies regarding processing of check requests for CETA fund disbursements.²⁹ Additionally, the Tribe felt a conflict of interest had existed with Kirkpatrick in that he was an Amway distributor receiving commissions from the sale of Amway products to an auto mechanics class of the Cherokee Nation. Both appeals ended when Walker and Kirkpatrick failed to pursue the process allowed them by the constitution.

After resolving the first employment cases, the Tribunal received its first election protest case in June of 1979 when Agnes Cowen, a candidate for the office of Deputy Principal Chief in the 1979 election, filed a complaint with the Cherokee Court.³⁰ Cowen charged that certain election improprieties had occurred which necessitated an appeal of the election.³¹ When she failed to continue the appeals process, the Court suspended her cause.

The composition of the Tribunal changed in October of 1979 when Roy Frye, Jr. resigned as a member of the Court. On the same day the President of the Council announced the resignation,

²⁹In re Twyla Walker, No. 78-2 (J.A.T. May 1978); and In re Ed Kirkpatrick, No. 78-3 (J.A.T. May 1978).

³⁰Complaint, In re Agnes Cowen, No. 79-E1 (J.A.T. June 19, 1979), Cherokee Nation Judicial Appeals Tribunal, JAT Suspended Cases 1979-1987 file. Tahlequah, Oklahoma.

³¹Ibid.

Principal Chief Ross Swimmer nominated E. Moses Frye to serve out the remaining term of the vacancy. Resolution 84-79 appointing Frye passed unanimously.³² With this smooth transition, the Court was complete and prepared to dispose of its business. The Tribunal consisted of Chief Justice Ralph Keen, Philip H. Viles, Jr., and E. Moses Frye.

Late in 1979 the Tribunal received another employment termination case. Lena Squirrel, represented by Jack E. Rider, appealed her discharge as a clerk-typist, a job she had performed since February of 1970.³³ Although she had received a written reprimand in May of 1978 for continual tardiness, the Nation based the dismissal on certain disruptive acts Squirrel allegedly committed.

The initial discharge of Squirrel followed an investigation sparked by the complaint of two fellow workers, David and T. J. Stand, a married couple. The Stands protested three anonymous letters accusing Mr. Stand of having an adulterous affair with another member of the Cherokee Nation during working hours. The writings had been circulated among employees of the Stilwell office of the Cherokee Nation. Marcus Hendricks, Personnel Director of the Cherokee Nation, had all employees in the

³²Councilmember Baker moved for the adoption of a resolution to approve the appointment. The second came from Councilmember Crittenden. Tribal Council Minutes, October 13, 1979, *Minute Book of the Cherokee Nation of Oklahoma*, Book 1, page 118. Tahlequah, Oklahoma.

³³Brief of Appellant, In re Lena Squirrel, No. 79-1 (J.A.T. July 1980).

Stilwell office submit handwriting samples. Based on a comparison of the three letters with the samples, a qualified handwriting expert concluded the anonymous correspondence had been written by Lena Squirrel. The Nation then placed her on a five day suspension pending further investigation. Following a written confirmation concerning the matter, she was relieved of her duties. Squirrel appealed to the Tribunal after Principal Chief Swimmer upheld the decision of the Personnel Department.³⁴

In writing the opinion of the Tribunal, E. Moses Frye³⁵ did not focus on the facts surrounding the case but whether or not Lena Squirrel had been afforded proper due process under the Cherokee Constitution. The central analysis of the Court rested on the interpretation of Article XII, allowing an employee a hearing under rules and procedures prescribed by the Council.³⁶ The Tribunal found the Article XII requirements had been

³⁴Brief of Respondent/Appellee, In re Lena Squirrel, No. 79-1 (J.A.T. July 1980). Harvey L. Chaffin represented the Cherokee Nation in this matter.

³⁵Justice Philip H. Viles, Jr. concurred with the opinion.

³⁶The Article VII directive pertaining to procedural rules was made applicable to employee rights under Article XII:

No employee, who having served in a position at least one (1) year, shall be removed from the employment of the Cherokee Nation except for cause. The employee shall be afforded a hearing by the Judicial Appeals Tribunal under such rules and procedures as may be prescribed by the Council. These rules and procedures, however, must follow, as nearly as practicable, the provisions of the Oklahoma Administrative Procedures Act, Title 75, Oklahoma Statutes 301 et. seq.

Cherokee Nation of Oklahoma, Constitution, art. XII.

sufficiently met at an informal hearing on May 24, 1980 where she appeared with counsel. The Court felt Squirrel had ample opportunity at that time to assert any entitled rights she may have possessed.³⁷ The Tribunal refused to allow evidence refuting the handwriting expert based on a fundamental principle of appellate review: "[e]vidence will not [be] disturbed if it appears the rights of the appellant were not materially violated."³⁸ As Squirrel had an early opportunity to present witnesses in her behalf, or evidence to challenge the competency of the expert, the Tribunal felt no compulsion to overturn the final decision of the Personnel Department.

By upholding the power of delegated agencies to indicate particular acts which constitute dismissal "for cause", the Court more clearly defined its position as interpreter within the Cherokee government. Frye noted the role of the Tribunal as an appellate court with constitutional authority to hear and resolve disagreements arising under the Constitution or enactments of the Council. He went on to point out the Judicial Appeals Tribunal was "not a trial court. Therefore, the hearing guarantees to a litigant, according to the provisions of Articles VII and XII, are by written appeal briefs, with oral arguments permitted at the court's discretion as is normal in

³⁷In re Lena Squirrel, No. 79-1 (J.A.T. July 1980).

³⁸*Ibid.*

all appellate court proceedings."³⁹ With the nature and function of the Tribunal more fully explained, the Court set standards of review which streamlined procedures while maintaining the commitment to due process rights of litigants.

During the pendency of the Squirrel case, the composition of the Cherokee Court was temporarily disrupted. On January 7, 1980, Chief Justice Keen submitted his resignation from the bench.⁴⁰ The replacement issue seemed resolved in February when the Council passed Resolution 17-80 approving the appointment of Earl Boyd Pierce, contingent upon his acceptance of the position.⁴¹ Pierce, the former General Counsel for the Cherokee Nation, frustrated the Council in their search when he declined the position. Finally on July 14, 1980 the Council unanimously approved Resolution 78-80 for the appointment of Jack E. Rider to the vacant Tribunal seat.⁴² Rider, who had recently lost the

³⁹In re Lena Squirrel, No. 79-1 (J.A.T. July 1980).

⁴⁰In a letter to Philip Viles, Chief Justice Keen stated the reason for his resignation was the pressures of his business having "prevented him from devoting the time to the Tribunal . . . necessary to get it functioning properly." Ralph Keen to Philip H. Viles, Jr., January 8, 1980, in Cherokee Nation Judicial Appeals Tribunal, JAT General Correspondence 1977-1987 file. Tahlequah, Oklahoma.

⁴¹Councilmember Chapman moved to offer the position to Pierce. Councilmember Proctor seconded the motion. Tribal Council Minutes, February 11, 1980, *Minute Book of the Cherokee Nation of Oklahoma*, Book 1, page 129. Tahlequah, Oklahoma.

⁴²The motion by Principal Chief Swimmer received a second by Councilmember Proctor. Tribal Council Minutes, July 14, 1980, *Minute Book of the Cherokee Nation of Oklahoma*, Book 1, page 148. Tahlequah, Oklahoma.

appeal of Lena Squirrel, accepted the position he would fill until his death in 1989.⁴³ The Judicial Appeals Tribunal now consisted of Philip H. Viles, Jr., E. Moses Frye, and Jack E. Rider. Early in 1981 Principal Chief Ross Swimmer requested the appointment of Philip H. Viles, Jr., the tenured member of the Tribunal, as Chief Justice.⁴⁴

Between the business of resolving the Squirrel case and the Council search for a replacement of Chief Justice Keen in 1980, E. Moses Frye busied himself by modeling legislation designed to alter the organization of the Court.⁴⁵ Most of the proposal would have added more specificity to the organization of the Tribunal. In order to indicate a traditional link within the spirit of the 1976 constitution, Frye suggested the name of the Judicial Appeals Tribunal be changed to the Supreme Court of the Cherokee Nation. While leaving the membership at three persons, each appointment would be limited to four years with the Chief Justice being selected only by the Court for a specified term. The plan also included reimbursements of per diem and travel expenses as well as a stipend of \$100.00 per month for each

⁴³"Cherokee Nation Appeals Tribunal Justice Jack Rider dies," *Cherokee Advocate*, March 1990, p. 21.

⁴⁴Ross Swimmer to Philip H. Viles, Jr., E. Moses Frye, and Jack Rider, January 28, 1981, in Cherokee Nation Judicial Appeals Tribunal, JAT General Correspondence 1977-1987 file. Tahlequah, Oklahoma.

⁴⁵E. Moses Frye to Phil[ip] H. Viles, Jr., April 23, 1980, in Cherokee Nation Judicial Appeals Tribunal, JAT General Correspondence 1977-1987 files. Tahlequah, Oklahoma.

Justice. The most far reaching measure of the plan was section seven which mandated the Court to convene at a regularly scheduled time after the Council meeting each quarter.⁴⁶ If enacted the proposal would have been a unitary law designed to serve as an umbrella in order to eliminate piecemeal legislation concerning the Tribunal.

The plan received little support and the Court continued to function under the established rules and enactments. Pursuant to the 1978 Council directive to develop a budget for the Tribunal, Chief Justice Viles and Councilmember Gary Chapman⁴⁷ entered into discussions concerning the funding of the Court in 1981. Chief Justice Viles made suggestions to the Council and submitted the figures to Councilmember Chapman.⁴⁸ The proposed allocations called for general office expenses and then echoed the Frye plan by including monthly retainers for each of the Justices.⁴⁹ The Council would not agree to a regular salary but accepted a modification of the request to include per diem expenses. The Councilmembers endorsed the proposal by

⁴⁶*Ibid.*

⁴⁷Gary Chapman also served as Secretary-Treasurer of the Cherokee Nation of Oklahoma.

⁴⁸Philip H. Viles, Jr. to Gary Chapman, June 22, 1981, in Cherokee Nation Judicial Appeals Tribunal, JAT General Correspondence 1977-1987 file. Tahlequah, Oklahoma.

⁴⁹The proposal called for a monthly salary of \$175 for the Chief Justice and \$150 for each of the Associate Justices with general office expenses being set at \$25. *Ibid.*

unanimously adopting Resolution 82-81 on October 19, 1981.⁵⁰ Even though it took the Council nearly three years to adopt a budget for the Tribunal,⁵¹ the allocation of funds for the operation of the third branch of government indicated the commitment of the Nation to expressing its sovereignty and providing tribal members the opportunity of a fair and impartial hearing to resolve disputes.

The first case to come before the Court under the tenure of Chief Justice Viles was the 1981 appeal concerning the employment termination of Nick Sunday.⁵² In writing the opinion of the Court, Chief Justice Viles⁵³ dismissed the cause of action because the court lacked the jurisdiction to hear the case. Sunday had been discharged six days short of being employed by the Tribe for exactly one year. Viles noted that according to Article XII of the Constitution, a hearing would be afforded to

⁵⁰The Council approved a per diem of \$85 for the Chief Justice as well as reimbursements for "actual and necessary expenses and mileage allowance . . . for days spent on Tribal business." The motion for adoption by Councilmember Crittenden was seconded by Councilmember Sunday. Tribal Council Minutes, October 19, 1981, Minute Book of the Cherokee Nation of Oklahoma, Book 1, page 192. Tahlequah, Oklahoma.

⁵¹The original directive came from the Council in 1978. Tribal Council Minutes, July 8, 1978, Minute Book of the Cherokee Nation of Oklahoma, Book 1, page 72. Tahlequah, Oklahoma. Philip H. Viles, Jr. to Gary Chapman, June 22, 1981, in Cherokee Nation Judicial Appeals Tribunal, JAT General Correspondence 1977-1987 file. Tahlequah, Oklahoma.

⁵²In re Cherokee Nation/Nick Sunday, No. 81-1 (J.A.T. July 10, 1981).

⁵³Justice Jack Rider concurred in the opinion.

"those having served in a position at least one (1) year."⁵⁴ As Sunday did not fall into that category, the Tribunal thus lacked jurisdiction to hear the appeal. As an aside Viles went on to point out one question not reached was whether the Cherokee Nation was entitled to an appeal in personnel matters or whether that was a right reserved solely for the employee.⁵⁵ This case served as an important recognition of the Constitution as the paramount law of the Cherokee Nation.

The inertia of 1982 gave way in 1983 to the activity of reorganizing the bench and resolving intense litigation over election results. Early in 1983 E. Moses Frye resigned his position on the Tribunal for an appointment on the Council.⁵⁶ Principal Chief Swimmer filled the vacancy by appointing Associate District Judge Lynn Burris. The Council unanimously approved the choice by adopting Resolution 24-83.⁵⁷ The Tribunal

⁵⁴Cherokee Nation of Oklahoma, Constitution, art. XII.

⁵⁵Chief Justice Viles noted that Article XII contemplates the employee having the right of appeal after one year but § 9 of Chapter 9 of the pre-1981 Personnel Policies and Procedures handbook of the Nation appeared to give the right to review to those completing a probationary period of less than a year. This would conflict with the Constitution and require a rewriting in order to conform with the superior law. In re Cherokee Nation/Nick Sunday, No. 81-1, (J.A.T. July 10, 1981).

⁵⁶Tribal Council Minutes, April 11, 1983, Minute Book of the Cherokee Nation of Oklahoma, Book 2, Page 41. Tahlequah, Oklahoma.

⁵⁷Councilmember Baker moved for the approval and received a second from Councilmember Frye. Tribal Council Minutes, April 11, 1983, Minute Book of the Cherokee Nation of Oklahoma, Book 2, page 41. Tahlequah, Oklahoma.

now consisted of Chief Justice Philip H. Viles, Jr., Jack E. Rider, and Lynn Burris.

The summer of 1983 proved to be the busiest ever for the Tribunal. As 1983 was an election year, Chief Justice Viles anticipated appeals following the balloting and initial count.⁵⁸ His intuition proved correct.

R. Perry Wheeler was one of three candidates seeking the office of Principal Chief in the tribal general election held on June 18, 1983. Running against incumbent Ross Swimmer, Wheeler made a good showing at the polls. The initial tally indicated a lose to Swimmer by 445 votes, only 90 ballots short of forcing a run-off. Wheeler felt the vote close enough to seek a recomputation. On June 20, he filed a Petition of Protest with the Cherokee Election Committee.⁵⁹ A week later, in an amended motion to the Committee, Wheeler sought a run-off election.⁶⁰

At the recount hearing convened by the Tribunal on June 29, 1983, Wheeler asked the Cherokee Court to grant a temporary

⁵⁸A month before the election Chief Justice Viles informed each of the Associate Justices of his travel plans and places of contact for the time when the elections would occur. In case the Tribunal needed to convene quickly, the Chief Justice requested the same information from the others as well as the General Counsel for the Nation. Each returned a pre-addressed post card with the necessary information. Philip H. Viles, Jr. to Jack E. Rider, Lynn Burris, Andrew Wilcoxon, May 19, 1983, in Cherokee Nation Judicial Appeals Tribunal, JAT General Correspondence 1977-1987 file. Tahlequah, Oklahoma.

⁵⁹Petition, Wheeler v. Tribal Registrar et al., No. 83-E1, (J.A.T. July 8, 1983).

⁶⁰Amended Petition, Wheeler v. Tribal Registrar et al., No. 83-E1 (J.A.T. July 8, 1983).

restraining order preventing the Cherokee Election Committee from recalculating the ballots.⁶¹ Wheeler sought a delay in the tallying until either the Council or the Judicial Appeals Tribunal established a criterion defining acceptable ballots which could withstand judicial scrutiny.⁶² The Tribunal denied the request and the recount proceeded as scheduled, resulting in the declaration of Ross Swimmer as the winner.

The next day Wheeler petitioned the Court through his attorneys L. V. Watkins, Bruce Green, and Ralph Keen.⁶³ Wheeler sought injunctive relief against the Tribal Registrar, the Cherokee Election Committee, and the Cherokee Election Board. In seeking to overturn the decision of the Cherokee Election Committee, he alleged the integrity of the entire process had been destroyed by numerous irregularities.⁶⁴ His petition asked

⁶¹Hearing Record, June 29, 1983, p. 7, Wheeler v. Tribal Registrar et al., No. 83-E1 (J.A.T. July 8, 1983).

⁶²Hearing Record, June 29, 1983, p. 8, Wheeler v. Tribal Registrar et al., No. 83-E1 (J.A.T. July 8, 1983).

⁶³Motions, Wheeler v. Tribal Registrar et al., No. 83-E1 (J.A.T. July 8, 1983).

⁶⁴In his original petition to the court, Wheeler listed four causes of action: 1) irregularities in the number of ballots so as to destroy their integrity; 2) excessive irregularities in the absentee voting process; 3) irregularities in calculating; and 4) the need for judicial review of rejection of any ballot due to error in affidavits prior to conducting a recount. To support these causes his petition included an extensive list of claims. Petition Appealing from Order of the Tribal Election Committee, Wheeler v. Tribal Registrar et al., No. 83-E1 (J.A.T. July 8, 1983). L. V. Watkins elaborated on these claims during oral arguments. Hearing Record, June 29, 1983, pp. 4-8, Wheeler v. Tribal Registrar et al., No. 83-E1 (J.A.T. July 8, 1983).

the Tribunal to void the election and call for a new one. In the alternative he asked the Court to either void the absentee ballots and decide the election on the poll vote or declare a run-off between Swimmer and himself.⁶⁵

The Tribunal set July 8, 1983 as the date to hear the matter in the Council Chambers at Tahlequah. At the hearing L. V. Watkins and Ralph Keen represented plaintiff Perry Wheeler. Andrew Wilcoxon, General Counsel for the Cherokee Nation, appeared for the named defendants as entities of the Tribe and Harvey Chaffin represented Ross Swimmer even though the Principal Chief had not been mentioned in the cause of action.⁶⁶

The attorneys for Wheeler argued that his cause of action was one of first impression for the Tribunal. After making the proper jurisdictional plea, the Wheeler position interpreted the Constitution as mandating the office of Principal Chief to go to the person receiving the highest number of votes unless there were more than two candidates, in which case a run-off would occur if one did not have a majority.⁶⁷ Watkins argued that determining the "highest number of votes" depended on the number of recognized votes cast in the balloting. He then asked the Cherokee Court to declare the law of the State of Oklahoma

⁶⁵Amended Motions, Wheeler v. Tribal Registrar et al., No. 83-E1 (J.A.T. July 8, 1983).

⁶⁶Hearing Record, July 8, 1983, Wheeler v. Tribal Registrar et al., No. 83-E1 (J.A.T. July 8, 1983).

⁶⁷Hearing Record, July 8, 1983, p. 8, Wheeler v. Tribal Registrar et al., No. 83-E1 (J.A.T. July 8, 1983).

regarding the definition of the words "votes cast", to be the law of the Tribe.⁶⁸ This would have forced the Cherokee Election Committee to add into the count every mutilated or spoiled ballot.

In response, the defendants countered with three points. Chaffin noted that first, Oklahoma law was inapplicable because of the large number of tribal members who lived in other states. He further argued common law provisions for defining "votes cast" distinguished valid ballots from those to be discarded. Accordingly, the common law equated "votes cast" with "valid votes counted."⁶⁹ Finally, Wilcoxon joined Chaffin in asserting the Tribunal did not have jurisdiction to hear the case as the Constitution limited the capacity of the Court to resolve disputes between tribal members, which arose under provisions of the Constitution, or Council enactments.⁷⁰

Immediately after oral arguments the Tribunal deliberated the case and the same day issued its split decision. Chief Justice Viles and Justice Rider found in favor of the defendants by overruling all the requested motions and dismissing the case, while leaving Perry Wheeler the opportunity for filing written

⁶⁸Hearing Record, July 8, 1983, pp. 12-13, Wheeler v. Tribal Registrar et al., No. 83-E1 (J.A.T. July 8, 1983).

⁶⁹Hearing Record, July 8, 1983, pp. 18, 24-26, Wheeler v. Tribal Registrar et al., No. 83-E1 (J.A.T. July 8, 1983).

⁷⁰Hearing Record, July 8, 1983, pp. 26-27, Wheeler v. Tribal Registrar et al., No. 83-E1 (J.A.T. July 8, 1983).

exceptions to the Tribunal order.⁷¹ In a biting dissent, Justice Burris focused on the recount procedures as a basis for arguing the Tribunal had not sufficiently protected the due process rights of the appellant. The new Justice felt the majority condoned a venture into uncertainty by passing over various problems, including storage of ballots. After emphasizing all democratic elections must avoid the appearance of impropriety, Burris then requested the federal court to take up the matter.⁷²

Perry Wheeler took his cause to the federal judicial system. The federal district court twice declined to hear the matter, interpreting the issues as affecting intra-tribal affairs not subject to federal intrusion. Subsequently, the United States Tenth Circuit Court of Appeals also declined to assume jurisdiction upholding the inherent right of the Cherokee Nation to self-government.⁷³

At the same time Perry Wheeler was protesting the election results, the Tribunal received another appeal concerning the election.⁷⁴ Wendell Cochran had been an unsuccessful candidate for a seat on the Tribal Council. He

⁷¹Hearing Record, July 8, 1983, p. 39, Wheeler v. Tribal Registrar et al., No. 83-E1 (J.A.T. July 8, 1983).

⁷²Wheeler v. Tribal Registrar et al., No. 38-E1 (J.A.T. July 8, 1983) (Burris, J., dissenting).

⁷³"Wheeler lawsuit thrown out by appeals court," Cherokee Advocate, March 1988, p. 17.

⁷⁴Petition of Appeal, In the Matter of Wendell Cochran, No. 83-E2 (J.A.T. August 5, 1983).

petitioned the Court concerning the qualifications of Stann Hummingbird and Ron Qualls to serve on the Council. Cochran claimed that Hummingbird and Qualls, both winners at the ballot box, were not eligible to run for office under Article 17 (h) of the election laws. That rule prohibited employees of the Nation from being candidates in Tribal elections. Cochran contended both men were employees of the Cherokee Nation and sought to have the Tribunal declare them ineligible to hold office.⁷⁵

On August 5, 1983 the Cherokee Court heard the appeal with Chief Justice Viles presiding, Justice Rider present, and Justice Burris unable to attend. Wendell Cochran represented himself while Andrew Wilcoxon, General Counsel for the Cherokee Nation, acted on behalf of the Tribe. Nathan H. Young, III, Counsel for the Cherokee Housing Authority, appeared for the Authority as well as Hummingbird and Qualls.⁷⁶

Cochran had based his original allegations of ineligibility on the fact that both men were employed by the Cherokee Housing Authority, an entity he claimed was an part of the tribal government. If the Housing Authority was an extension of the Cherokee Nation, then each man would have been in violation of the employee policies of the Tribe. The question before the Tribunal became one of defining the relationship between the Housing Authority and the Cherokee Nation. Cochran brought to

⁷⁵Ibid.

⁷⁶Hearing Record, August 5, 1983, In the Matter of Wendell Cochran, No. 83-E2 (J.A.T. August 5, 1983).

the attention of the court the case of *United States v. Crossland*,⁷⁷ which had viewed an Indian housing authority as an inseparable extension of an Indian tribal government.

Hummingbird and Qualls took the position they were not employees of the Cherokee Nation and therefore eligible to stand for office. In asking the Court to ignore the 1981 *Crossland* decision, attorney Young relied on the Oklahoma act creating Indian housing authorities.⁷⁸ That legislation created a corporate and public body called a "housing authority" designed to function in the operating area of a tribe after the tribe had declared a need for the organization. The act specified the authority to "be an agency of the State of Oklahoma."⁷⁹ Hummingbird and Qualls felt the express language of the act indicated the Cherokee Housing Authority was not part of the Tribe and as such their employment with the Housing Authority was not employment with the Cherokee Nation.⁸⁰

After hearing the arguments of all parties, the Tribunal let the election results stand when it dismissed the appeal in favor of Hummingbird and Qualls. In issuing its decision the Court

⁷⁷*United States v. Crossland*, 642 F.2d 1113 (10th Cir. 1981). In his appeal Cochran attached a copy of the slip opinion of the decision of the Tenth Circuit: *United States v. Crossland*, No. 80-1017, slip op. (10th Cir. June 1, 1981).

⁷⁸*Creation of Indian Housing Authorities* is found in Oklahoma Statutes, Title 63, § 1057 (1981 & Supp. 1984).

⁷⁹*Ibid.*

⁸⁰Hearing Record, August 5, 1983, p. 14, In the Matter of Wendell Cochran, No. 83-E2, (J.A.T. August 5, 1983).

made two findings. First, employees of the Cherokee Housing Authority were not employees of the Cherokee Nation of Oklahoma. The Justices then went on to state the "Housing Authority of the Cherokee Nation is an instrumentality of the State of Oklahoma as specified in Title 63, Oklahoma Statutes, Section 1057 and is governed by the laws of the State of Oklahoma and not the laws of the Cherokee Nation."⁸¹ This interpretation of inter-governmental relationships strengthened the position of the Judicial Appeals Tribunal in its function of defining jurisdictional limits of the Tribe.

The Wheeler and Cochran cases marked a developmental change in procedure for the Tribunal.⁸² Prior to these appeals petitions to the Court were usually handwritten and consisted of general allegations. The formal presentation and specificity of the 1983 charges added a level of professionalism lacking in most pleadings to the Tribunal. From this point forward the Cherokee Court began expecting more clarity in the issues presented at the initial stages of litigation. The attitude of the Court became evident in the handling of its next case.

⁸¹Order, In the Matter of Wendell Cochran, No. 83-E2 (J.A.T. August 5, 1983).

⁸²In responding to requests for the institution of proceedings by the Tribunal, Chief Justice Viles noted the recent practice of the Court in the Wheeler and Cochran cases was "to ask for a written response from the other side within seven to ten days, allowing one week to review writings and then hold a brief hearing at which oral arguments can be presented." Philip H. Viles, Jr. to Henry Johnson, August 9, 1983, Johnson et al. v. Cherokee Nation, No. 83-1, (J.A.T. September 7, 1983).

While the Tribunal was busy disposing of the election dispute cases, four members of the Nation appealed their termination as maintenance employees with the Tribe. In July of 1983 Henry Johnson, Jerry W. Caviness, Jerry T. Bush, and Jim Johnson all submitted handwritten inquiries to the Cherokee Court. Chief Justice Viles requested each party to specify three items: first, their employment with the Cherokee Nation had been for a period greater than one year; second, their dismissal was without cause; and finally, all administrative remedies under the personnel policies of the Tribe had been exhausted.⁸³

Once the complainants filed proper enough papers, the Court consolidated the cases and set a hearing date of September 7, 1983. At the appointed time only Henry Johnson and Jerry Caviness came before the Tribunal. Because Jerry Bush and Jim Johnson failed to appear, the Court dismissed their petitions and then proceeded to hear oral arguments. Principal Chief Ross Swimmer represented the interests of the Nation.⁸⁴

Johnson and Caviness, representing themselves, claimed their dismissal was without cause and politically motivated. Johnson claimed "[t]hey wanted to get rid of us because we might have

⁸³*Ibid.*

⁸⁴Hearing Record, September 7, 1983, Johnson et al. v. Cherokee Nation (J.A.T. September 7, 1983).

had some political innovation. . . ."⁸⁵ Caviness also subscribed to this idea when he testified he believed his involvement in the recent election had prompted his termination.⁸⁶

Ross Swimmer countered these claims by asserting there was a distinction between a lay off and a dismissal and, as such, Johnson and Caviness did not have grounds to sue the Nation.⁸⁷ To support his contention Swimmer called Larry Brocklesby, Personnel Department Chairperson, as a witness. According to Brocklesby, the employee policies of the Cherokee Nation specified that eligibility for appeal required a dismissal "for cause" which occurred as a disciplinary action, such as when there was "a wrong done by an employee in the supervisor's eyes."⁸⁸ On the other hand, the personnel policies of the Cherokee Nation defined lay off as an economic action resulting from business decisions of the Tribe.⁸⁹

After the litigants had an opportunity to question each other, the Tribunal retired to deliberate. Following a short recess the Court denied both appeals. In the instance of Henry

⁸⁵Hearing Record, September 7, 1983, p. 8, Johnson et al. v. Cherokee Nation (J.A.T. September 7, 1983).

⁸⁶Hearing Record, September 7, 1983, p. 15, Johnson et al. v. Cherokee Nation, No. 83-1 (J.A.T. September 7, 1983).

⁸⁷Hearing Record, September 7, 1983, pp. 22, 23, Johnson et al. v. Cherokee Nation, No. 83-1 (J.A.T. September 7, 1983).

⁸⁸Hearing Record, September 7, 1983, p. 23, Johnson et al. v. Cherokee Nation, No. 83-1 (J.A.T. September 7, 1983).

⁸⁹*Ibid.*

Johnson, Chief Justice Viles and Justice Burris voted for the Tribe while Justice Rider abstained because he had previously represented Johnson on another matter. The rejection of the Caviness cause was by a split decision, Chief Justice Viles and Justice Rider voting to deny the appeal while Justice Burris dissented without comment.⁹⁰

Following the Johnson decision, the composition of the Court underwent another change. Late in 1984 Principal Chief Swimmer informed the Council the term of office for Justice Burris had expired. Swimmer then presented the appointment of William D. Toney for the approval of the Council. The Toney appointment passed by a fourteen to one vote.⁹¹ Beginning in 1985, the Tribunal consisted of Chief Justice Philip H. Viles, Jr., Jack E. Rider, and William D. Toney.

The resolution of the election litigation and the Johnson appeal, combined with a replacement on the bench, ended one of the busiest periods of the Court up to that time. The Tribunal had let stand the contested election results of 1983 while at the same time defining certain intra-tribal and inter-tribal relationships. The Court had also upheld the discretionary right of Tribal entities to define the terms by which those

⁹⁰Hearing Record, September 7, 1983, p. 44, Johnson et al. v. Cherokee Nation, No. 83-1 (J.A.T. September 7, 1983).

⁹¹The motion by Councilmember Chapman received a second by Councilmember Crittenden. Tribal Council Minutes, December 8, 1984, Minute Book of the Cherokee Nation of Oklahoma, Book 2, page 157. Tahlequah, Oklahoma.

agencies would operate. These results were of great importance in preparing the judiciary for their role in codifying the procedures of the court as well as defining certain parameters for the Cherokee Court. Based on its experience the Tribunal was in a position to more clearly express its desires concerning the manner of conducting court business.

THE CODE COMMISSION OF 1985

After nearly a decade of existence, the Cherokee Council perceived the need to codify the voluminous amount of legislation it had created. On February 9, 1985 the Council created a Code Commission to supervise the revision of general laws for the Nation.⁹² The composition of the Commission included Principal Chief Ross Swimmer, President of the Council Wilma Mankiller, and all members of the Rules Committee.⁹³ The Commission then obtained the services of Lance Hughes, a research consultant in the area of drafting model codes and legislation. Discussions among Hughes, the Commissioners and

⁹²Cherokee Nation of Oklahoma, *An Act Relating to Cherokee Nation of Oklahoma General Laws; Providing for the Revision of the General Laws into Statute Form; Establishing a Code Commission within the Rules Committee; and Declaring an Emergency*, Legislative Act 1-85. At the same time the Council also approved a resolution supporting the codification of the laws. Cherokee Nation of Oklahoma, *Resolution No. 6-85 Providing for the Codification of the General Laws of the Cherokee Nation*, Resolution 6-85.

⁹³Cherokee Nation of Oklahoma, *An Act Establishing a Code Commission*, Legislative Act 1-85.

Chief Justice Viles led to the inclusion of the judiciary in the process of developing appropriate legislation for the Court.⁹⁴

The formation of the Commission gave the Court an opportunity to more closely outline and specify procedures of the Tribunal. In considering changes of judicial organization within the code, Hughes noted that the CHEROKEE APPEALS TRIBUNAL, ADMINISTRATIVE PROCEDURES, under which the Court had operated since 1978, seemed to mix items of a legislative nature with the methods of processing an appeal. He suggested placing the laws concerning the governance of the Tribunal under the Judicial Code while making a separate compilation of the rules of procedure.⁹⁵

By the end of May 1985, Hughes submitted his first draft of the Judicial Code to various members of the Commission and the Tribunal for comments. His original draft was "modeled after the Federal Judiciary Code, with some minor variations from the State of Oklahoma Administrative [sic] Procedures Act and the Judicial Code of the Navajo Nation."⁹⁶ Hughes also presented a set of rules and procedures modeled after the rules and

⁹⁴Lance Hughes to the Cherokee Nation Judicial Appeals Tribunal, March 18, 1985, in Cherokee Nation Judicial Appeals Tribunal, 1985 Cherokee Nation Code Commission, 1985 JAT Procedures/Recommendations file. Tahlequah, Oklahoma.

⁹⁵*Ibid.*

⁹⁶Lance Hughes to Chief Swimmer, Deputy Chief Mankiller, Chief Justice Viles, Justice Ryder [sic], Justice Toney, Jim Wilcoxon, Bill Steeler, May 20, 1985, in Cherokee Nation Judicial Appeals Tribunal, 1985 Cherokee Nation Code Commission, 1985 JAT Procedures/Cherokee Laws file. Tahlequah, Oklahoma.

regulations for hearings before the National Labor Relations Board.⁹⁷ Through the end of spring and into the early part of summer the Code Commission met and modified the draft.⁹⁸

In late June, Hughes presented to the Tribunal for final comment, the proposed Judicial Code along with a prototype of the procedural rules. These drafts met with general approval from the Justices. Yet Chief Justice Viles expressed some concern over the amended version of the Judicial Code which specified jurisdiction of the Tribunal.⁹⁹ Viles noted a proposed subsection gave the Judicial Appeals Tribunal original and exclusive jurisdiction over administrative decisions made by the executive branch, something not specified in the Constitution. The Chief Justice, fearing an intrusion on the separation of powers, believed if adopted, this amendment "stands the chance of opening the floodgates of litigation."¹⁰⁰ Hughes removed the suggested portion and sent the final draft of the code to the

⁹⁷*Ibid.* Concerning the proposed rules and procedures, Chief Justice Viles indicated his desire that the right to petition the Tribunal be extended to Cherokees who were not members of the Tribe as well as non-Indians, governmental agencies and members of other tribes.

⁹⁸Lance Hughes to Chief Justice Viles, Justice Rider, Justice Toney, May 31, 1985; and Lance Hughes to Chief Justice Viles, Justice Rider, Justice Toney, June 4, 1985, in Cherokee Nation Judicial Appeals Tribunal, 1985 Cherokee Nation Code Commission, 1985 JAT Procedures/Cherokee Laws file. Tahlequah, Oklahoma.

⁹⁹Philip H. Viles, Jr. to Lance Hughes, July 1, 1985, in Cherokee Nation Judicial Appeals Tribunal, JAT General Correspondence 1977-1987 file. Tahlequah, Oklahoma.

¹⁰⁰*Ibid.*

Commission for their ultimate disposition.

The Commission placed the completed version of the proposal on the Council agenda for mid-July. In order to assist the legislative branch in expediting the adoption process, Chief Justice Viles informed the Council that under the proposed Judicial Code, the Justices, and not the Tribal Council as in the past, would be given the authority to adopt rules of pleading practice and procedure. The Chief Justice reported all the Justices had reviewed and approved the final draft of the Judicial Appeals Tribunal Procedures.¹⁰¹

The Tribal Council had no problem with allowing the Tribunal its own discretion in creating procedural rules. On July 13, 1985 the Council unanimously enacted the Judicial Code.¹⁰² The Judicial Code was placed under Title 7 of the Cherokee Nation Code Annotated and the Judicial Appeals Tribunal Procedures attached as an appendix.

At the same time the Council adopted the Judicial Code it also passed legislation relating to the tribal election laws.¹⁰³

¹⁰¹Philip H. Viles, Jr. to the Tribal Council, Cherokee Nation of Oklahoma, July 8, 1985, in Cherokee Nation Judicial Appeals Tribunal, JAT General Correspondence 1977-1987 file. Tahlequah, Oklahoma.

¹⁰²Cherokee Nation of Oklahoma, *A New Act Relating to [the] Cherokee Nation of Oklahoma Judicial Branch; Enacting a Code for the Judiciary Branch of Government; and Providing for Procedures and Rules of the Judicial Appeals Tribunal*, Legislative Act 12-85.

¹⁰³Cherokee Nation of Oklahoma, *An Act Relating to [the] Cherokee Nation of Oklahoma Election Laws; Amending 21 CNCA 1985 (LA 1-78), Sections 1 and 2; Changing the Fee of the Registered Voters List; Changing the Fee Charged for the Request of a*

This legislation specified the role of the Judicial Appeals Tribunal in a contested election. The new rules delegated authority to the Tribunal to supervise recounts. The act then detailed the standards governing the petition process and directed general procedures if the determination of a successful candidate became impossible.¹⁰⁴ The procedures set out in the new election laws proved to be of great assistance to the Tribunal in the 1987 Election Recount Cases.

The 1985 adoption of the Judicial Code and the Judicial Appeals Tribunal Procedures marked a turning point in the history of the Court. The Code was the culmination of an aspiration of the Cherokee Nation to have a more sophisticated form of government. That desire, for the judiciary, had been echoed in 1980 when E. Moses Frye proposed one piece of legislation to cover the Tribunal. The Code gave the Nation everything Frye had wanted and more.¹⁰⁵ The statutory compilation provided the citizens of the Nation with an easy reference to aid them in the future. Just as important, the Court was in a better position to exact more specificity from those seeking use

Recount; Adding New Items; Repealing Legislative Act 2 - 82; and Declaring an Emergency, Legislative Act 9-85.

¹⁰⁴*Ibid.*

¹⁰⁵The Code not only set an annual salary for the Justices but also included the process of choosing the Chief Justice, allowed for the appointment of a clerk, specified the jurisdiction of the Court, and detailed the procedural rules of the Tribunal. Cherokee Nation of Oklahoma, *Cherokee Nation Code Annotated* (1985), Title 7.

of the Cherokee judicial system.

THE LATE 80s

By following the procedures outlined in the Code, litigants in the second half of the 1980s presented the Tribunal with concise petitions stating their causes of action. With one exception, the subject matter of the cases coming before the Tribunal continued to be either employment terminations or protested election results. The procedures outlined in the Code assisted the Court in providing petitioners their due process rights.

The initial test of the new Code came with an unexpected appeal concerning the appropriation of financial aid for students attending Flaming Rainbow University (FRU). Since 1974 students attending FRU had received funds from the Bureau of Indian Affairs (BIA). The recipients had to be students of at least one quarter Indian blood and enrolled in an accredited institution of higher education. The BIA had contracted for the Cherokee Nation to disburse the money. In March of 1985 the Council established guidelines for dispensing the financial aid.¹⁰⁶

The FRU students made application to the Cherokee Nation for their share of distributable funds. In May, Turner Bear,

¹⁰⁶Petition, FRU Students v. Cherokee Nation, No. 85-1, (J.A.T. September 6, 1985).

Director of Cherokee Nation Higher Education, informed them that FRU did not fit the criteria of being "fully accredited" as it allegedly did not issue letter grades. In accordance with procedures set out by the Council, the students appealed the decision within the Executive branch. After failing to receive authorized disbursements, the students appealed to the Judicial Appeals Tribunal late in July, naming Principal Chief Ross Swimmer, Turner Bear, Jr., Yvonne Bushyhead, and the Cherokee Nation as defendants. Through their attorneys James M. McElfish, Jr., and Julian K. Fite, the plaintiff students petitioned the Tribunal to reverse the decision of the defendants and order the disbursement of the federal funds on the same basis as provided to other Cherokee students.¹⁰⁷

Before the issue could come before the Court the parties reached a settlement. The Nation agreed to provide the grant money to the students. The petitioners then stipulated to a dismissal of the cause with prejudice.¹⁰⁸

Even though the Tribunal did not decide the outcome, the FRU case indicated the importance of the newly adopted rules of procedure. The petition presented the Court with a list of the alleged facts upon which the cause of action rested. It also included issues of law and particular grievances of the plaintiffs. Finally, the pleading specified the relief the

¹⁰⁷ *Ibid.*

¹⁰⁸ Stipulation of Settlement, FRU Students v. Cherokee Nation, No. 85-1 (J.A.T. September 6, 1985).

claimants sought. The format of the petition under the new Code aided both sides in defining the questions involved. The filings in the FRU case were examples of how the new requirements simplified the appeals procedure while maintaining due process.

While the tenth anniversary of the adoption of the Cherokee Constitution passed with no caseload for the Tribunal, the next year was filled with continuous litigation and changes for the Tribunal. Early in 1987 Lucille Gossett, representing herself, filed suit in the Cherokee Court to appeal her employment termination.¹⁰⁹ Gossett, an eleven year employee of the Cherokee Health Department, claimed her lay off, in 1986, was a violation of the personnel policies of the Nation and based in part on her age. Her petition claimed she suffered mental anguish and embarrassment over the loss of the job and asked the Court to reinstate her with pay retroactive to the time of termination.

To clarify the issues and to protect Gossett's due process rights, Chief Justice Viles appointed Associate Justice Toney to hold a Simplification Conference on February 27, 1987. Toney was a natural choice for the task due to his experience with the National Labor Relations Board. Following the conference Justice Toney issued his findings on March 2¹¹⁰ and sent them to

¹⁰⁹Petition, Gossett v. Cherokee Nation, No. 87-1 (J.A.T. March 13, 1987).

¹¹⁰Finding, Gossett v. Cherokee Nation, No. 87-1 (J.A.T. March 13, 1987).

Chief Justice Viles in order to set a hearing date.

The significance of the preliminary conference was three fold. First, because Lucille Gossett did not have benefit of counsel, the Court wanted to protect her due process rights and make certain she understood the legal issues she would have to argue. Also, the Court desired specificity of the legal questions on which it would rule. Finally, this was the first time such a process had been used under a new procedural rule which allowed the Chief Justice to assign a preliminary proceeding to one Justice.¹¹¹

The Tribunal heard the Gossett appeal on March 13, 1987 with Chief Justice Viles presiding and Associate Justice Rider present. Associate Justice Toney was not present, having taken an administrative leave of absence.¹¹² Gossett appeared before the Tribunal to argue her own case. James G. Wilcoxon, General Counsel for the Tribe, represented the defendant Nation.

Gossett claimed she had been terminated in violation of the personnel policies of the Cherokee Nation. In making this assertion she argued she had an employment contract with the Nation which had been breached. The former employee also stated

¹¹¹The new procedural rule went into effect on February 27, 1987 as the result of the annual Judicial Conference. Philip H. Viles, Jr. to the Tribal Council, Cherokee Nation of Oklahoma, February 27, 1987, in Cherokee Nation Judicial Appeals Tribunal, JAT Judicial Conference February 1987 file. Tahlequah, Oklahoma.

¹¹²William D. Toney to Philip H. Viles, Jr., March 13, 1987, in Cherokee Nation Judicial Appeals Tribunal, JAT General Correspondence 1977-1987 file. Tahlequah, Oklahoma.

the reason for her termination was age. Gossett was 61 at the time of her discharge, and further claimed she had seniority and thus a right to continue working for the Nation.¹¹³

Wilcoxon argued that no Tribal policies had been violated and the termination of Lucille Gossett was proper under the circumstances. According to Wilcoxon, Gossett was not a contracted employee but an employee at will, subject to termination at any time. The attorney for the Nation then presented evidence indicating steps had been taken by the Tribe to avoid age discrimination. He went on to state the personnel policies of the Nation allowed the Tribe to retain the right to reduce the work force because of budget necessities.¹¹⁴ Wilcoxon called Mary Harris as a witness. Harris, Director of Personnel for the Cherokee Nation, testified the health department had no alternative but to lay off employees because of a 28 percent budget cut.

At the completion of the two hour hearing the Tribunal recessed to deliberate the matter. Upon reconvening, the Court issued its holding in favor of the Nation. In delivering the ruling, Chief Justice Viles based the decision of the Court on Article XII of the Cherokee Constitution which allows an employment termination "for cause." The Tribunal felt the lay

¹¹³Hearing Record, March 13, 1987, pp. 13-14, Gossett v. Cherokee Nation, No. 87-1, (J.A.T. March 13, 1987).

¹¹⁴Hearing Record, March 13, 1987 pp. 17-21, Gossett v. Cherokee Nation, No. 87-1 (J.A.T. March 13, 1987),

off, due to the budget cut in the health department, constituted "cause" and was within the personnel policies of the Nation.¹¹⁵

During the early stages of the Gossett case, Chief Justice Viles called the Judicial Appeals Tribunal to a Judicial Conference as directed by the 1985 Code.¹¹⁶ The Conference agenda included a discussion of pending cases, preparation for the upcoming 1987 elections, and a survey of the rules of practice and procedure.¹¹⁷ The result of the Conference was the adoption of an additional rule of procedure concerning petitions.¹¹⁸ In order to better facilitate procedures for litigation, the Justices unanimously agreed to allow the Chief Justice the discretion of assigning those matters of a preliminary nature to one Justice.¹¹⁹

¹¹⁵Hearing Record, March 13, 1987, p. 70, *Gossett v. Cherokee Nation*, No. 87-1 (J.A.T. March 13, 1987); "Cherokee Tribunal rules for tribe, against former employee," *Cherokee Advocate*, March 1987, pp. 3,9.

¹¹⁶On January 30, 1987 Chief Justice Viles called the Justices to meet on February 27, 1987 pursuant to § 7-2-13, Cherokee Nation Code Annotated (1985). Order Calling Justices of the Cherokee Nation to the Judicial Conference of the Cherokee Nation, in Cherokee Nation Judicial Appeals Tribunal, JAT Judicial Conference February 1987 file. Tahlequah, Oklahoma.

¹¹⁷Agenda for Annual Judicial Conference, in Cherokee Nation Judicial Appeals Tribunal, JAT Judicial Conference February 1987 file. Tahlequah, Oklahoma.

¹¹⁸Philip H. Viles, Jr. to the Tribal Council, Cherokee Nation, February 27, 1987, in Cherokee Nation Judicial Appeals Tribunal, JAT Judicial Conference February 1987 file. Tahlequah, Oklahoma.

¹¹⁹The Court renumbered the new procedure Rule 3 and changed Rule 3 to Rule 3a. The new procedure involved assigning cases to the Justices:

Shortly after the 1987 Judicial Conference, the composition of the Court changed. At the beginning of the year Associate Justice Rider had been reconfirmed¹²⁰ but on March 4, 1987 Associate Justice Toney took a leave of absence when a controversy arose regarding his application for a Certificate of Degree of Indian Blood (CDIB).¹²¹ Although it was understood by many that Toney was a "member by blood",¹²² the Council, on March

Rule 3. Assignment of cases

The Chief Justice shall have the power to assign any case to one of the Associate Justices for review, simplification conference, or such other preliminary proceedings as he shall see fit. If the Chief Justice so assigns any case, then the words, "the justice", used herein, shall apply to that justice.

The Chief Justice shall retain the power to assign any case to the entire court (as modified by §7-2-1 and §7-2-6 and §7-3-5) for decision. In that case, the words "the justice", used herein, shall apply to a majority of the Tribunal.

Philip H. Viles, Jr. to the Tribal Council, Cherokee Nation of Oklahoma, February 27, 1987, in Cherokee Nation Judicial Appeals Tribunal, JAT Judicial Conference February 1987 file. Tahlequah, Oklahoma.

¹²⁰Councilmember Chapman made the motion to reconfirm Rider. The second came from Councilmember Proctor. Tribal Council Minutes, January 10, 1987, Minute Book of the Cherokee Nation of Oklahoma, Book 3, page 7. Tahlequah, Oklahoma.

¹²¹The CDIB is issued by the Bureau of Indian Affairs and is processed and distributed by the Cherokee Nation. The CDIB is a lineage proving process that provides the necessary evidence that must be presented when making application for tribal membership.

¹²²At the Council meeting of March 14, 1987, Principal Chief Wilma Mankiller stated she understood Toney was a Cherokee by blood and was in the process of acquiring a CDIB. "CN council ousts Judge Toney from Judicial Appeals Tribunal," Cherokee Advocate, March 1987, p. 16.

14, voted to withdraw their confirmation until the completion of his application for a CDIB.¹²³ This left the Tribunal with only two Justices to handle pending issues. The Council finally filled the vacancy in November of 1987 with the approval of the appointment of Dwight W. Birdwell.¹²⁴ The composition of the Court at the end of 1987 was Chief Justice Philip H. Viles, Jr., Jack E. Rider, and Dwight W. Birdwell. The confirmation of Birdwell came too late to assist the other two Justices in deciding the spring litigation and the 1987 Election Recount Cases.

Almost immediately after the Tribunal decided the Gossett case the Tribunal received another appeal concerning termination of employment. On March 24, 1987, J. D. "Pete" Pittman, Jr., through his Arkansas attorney Priscilla Karen Pope, filed a petition with the Court asking for a reversal of his dismissal.¹²⁵ After the initial denial of reinstatement by Principal Chief Mankiller, Pittman sought the constitutional appeal claiming his discharge was without cause. James G. Wilcoxen, representing the defendant Nation, filed a timely answer with the Tribunal

¹²³Tribal Council Minutes, March 14, 1987, *Minute Book of the Cherokee Nation of Oklahoma*, Book 3, page 3. Tahlequah, Oklahoma.

¹²⁴Tribal Council Minutes, November 14, 1987, *Minute Book of the Cherokee Nation of Oklahoma*, Book 3, page 11. Tahlequah, Oklahoma. "Birdwell appointed to Cherokee Nation Judicial Appeals Tribunal," *Cherokee Advocate*, December 1987, p. 7.

¹²⁵Petition, Pittman v. Cherokee Nation, No. 87-2 (J.A.T. May 22, 1987).

denying all charges and stating the discharge was for sufficient cause pursuant to the Cherokee Nation Personnel Policies and Procedures.¹²⁶

Pittman had served as Director of Clerical Services, Health & Human Services and Facility Director, and Chief Pharmacist of the Sallisaw Clinic of the Cherokee Nation. In the middle of the afternoon on February 11, 1987, Jo Ann Pettit brought her injured husband, Rynold, to the clinic. He had a piece of steel lodged in the upper left side of his back. All the medical doctors were out of the health center at the time. Pittman, a certified pharmacist, supposedly instructed a nurse to administer a local anesthetic and clean the wound. He then allegedly removed the metal and instructed the Pettits to go to the local hospital for X-rays and inspection of the wound for suturing.¹²⁷ After receiving written complaints concerning the incident, the Nation terminated its contract with Pittman.

The appeal to the Tribunal centered on the disciplinary aspect of the dismissal. Pope contended the action of the Nation exceeded the guidelines set out in the adopted personnel policies and procedures of the Nation. As such, there was no just cause for the dismissal and the Principal Chief, on initial

¹²⁶Answer, Pittman v. Cherokee Nation, No. 87-2, (J.A.T. May 22, 1987).

¹²⁷Pittman v. Cherokee Nation, No. 87-2, (J.A.T. May 22, 1987).

appeal, should have reinstated Pittman.¹²⁸

Wilcoxon answered the Pittman argument by asserting the Cherokee Nation Personnel Policy had been violated by Pittman and not the Nation. In claiming the dismissal was proper, Wilcoxon indicated the medical procedure performed by Pittman was unauthorized and thus a violation of the personnel policies of the Nation. As such, the dismissal of the pharmacist was with cause.¹²⁹

In upholding the prerogative of the Nation to terminate Pittman, the Tribunal did not rely on the personnel policies of the Tribe. Instead the Court looked at the special contractual relationship between Pittman and the Nation. The Tribunal noted the provisions of the agreement between the pharmacist and the Tribe were specific and replaced the personnel policies developed pursuant to the Constitution. Because the policies were not applicable, the Court found the dismissal of Dr. Pittman as proper under the laws of the Cherokee Nation.¹³⁰

The Gossett and Pittman appeals kept the Tribunal busy through the spring of 1987 but more intense work lay ahead of the Court with the upcoming elections. The election of 1987 proved crucial for the Tribunal in asserting its power under the

¹²⁸Petition, Pittman v. Cherokee Nation, No. 87-2 (J.A.T. May 22, 1987).

¹²⁹Answer, Pittman v. Cherokee Nation, No. 87-2 (J.A.T. May 22, 1987).

¹³⁰Interview with Philip H. Viles, Jr., Cherokee Nation Judicial Appeals Tribunal, Claremore, Oklahoma, May 18, 1990.

1985 Code to oversee the election recount process and certify the results of the election. The new code had delegated to the Tribunal the duty of supervising all recount elections.¹³¹ The 1987 election provided the impetus for the Tribunal to clarify the boundaries of that directive.

Joe Grayson, Sr. was a candidate for one of the fifteen council seats open in June of 1987. After a close contest in which he finished sixteenth, Grayson posted the \$500 statutory bond with the Tribal Election Committee and demanded a recount of the election but only so far as to the absentee ballots.¹³²

On July 9, 1987 the Judicial Appeals Tribunal met with the Tribal Election Committee and held a recount. After hours of tallying, Chief Justice Viles with the concurrence of Associate Justice Rider, had the polling machines desensitized in an effort to save time and preserve the accuracy of the intent of individual voters.¹³³ This allowed machines to count a large number of ballots which otherwise would have been counted by hand.¹³⁴ After the recount, Grayson came in fourteenth, winning

¹³¹Cherokee Nation of Oklahoma, *Cherokee Nation Code Annotated* (1985), Title 7, Appendix Rule 36, and Title 10, §§ 10-5-91 - 10-5-93.

¹³²Petition, Grayson v. Tribal Election Committee, No. 87-E2 (J.A.T. August 12, 1987).

¹³³Proceedings, July 9, 1987, pp. 41-46, Cherokee Nation Judicial Appeals Tribunal, Election Recount 1987 file. Tahlequah, Oklahoma.

¹³⁴While the electronic voting machines required the use of number two pencils many of the ballots the machines rejected had been marked with ink. It appeared that confusing instructions had been issued concerning the type of necessary writing

a position that had previously been denied him by the initial computation. With the announcement of the new totals, Chief Justice Viles specified the figures had been cross checked with the Election Committee and presumed the results would be posted following the transcription of a legible copy.¹³⁵

On July 19, the Tribal Election Committee met and issued a statement challenging the authority of the Tribunal to direct and oversee the recount. The Election Committee then ignored the recount tally of July 9 and certified the results of the original election.¹³⁶ Two days later the Cherokee Nation, through its General Counsel, James G. Wilcoxon, filed suit against the Election Committee claiming it did not have the authority to

instrument voters were to use. Desensitizing the machines allowed those ballots marked with ink to be counted. Proceedings, July 9, 1987, pp. 41-46, Cherokee Nation Judicial Appeals Tribunal, Election Recount 1987 file, Tahlequah, Oklahoma; Hearing Record, August 12, 1987, pp. 13-16, Grayson v. Tribal Election Committee, No. 87-E2 (J.A.T. August 12, 1987); Philip H. Viles, Jr. to PHV, Jr., July 9, 1987, in Cherokee Nation Judicial Appeals Tribunal, Election Recount 1987 file. Tahlequah, Oklahoma.

¹³⁵Final Decision, July 9, 1987, pp. 2-3, Cherokee Nation Judicial Appeals Tribunal, Election Recount 1987 file. Tahlequah, Oklahoma. Following the recount, Justice Viles wrote a memo to himself about future elections. Philip H. Viles, Jr. to PHV, Jr., July 9, 1987, in Cherokee Nation Judicial Appeals Tribunal, Election Recount 1987 file. Tahlequah, Oklahoma.

¹³⁶Cherokee Nation Tribal Election Committee Statement, Grayson v. Tribal Election Committee, No. 87-E2 (J.A.T. August 12, 1987).

certify the first count over the direction of the Tribal Court.¹³⁷ A day later Joe Grayson, Sr., through his attorney Tina Glory-Jordan, filed a second suit stating an almost identical claim.¹³⁸

The matter became more complicated when two weeks later, on August 7, Gloria Matthews and David Cornsilk separately petitioned the Tribunal to appoint them to the Council.¹³⁹ Matthews and Cornsilk each claimed they had finished sixteenth in the recount. Due to the recent death of Councilmember-elect Clarence Sunday, both claimants asserted they should be appointed to fill the vacant position as they were next in line.¹⁴⁰

As the common source of all four complaints arose from the election recount, the Court consolidated the cases and held a hearing on August 12, 1987 to resolve the issue.¹⁴¹ At the hearing the Tribunal first considered the claims of Matthews and Cornsilk. The Cherokee Court dismissed their cause of action on the procedural grounds that neither one of them had named a

¹³⁷The Election Committee consisted of Ben Shoemake, Florene Milligan, Edith Dalton, James Gann, and Betty Owens. Cherokee Nation v. Tribal Election Committee, No. 87-E1 (J.A.T. August 12, 1987).

¹³⁸Grayson v. Tribal Election Committee, No. 87-E2 (J.A.T. August 12, 1987).

¹³⁹In re Gloria Matthews, No. 87-E3 (J.A.T. August 12, 1987); and In re David Cornsilk, No. 87-E4 (J.A.T. August 12, 1987).

¹⁴⁰*Ibid.*

¹⁴¹Order, Grayson v. Tribal Election Committee, No. 87-E2, (J.A.T. August 12, 1987).

defendant in their petition as required by the Cherokee Nation Code Annotated.¹⁴² The Tribunal then went further and established a parameter for the separation of powers by stating the Tribal Council had constitutionally mandated ways of filling vacant positions in that body and the Court should not meddle in the affairs of the legislative branch of the government.¹⁴³

The Tribunal then turned its attention to the major litigants of the appeals, the Cherokee Nation and Joe Grayson. James G. Wilcoxon called two witnesses to verify the validity of the recount of July 9, 1987. Tommy Thompson, Comptroller of the Cherokee Nation, testified as to the number of votes cast and counted.¹⁴⁴ Tom Ishberger, Vice-President of Business Records Corporation, described the workings of the election machines his company had used in running the June 20 election of the Nation.¹⁴⁵ He also explained the adjustments which Chief Justice Viles had directed for counting those ballots marked with ink.

Tina Glory-Jordan, representing Joe Grayson, then narrowed the issue before the Tribunal. Her presentation to the Court posed the question of whether or not the Tribal Election

¹⁴²Hearing Record, August 12, 1987, pp. 2-3, Grayson v. Tribal Election Committee, No. 87-E2 (J.A.T. August 12, 1987).

¹⁴³Hearing Record, August 12, 1987, p. 3, Grayson v. Tribal Election Committee, No. 87-E2 (J.A.T. August 12, 1987).

¹⁴⁴Hearing Record, August 12, 1987, p. 7, Grayson v. Tribal Election Committee, No. 87-E2 (J.A.T. August 12, 1987).

¹⁴⁵Hearing Record, August 12, 1987, p. 12, Grayson v. Tribal Election Committee, No. 87-E2 (J.A.T. August 12, 1987).

Committee had exceeded its authority in upholding the June 20 results over those of the Tribunal recount of July 9.¹⁴⁶ She contended the Committee had no power to ignore the recount results and as such the Cherokee Court could either declare the acts of the Tribal Election Committee illegal or order that body to certify the recount results.¹⁴⁷

Donn Baker, attorney for the defendant Tribal Election Committee, was unable to represent his clients due to a conflict in schedule. Yet after informing his clients of the situation, the plaintiffs did not obtain another attorney.¹⁴⁸ Only one of the named defendants, Edith Dalton, appeared at the hearing.¹⁴⁹ After allowing Mrs. Dalton to ask and answer questions,¹⁵⁰ the Justices entered their decision in favor of the Cherokee Nation and Joe Grayson upholding the constitutionality of the election recount process.¹⁵¹

In writing the decision for the 1987 Election Recount Cases,

¹⁴⁶Hearing Record, August 12, 1987, p. 22, Grayson v. Tribal Election Committee, No. 87-E2 (J.A.T. August 12, 1987).

¹⁴⁷Hearing Record, August 12, 1987, pp. 21-22, Grayson v. Tribal Election Committee, No. 87-E2 (J.A.T. August 12, 1987).

¹⁴⁸Hearing Record, August 12, 1987, p. 4, Grayson v. Tribal Election Committee, No. 87-E2 (J.A.T. August 12, 1987).

¹⁴⁹Hearing Record, August 12, 1987, p. 17, Grayson v. Tribal Election Committee, No. 87-E3 (J.A.T. August 12, 1987).

¹⁵⁰Hearing Record, August 12, 1987, pp. 18, 24, Grayson v. Tribal Election Committee, No. 87-E2 (J.A.T. August 12, 1987).

¹⁵¹Hearing Record, August 12, 1987, p. 25, Grayson v. Tribal Election Committee, No. 87-E3 (J.A.T. August 12, 1987).

Chief Justice Viles identified the role of the Tribunal in the election process.¹⁵² After giving an historical explanation of the development of the procedural rules governing the Court, he elaborated on the 1985 Code changes and stated express legislative intent had provided the Tribunal with the power to oversee the recount process:

To the Tribunal, this change from "being present" to "supervising" is a conscious expression of legislative intent, requiring us to follow available rules and use common sense and experience where no rules are applicable. The same requirements were implied, to a degree, when we were required to be present during a recount. There is no point in having justices present unless they will be used to oversee or supervise or adjudicate.¹⁵³

After explaining the process of July 9, the Tribunal certified the results of the recount. The 1987 Election Recount Cases solidified the position of the Tribunal as the final arbiter of Tribal election results and established a recognized boundary for the separation of powers between the various branches of the government.

Following the litigation of 1987, the Tribunal performed ceremonial functions and received only perfunctory inquiries concerning the possibilities of litigation. In 1988 the Council established a Children's Commission to make recommendations for

¹⁵²Associate Justice Rider concurred in the decision. At the time the Tribunal ruled on the issue, no replacement had yet been appointed or approved to fill the third position of former Associate Justice Toney.

¹⁵³Decision, Grayson v. Tribal Election Committee, No. 87-E2 (J.A.T. August 12, 1987).

improving the lives of Cherokee children. As part of instituting of the Commission, Principal Chief Mankiller called on Chief Justice Viles to administer the oath of office to the Commissioners.¹⁵⁴ During the fall of 1988 the Chief Justice also acted as host for a meeting between a delegation from the University of Tulsa College of Law and officials of the Nation. The law school was seeking to expand its services to tribal governments as part of a new Indian Law Certificate Program at the college.¹⁵⁵

The composition of the Tribunal changed following the 1987 Recount Election Cases. In November of 1987 the Council filled the third seat on the Cherokee Court by approving the appointment of Dwight W. Birdwell.¹⁵⁶ In the summer of 1989 the Council ratified the reappointment of Philip H. Viles, Jr. for another six year term.¹⁵⁷ That summer the Justices elected Philip

¹⁵⁴Gwen Grayson to Phillip [sic] Viles, September 12, 1988, in Cherokee Nation Judicial Appeals Tribunal, JAT General Correspondence 1988- file. Tahlequah, Oklahoma.

¹⁵⁵Philip H. Viles, Jr. to Principal Chief Wilma Mankiller, September 20, 1988, in Cherokee Nation Judicial Appeals Tribunal, JAT General Correspondence 1988- file. Tahlequah, Oklahoma.

¹⁵⁶"Birdwell appointed to Cherokee Nation Judicial Appeals Tribunal," Cherokee Advocate, December 1987, p. 7.

¹⁵⁷The motion for re-appointment by Councilmember G. Proctor received a second from Councilmember Chapman. Tribal Council Minutes, July 8, 1989, Minutes drawer, Tribal Council vertical files. Tahlequah, Oklahoma. Philip H. Viles, Jr. to Justice Jack Rider and Justice Dwight Birdwell, July 11, 1989, in Cherokee Nation Judicial Appeals Tribunal, JAT Judicial Composition file. Tahlequah, Oklahoma.

H. Viles, Jr. as the Chief Justice.¹⁵⁸ In December of 1989, Associate Justice Rider died.¹⁵⁹ In March of 1990, Principal Chief Wilma Mankiller received Council approval for the appointment of former Chief Justice Ralph Keen to fill the remaining period of the Rider term.¹⁶⁰ Chief Justice Viles administered the oath of office to the new Justice on April 6, 1990.¹⁶¹

Administrative alterations also accompanied the compositional changes on the bench after 1987. In mid-summer of 1989, Marj White, who had served as Court Clerk for the Tribunal for a number of years,¹⁶² left employment with the Tribe. In January 1990, Chief Justice Viles appointed Gina Blackfox as Court Clerk for the Judicial Appeals Tribunal.¹⁶³ With the

¹⁵⁸Notice, August 3, 1989, in Cherokee Nation Judicial Appeals Tribunal, JAT Judicial Composition file. Tahlequah, Oklahoma.

¹⁵⁹"Cherokee Nation Appeals Tribunal Justice Jack Rider dies," *Cherokee Advocate*, March 1990, p. 21.

¹⁶⁰The motion by Councilmember Phillips for appointment received a seconding motion from Councilmember Bush. Tribal Council Minutes, March 10, 1990, Minutes drawer, Tribal Council vertical files. Tahlequah, Oklahoma.

¹⁶¹"Ralph F. Keen named to Judicial Appeals Tribunal," *Cherokee Advocate*, May 1990, p. 1.

¹⁶²Marj White had served in the capacity as Court Clerk from approximately 1980 until the summer of 1989. Interview with Philip H. Viles, Jr., Cherokee Nation Judicial Appeals Tribunal, Claremore, Oklahoma, March 9, 1990.

¹⁶³Order, January 18, 1990, in Cherokee Nation Judicial Appeals Tribunal, JAT General Correspondence 1988- file. Tahlequah, Oklahoma.

appointment of Gina Blackfox, the Tribunal was fully functional and ready to carry out its constitutional duties.

CONCLUSION

To create a viable court from nothing is a formidable task for any government. To create a system that is fair and equitable as well makes the job even more difficult. Without the dedicated efforts of the original Justices the job would have been nearly impossible.

From the first decade through the present the Cherokee Nation has been fortunate to have had foresightful Justices that have been sensitive to the needs of the Tribe and its members. Through their input during the drafting of the Title 7 of the Cherokee Nation Code Annotated, the Justices insured tribal members due process while creating the necessary framework for asserting tribal sovereignty should the need arise in the future. The Tribunal has carefully ruled on the issues before it, elaborating only when necessary in order to carefully develop an emerging common law and also to give future courts more latitude in their decision making. Although the Court has not cited its earlier rulings in deciding cases, the Tribunal has been consistent in its interpretation of the issues coming before it.

The first fifteen years of existence of the Judicial Appeals Tribunal has been marked with a small but steady caseload. The

Court was fortunate that few tribal members availed themselves of the new judicial system in these formative years. This gave the Tribunal the necessary time to develop its procedures.

The few number of appeals to the Court is partly due to the specific constitutional restrictions placed on the Court as to the type of cases it can hear. The small work load of the Cherokee Court belies the significance of the cases that have come before it. The Tribunal has functioned as the interpreter of the Cherokee Constitution as well as the final decision maker in resolving internal disputes of the Cherokee Nation. The Judicial Appeals Tribunal is an important part of the Cherokee Nation in serving as it judicial voice and assuring a continued recognition of tribal sovereignty.

APPENDIX A

JUSTICES OF THE CHEROKEE NATION JUDICIAL APPEALS TRIBUNAL

Under Article VII of the 1975 Cherokee Constitution, the Cherokee Nation Judicial Appeals Tribunal is composed of three Justices, each a member of the Tribe and all admitted to practice law in Oklahoma. According to the Constitution, the Principal Chief appoints the Justices with the final approval of the Tribal Council. Under Title 7, § 7-2-3 of the *Cherokee Nation Code Annotated* (1985), each Justice serves a six year term with the periods staggered every two years. The filling of a vacancy on the Tribunal follows the regular appointment process. By custom, the newly approved Justice fills the remaining term of the vacancy. Title 7, § 7-2-5 of the *Cherokee Nation Code Annotated* (1985) mandates the election of a Chief Justice by the members of the Tribunal. The Chief Justice holds that office for the duration of his or her term. As of 1990, eight Justices have served on the Judicial Appeals Tribunal.

Dwight W. Birdwell - A native of the Bell Community in Adair County, Birdwell is a partner in the law firm of Birdwell & Pain of Norman, Oklahoma. A Vietnam veteran, he twice received the Silver Star as well as the Bronze Star, a Purple Heart, and the Good Conduct Medal. After his military service he received a Bachelor of Arts degree in History from Northeastern State University in Tahlequah.

Birdwell then attended law school at the University of Oklahoma where he graduated in 1976, being admitted to the Order of the Coif, a scholastic society restricted to the top ten percent of the graduating class. He was appointed to the bench by Principal Chief Wilma Mankiller in 1987.

Lynn Burris - An Associate District Judge for Judicial District Number 15 of the State of Oklahoma, Judge Burris received his legal training at the University of Oklahoma Law School where he graduated in 1968. After playing on the State Championship football team at Muskogee High School, Burris attended Northeastern State University. While attaining his bachelor's degree from Oklahoma University, he was a member of the National Championship football team. From 1968 until 1973, Judge Burris served as an Assistant District Attorney in Sequoyah and Cherokee Counties as well as having a private practice. Judge Burris assumed his present position on the bench in 1973. Judge Lynn Burris was approved to the Judicial Appeals Tribunal in 1983 after his appointment by Principal Chief Ross Swimmer.

E. Moses Frye, Jr. - Best noted as the principal author of the 1975 Cherokee Constitution, Frye was the son of former Principal Chief Edward M. Frye. After growing up in Sallisaw and Muskogee, he received a Bachelor of Arts degree in History and Economics from Oklahoma University in 1941.

A former brigadier general, Frye was a decorated combat veteran of World War II and the Korean Conflict. After receiving a law degree in 1961 from Oklahoma City University, he served as a tax attorney for the Oklahoma Tax Commission. Between 1962 and 1975, he acted as legal counsel to the Board of Regents for the Oklahoma Agricultural and Mechanical Colleges. From 1975 until his retirement in 1985, Frye taught various business education and business law courses as a professor at Oklahoma State University. He passed away in Stillwater, Oklahoma in the spring of 1989. Principal Chief Ross Swimmer appointed Frye to the Cherokee bench in 1979.

Roy Frye, Jr. - Roy Frye, Jr., a cousin of E. Moses Frye, was a native of Sallisaw. A Phi Beta Kappa scholar at the University of Oklahoma, Frye received his law degree from there in 1941. Frye served as a captain in the Army during World War II, and from 1946 until 1952 he worked in the Muskogee adjudication office of the Veterans Administration. In 1952 he entered private practice with his father in Sallisaw, Oklahoma. He was active in forming the Sallisaw Industrial Park as well as the Sequoyah County Conservancy District for local flood control. He was a recognized community leader in the local PTA, Little League baseball, and the Sallisaw Booster Club. He passed away in Sallisaw in 1984. Frye was one of the original members of the

Judicial Appeals Tribunal, being appointed by Principal Chief Ross Swimmer in 1976.

Ralph F. Keen - An Assistant United States Attorney for the Eastern District of Oklahoma, Keen has been actively involved in Native American affairs since receiving his Bachelor of Arts in History from Northeastern State University. He has served as Executive Director of the Inter-Tribal Council of Nevada and the Director for the Bureau of Indian Services at the University of Utah. In 1972 Keen received his law degree from the University of Tulsa, where he graduated in the top 10 percent of his class. The former Business Manager of the Cherokee Nation of Oklahoma was one of the original Justices of the new Cherokee Court, being appointed by Principal Chief Ross Swimmer in 1977. In 1978 the Tribal Council named him the first Chief Justice of the Judicial Appeals Tribunal. Keen was again appointed to the bench in 1990 by Principal Chief Wilma Mankiller.

Jack E. Rider - A native of Stilwell, Rider took pre-law classes from Northeastern State University following his tour of duty during the Korean War. After receiving his law degree from the University of Tulsa in 1961, he maintained a law practice in Stilwell. He served that community as city attorney as well as attorney for the utility board. In

addition to his law practice, Rider was a noted steel guitarist. He made solo records and accompanied such noted musicians as Johnnie Lee Wills and Leon McAuliffe. Principal Chief Ross Swimmer first appointed Rider to the bench in 1980. He was reappointed in 1987 by Principal Chief Wilma Mankiller. Late in 1989 Rider became the first Justice to die in office when he passed away while undergoing medical treatment in Temple, Texas.

William D. Toney - A founding partner of the Tulsa law firm of Pray, Walker, Jackman, Williamson, & Marlar, Toney received his law degree from the University of Oklahoma in 1957. Born in Sallisaw and raised in Tulsa, Toney served in both World War II and the Korean War. Following his military service he attended Oklahoma State University where he graduated in 1954 with a Bachelor of Science degree. Toney then received an academic scholarship to attend law school at the University of Oklahoma. After returning to the Tulsa area, he concentrated his practice on corporate and administrative law. He has served as in-house counsel for Texas Instruments, American Airlines, and Emerson Electric. Since 1988 he has served on the United States Military Academy Candidate Screening Board. His appointment to the Judicial Appeals Tribunal by Principal Chief Ross Swimmer received confirmation by the Tribal Council late in 1984.

Philip H. Viles, Jr. - A native of Claremore, Oklahoma, Viles is the grandson of former Principal Chief J. B. Milam. He received a Bachelor of Arts in Economics from the University of Virginia and then served a tour of duty in Vietnam, being decorated four times by the United States government and twice by the Republic of Vietnam. In 1975 he graduated from the University of Tulsa College of Law where he was active on the law journal. In 1983 he also earned a Master of Business Administration from the University of Tulsa. He is a Director of the Cherokee National Historical Society and also serves that organization in the capacity of Secretary/Treasurer and member of the Executive Committee. He was one of the original three members of the Judicial Appeals Tribunal, being appointed in 1976 by Principal Chief Ross Swimmer. He became the second Chief Justice of the Judicial Appeals Tribunal in 1981. In 1989 the Tribal Council ratified his reappointment to the bench by Principal Chief Wilma Mankiller. That same year he was unanimously elected to another term as Chief Justice.

APPENDIX B

COMPOSITION OF THE CHEROKEE NATION JUDICIAL APPEALS TRIBUNAL

1976

Philip H. Viles, Jr.
Roy Frye, Jr.

1977

Philip H. Viles, Jr.
Roy Frye, Jr.
Ralph F. Keen

1978

Ralph F. Keen, C.J.
Philip H. Viles, Jr.
Roy Frye, Jr.

1979

Ralph F. Keen, C.J.
Philip H. Viles, Jr.
E. Moses Frye

1980

Philip H. Viles, Jr., C.J.
E. Moses Frye
Jack E. Rider

1981

Philip H. Viles, Jr., C.J.
E. Moses Frye
Jack E. Rider

1982

Philip H. Viles, Jr., C.J.
E. Moses Frye
Jack E. Rider

1983

Philip H. Viles, Jr., C.J.
Jack E. Rider
Lynn Burris

1984

Philip H. Viles, Jr., C.J.
Jack E. Rider
Lynn Burris

1985

Philip H. Viles, Jr., C.J.
Jack E. Rider
William D. Toney

1986

Philip H. Viles, Jr., C.J.
Jack E. Rider
William D. Toney

1987

Philip H. Viles, Jr., C.J.
Jack E. Rider
William D. Toney

1988

Philip H. Viles, Jr., C.J.
Jack E. Rider
Dwight W. Birdwell

1989

Philip H. Viles, Jr., C.J.
Jack E. Rider
Dwight W. Birdwell

1990

Philip H. Viles, Jr., C.J.
Dwight W. Birdwell
Ralph F. Keen

APPENDIX C

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