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## COMMENT

### THE OPIOID CRISIS IN INDIAN COUNTRY: THE IMPACT OF TRIBAL JURISDICTION AND THE ROLE OF THE EXHAUSTION DOCTRINE

*Matt Irby\**

Opioids have been a significant part of pain treatment in the United States for over 150 years.<sup>1</sup> Stories of overdose from the early nineteenth century are almost indistinguishable from stories today.<sup>2</sup> For example, Ella Henderson was a thirty-three-year-old hotel owner in high society Seattle, Washington.<sup>3</sup> Following the death of her beloved father, Ms. Henderson sought the help of doctors, who were ready and willing to prescribe to her a cutting-edge new treatment for both physical and emotional pain: morphine.<sup>4</sup> Liberal prescription was the practice of the time, and like many others, Ms. Henderson was soon overwhelmed by addiction.<sup>5</sup> Referred to in the local newspaper as a “Beautiful Opium Eater,”<sup>6</sup> her community shunned her, and she died alone in her room; the year was 1877.<sup>7</sup>

By the turn of the twentieth century, Congress began to respond to an epidemic indistinguishable from the one the United States faces today through enactment of the Pure Food and Drug Act of 1906.<sup>8</sup> Congress also passed the Harrison Anti-Narcotic Act of 1914<sup>9</sup> and the Anti-Heroin Act of

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1. See Clinton Lawson, *America’s 150-Year Opioid Epidemic*, N.Y. TIMES, May 19, 2018, at 10.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Ch. 3915, 34 Stat. 768, 768 (“For preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.”).

9. Ch. 1, 38 Stat. 785, 785 (“To provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes.”).

1924<sup>10</sup> in the wake of the twentieth century opioid epidemic. These congressional acts worked to prevent the flow of illicit opiates in the United States but failed to control the origin of addiction that led to their use—the medical community’s over-prescription of these problematic narcotics.<sup>11</sup>

On the heels of the Roaring Twenties and the Great Depression, America’s focus soon turned to war, pushing the danger of opioids out of the public eye. As veterans returned from World War II battlefields, families began to grow. Although the 1950s is often characterized by conformity and conservatism, abuse and misuse of opiates lurked in the background until the 1970s, when Congress again responded.<sup>12</sup> This time, Congress attempted to control first the source of legal opiates—doctors and pharmacies—and second, the illicit sources of opiates on the black market.<sup>13</sup> Over the course of the next two decades, doctors were instructed to give opioids sparingly for chronic pain unless the patient was at death’s door.<sup>14</sup> Doctors and nurses were so concerned “drug addiction itself [would] become a hideous spectacle” that they often under-used opioids, even below the suggested dosage based on the circumstances.<sup>15</sup>

As the cloud that followed opiates through the 1970s began to lift by the mid-1980s, cancer specialists challenged the notion that long-term opiate use would “lead the unwitting patient down the primrose path to addiction.”<sup>16</sup> One doctor in particular, Dr. Kathleen Foley, then of the Memorial-Sloan-Kettering Cancer Center in New York City, was especially influential in the resurgence of pain management through long-term opiate use.<sup>17</sup> Dr. Foley published two studies in the early 1980s that showed addiction to be “rare among inpatients.”<sup>18</sup> Dr. Foley’s justification for opioid use was that there were no long-term studies showing that pain patients were likely to become addicted.<sup>19</sup> The reality of the claim,

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10. Ch. 352, 43 Stat. 657, 657 (“Prohibiting the importation of crude opium for the purpose of manufacturing heroin.”).

11. See Lawson, *supra* note 1.

12. *Id.*

13. *Id.*

14. Marcia L. Meldrum, *The Ongoing Opioid Prescription Epidemic*, 106 *AJPH* 1365, 1365 (2016).

15. *Id.* (internal quotation omitted).

16. *Id.* (internal quotation omitted).

17. *Id.*

18. *Id.*

19. *Id.*

however, was that no long-term studies existed to demonstrate how patients would respond.<sup>20</sup>

Doctors celebrated Dr. Foley's work and felt emboldened to introduce opiates as a part of chronic pain treatment. Patients felt empowered by doctors trusting them to take part in their own pain management.<sup>21</sup> During the 1990s, prescriptions for opioids began to rise across the country, and the pharmaceutical industry spread the word about opioids, sponsoring presentations by physicians "championing chronic opioid therapy."<sup>22</sup> It was during this time period that prescription opioid overdose deaths again started to rise.<sup>23</sup>

In the early 2000s, pharmaceutical manufacturer Purdue launched a nationwide advertisement campaign promoting its newest opioid product, OxyContin.<sup>24</sup> That ad campaign included language billing OxyContin as non-addictive because of its slow release in the body.<sup>25</sup> One ad stated, "in fact, the rate of addiction amongst pain-patients who are treated by doctors is much less than one percent . . . . These drugs, which I repeat are our best, strongest pain medications, should be used much more than they are for patients in pain."<sup>26</sup> Legitimate doctors and "pill-mill" operators alike prescribed OxyContin widely for all types of ailments.<sup>27</sup> OxyContin became popular on the black market because low-income patients were willing to sell from the almost unlimited prescriptions they received, and the pills themselves were easily crushed into powder to enable the desired high for the end user.<sup>28</sup> Feeling the pinch of high OxyContin prices, recreational users soon found a cheaper alternative in black tar heroin.<sup>29</sup> Heroin traffickers took notice of the high use of OxyContin and other prescription opioids in middle America and capitalized on the opportunity.<sup>30</sup> The

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20. *Id.*

21. *Id.*

22. *Id.*

23. *Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/epidemic/index.html> (last updated Dec. 19, 2018).

24. Meldrum, *supra* note 14, at 1366.

25. *Id.*

26. *Our Amazing World, Purdue Pharma OxyContin Commercial*, YOUTUBE (Sept. 22, 2016), <https://www.youtube.com/watch?v=Er78Dj5hyeI>.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

increase in heroin use led to a sharp 137 percent increase in overdose deaths between 2000 and 2014.<sup>31</sup>

This brings us to the present day, which is known as the “third wave” of the opioid crisis. The third wave is characterized by the rise of synthetic opioids, primarily illicitly manufactured fentanyl (IMF).<sup>32</sup> Heroin, IMF, and prescription opioid misuse and abuse are decimating communities across the country. In 2016 and 2017 alone, 11.4 million people misused opioids, 2.1 million people suffered non-fatal opioid overdose, 2 million people misused for the first time, and 42,000 people died from an opioid overdose.<sup>33</sup> During the same time frame, 886,000 people used heroin, 81,000 of which used for the first time. As a result, 15,469 people died of a heroin overdose, and 19,413 people died of an IMF or other synthetic opioid overdose.<sup>34</sup>

The Native American community has experienced particularly devastating impacts from the opioid crisis. Part I of this Comment will discuss the impact of the crisis on Native communities and how the federal government’s response has failed Native peoples. In response to that failure, the Cherokee Nation filed the first legal action in tribal court in an attempt to protect its citizens and hold the pharmaceutical industry responsible for the catastrophic impact on the Tribe.

Part II will lay out the procedural posture and the dismissal of the Nation’s suit by way of a tribal jurisdiction decision in federal district court. Part II will then analyze the court’s opinion and ultimate decision to rule in favor of the opioid defendants by relying on the jurisdiction test laid out in *Montana v. United States*.<sup>35</sup> Part II will argue that the district court erred in its ruling for the pharmaceutical defendants when it enjoined the Cherokee Nation from civil litigation in its tribal court. By reviewing case law citing to *Montana* and the exhaustion doctrine, Part II will show that the district court should have applied the exhaustion doctrine in the case. This Part will argue that the district court was not precluded from applying the exhaustion doctrine but rather that current Supreme Court precedent welcomes its use to further the recognition of tribal sovereignty.

Part III will discuss the procedural posture of the most recent development in the Cherokee Nation’s opioid litigation. In a multi-district

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31. *Id.*

32. *Understanding the Epidemic*, *supra* note 23.

33. *What Is the U.S. Opioid Epidemic?*, HHS.GOV/OPIOIDS, <https://www.hhs.gov/opioids/about-the-epidemic/index.html> (last reviewed Jan. 22, 2019).

34. *Id.*

35. 450 U.S. 544 (1981).

litigation suit in Federal District Court for the Northern District of Ohio, Eastern Division, the Tribe's claims were summarily dismissed from Oklahoma state district court based on the federal officer removal statute. Part III will discuss how this decision fell short of the statute's standard, and that the court should have allowed the Tribe to participate in the State of Oklahoma's litigation against the opioid defendants.

The rulings discussed in Part II and Part III have forced the Cherokee Nation into litigating in federal court in an unfamiliar venue or dropping the suit altogether. While the Cherokee Nation is stuck in a holding pattern, the first trial against opioid defendants was held in Cleveland County, Oklahoma.<sup>36</sup> After a bench trial, the judge found Johnson and Johnson liable for damages in a nuisance action.<sup>37</sup> The judge awarded the state \$527 million in abatement funds.<sup>38</sup>

### *I. Background*

Rory Wheeler is a member of the Seneca Nation of Indians in New York and an emergency medical technician for the Tribe.<sup>39</sup> Wheeler, at only nineteen years old, has already seen the serious impact the opioid epidemic is having on Indian Country.<sup>40</sup> In October of 2016, Wheeler responded to two separate calls for "female possible overdose" in one day.<sup>41</sup> Both of these young women were members of the Seneca Tribe, both were mothers to young children, and both died on the scene.<sup>42</sup> Wheeler said this was the day that "changed [his] life," and he "began to realize that the issue of opiates was serious in [his] community and that [he] had to do something."<sup>43</sup>

The crisis has hit communities across the country hard, and Indian Country has not been immune from its impact. Poverty and poor health make Native American communities acutely vulnerable to the opioid

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36. *Oklahoma v. Johnson & Johnson*, No. CJ-2017-816 (Cleveland Cty. Dist. Ct., Aug. 26, 2019).

37. *Id.*

38. *Id.*

39. Suzette Brewer, *Tribes Lead the Battle to Combat a National Opioid Crisis*, HIGH COUNTRY NEWS (May 9, 2018), <https://www.hcn.org/articles/tribal-affairs-tribes-lead-the-battle-to-combat-a-national-opioid-crisis>.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

crisis<sup>44</sup>, as “[f]or centuries, [Native American communities] have suffered from the effects of war, disease, forced relocation, famine, poverty and intergenerational trauma—all of this reflect[ing] [] the poorest health statistics of any racial group in the United States.”<sup>45</sup> Between 1999 and 2015, overdose rates in Indian Country had increased by 500 percent.<sup>46</sup> Accordingly, one in ten Native American children will misuse prescription opioids, a figure twice that of white children.<sup>47</sup> Their mothers, too, often struggle with opioid abuse; indeed, “pregnant Native people are eight times more likely to be diagnosed with opioid dependence than pregnant white folks.”<sup>48</sup> Native Americans make up only 2 percent of the U.S. population, but they die of opioid overdose at the highest rate of any group in the country.<sup>49</sup> High use rates by Native Americans are likely tied to over-prescription at Indian Health Service (IHS) facilities.<sup>50</sup> Many remote tribes have a difficult time bringing in health professionals, and as a result, receive “direct services” from IHS and must accept the method of pain management that IHS provides.<sup>51</sup>

The crisis has forced many tribes to reallocate funds from important programs—like housing and heating assistance—to fund the court system, law enforcement, social services, and treatment programs to deal with the ever-increasing number of people impacted by opioid use.<sup>52</sup> In particular, tribes are struggling to handle a significant increase in Indian Child Welfare Act (ICWA) cases.<sup>53</sup> That sharp increase in cases is alleged to be a result of the opioid epidemic.<sup>54</sup> While most tribes do their best to place Native children with family members or other tribal members, many are simply running out of homes for placement.<sup>55</sup> Many kids end up in homes outside of the tribe and risk losing the bond with their home and culture.<sup>56</sup>

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44. *Id.*

45. *Id.*

46. Stephanie Valenzuela, *In Plain Sight: How the Opioid Crisis Has Ravaged Indian Country*, LAKOTA PEOPLES LAW PROJECT (July 5, 2018), <https://www.lakotalaw.org/news/2018-07-05/opioid-crisis>.

47. *Id.*

48. *Id.*

49. Brewer, *supra* note 39.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

Even the Cherokee Nation, one of the country's largest Indian nations, has been impacted by an increase of ICWA placements.<sup>57</sup> The Cherokee Nation went from two ICWA cases per month to two dozen cases in a matter of a few weeks.<sup>58</sup> Besides an increase in ICWA cases, government services have been diminished as the number of overdoses continues to rise, further raising the fear that tribal membership will dwindle over the long term.<sup>59</sup> The cornerstone of any tribe is the family unit, and as opioid use breaks families apart, tribal membership will suffer as a result.

Along with its work across the United States, the Substance Abuse and Mental Health Services Administration (SAMHSA) also works specifically with tribal governments to implement the five-point opioid strategy.<sup>60</sup> The five-point strategy as it relates to tribes is:

- “*Improving access to prevention, treatment, and recovery support services.*”<sup>61</sup> SAMHSA accomplishes this by providing State Targeted Response to Opioids Crisis Grants through the 21st Century Cures Act.<sup>62</sup> States can utilize these funds to pinpoint areas of the most need.<sup>63</sup>
- “*Targeting Overdose-Reversing Drugs.*”<sup>64</sup> SAMHSA has increased access to naloxone, an effective overdose reversing drug, and provides first responders and community leaders with access to the “Opioid Overdose Prevention Toolkit.”<sup>65</sup>
- “*Strengthening Public Health Data and Reporting.*”<sup>66</sup> SAMHSA administers the National Survey on Drug Use and Health (NSDUH) and provides the data collected to state and local officials.<sup>67</sup> With

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57. *Id.*

58. *Id.*

59. *Id.*

60. See *Opioids in Indian Country: Beyond the Crisis to Healing the Community: Hearing Before the S. Comm. on Indian Affairs*, 115th Cong. 10 (2018), <https://www.indian.senate.gov/sites/default/files/documents/CHRG-115shrg32784.pdf> (testimony of Christopher Jones, Director, Nat'l Mental Health & Substance Use Pol'y Lab., Substance Abuse & Mental Health Serv. Admin.) [hereinafter Jones Testimony].

61. *Id.* at 13.

62. *Id.*; see Pub. L. No. 114-255, 130 Stat. 1033 (2016).

63. Jones Testimony, *supra* note 60, at 13.

64. *Id.* at 14.

65. *Id.*

66. *Id.*

67. *Id.*

this data, officials are able to better target high risk areas and populations in order to effectively and efficiently target resources.<sup>68</sup>

Through these resources, tribes have access to prevention programs, including the Strategic Prevention Framework-Partnerships for Success (SPF-PFS) grant program.<sup>69</sup> Through the SPF-PFS grant, “First Nations Community HealthSource has developed prevention strategies based on research and tribal traditions” aiming to reduce prescription drug abuse, educate tribal leadership on prevention strategies, and cultivate “a tribal strengths-based method to decrease prescription drug abuse and misuse.”<sup>70</sup> Tribes also have access to grant money through the Opioid Response Grant Fund, with a tribal set aside of \$50 million, and the Medication-Assisted Treatment for Prescription Drug and Opioid Abuse Program, with a tribal set aside of \$5 million.<sup>71</sup> These funds have given tribes the opportunity to begin combating prescription-opioid misuse; unfortunately, however, a new era in the opioid crisis has begun. While the federal government focuses its response to the crisis on prescription-opioid abuse and data collection, the third wave of the crisis—a shift from prescription opioids to illicitly-manufactured fentanyl—is already underway.<sup>72</sup>

Determined to protect its people from this threat, the Cherokee Nation, led by Attorney General Todd Hembree, began putting together the pieces of the plan in the fall of 2016.<sup>73</sup> AG Hembree assembled a task force to build a case against the opioid industry.<sup>74</sup> He learned that opioid manufacturers, although working as contractors for the IHS, were calling the shots when it came to prescription patterns in Indian Country.<sup>75</sup> He also discovered that “opioid manufacturers, distributors and pharmacies had been operating virtually unchecked, paying relatively small fines for violating laws intended to stop large shipments and suspiciously high-volume prescriptions.”<sup>76</sup> Congress passed the Ensuring Patient Access and

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68. *Id.* The remaining elements of the five-point strategy—“[s]upport cutting-edge research that advances our understanding of pain and addiction,” *id.* at 13, and “[a]dvance the practice of pain management to enable access to [effective] care,” *id.*—are not directly related to the response in Indian country.

69. *Id.*

70. *Id.*

71. Valenzuela, *supra* note 46.

72. *Understanding the Epidemic*, *supra* note 23.

73. *Id.*

74. *Id.*

75. *See id.*

76. *Id.*

Effective Drug Enforcement Act in 2016.<sup>77</sup> AG Hembree believes that this legislation has made it easier for opiates to enter the country because it prevents the Drug Enforcement Agency (DEA) from stopping large or suspicious shipments of opioids entering the United States.<sup>78</sup> Armed with this information, AG Hembree and the Cherokee Nation stood ready to be the “tip of the spear” in the battle against the opioid epidemic.<sup>79</sup> Since the Nation filed suit in Cherokee Tribal Court in April 2017, hundreds of tribes and other communities have filed suits of their own.<sup>80</sup> The action brought by the Cherokee Nation does not just stand to impact the lives of Cherokee members, but the suit also stands to impact the viability of other litigation across the country; the importance of *McKesson Corp. v. Hembree* cannot be understated.

## II. Statement of the Case: McKesson Corp. v. Hembree

### A. Facts

The Center for Disease Control reports that over 300,000 Americans have died from opioid-involved drug overdoses,<sup>81</sup> indeed, “[i]t is undisputed that this nation is in the midst of an opioid crisis.”<sup>82</sup> Forty percent of the opioid deaths in America have involved a prescription opiate.<sup>83</sup> The Cherokee Nation is particularly affected by the epidemic and, like many other states and tribal nations, planned to litigate against several defendants in the opioid industry.<sup>84</sup>

In 2016, the Cherokee Nation Legislature enacted the Cherokee Nation Unfair and Deceptive Practices Act (CNUDPA).<sup>85</sup> The CNUDPA, part of the Comprehensive Access to Justice Act (CAJA) of 2016, amended the Cherokee Nation Civil Procedure Rules, allowing the Cherokee Nation to

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*; “Plaintiffs [cities, counties, or states] in 46 actions move[d] under 28 U.S.C § 1407 to centralize pretrial proceedings . . . pending in nine districts.” *In re Nat’l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375, 1376–77 (J.P.M.L. 2017).

81. *Id.*

82. *McKesson Corp. v. Hembree*, No. 17-CV-323-TCK-FHM, 2018 WL 340042, at \*1 (N.D. Okla. Jan. 9, 2018).

83. *Id.*

84. *Id.*

85. Comprehensive Access to Justice Act, CHEROKEE NATION CODE ANN. tit. 12, §§ 21–28 (2016).

file a civil lawsuit against opioid defendants as *parens patriae*.<sup>86</sup> In *parens patriae* actions, “states seek ‘to protect or vindicate the state’s “quasi-sovereign” interests in the health, safety, and welfare of their citizens.’”<sup>87</sup> States have used the *parens patriae* principle successfully in other instances, including recovering costs incurred as a result of tobacco use by citizens.<sup>88</sup> As a result of the tobacco litigation, forty-six states settled with four tobacco companies in 1998.<sup>89</sup> The tobacco industry was able to defend against individual lawsuits by asserting that the “smoker was aware of the risks and decided to smoke anyway.” This defense was unsuccessful against the states as *parens patriae*.<sup>90</sup> AG Hembree planned to use the same strategy for litigation in tribal court and hoped that, as a sovereign government, the Cherokee Nation would obtain similar results as the states in the tobacco litigation.

#### B. Procedural History

The Cherokee Nation filed suit in Cherokee District Court, naming six pharmaceutical companies as defendants: CVS, Walgreens, and Wal-Mart (Pharmacies); and McKesson, Cardinal Health, and AmerisourceBergen (Distributors).<sup>91</sup> The Nation “assert[ed] claims under CNUOPA and common law claims for nuisance, negligence, unjust enrichment, and civil conspiracy,” alleging the pharmaceutical defendants “knowingly or negligently distributed and dispensed prescription opioid drugs within the Cherokee Nation in a manner that foreseeably injured . . . the Cherokee Nation and its citizens.”<sup>92</sup> The common law claims sought “injunctive relief, imposition of civil penalties, compensatory and punitive damages, restitution, and disgorgement.”<sup>93</sup>

The pharmaceutical companies filed an action challenging the tribal court’s jurisdiction in the United States District Court for the Northern District of Oklahoma against AG Hembree, Judge Crystal R. Jackson,

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86. *McKesson*, 2018 WL 340042, at \*1; see Robert C. Batson, *Addressing the Opioid Crisis in Indian Country with A Parens Patriae Action in Tribal Court*, 11 ALB. GOV’T L. REV. 106, 116 (2018).

87. Batson, *supra* note 86, at 107.

88. *Id.*

89. *Id.*

90. *Id.* at 108.

91. *McKesson*, 2018 WL 340042, at \*2 (citing *Cherokee Nation v. McKesson Corp.* et al., No. CV-2017-203 (Cherokee Nation D. Ct. filed Apr. 20, 2017)).

92. *Id.*

93. *Id.*

Judge T. Luke Barteaux, and Doe Judicial Officers 1-4.<sup>94</sup> The pharmaceutical companies sought a declaratory judgment that the Nation lacked jurisdiction in tribal court. They also sought a preliminary injunction under Federal Rule of Civil Procedure 65 to enjoin the Nation from proceeding with the action in tribal court.<sup>95</sup>

### C. Opinion

Before addressing the primary issues in front of it, the court established the standard for preliminary injunction,<sup>96</sup> then found that the tribal court's lack of jurisdiction over the claims was "clear," holding that the pharmaceutical companies met all the elements to warrant preliminary injunction as to both the CNUPDA and common law claims.<sup>97</sup> The companies were also able to show they did not need to exhaust tribal court remedies before challenging the tribal court's jurisdiction.<sup>98</sup>

The court then addressed whether the pharmaceutical companies were likely to succeed in their challenge of tribal jurisdiction. Success on the merits in this case called for application of the tribal court jurisdictional rule set forth in *Montana v. United States*. The *Montana* rule is subject to two exceptions; the burden to prove one of the exceptions applies falls on the party seeking to assert tribal jurisdiction—here, the Cherokee Nation.<sup>99</sup> Those two exceptions are as follows. First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.”<sup>100</sup> Second, “[a] tribe may also retain inherent power to exercise civil authority over the conduct

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94. *Id.* The court indicates in footnote 2 that although the tribal parties asserted in response to the companies' complaint that only Judge Barteaux is assigned to hear the case in tribal court, because Judge Jackson failed to file a motion seeking to be dismissed pursuant to the local rules, she must remain a party to the action. *Id.* at \*2 n.2.

95. *Id.* at \*2.

96. *Id.* The court identified that the burden falls on the plaintiff to show that: (1) they are likely to succeed on the merits of the claim; (2) they will undergo irreparable injury without the injunction; (3) the threatened injury against the plaintiff would be greater without the injunction than the defendants with it; (4) the injunction would not negatively affect the public interest. *Id.* (citing N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior, 854 F.3d 1236, 1246 (10th Cir. 2017)).

97. *Id.* at \*5, \*9–11.

98. *Id.* at \*5.

99. *McKesson*, 2018 WL 340042, at \*3 (citing *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008)).

100. *Id.* at \*3 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)).

of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>101</sup>

In order for the pharmaceutical companies to “avoid exhaustion [they] must ‘make a substantial showing of eligibility’ that one of the exceptions [to the exhaustion rule] applies.”<sup>102</sup> Those exceptions are: “(1) where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) where the action is patently violative of express jurisdictional prohibitions; . . . (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court’s jurisdiction; [and] (4) where it is clear that the tribal court lacks jurisdiction and that judicial proceedings would serve no purpose other than delay.”<sup>103</sup>

The companies contended that the CNUDPA was an inappropriate attempt to enforce the Controlled Substances Act (CSA), and as such, tribal jurisdiction over the claim was automatically foreclosed; the court agreed.<sup>104</sup> The Cherokee Nation’s enforcement was found to be private because “unlike states, tribes do not have courts of general jurisdiction.”<sup>105</sup> Additionally, the court found that because the companies are nonmembers, and it is well established that the CSA may not be privately enforced,<sup>106</sup> “the lack of tribal court jurisdiction . . . [was] ‘so patently obvious as to defy exhaustion.’”<sup>107</sup>

After denying the CNUDPA claims, the court found that the common law claims fell outside of both *Montana* exceptions, denying the tribal court jurisdiction over the claims as well.<sup>108</sup> Further, it explained that any relationship between the Cherokee Nation and the companies was sufficiently limited to prevent tribal court jurisdiction over the conduct.<sup>109</sup> Citing only the companies’ evidence, the court explained that the relationship was separated by third parties, keeping any transactions at

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101. *Id.* (quoting *Montana*, 450 U.S. at 566).

102. *Id.* at \*4 (quoting *Kerr-McGee Corp. v. Farley*, 115 F.3d 1489, 1502 (10th Cir. 2011)).

103. *Id.* (quoting *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1238 (10th Cir. 2014)).

104. *Id.* at \*5.

105. *Id.* (citation omitted).

106. *Id.* (citing *Jones v. Hobbs*, 745 F. Supp. 2d 886, 890–94 (E.D. Ark. 2010); *Hatfield v. Arbor Springs Health & Rehab Center*, No. 3-12CV528-MHT, 2012 WL 4476612, at \*3 (M.D. Ala. Sept. 4, 2012)).

107. *Id.* (quoting *Thlopthlocco Tribal Town*, 762 F.3d at 1239).

108. *Id.* at \*6–9.

109. *Id.* at \*6.

arm's length.<sup>110</sup> In conclusion, because there is no apparent nexus between the claims made and any consensual relationship, the court held that the common law claims fall outside the first *Montana* exception.<sup>111</sup>

#### *D. Analysis*

The district court's decision in *McKesson* is a far cry from where federal Indian policy stood almost 200 years ago. In the case of *Worcester v. Georgia*, the Supreme Court set the relationship between the states and tribes as one of "political independence."<sup>112</sup> In *McKesson*, the court's decision that the CNUPDA was a private enforcement of the CSA is illustrative of how differently the court views tribes from state or even local governments. The court found fault in the Cherokee Nation's use of the CSA as advisory in the passage of its own laws.<sup>113</sup> The court analyzed the issue as though the federal government is far superior to the Tribe. AG Hembree asserted in response that the Tribe can utilize the CSA in its legislation the same way that a state can because the statute expressly denies field preemption over a state's ability to regulate controlled substances.<sup>114</sup> However, the district court denied this claim because the tribal court lacked general jurisdiction.

In *McKesson*, the court analyzed the *Montana* rule to determine whether tribal court jurisdiction was appropriate in the case. The court held that the first *Montana* exception did not apply.<sup>115</sup> It relied on evidence provided by the companies in the case that indicated the relationship was "simply routine business or consumer transactions."<sup>116</sup> The argument certainly exists that the court unfairly favored the companies' evidence without considering the factual dispute arising from the evidence presented by AG Hembree—in particular, the service of the Cherokee Nation Health Plan by the

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110. *Id.* ("This evidence indicates that at most, any relationship[] between Plaintiffs and the Cherokee Nation or its members [is] simply routine business or consumer transactions."). The court goes on to provide several cases that applied the first *Montana* exception. *Id.* at \*7 (citing *Williams v. Lee*, 358 U.S. 217, 233 (1959); *Cardin v. De La Cruz*, 671 F.2d 363, 366–67 (9th Cir. 1982)).

111. *Id.* at \*7.

112. James A. Casey, Note, *Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty*, 79 CORNELL L. REV. 404, 410–11 (1994).

113. *McKesson*, 2018 WL 340042, at \*5 ("However, courts have rejected private attempts to enforce the CSA through other vehicles.").

114. *Id.*

115. *Id.* at \*6–7.

116. *Id.* at \*6.

companies.<sup>117</sup> The Cherokee Nation Health Plan is the largest tribally operated health care system in the United States.<sup>118</sup> Administering the prescription drug program for the health plan, even through a third-party contract, should constitute an intentional relationship to satisfy the *Montana* exception.

The court's rejection of the second *Montana* exception is more questionable than the first. Even though the exception "is a narrow one," the refusal to allow AG Hembree to even present any evidence to a jury of whether the Plaintiffs' conduct "imperil[ed] the subsistence of the tribal community[]" limited the capacity of the Cherokee Nation to protect its citizens.<sup>119</sup> The court diminished the evidence of the harm caused by the opioid crisis to the Cherokee Nation; this treatment of the Tribe is emblematic of the larger problem of the federal-tribal relationship. The safety and well-being of tribes and tribal members has always been secondary to the maintenance of the power structure of the federal government. The difference between this case and jurisdictional battles between tribes and federal or state governments is that here the court willfully ignored the evidence of serious harm, choosing instead to protect the interests of a group of some of the world's largest corporations.

The second *Montana* exception is narrow, applying to "situations where the conduct of the nonmember poses a direct threat to tribal sovereignty."<sup>120</sup> Indeed, "[t]he nonmember's conduct must be 'catastrophic for tribal self-government.'"<sup>121</sup> The court distinguished two cases put forward by the Tribe and found that, despite the significant harm that has been caused to the Cherokee Nation by the opioid epidemic, the conduct alleged did not reach the level required to grant tribal jurisdiction.<sup>122</sup>

The court declined to apply exhaustion to the common law claims either, finding that the companies are nonmembers and the defendants failed to make a legitimate argument that either *Montana* exception applied.<sup>123</sup> In conclusion, the court found that the companies were likely to succeed on

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117. *Id.*

118. *About Health Services*, CHEROKEE NATION, <https://www.cherokee.org/Services/Health/About-Health-Services> (last visited Mar. 5, 2019).

119. *McKesson*, 2018 WL 340042, at \*7.

120. *Id.* at \*8 (quoting *Phillip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 943 (9th Cir. 2009)).

121. *Id.* (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008)).

122. *Id.* at \*9. It appears that the court did not analyze the plaintiffs' evidence as to the second *Montana* exception and provided no affirmative justification for its decision.

123. *Id.*

the claim that the tribal court lacked jurisdiction and that exhaustion need not be required.<sup>124</sup>

In determining whether to issue an injunction against the tribal court, the court looked to whether the companies would suffer irreparable injury absent an injunction. The court appeared to discount promises made by the Tribe that would have prevented the very harm that it deemed necessitated an injunction.<sup>125</sup> Even though the tribe had agreed to honor any requirements put upon it by the federal court, because the tribe failed to waive sovereign immunity, the court determined that the companies may face irreparable harm.<sup>126</sup> This notion comes despite an order from the Cherokee Nation District Court that stated “the defendants in that case (the Plaintiffs here) ‘shall not be required to post any appeal or supersedeas bond’ . . . and ‘may seek a stay of execution of any judgment of this Court pending appeal without the posting of a supersedeas bond.’”<sup>127</sup> Despite the tribal court order, as well as a concession from the Tribe that it would honor any additional protections imposed by the federal court, the court found that irreparable harm “is both great and non-speculative” due to the “plain terms of its own law.”<sup>128</sup>

Next, the discussion moved to whether the Tribes’ risk of injury without the injunction outweighed the Companies’ risk of injury with the injunction.<sup>129</sup> The court disposed of this issue by finding that the Tribe could assert its claims in another forum; thus, injury was unlikely.<sup>130</sup> Accordingly, the risk of injury to the companies outweighed the risk to the Tribe. Finally, the court determined that the injunction would not adversely impact the public interest.<sup>131</sup> Because the tribal court clearly lacked jurisdiction, public interest was not served to allow the tribal court to make findings on the matter.<sup>132</sup>

The opioid crisis continues to ravage Indian Country, but the court at no point acknowledged the damage being done to the Cherokee Nation and its

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124. *Id.*

125. *Id.* at \*10.

126. *Id.* (“Due to tribal sovereign immunity, Plaintiffs may be unable to sue the Cherokee Nation for return of the bond funds even if a federal court later found that the tribal court lacked jurisdiction.”).

127. *Id.* (quoting Notice of Entry of Tribal Court Ordinance on Bond Issue, Doc. 130, at 2).

128. *Id.* at \*10, \*11.

129. *Id.* at \*11.

130. *Id.*

131. *Id.*

132. *Id.*

citizens. Instead, the court held that the Tribe was more risk averse than the companies because “the Cherokee Nation could assert claims to redress any injury in another, non-tribal forum.”<sup>133</sup>

The potential injury to the companies acknowledged by the court refers to the Cherokee Nation’s failure to waive sovereign immunity with regards to a bond that the companies would have to post on appeal of the tribal court ruling.<sup>134</sup> This justification is faulty in two ways. First, it presumes that the tribal court would indeed find for the Tribe in the case. While that is certainly a highly likely outcome, to base a decision of this magnitude on an assumption of that nature is equally irregular and inappropriate.

Second, it ignores both an order from the tribal court that the companies would not be required to post such a bond and a statement by AG Hembree that he would agree with any other protections recommended by the district court. To flatly ignore these good faith efforts and then claim that the “scenario is premised not on an assumption of bad faith by the Cherokee Nation” is a gravely misguided interpretation of the case.<sup>135</sup> The Cherokee Nation wanted to defend its citizens in a forum it knows will be fair to the Tribe. Throughout history, both state and federal courts have been unkind to tribes.<sup>136</sup> Tribal courts are a means of leveling the playing field between tribal plaintiffs and non-Indian defendants. To suggest that a tribe can simply make its claim in another forum, either state or federal, comes dangerously close to the language used in the assimilation era that caused great harm to Indians.<sup>137</sup> Additionally, as this comment will discuss in Part IV, the Cherokee Nation would lose its choice of forum altogether.

#### *E. Discussion*

The opioid crisis has harmed Native Americans in more catastrophic ways than any other group in America. This harm can be directly attributed to the long history of the federal-tribal relationship and the disruptive policies of the United States government. The very survival of tribal governance is at stake in this case; it is imperative that the Cherokee Nation be allowed to see this matter through in tribal court. It is important to understand the backdrop against which the district court in *McKesson* was working from in order to evaluate its decision. It is equally important to

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133. *Id.*

134. *Id.* at \*10.

135. *Id.*

136. See Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain A Relationship?*, 66 NOTRE DAME L. REV. 1461, 1465–66 (1991).

137. See *id.*

understand the historical context of federal Indian law to best analyze and critique the district court's opinion. The analysis will assert that these decisions gradually diminished the status of Indian tribes from that of a state to that of a local government. This historical context shaped the way the *Montana* decision is applied and as a result, *Montana* is too often used to rule against tribal sovereignty. Accordingly, the district court should have applied the exhaustion doctrine so that the tribal court could fulfill its duty to protect its citizens. The Supreme Court in the case of *National Farmers Union Insurance Companies v. Crow Tribe of Indians* created the exhaustion doctrine so that tribal courts could assess their own jurisdiction in civil cases before a federal court can review any jurisdictional issue.<sup>138</sup> The Court justified its decision in part because a fully developed record from the tribal court would serve "the orderly administration of justice in the federal court," and in order for that record to be developed, the federal courts should "stay[] its hand" until the tribal courts have the opportunity to "exhaust" their own remedies.<sup>139</sup> This decision created the exhaustion doctrine, which made it a requirement for tribal courts to fully determine their own jurisdiction before a federal court can review a claim that the tribal court exceeded its authority. The district court in *McKesson* should have applied the exhaustion doctrine, if for no other reason to serve "the orderly administration of justice in federal court[.]"<sup>140</sup> The stakes were too high in this case to continue down the path toward destruction of tribal jurisdiction.

*1. Tribal Jurisdiction and the Incoherence of Supreme Court Jurisprudence; Or, There and Back Again*

The Supreme Court's failure to establish cogent jurisprudence in its tribal court jurisdiction decisions has weakened the notion of tribal jurisdiction.<sup>141</sup> The Court's jurisprudence has wavered between respect for tribal courts and assertions of "judicial plenary power."<sup>142</sup> These waves have given lower courts space to exercise discretion in a manner that limits tribal jurisdiction in significant ways.

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138. 471 U.S. 845 (1985).

139. *Id.* at 856–57.

140. *Id.*

141. Frank Pommersheim, "Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community, 71 U. COLO. L. REV. 123, 129 (2000).

142. *Id.* at 128.

In *Oliphant v. Suquamish Indian Tribe*, the Court diminished tribal courts' criminal jurisdiction over non-Indians who commit crimes on tribal land.<sup>143</sup> The petitioners in the case were arraigned in Suquamish Indian Provisional Court on criminal charges; they filed writs of habeas corpus in the United States Western District of Washington, claiming the tribal court did not have criminal jurisdiction over non-Indians.<sup>144</sup> In response to the writ, the Tribe acknowledged that Congress or a treaty had not granted specific authorization, but asserted that "such jurisdiction flows automatically from the Tribe's retained inherent powers of government over the Port Madison Indian Reservation."<sup>145</sup> While the district court found for the petitioners, the Ninth Circuit reversed in favor of the Tribe, after which the Supreme Court granted certiorari.<sup>146</sup>

In its opinion, the Supreme Court made clear that, absent authorization by Congress, the Tribe does not have inherent authority over non-Indians.<sup>147</sup> The Court found that the assertion of any non-delegated jurisdiction by the tribal court contradicts subordination of the tribes to the United States government.<sup>148</sup> The reasoning of the Court is cyclical: Indian tribes have no inherent jurisdiction over non-Indians within the borders of their reservations because they forfeited full sovereignty in exchange for the protection of the United States. The tribes, however, only needed the protection of the United States because of the destruction of tribal governments by the United States government. In this way, the United States created the conditions under which the tribes were practically forced to forfeit that sovereignty. The Court also relies on the fact that the "Indians are within the geographical limits of the United States," and as such, "[t]he soil and people within these limits are under the political control of the Government of the United States . . . ."<sup>149</sup> This reasoning further diminished the tribes from being equivalent to the states, making them more akin to "cities, counties, and other organized bodies with limited legislative functions."<sup>150</sup> *Oliphant* was the first in a series of Supreme Court decisions that would diminish tribal jurisdiction.

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143. 435 U.S. 191, 195 (1978).

144. *Id.*

145. *Id.* at 196 (internal quotation omitted).

146. *Id.* at 195.

147. *Id.* at 211.

148. *Id.*

149. *Id.*

150. *Id.*

While the case of *United States v. Lara* seemed to overrule *Oliphant*,<sup>151</sup> the reasoning in *Oliphant* would survive even if it produced contradictory results as related to the parties. The petitioner in *Lara* was a nonmember Indian who was expelled from the Spirit Lake Reservation for numerous instances of wrongdoing; he ignored the order, and when apprehended by federal officials, he struck and injured one of the officers.<sup>152</sup> The petitioner was convicted in Spirit Lake Tribal Court for “violence to a policeman” and was also charged in the Federal District Court for the District Court of North Dakota for a corresponding federal crime.<sup>153</sup> The petitioner challenged the federal charge by claiming that he was protected by the double jeopardy clause.<sup>154</sup> To this claim, the government responded that because the prosecutions were brought by separate sovereigns, double jeopardy protection was precluded.<sup>155</sup>

The Court’s opinion did not reject the reasoning that it utilized in *Oliphant*. Rather, the Court recognized that when Congress passed 25 U.S.C. § 1301(2),<sup>156</sup> it “enlarge[d] the tribes’ own powers of self-government to include the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians, including nonmembers.”<sup>157</sup> The Court held that because Congress intended to give “inherent tribal sovereignty” rather than “delegated federal authority” to prosecute Indians to the tribes, dual sovereignty applied, which would preclude the petitioner’s double jeopardy claim.<sup>158</sup> The Court went on to explain that Congress had the authority to delegate such

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151. See *United States v. Lara*, 541 U.S. 193, 196 (2004).

152. *Id.*

153. *Id.* at 196–97.

154. U.S. CONST. amend. V. (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .”).

155. *Lara*, 541 U.S. at 197 (describing the holding in *Heath v. Alabama*, 474 U.S. 82, 88 (1985)) (“[T]he Double Jeopardy Clause reflects the ‘common-law conception of crime as an offense against the sovereignty of the government’; when ‘a defendant in a single act violates the ‘peace and dignity’ of two sovereigns by breaking the laws of each, he has committed two distinct ‘offences’ . . .”).

156. The section states in full:

“[P]owers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.

25 U.S.C. § 1301(2) (2018).

157. *Lara*, 541 U.S. at 198 (internal quotations and emphasis omitted).

158. *Id.* at 199.

“inherent sovereignty,” and that the opinion in *Lara* was consistent with its other opinions that found the authority to prosecute nonmembers had been “part of the tribal sovereignty that was divested by treaties and by Congress.”<sup>159</sup>

While the Court in *Lara* appeared to err on the side of self-determination by Indian Tribes, the Court did not go far enough to insulate its decision from future intervention by either the Court or Congress. The Court used shaky logic, at best, to uphold Congress’s authority to legislatively give tribes inherent power of self-determination. For a power to be inherent in something, the thing must exist in and of its self in order for the power to exist at all; if Congress has the discretion to take away and then give back the tribe’s jurisdictional authority, it is hardly an inherent power. Rather, it is a power that the tribes hold at the behest of Congress. Thus, if the Court’s first holding—that criminal jurisdiction over nonmember Indians is an inherent tribal power—then the second holding—that Congress can legislatively change tribal jurisdiction—cannot stand. The Supreme Court’s unwillingness to put its foot down when it comes to the inherent sovereignty of Indian tribes in *Oliphant* and *Lara* has played a major role in the continued diminishment of tribal jurisdiction. A tribe’s authority over criminal matters that occur against its citizens or within its territories is perhaps the most fundamental to the protection of the health and safety of tribal citizens. If the Supreme Court was willing to so easily limit that authority as they did in *Oliphant* and *Lara*, they wouldn’t blink twice to do the same to civil jurisdiction.

The holding in *Montana v. United States*<sup>160</sup> attempted to reign in the meandering jurisprudence in the field of federal Indian law. However, it actually placed significant discretion within the federal court system to determine when tribal court jurisdiction is appropriate. Similar to *Lara*, while *Montana*, though operating in the civil context, again attempted to give tribal courts more opportunities to assert jurisdiction, it actually further limited the “inherent” sovereignty vested in the tribes.

*Montana* involved a challenge by the State of Montana against the Crow Tribe of Montana’s power to limit hunting and fishing by nonmembers on non-Indian property within reservation boundaries.<sup>161</sup> The dispute centered around two issues: first, the ownership of the banks and bed of the Big

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159. *Id.* at 205 (distinguishing *United States v. Wheeler*, 435 U.S. 313, 326 (1978); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209–10 (1978); *Duro v. Reina*, 495 U.S. 676, 686 (1990)).

160. 450 U.S. 544, 547 (1981).

161. *Id.*

Horn River; second, whether the Tribe's inherent sovereignty gave it the authority to regulate and/or prohibit the activity in question.<sup>162</sup> The United States, acting on behalf of the Tribe, claimed that the government "conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868, and therefore continues to hold the land in trust for the use and benefit of the Tribe."<sup>163</sup> Montana claimed that the United States did not hold the land in trust by treaty, but it rather "retained ownership of the riverbed as public land which then passed to the State of Montana upon its admission to the Union."<sup>164</sup> The Court held that the United States presumptively maintains the title to the riverbed under any navigable river, regardless of whether the government conveys the land surrounding and including the river.<sup>165</sup> Thus, the Court found that the riverbed land is held in trust by the government for future states "when they enter the Union and assume sovereignty on an equal footing with the established States."<sup>166</sup> Because the ownership of navigable riverbeds is "so strongly identified with the sovereign power of government," any transfer to an entity other than a future state can only be completed to fulfill "some international duty or public exigency."<sup>167</sup> The Court held that the treaties between the Crow Tribe and the United States were insufficient to overcome the presumption.<sup>168</sup> Thus, the United States retained the land in trust until it was conveyed to the State of Montana.<sup>169</sup> In deciding this issue, the Court developed a balancing test to determine whether it would be prudent for the Tribe to assert jurisdiction in the matter.

Courts often use the *Montana* test to justify decisions that although perhaps not expressly intentional, ultimately disfavor tribal jurisdiction. The *Montana* test attempts to allow for more nuanced decisions regarding tribal jurisdiction. This approach does not support the Court's decisions in *Lara*, above, and *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, below, which stand for the principle that tribal sovereignty is inherent. If the Court wanted to uphold the principle that tribal sovereignty is inherent, then nuance is the last thing the Court should bring into the fold.

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162. *Id.* at 557.

163. *Id.* at 551.

164. *Id.*

165. *Id.* at 555.

166. *Id.* at 551 (internal quotation omitted).

167. *Id.* at 552 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)).

168. *Id.* at 554.

169. *Id.*

A balancing test is adversative to an inherent power of a sovereign government.<sup>170</sup>

*National Farmers Union Insurance Companies v. Crow Tribe of Indians* demonstrates the Court's intent to support tribal court jurisdiction.<sup>171</sup> The case involved a suit in Crow Tribal Court filed by a member of the Tribe against a non-Indian.<sup>172</sup> The defendant's insurance provider filed suit in the District Court of Montana, asserting a lack of jurisdiction by the tribal court.<sup>173</sup> The district court sided with the defendant and entered an injunction to prevent further action in the tribal court.<sup>174</sup>

On appeal, the appellate court reversed the injunction, holding that the District Court of Montana did not have jurisdiction to order the injunction, and the Supreme Court granted certiorari to determine if the district court had jurisdiction over the request pursuant to 28 U.S.C. § 1331.<sup>175</sup> Justice Stevens wrote for the Court and held that because the issue involved a federal question, the district court properly asserted jurisdiction.<sup>176</sup> "[T]he question [of] whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians . . . should [be examined] in the first instance in the Tribal Court itself."<sup>177</sup> The Court refused to apply the reasoning from *Oliphant* and expressed a desire to develop a doctrine that would align with the federal policy supporting self-governance and self-determination.<sup>178</sup>

The case of *Strate v. A-1 Contractors* involved a jurisdictional question regarding a traffic accident that occurred on a North Dakota state highway running through the Fort Berthold Indian Reservation.<sup>179</sup> The action was originally brought in tribal court against one of the drivers and his employer for damages sustained during the accident.<sup>180</sup> Neither the plaintiff,

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170. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1004 (1987) ("Balancing has turned us away from the Constitution, supplying 'reasonable' policymaking in lieu of theoretical investigations of rights, principles and structures.")

171. 471 U.S. 845, 847 (1985).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 853.

177. *Id.* at 855-56.

178. *Id.* at 856.

179. See 520 U.S. 438, 442 (1997).

180. *Id.* at 443.

defendant, or defendant's employer were members of the Tribe.<sup>181</sup> The respondents made appearances in tribal court to challenge the tribal court's personal and subject-matter jurisdiction over the matter.<sup>182</sup> The respondents sought an injunction in the district court, where the court found the tribal court had jurisdiction based on the decision in *National Farmers Union Insurance Companies v. Crow Tribe of Indians*.<sup>183</sup> The Eighth Circuit affirmed, and the Supreme Court granted certiorari.<sup>184</sup>

In its analysis, the Court attempted to explain the recent history of Indian law jurisprudence at the Supreme Court. The Court held that the decision in *National Farmers* does not make the jurisdictional analysis in *Montana* inapplicable and that the rule in *National Farmers* is nothing "more than a prudential exhaustion rule, in deference to the capacity of tribal courts to explain to the parties the precise basis for accepting or rejecting jurisdiction."<sup>185</sup> This decision contradicts the language in *National Farmers*, which states that "exhaustion is required before such a claim may be entertained in a federal court."<sup>186</sup> *National Farmers* explicitly required exhaustion in federal court. The Court in *Strate* did not overrule the exhaustion doctrine in *National Farmers*, but held the rule is less stringent than what the language in *National Farmers* required. The Court instead used the *Montana* rule, finding that tribal jurisdiction over the matter was not "necessary to protect tribal self-government."<sup>187</sup>

The Supreme Court has wavered between decisions that support tribal jurisdiction, decisions that outwardly support tribal jurisdiction but inwardly work to limit it, and decisions that on their face cause damage to tribal jurisdiction. This wavering has created a body of federal case law that has limited tribal jurisdiction. While the Supreme Court consistently alludes to tribes' "inherent sovereignty," it nevertheless continues to rule in ways to diminish that authority. For a power to be inherent, it must be so vital to the tribes that they would fail to exist without it. *McKesson* is a perfect example of a case where the *Montana* rule and the *Strate* prudential exhaustion rule have combined to threaten not only tribal sovereignty, but an Indian tribe's very way of life. These rules have narrowed the window through which a

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181. *Id.*

182. *Id.* at 444.

183. *Id.* at 444–45 (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985)).

184. *Id.* at 445.

185. *Id.* at 450 (Internal quotations omitted).

186. *Nat'l Farmers*, 471 U.S. at 857.

187. *Strate*, 520 U.S. at 459.

federal court may view tribal jurisdiction. That window is now so small that a public health crisis—which gave cause for a presidential emergency declaration—is not enough to trigger *Montana's* second exception. The court in *McKesson* should have required the opioid defendants to exhaust their remedies in tribal court. Not only is that the “prudential” decision, Tenth Circuit precedent also indicates that it is the correct course of action. Doing so is the only way to both promote the inherent sovereignty of the Cherokee Nation and protect its way of life from the opioid crisis.

## 2. *The Role of the Exhaustion Doctrine*

The opioid crisis represents such a grave threat to tribal self-governance—and the tribal way of life—that the only legitimate option to prevent severe damage to those interests is to apply the exhaustion doctrine.<sup>188</sup> The opioid crisis has caused the overdose rate among Indians to increase by 500 percent in the last decade. That increase is the highest among racial groups in the United States. For the district court to claim that “[a]ny potential injury to the Cherokee Nation does not outweigh the certain and great injury to Plaintiffs if the Court does not enjoin the Tribal Court Action” is to ignore the fact that over 120,000 tribal members are misusing opiates.<sup>189</sup> The district court’s failure to realize the gravity of the situation facing the Cherokee Nation illustrates how the exhaustion doctrine can be effective in balancing the Tribe’s wish to assert sovereignty with the federal courts interest in “orderly administration of justice.”<sup>190</sup>

Additionally, without the benefit of a record from the tribal court, the district court had a limited set of facts upon which to make its decision. The opinion in *McKesson* is decidedly void of any substantive factual justifications for its decision.<sup>191</sup> Had the district court stayed its decision until the tribal remedies were exhausted, the record upon *de novo* review of the tribal court’s “construction of jurisdictional limitations” would have been far more robust than the review for preliminary injunction.<sup>192</sup>

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188. See Phillip Allen White, Comment, *The Tribal Exhaustion Doctrine: "Just Stay on the Good Roads, and You've Got Nothing to Worry About"*, 22 AM. INDIAN L. REV. 65, 68 (1997).

189. *McKesson Corp. v. Hembree*, No. 17-CV-323-TCK-FHM, 2018 WL 340042, at \*11 (N.D. Okla. Jan. 9, 2018).

190. *Nat'l Farmers*, 471 U.S. at 856.

191. *McKesson*, 2018 WL 340042, at \*3–11.

192. See Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After National Farmers Union and Iowa Mutual: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 MINN. L. REV. 259, 295 (1993); *McKesson*, 2018 WL 340042, at \*2.

Another reason to apply the exhaustion doctrine is to provide consistency surrounding issues of tribal jurisdiction.<sup>193</sup> Following *National Farmers*, federal district courts and federal circuit courts began to formalize their processes when reviewing tribal jurisdiction.<sup>194</sup> The decision in *Strate* destroyed that consistency, which has created a lack of trust in the judicial system.

Although the Supreme Court in *Strate* sharply limited the reach of the exhaustion doctrine by making it prudential, it plainly left the doctrine intact. In fact, the Court acknowledged that the two exceptions in *Montana* still apply.<sup>195</sup> The district court in *McKesson* still had the option to decide that the exhaustion doctrine was appropriate. Indeed, when the Supreme Court stated that it “[did] not extract from *National Farmers* anything more than a prudential exhaustion rule,” it still expected lower courts to consider exhaustion.<sup>196</sup> The Court indicated that exhaustion is a way to ensure that the reviewing court has a full record to serve “the orderly administration of justice,” to avoid “procedural nightmare[s],” to “encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction,” and to “provide other courts with the benefit of their expertise in such matters.”<sup>197</sup>

The Tenth Circuit case of *Kerr-McGee Corp. v. Farley* illustrates how *Strate* did not eliminate the exhaustion doctrine requirement on all tribal jurisdiction matters, but rather was a narrow ruling pertaining to a particular fact scenario.<sup>198</sup> In *Kerr-McGee Corp.*, the Tenth Circuit stated that the Supreme Court in *Strate* was not seeking to “identify an express jurisdictional prohibition, but rather was in the position to address whether tribal adjudicatory power remains over civil disputes involving nonmembers on state highways within the reservation.”<sup>199</sup> Thus, *Strate* did not apply because the federal plaintiffs had already exhausted their remedies in tribal court, where the plaintiffs in *Kerr-McGee Corp.* had not.

The Tenth Circuit went on to review the comity concerns for tribal sovereignty and applied the exhaustion rule.<sup>200</sup> It found that “absent overwhelming countervailing concerns[.]” tribal courts should be allowed to

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193. *Id.* at 307.

194. *Id.*

195. *See Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

196. *Id.* at 450.

197. *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985).

198. 115 F.3d 1498, 1507 (1997).

199. *Id.* (internal quotations omitted).

200. *Id.* at 1509.

try cases that are within their jurisdiction and allege injury to tribal members.<sup>201</sup> The Cherokee Nation has satisfied these requirements in *McKesson*. The court in *McKesson* should have ruled in favor of allowing the tribal court to decide if the issues alleged by the Cherokee Nation allowed for tribal jurisdiction. “Even *Strate* and *Montana*, cases that curtailed tribal authority over non-Indians, recognized that tribes retain a core sovereign interest in protecting the health and welfare of the tribe . . . .”<sup>202</sup>

### III. Statement of the Case: *In re* National Prescription Opiate Litigation

#### A. Procedural History

Following its defeat in federal court, the Cherokee Nation filed similar litigation in the District Court of Sequoyah County, Oklahoma.<sup>203</sup> In this action, the Cherokee Nation asserted only state law claims against the opioid defendants in response to the same factual scenario as *McKesson*.<sup>204</sup> With the number of potential actions against common opioid defendants increasing, plaintiffs in forty-six federal actions moved the Judicial Panel on Multidistrict Litigation to centralize the pretrial proceedings in sixty-four actions across nine districts.<sup>205</sup> Pursuant to 28 U.S.C. § 1407, actions involving common questions of fact that are pending in different federal districts may be combined. These claims will be assigned to a judge or judges by the Judicial Panel on Multidistrict Litigation.<sup>206</sup> In this case, the multidistrict litigation (MDL) was assigned to the Federal District Court for the Northern District of Ohio.

Following the creation of the MDL, opioid defendant *McKesson* removed the Oklahoma state case to the United States District Court for the Eastern District of Oklahoma pursuant to the Federal Officer Removal Statute.<sup>207</sup> The motion was considered in the Federal District Court for the Northern District of Ohio, Eastern Division, due to the MDL.

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201. *Id.* at 1508.

202. *Id.*

203. *In re Nat'l Prescription Opiate Litig.*, 327 F. Supp. 3d 1064, 1068 (N.D. Ohio 2018). Although the case resolves two separate motions from similarly situated tribal nations, this Comment will only discuss the opinion as it relates to the Cherokee Nation.

204. *Id.*

205. *In re Nat'l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375 (J.P.M.L. 2017).

206. 28 U.S.C. § 1407(b) (2018).

207. *Nat'l Prescription Opiate Litig.*, 327 F. Supp. 3d at 1068 (citing 28 U.S.C. § 1442).

## B. Opinion

### 1. Issue Framing/Holding

The district court established that when applying the federal officer removal statute, it is free to use its own circuit's precedent.<sup>208</sup> As a result, the court applied Sixth Circuit precedent to the Cherokee Nation case.<sup>209</sup> “[T]he Sixth Circuit has endorsed ‘the broad scope of the federal officer removal statute’ . . . .”<sup>210</sup> In order to determine whether or not removal applies to a private corporate defendant, the defendant must show that “(1) it is a person who acted under the direction of a federal officer; (2) the actions for which it is being sued were performed under the color of federal office, and (3) there is a colorable federal defense to the plaintiff’s claims.”<sup>211</sup> The court held that even though this case was a “close call,” the facts asserted by the McKesson were sufficient to meet the “liberal construction of the federal officer removal statute mandated by the Supreme Court.”<sup>212</sup>

### 2. Reasoning

The first step for the court was to find that McKesson was “acting under” a federal officer because of their contract with the Veterans Administration (VA).<sup>213</sup> Private contractors are said to be acting under a federal officer when the contractor “is helping the Government to produce an item that it needs, [and] in the absence of a contract with a private firm, the Government itself would have had to perform [the contracted job].”<sup>214</sup> In this case, the district court agreed with McKesson that their contract with the VA represented an “unusually close relationship . . . due to monitoring and oversight of the PPV Contract by a Contracting Officer.”<sup>215</sup> Were it not for the contract with McKesson, the court explained that the VA would have had to handle the distribution and storage of drugs itself.<sup>216</sup> As a result,

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208. *Id.* (citing *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1186 (D.C. Cir. 1987)).

209. *Id.*

210. *Id.* at 1069 (quoting *Bennett v. MIS Corp.*, 607 F.3d 1076, 1084 (6th Cir. 2010)).

211. *Id.* (citing *Bennett*, 607 F.3d at 1085).

212. *Id.* at 1076.

213. *Id.* at 1071–72.

214. *Id.* at 1070 (citing *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 154 (2007)).

215. *Id.* at 1071.

216. *Id.* at 1076.

McKesson was acting under a federal officer for purposes of the federal officer removal statute.

The next consideration was whether McKesson was acting under the “color of federal office”; according to the District Court for the Northern District of Ohio, Eastern Division, the conduct for which the McKesson was being sued indeed occurred under color of federal office.<sup>217</sup> This element requires a “causal nexus” between the claims and conduct out of which the action arises.<sup>218</sup> The court found that the Tribal plaintiff’s claims “put *all* prescription opioids at issue . . . including those opioids supplied pursuant to the PPV contract.”<sup>219</sup>

Finally, the court found that McKesson asserted a colorable federal defense.<sup>220</sup> The court agreed with McKesson that the “government contractor defense” is a plausible federal defense.<sup>221</sup> The court also discussed some of the potential policy issues with removing the case to federal court. It dismissed the tribal plaintiff’s argument that removal in the instant case would allow McKesson to seek removal of cases brought by state attorney generals.<sup>222</sup> The court reasoned that because neither McKesson or any of the other opioid defendants removed any state cases under the federal officer removal statute, it is unlikely that they would do so following this action.<sup>223</sup>

### C. Analysis

To justify its decision that McKesson “acted under the direction of a federal officer,” the court focused on some of the details of the pharmaceutical prime vendor (PPV) Contract between McKesson and the

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217. *Id.*

218. *Id.* (citing *Watson*, 551 U.S. at 148).

219. *Id.* at 1077.

220. *Id.* at 1077–78 (citing *Bennett v. MIS Corp.*, 607 F.3d 1076, 1089 (6th Cir. 2010) (“[W]e have stated that a colorable federal defense need only be plausible, and that a district court is not required to determine its validity at the time of removal.”) (citations omitted)).

221. *Id.* at 1078 (“The government contractor defense applies when: ‘(a) the United States approved reasonably precise specifications; (b) the equipment conformed to those specifications; and (c) the supplier warned the United States about dangers in the use of the equipment known to the supplier but not to the United States.’”) (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 501 (1988)).

222. *Id.*

223. *Id.* The court did acknowledge that McKesson had removed a case brought by the Commonwealth of Kentucky, but that McKesson subsequently agreed for the case to be remanded to state court. *Id.*

VA, as well as the Indian Health Service (IHS).<sup>224</sup> The PPV contract requires that “[t]he Government will witness products received at the loading docks (or specified delivery location) and sign delivery receipt documents before the PPV driver departs.”<sup>225</sup> The court acknowledges that the level of supervision in the PPV contract falls short of the case it cites in support, *Bennet v. MIS Corp.*, but brushes the issue to the side because “the PPV Contract provides recourse in the event the government is not satisfied with an order.”<sup>226</sup> However, the court fails to provide examples of what this recourse entails. Rather, to further justify the relationship, the court made the claim that a fine on McKesson *not based on the contract* is further proof that “McKesson’s actions are heavily monitored and regulated.”<sup>227</sup>

To say that the PPV contract is both so regulated by the government that McKesson “cannot act (i.e., distribute) without direction from the VA[,]”<sup>228</sup> while simultaneously acknowledging that the contract does not meet the level of “supervision and involvement” of the government in the *Bennett* case is a questionable contention on its own. For the court to then claim that McKesson is adequately supervised by the contract because of a fine *not based on the contract*, it is unclear what the actions support the decision.

The Cherokee Nation’s primary contention against McKesson has always been that actions taken by the company, whether negligent or willful, allowed for massive amounts of opioids to be diverted into Indian Country in violation of the PPV contract. In particular, the Tribe claims that because the alleged conduct violated the PPV contract, there is no causal nexus between the contract and the alleged conduct.<sup>229</sup> However, the court did away with this particular allegation because it was made against the “acting under” prong, and this prong “is not concerned with the specific actions actually taken by McKesson . . . .”<sup>230</sup> Thus, the court did not consider the allegation that McKesson violated the contract as related to the “causal nexus” prong.

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224. *Id.* at 1070.

225. *Id.* at 1071 (quoting document 29-3 of document no. 1:18-OP-45695 at 40).

226. *Id.* at 1071.

227. *Id.* McKesson was fined \$150 million in 2017 for “failing to ‘design and implement an effective system to detect and report ‘suspicious orders’ for controlled substances’ . . . .” *Id.* (citing document 15-1 of docket no. at 1).

228. *Id.* (quoting document 29 of docket no. 1:18-OP-45695 at 13).

229. *Id.* at 1077.

230. *Id.* at 1075.

Finally, as to the federal officer removal statute, the court determined that McKesson met the “relatively low bar” of the colorable federal defense prong with its assertion of the government contractor defense.<sup>231</sup>

#### *D. Discussion*

The Cherokee Nation is one of only two tribes to bring an action against the pharmaceutical defendants in tribal court. Despite its best efforts to avoid federal court, the Nation will find itself in federal court following the denial of its remand motion in *In re National Prescription Opiate Litigation*. The court began its analysis by explaining that “[w]hile some circuits have taken a more narrow view of removal under the federal officer removal statute, the Sixth Circuit has endorsed the broad scope of the . . . statute . . . .”<sup>232</sup>

The liberal construction of the federal officer removal statute tips the scales to McKesson and is especially problematic when the defendant is a large corporation. The stated intent of the federal officer removal statute is to allow federal officers the opportunity to assert federal defenses against the claims that are raised.<sup>233</sup> All of the Cherokee Nation’s claims in state court are state law claims. While it is true that federal courts are courts of general jurisdiction and can preside over state law claims, state courts are also courts of general jurisdiction, so there is no reason that the state court cannot hear the federal defense.

The outcome of *In re National Prescription Opiate Litigation* will have significant implications on the legal battle against the opioid crisis. Not only has the Cherokee Nation been deprived of the opportunity to sue McKesson, and likely the other opioid defendants, in either tribal or state court, now other tribes will be wary of bringing actions in their own courts. While this case does not specifically implicate tribal jurisdiction, it is surely part of a trend working against tribal sovereignty. A tribe’s right to sue its own courts, under its own laws, is a key component of its status as a sovereign nation. Without a robust foundation of federal case law that supports that sovereignty, federal Indian law will continue to serve as a detriment to tribal sovereignty. Part IV will discuss how the major cases in

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231. *Id.* at 1078. “The government contractor defense applies when: ‘(a) the United States approved reasonably precise specifications; (b) the equipment conformed to those specifications; and (c) the supplier warned the United States about dangers in the use of the equipment known to the supplier but not to the United States.’” *Id.* (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 501 (1988)).

232. *Id.* at 1069.

233. 28 U.S.C. 1442 (2018).

federal Indian law have led to the situation today where federal courts do not respect the importance of tribal sovereignty.

*IV. Applying the History of Tribal Jurisdiction  
to the Opioid Crisis Litigation*

The analysis below will illustrate how the long history of the tribal-federal relationship, beginning with the Marshall Trilogy cases and ending with the most recent policy decision by the current administration, has led to this crisis point.

*A. The Marshall Trilogy Cases*

The “discovery doctrine” existed for hundreds of years before the Supreme Court made its first interpretation in *Johnson v. M’Intosh*.<sup>234</sup> In this case, however, the Court held the European nation that “discovered” the land held the only legitimate title.<sup>235</sup> The Court reasoned that it was prudent to distinguish the sovereignty of tribes from that of an independent nation with full property rights, limiting their land rights to that of occupancy.<sup>236</sup> The decision was the first blow to tribal sovereignty, putting the authority of the tribes as secondary to that of the federal government. While *M’Intosh* is no longer an oft cited case in Indian law, its impact on the jurisdictional issues faced by the Cherokee Nation’s opioid litigation should not be overlooked. *M’Intosh* set in motion the legal and moral justifications behind the conquest of the American continent and the genocide of its native people.<sup>237</sup>

Following the *M’Intosh* decision, in *Cherokee Nation v. Georgia*, the State of Georgia passed legislation destroying the governmental authority of the Cherokee Nation and bringing its people and lands under control of the state government.<sup>238</sup> The Cherokee Nation filed suit to enjoin the legislation in federal court.<sup>239</sup> Marshall, writing for the Court, declined jurisdiction over the case. “He determined that the tribes were ‘domestic dependent nations’ and characterized the tribes relationship to the United States as resembling ‘that of a ward to his guardian.’”<sup>240</sup> Marshall was in

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234. 21 U.S. (8 Wheat.) 543 (1823).

235. *Id.* at 562; *see also* Casey, *supra* note 112, at 409.

236. *See* Casey, *supra* note 112, at 409–10.

237. Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 *FORDHAM L. REV.* 3085, 3099 (2013).

238. 30 U.S. (5 Pet.) 1 (1831).

239. *Id.* at 15.

240. Casey, *supra* note 112, at 410 (quoting *Cherokee Nation*, 30 U.S. at 17, 18).

effect establishing the government's view that tribes were not independent nations for purposes of original jurisdiction in the Supreme Court. This decision would become the justification needed for Congress to exert plenary power over Indian tribes.<sup>241</sup> It also confirmed the inevitability set in motion by *M'Intosh*: the idea that tribal authority is not only secondary to, but is in fact, under direct control of the federal government.

While *M'Intosh* and *Cherokee Nation* made it clear that tribes were not on the same plane as a foreign nation, *Worcester v. Georgia* established that tribes could withstand the intrusion of state governments into their internal affairs. Marshall, again writing for the Court, found that tribes and individual states enjoy political independence from one another: "The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . ."<sup>242</sup> The result of *Worcester v. Georgia*, if taken on its own, put tribes on the same level as states within the dual sovereignty system. In Both *McKesson v. Hembree* and *In re National Opiate Litigation*, the Cherokee Nation argued that this status should give them the right to assert jurisdiction over the opioid defendants in tribal court. No federal court that reviewed the litigation acknowledged these arguments. The remaining discussion below will further explain how, despite *Worcester v. Georgia*, federal policy and court decisions have diminished tribal sovereignty.

### B. Federal Indian Law and the Politically Motivated Jig

The Marshall Trilogy cases set the stage on which political actors stand as they dance the dance of federal Indian policy. This dance is not one that has been rehearsed or even choreographed. Instead, policymakers can move as the winds of politics shift around them. Under *Worcester*, tribal nations began to establish political footing, but as white settlement pushed toward the Mississippi River, President Andrew Jackson put pressure on Congress to act in the interest of settlement.<sup>243</sup> Congress passed the Indian Removal Act<sup>244</sup> on May 28, 1830. The Act made legal the voluntary removal of the tribes.<sup>245</sup> Jackson hoped that by stipulating for the "negotiated" removal of the tribes to the western territories, he could allow for continued settlement,

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241. *Id.* at 410.

242. *Id.* at 561.

243. See Casey, *supra* note 112, at 411.

244. Act of May 28, 1830, ch. 148, 4 Stat. 411 (codified as amended at 25 U.S.C. § 174 (2018)).

245. *Id.*; see also Casey, *supra* note 112, at 411.

prevent further conflicts between the tribes and settlers, and maintain separate status for the tribes.<sup>246</sup> Expansion continued west, and it soon became clear that a new policy was needed to deal with the increasing struggle between settlers and tribes.

Congress passed the Dawes Act in 1887,<sup>247</sup> moving toward a policy of assimilation. The Dawes Act dismantled tribal governments and “transform[ed] the Indians into farmers, that being the quickest route to assimilation.”<sup>248</sup> The Dawes Act divided reservation land and allotted it to individual members in trust for twenty-five years.<sup>249</sup> The trust would then convert to ownership in fee, with the land and its owner then under the authority of federal and state laws.<sup>250</sup> The Act also allowed for any land remaining after allotment to be sold to non-Indians.<sup>251</sup> “The end of the allotment era saw approximately two thirds of Indian lands converted to non-Indian ownership and very little progress toward the assimilation of Indians . . . .”<sup>252</sup> Although the assimilation of individual Indians could not be achieved through allotment, it did trigger the destruction of the tribal system of governance.

Having successfully dismantled the existing tribal system in order to facilitate swifter settlement of the west, by 1934 the government was ready to “remedy some of the damage [it] had caused.”<sup>253</sup> The Indian Reorganization Act (IRA)<sup>254</sup> allowed tribes to reestablish a government based on models provided by the federal government.<sup>255</sup> The effect of the IRA was that tribes could establish some semblance of self-governance, just without the full sovereignty that they enjoyed prior to the Dawes Act.

Federal Indian policy shifted again in the mid-1950s, when House Concurrent Resolution 108 was passed in 1953,<sup>256</sup> instituting what is now known as the termination era. In the name of “Indian emancipation,” 109 tribes and bands were dismantled, turning over control to the states where

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246. See Casey, *supra* note 112, at 412.

247. Indian General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 336, 339, 341-342, 348-349, 381 (2018)).

248. Casey, *supra* note 112, at 412.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 413.

253. *Id.*

254. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101-5129 (2018)).

255. Casey, *supra* note 112, at 413.

256. H.R. Con. Res. 108, 83rd Cong., 67 Stat. B132 (1953).

they were located (California, Florida, New York, and Texas).<sup>257</sup> Another shift occurred in the 1970s when President Nixon redirected federal Indian policy towards self-determination.<sup>258</sup> That policy preference carried through the Obama administration. President Obama instituted a policy of administrative interaction that described tribes as “sovereign nations” and considered the relationships between tribal governments and the United States as “government-to-government.”<sup>259</sup>

President Trump has not been as friendly to tribes as his predecessor. On September 7, 2018, Department of the Interior (DOI) Assistant Secretary Tara Sweeney “pave[d] the way for a reservation to be taken out of trust for the first time since the termination era.”<sup>260</sup>

This series of schizophrenic policy shifts and legislation has caused great harm to Native American people and crippled many tribes’ abilities to support a functioning government. The federal government only recognized tribal sovereignty until it became a hindrance to western settlement, at which point the government destroyed the systems that tribes had developed over many centuries. Once settlers had stretched to the far western ranges of the United States and Indians were no longer a threat, the federal government attempted to bring the tribes back through the IRA, but not to the way they existed prior to settlement. Under the IRA, the federal government pressured newly recognized tribes to organize themselves like the federal government, but by this time their sovereignty had been ground into dust.<sup>261</sup>

In this way, the government exerted control over the tribes by breaking them down and then building them back up in its own image. As tribes began to rebuild, America emerged victorious from World War II, and a new era of American Exceptionalism was born.<sup>262</sup> Tribal self-determination soon became antithetical to the “American way”; instead, Native Americans would assimilate into the mainstream of society or risk being cast out as un-

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257. *Id.*

258. Casey, *supra* note 112, at 414.

259. David M. Schraver & David H. Tennant, *Indian Tribal Sovereignty-Current Issues*, 75 ALB. L. REV. 133, 146 (2012) (citing Tribal Consultation, 74 Fed. Reg. 57881 (Nov. 5, 2009)).

260. *Trump Administration Takes Indian Country Back to Termination Era*, INDIANZ.COM (Sept. 10, 2018), <https://www.indianz.com/News/2018/09/10/trump-administration-takes-indian-countr.asp>; see also Letter from Tara Sweeney, Assistant Sec’y, Indian Affairs, Dep’t of Interior, to Cedric Cromwell, Chairman, Mashpee Wampanoag Tribe (Sept. 7, 2018).

261. See Casey, *supra* note 112, at 413.

262. See O’Brien, *supra* note 136, at 1466.

American.<sup>263</sup> Termination was unsuccessful in achieving its stated goal to “civilize and assimilate”<sup>264</sup> Native Americans, but it was successful at yet again damaging tribal governments and the social safety net established during the previous era.<sup>265</sup> Each cycle of dismantling and reconstructing takes power away from tribal governments.

The damage to tribal sovereignty has been done, and the results are borne in both in the opioid crisis, and in the Cherokee Nation’s opioid litigation. Tribal members are far more likely to become addicted to substances like prescription opioids and illicitly-manufactured fentanyl because of the harm caused to the tribal way of life by the tumult of the federal-Indian relationship. Similarly, tribal sovereignty has been greatly diminished from the days of *Worcester v. Georgia*. Where tribes once stood on equal footing with states in the dual sovereignty system, resulting in part to the ever-shifting landscape of federal Indian policy, tribes today are subject to court decisions that threaten their ability to protect their own citizens. In filing its action in tribal court, the Cherokee Nation sought to right not only the wrongs done to its members by the opioid defendants, but perhaps also to right the wrongs that have been done to Indians across this country for hundreds of years. Until tribes can retain the status they once held alongside states, decisions like *McKesson* and *In re National Prescription Opioid Litigation* will continue to threaten the tribal way of life.

#### VI. Conclusion

The opioid crisis has wreaked havoc on tribal communities across the country. The Cherokee Nation attempted to assert its sovereign authority to protect its people, but it was denied that authority by the Northern District of Oklahoma. Since the decision in *McKesson*, the Cherokee Nation joined with the State of Oklahoma in a similar action in state court. Again, the Tribe’s ability to sue in a venue of its choosing was thwarted by a federal court. This time District Court for the Northern District of Ohio removed the Tribe’s action in state court to federal court under the federal officer removal statute. The decision resulted in the Tribe’s case again being removed to federal court.

These two decisions have forced the Tribe to pursue its causes of action exclusively in federal court. Looking back, there is a bit of sad irony surrounding the ultimate results of these two cases. The court in *McKesson*

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263. *Id.*

264. Casey, *supra* note 112, at 413.

265. O’Brien, *supra* note 136, at 1467–68.

*v. Hembree* relied in part on the idea that the Tribe would indeed have a choice of venue after being denied jurisdiction in tribal court.<sup>266</sup> However, the Northern District of Ohio's decision in *In re National Prescription Opioid Litigation* proved that reliance to be unfounded. These decisions are a retelling of an old story; the Tribe asserted its jurisdiction, but the federal judiciary saw fit to deny that authority, instead asserting its own jurisdiction over the claims in a "take it or leave it" fashion.

The relationship between the tribes and the U.S. government is littered with decisions that have limited tribal sovereignty and prevented tribal governments from realizing their full potential to govern tribal citizens. These decisions and the end results are no different, and until the federal judiciary recognizes the importance of tribal sovereignty, can expect that old story to continue to their peril.

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266. *McKesson Corp. v. Hembree*, No. 17-CV-323-TCK-FHM, 2018 WL 340042, at \*11 (N.D. Okla. Jan. 9, 2018).