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Morton Gitelman

THE CIVIL SIDE OF JUDGE PARKER

MORTON GITELMAN*

The most famous federal district court judge in the nineteenth century was Isaac C. Parker, the so-called "hanging judge." Because the Western District of Arkansas retained jurisdiction over Indian Territory for more than twenty-five years, almost co-incident with Parker's tenure, it was the most active criminal court in the federal system.[1] The Western District docketed more than 13,000 criminal cases in the twenty-one years that Parker presided, and he tried a significant number of murder cases during this time.[2] Authors have written many books about Judge Parker and his court,[3] but they all tend to focus on the "Wild West" aspect of the court and on the notorious criminal characters that appeared in court and, often, on the gallows in Fort Smith. This myriad of books and articles about Parker and the court, however, often overlook the opinions that he wrote in the civil cases he handled. These civil cases provide useful insight into the nature of Judge Parker's social and political leanings, his judicial philosophy, and help inform the proper evaluation of his character in the broadest sense. This Article is devoted to the civil opinions written by the judge both as district and circuit judge.[4]

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* Distinguished Professor of Law, University of Arkansas. LL.M., 1965, University of Illinois; J.D., 1959, DePaul University.

1. ROBERT H. TULLER, LET NO GUILTY MAN ESCAPE: A JUDICIAL BIOGRAPHY OF "HANGING JUDGE" ISAAC C. PARKER 8 (2001)

2. Records of the District Courts of the United States, Record Group 21 (W.D. Ark.) (Nat'l Archives & Records Admin., Southwest Region — Ft. Worth).

3. The first book, SAMUEL W. HARMAN, HELL ON THE BORDER: HE HANGED EIGHTY-EIGHT MEN (1898), appeared two years after Judge Parker died. Harman was a frequent juror in Parker's court and the owner of a hotel. J. Warren Reed, a prominent defense attorney in Fort Smith who took many of the appeals from the Western District to the Supreme Court in the early 1890s provided the financial backing for the book. The book also lists C.P. Sterns as "compiler." The book, well over 400 pages, contains biographical sketches of court personnel and some attorneys, lists of capital defendants with further dispositions of their cases, and a considerable number of chapters devoted to the crimes and criminals that comprised the capital case prosecutions. Although the book contains many inaccuracies, all subsequent biographies rely on it to a great extent. Later books, e.g., FRED HARVEY HARRINGTON, HANGING JUDGE (1951); GLENN SHIRLEY, LAW WEST OF FORT SMITH: A HISTORY OF FRONTIER JUSTICE IN THE INDIAN TERRITORY, 1834-1896 (1968), clear up many of the inaccuracies, but also concentrate entirely on the criminal episodes in Indian Territory. Even the latest, most scholarly book about Parker's court, TULLER, *supra* note 1, discusses the criminal side of the court, albeit that it does cover some of Judge Parker's jurisdictional rulings.

4. Congress established the Western District of Arkansas as both a district and circuit court. Act of Mar. 3, 1851, ch. 24, 9 Stat. 594.

The large number of criminal cases over Parker's twenty-one-year tenure have overshadowed some 1400 civil cases docketed in that same period.[5] Because the geographic jurisdiction of the court covered 74,000 square miles of Indian Territory in addition to a substantial part of western Arkansas, a number of civil cases — based on federal question jurisdiction — came from Indian country, in addition to federal question and diversity of citizenship cases originating in Arkansas.[6]

Parker filed about twenty-five written opinions in civil cases, approximately half of those as a circuit court judge. Those opinions demonstrate quite well that Judge Parker was a thoughtful, sometimes eloquent, jurist, who wrote clear, well-organized opinions. As the following snapshots illustrate, one striking aspect of Parker's written opinions is his penchant for elucidating basic principles of law.

Bankruptcy

In *Conner v. Scott*,[7] his first civil opinion, Judge Parker addressed the issue of whether a defendant who claimed that his land deed was from a borrower's assignee in bankruptcy could remove to federal court a state court suit to enforce a vendor's lien on land. In *Connor*, Parker upheld the removal in an opinion that demonstrates his "basic principles" approach. He wrote:

> The field of jurisdiction is a wide one, and one in which there are frequently to be found many difficulties in the way of a correct solution of the question.
>
> The question involves the relative powers of the two systems of courts, which are a part of our duplex system of government. . . . Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause; in the second, the jurisdiction depends entirely on the character of the parties.

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5. 1875-1896 ATT'Y GEN. ANN. REP. The statistical tables in these reports show that the United States was a party in 609 out of 853 civil cases in the Western District of Arkansas. Civil disputes between Indians and non-Indians arising in the territory fell into a jurisdictional limbo most of the time; the tribal courts shunned those cases and the district court only had jurisdiction over crimes in the territory because jurisdiction based on diversity of citizenship did not apply. Diversity jurisdiction is limited to suits between citizens of the several states. U.S. CONST. art. III, § 2, cl. 1; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

6. William H. Rehnquist, *Isaac Parker, Bill Sikes and the Rule of Law*, 6 U.ARK. LITTLE ROCK L.J. 485, 487 (1983); *see also Ex Parte* Kenyon, 14 F. Cas. 353 (C.C.W.D. Ark. 1878) (No. 7720).

7. 6 F. Cas. 313, 314 (C.C.W.D. Ark. 1876) (No. 3,119).

> The first class comprehends all cases in law and equity, arising under the constitution, the laws of the United States, and treaties. . . . [T]he act of congress of the 3d of March 1875, which provides for the removal of a certain class of causes, dependent upon the subject matter of the same, is identical in meaning with the clause of the second section of the third article of the constitution . . . .[8]

Parker then asked rhetorically, "Does the correct decision of this case depend on the construction of a law of Congress? Or does the case involve any question arising under a law of the United States?"[9] Parker answered by reciting a series of questions to show that construction of the federal bankruptcy law was involved, *e.g.*, "Is a vendor's lien preserved in bankruptcy? . . . Can the holder of a lien enforce it after discharge? If so, how? Can any one answer without placing a construction on the bankrupt act?"[10] Parker overruled the motion to strike the case from the docket, of course, but made the following interesting statement:

> I cannot pass this case without making a remark as to the delicate position in which a judge of the federal court is placed when called on to settle a question of jurisdiction arising between his own court and the court of a state, especially when that question has been passed on by the judge of that court. Yet, with due deference to the judge of the state court, and with high regard for his opinions, I adopt the language of Chief Justice Marshall, in Cohens v. Virginia, while speaking with reference to the jurisdiction of the supreme court: "It is most true that this court will not take jurisdiction if it should not, but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution; we cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties a case may be attended, we must decide it if it be brought before us; we have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given; the one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do

8. *Id.*
9. *Id.* at 315.
10. *Id.* at 316.

> is to exercise our best judgment and conscientiously perform our duty."[11]

Judge Parker was basically a legal positivist who strictly followed the law, even in cases when he disliked the result. This strict adherence to the law is clearly shown in a timber trespass case in which Judge Parker expressed his frustration at having to rule the way he did. That case — although criminal — is worthy of note.

The western progress of the railroads caused the denuding of vast forests for timber. Because much of the land containing mature trees was public land, this harvesting destroyed public resources at an alarming rate.[12] In June 1878, Congress finally responded to requests for action by passing the Timber and Stone Act.[13] The Act made it a crime to take timber from "lands of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes."[14] Soon after passage of the Act, a criminal case forced Parker to decide if the Act applied to lands of the Cherokee Nation. In *United States v. Reese*,[15] District Attorney W. H.H. Clayton charged the defendant by an information with "unlawfully cutting timber on lands situated and lying in the Cherokee Nation, in the Indian country, in the Western District of Arkansas, which said lands, in pursuance of law, may be reserved and purchased by the United States for military or other purposes."[16] The

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11. *Id.* (citation omitted) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)).
12. Scholars have noted that

> [t]he rolling hills in eastern Oklahoma and western Arkansas were once home to magnificent old forests of white oak and southern pine. During the last quarter of the nineteenth century, the tall trees in these green reserves underwent an assault unmatched in America's forest history. Though defined as "iron roads" in most languages, railroads could have been more accurately designated as "wooden roads." Rail line construction consumed great quantities of mature timber; a mile of track took approximately 2,640 crossties, and it took an acre of forest to yield 200 ties (an average). . . .
>
> . . . .
>
> . . . Railroad interests created and sustained a burgeoning timber market that ravaged the forests of the Parker court jurisdiction throughout the last quarter of the nineteenth century . . . .

Bradley W. Kidder, Who Took the Trees? A Review of Timber Trespass Litigation in the Federal Court for the Western District of Arkansas Under the Administration of Judge Isaac C. Parker, 1875-1896, at 3-4 (1996) (unpublished Master's thesis, University of Arkansas) (on file with author).

13. Act of June 3, 1878, ch. 150, 20 Stat. 88.
14. *Id.*
15. 27 F. Cas. 742 (C.C.W.D. Ark. 1879) (No. 16,137).
16. *Id.* at 743.

defendant demurred on the grounds that the information did not state an offense and that the court lacked jurisdiction.[17]

Parker held that "[t]o determine the question whether these are lands of the United States, requires a consideration of the title by which they are held by the Cherokee Nation. To any one who has given any attention to this subject, it presents a question not free from doubt or intrinsic difficulty."[18] The case required Parker to interpret the Treaty of May 6, 1828, wherein the United States "agree[d] to possess and guarantee to the Cherokees, forever, seven million acres of land" provided "that such lands shall revert to the United States if the Indians become extinct or abandon the same."[19] Judge Parker analyzed the treaty in terms of property law and concluded that the Cherokee Nation enjoyed fee simple title with a possibility of reverter.[20] He therefore held that he could not "see how these lands, which have been depredated upon, can be held to be 'lands of the United States,' in the sense of the language used in section 5388."[21] Parker regretted having to hold the penal statute inapplicable, because timber thieves regularly preyed upon the Indian lands. He wrote:

> It is to be regretted that it cannot be held to be an offence, as the complaints of depredations upon the timber of the Indian lands are constantly being made to officers of this court. There is a class of men on the borders of Indian country who revel in the idea that they have an inherent, natural right to steal from the Indians. This right is not to be questioned. They think it a tyrannical use of authority if they are interfered with.
>
> There should be a law enacted, the penalty of which would teach persons that Indians have rights which should be respected as well as the rights of citizens. . . .
>
> If the law-making power will give us a law, we will lay its mailed hand upon its violators in such a way that the timber in that Indian territory will be protected from the rapacity of those who are now stealing it.[22]

Parker obviously felt strongly that he could not "bend" the law. That same strict constructionist approach appears in a bankruptcy case in 1876 in which the plaintiff-assignee in bankruptcy sued the bankrupt to set aside the

17. *Id.*
18. *Id.*
19. *Id.* at 743-44.
20. *Id.* at 745.
21. *Id.*
22. *Id.* at 746.

discharge and recover property that the bankrupt fraudulently omitted from the schedule — several pieces of diamond jewelry worth $5000.[23] The bankrupt asserted the statute of limitations as a defense.[24] Parker held for the defendant, stating:

> The court has no hesitation in saying, if it be true, as alleged in the petition, that the defendant was guilty of the act charged against him, that it presents a most flagrant and outrageous case of fraud, and one which this court will, if it can, aid in uncovering. But, bad as this case may be, we must treat it legally, and if a remedy is wanting under the law, it is not with the court (which does not make laws, but construes and administers those already made), but with the law-making power. . . .
>
> . . . .
>
> From the language . . . and the general policy of the law of bankruptcy, I am inclined to the opinion that congress intended to limit the creditors, or any one representing them, to two years from the date of the discharge, as the time alone within which they might seek to set aside or annul the same. This is the interpretation . . . by all well-considered cases. I am aware that a different construction was placed upon the section by Judge Taft, of the superior court of Cincinnati . . . where he held that the discharge could be attacked at any time and in any court for fraudulent concealment by the bankrupt. But, with all due respect to that learned judge, I think this is not good law, that such a construction is not deducible from the language of the bankrupt law, or from its intent or spirit.[25]

Notably, publications such as the *Albany Law Journal*[26] circulated Judge Parker's opinion. Parker's opinion is all the more interesting because Judge Taft of Cincinnati later became President Taft and Chief Justice Taft.

Usury

Although Parker followed the law strictly, even when the result was distasteful, he sometimes was able to suggest an alternative. This approach can be seen in *Kinsey v. Little River County*.[27] In *Kinsey*, the county —

23. Pickett v. McGavick, 19 F. Cas. 588, 588 (W.D. Ark. 1876) (No. 7,829).
24. *Id.*
25. *Id.* at 588-89.
26. 13 ALBANY L.J. 400 (1876).
27. 14 F. Cas. 639 (C.C.W.D. Ark. 1876) (No. 7,829).

desirous of building a courthouse — borrowed $3000 from a Little Rock bank and issued a note bearing 30% interest, with $5000 worth of county warrants as collateral.[28] The bank sold the warrants to the plaintiff for $1900.[29] The bank also sold the paper to the plaintiff, who later brought suit against the county for $8200.[30] The county claimed that the warrants were ultra vires under Arkansas law and that the interest rate was usurious under the National Bank Act.[31] Parker found for the defendant, stating:

> The rule of law is, that these warrants issued by counties are unlike negotiable paper. They have not that quality of negotiable paper which prevents an inquiry into its fraudulent character or its consideration, when in the hands of an innocent holder for value before due. . . . I am therefore of the opinion that the plaintiff cannot recover. I am of the opinion, however, the county having received a sum of money from the bank, that this money, less the amount which has been paid, can be recovered back, with legal interest thereon, by an action of the proper kind, to wit, for money had and obtained.[32]

In *Dryfus v. Burnes*,[33] Parker held that a married couple that secured a mortgage loan for $8000 at 10% interest could not claim usury based on an agreement with an agent for 2% for negotiating the loan.[34] Citing an Arkansas case, Parker found that the loan agency fee was not part of the sum paid for the loan.[35]

Judge Parker held in another case in which the plaintiff alleged a usurious arrangement that even though the contract as he saw it was not usurious, it was so unconscionable that the court would provide some form of relief. In

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28. *Id.* at 640.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 641. Often, Parker could not suggest an alternative to achieve justice. In *Bland v. Fleeman*, 29 F. 669 (W.D. Ark. 1887), plaintiffs brought suit against the administrator of an Arkansas estate for fraudulent dealings. *Id.* at 670. The plaintiff-heirs were residents of Tennessee and Mississippi. *Id.* Unfortunately, two or three of the heirs were Arkansas residents, and the plaintiffs attempted to keep the case in federal court by naming them as defendants. *Id.* at 671. In finding that the joinder of these parties was collusive, Judge Parker wrote, "It is with some degree of regret that I feel compelled to hold that the court has no jurisdiction, as, from the examination of the facts of the case, I am led to the conclusion that the acts of Fleeman . . . bristle with fraud." *Id.* at 674.
33. 53 F. 410 (C.C.W.D. Ark. 1892).
34. *Id.* at 411.
35. *Id.* at 410 (citing Vahlberg v. Keaton, 11 S.W. 878 (Ark. 1889)).

Tilley v. American Building & Loan Ass'n,[36] the plaintiff seeking to borrow $30,000 on his farm in Sebastian County, agreed to subscribe for 600 shares of stock in a Minnesota building and loan association.[37] The agreement provided that Tilley would pay $360 per month as dues on the stock for nine years, a total of $38,880.[38] The association in turn loaned Tilley $30,000 on his stock with 6% interest, secured by a mortgage on the land.[39] At the end of the nine years, Tilley was to surrender his stock.[40] Judge Parker grudgingly found that the payments on the stock were not interest because they were not made for the use of the money borrowed, but to acquire a partnership interest in the association.[41] Judge Parker, however, found that even if the contract was not usurious as a matter of law, it could be viewed as one sided, unjust, unconscionable, or otherwise inequitable,[42] stating that a court

> may refuse to enforce so much of the contract as is inequitable or harsh, or will work a hardship on the plaintiff . . . or, because the court may construe the sum named in the bond as a penalty, it may give such relief as may be responsive to the demands of equity and good conscience.[43]

County Indebtedness

Suits on Arkansas county warrants were common in the 1880s, as counties often defaulted on their obligations. Some of these suits found their way into Parker's court. In two such cases, ten years apart, Parker filed opinions. In *National Bank of Western Arkansas v. Sebastian County*,[44] the bank, having purchased county warrants, brought suit to collect on those warrants.[45] The county argued that an Arkansas statute passed in 1879 had repealed the

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36. 52 F. 618 (C.C.W.D. Ark. 1892).
37. *Id.* at 619.
38. *Id.*
39. *Id.* at 620.
40. *Id.*
41. *Id.* at 620-21.
42. *Id.* at 621.
43. *Id.* at 627. Judge Parker wrote:
> The relief that would meet this demand would be to decree the amount of the $30,000 advanced, with 6 per cent. [sic] interest on the same, less the year's interest already paid in advance, and to decree the foreclosure of the mortgage given to secure the payment of the debt, and to cancel the remaining part of the contract . . . .

Id.
44. 17 F. Cas. 1209 (C.C.W.D. Ark. 1879) (No. 10,040).
45. *Id.* at 1210.

statutes providing that a county could sue or be sued.[46] The bank demurred, and Parker sustained the demurrer, reasoning:

> It is a proposition not debatable that the legislature of the state cannot take away the right of the plaintiff to sue in a federal court, as such right is secured by a law of congress, which, with the constitution of the United States, is the supreme law of the land.[47]

The same issue came up in 1889 in *Hoover v. Crawford County*.[48] Again, Parker ruled against the county, stating the proposition more forcefully:

> The purpose of the legislature evidently was to take away from the federal courts the right to entertain a suit against a county in the state. . . . Previous to that time [1879, when the Arkansas statute was passed] many suits had been brought in the federal courts in the state against counties upon evidences of indebtedness similar in character to these sued on in this suit. Judgments had been obtained, and payment compelled, by such courts. . . . This act seems to me to be but the exhibition of a foolish and futile purpose founded on an unwarrantable and unreasonable prejudice against federal courts, which are as much the courts of the whole people as the courts of the counties or of the circuits in a state.[49]

Another suit against a county forced Parker to decide a motion to transfer the proceedings from the Western District to the Eastern District federal court on the ground that, after the plaintiff filed the case in the Western District, Congress changed the makeup of the federal districts and put Woodruff County, the defendant, into the Eastern District.[50] Parker held that once jurisdiction attaches, a subsequent realignment of districts does not deprive the court of jurisdiction.[51] He based his ruling on a Supreme Court decision holding that when Congress created the Western District of Arkansas in 1851, cases pending in the old District of Arkansas did not have to be transferred.[52]

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46. *Id.*

47. *Id.* at 1211.

48. 39 F. 7 (C.C.W.D. Ark. 1889).

49. *Id.* at 8. The Arkansas Act in question provided in section 2 that persons having demands against counties must present them in county court for acceptance or rejection. *Id.*

50. Culver v. Woodruff County, 6 F. Cas. 949 (C.C.W.D. Ark. 1878) (No. 3,469).

51. *Id.* at 950.

52. *Id.* (citing United States v. Dawson, 56 U.S. (15 How.) 467 (1853)).

Indian Territory Problems

Two of Judge Parker's opinions addressed major issues of Indian rights and federal court jurisdiction. In both cases, Parker ruled against the tribal interests. One involved the Creek Nation and the other the Cherokee Nation.

In the reconstructionist Indian treaties of 1866, the tribes agreed to cede their nonsettled lands to the federal government upon demand and payment.[53] The idea behind this provision was either to purchase tribal lands for the purpose of settling other tribes in Indian country, or to have sufficient land to settle the Negro slaves who the slave-holding tribes agreed to emancipate in the treaty and, possibly, ex-slaves from the defeated South.[54] This provision proved to be troublesome in the 1880s when the boomers[55] insisted that those lands were open to homesteading.[56] The provision also caused dissension within tribal councils, and became the wedge by which the railroads invaded Indian Territory.[57]

In the case of *United States ex rel. McIntosh v. Crawford*,[58] Judge Parker was faced with an unusual claim. In 1889, the Interior Department began negotiating with the Creek Nation to purchase their unsettled lands for $2.28

53. *See, e.g.*, Treaty Between the United States of America and the Cherokee Nation of Indians, Aug. 11, 1866, 14 Stat. 755, *available at* 1866 WL 8570.

54. JEFFREY BURTON, INDIAN TERRITORY AND THE UNITED STATES, 1866-1906, at 27-30 (1995).

55. The so-called "boomers" were a group of whites who hungered to settle Indian lands not occupied by Indians. This group, whose most prominent leader was David L. Payne, claimed that any lands not actually occupied by Indians were public lands open to homesteading on the theory that the Indian nations had ceded those lands to the United States in the 1866 treaties. As the boomers grew in number, they set up camps on the southern border of Kansas and began to plan their occupation of unassigned lands in the Indian Territory. On April 26, 1880, Payne led a small party of boomers across the Kansas line. They began staking claims and built a stockade on the Canadian River not far from present-day Oklahoma City. Federal troops arrested Payne and his group and escorted them to the Kansas border, where they were hailed as heroes. A second incursion in July resulted in the Army taking the boomers into Fort Smith to appear before Judge Parker. District Attorney Clayton filed a civil complaint against Payne under the intercourse laws on August 13, 1880. Demurrers and motions to dismiss and counter-motions delayed the decision in the case until May, 1881. Parker ruled against the boomers, holding that the unassigned lands were not open to homesteaders, and fined Payne $1000, the maximum under the intercourse law. United States v. Payne, 8 F. 883 (W.D. Ark. 1881); *see also* United States v. Rogers, 23 Fed. 658 (W.D. Ark. 1885). On the history of the boomers, see BURTON, *supra* note 54, at 138-202.

56. *See* BURTON, *supra* note 54, at 138-202.

57. *See id.*

58. 47 F. 561 (C.C.W.D. Ark. 1891) (annotated in 81 A.L.R. 497).

million.[59] Even though an international tribal council determined in 1888 to resist all attempts to purchase land from the nations, just a year later the Creeks and Seminoles decided to sell off lands they would never need.[60] These lands would form the nucleus of the new territory of Oklahoma to be opened for settlement.[61] The Creek Nation sent a three-man delegation to Washington — Pleasant Porter, David M. Hodge, and Espar Hecher.[62] In 1885, the delegation had retained Samuel J. Crawford and others as agents for the Nation in negotiations with the government.[63] The agreed fee was $270,283.71.[64] The relators, disaffected members of the Creek Nation, filed suit in Parker's court alleging that the contract for legal services was fraudulent and designed to cheat the Creek Nation out of its money.[65] Crawford, a former Governor of Kansas and a resident of that state, made a special appearance to contest jurisdiction over him.[66] Judge Parker agreed that his court lacked jurisdiction and dismissed the suit.[67] The opinion relies on fundamental concepts of service of process and begins with the Judiciary Act of 1789. Parker states:

> The rule that a person can be sued in any court of the United States, and required to leave his home, and travel thousands of miles, it may be, to defend the suit, is an extremely harsh and oppressive one, and one that may work a great hardship upon the party sued.[68]

Parker also found that his court lacked subject matter jurisdiction.[69] In that part of the opinion, he analyzed the set of statutes passed to protect Indians from overreaching contracts by requiring the government to vet all contracts with Indians or Indian tribes. A specific provision in those statutes provided that no money belonging to Indians arising from the sale of their lands should be paid to any agent or attorney without meeting certain stringent conditions.[70]

Judge Parker, however, found that the Congressional Act of March 1, 1889, which consummated the sale of the Indian lands to the United States,

59. *Id.* at 562-63.
60. *Id.* The Seminole deal was for about the same amount as the Creek sale. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 564.
67. *Id.* at 571.
68. *Id.* at 565.
69. *Id.* at 571.
70. *Id.*

specifically authorized the Secretary of the Treasury to "pay out of the appropriation hereby made the sum of $280,857.10 to the national treasurer of the Muskogee (or Creek) Nation, or to such persons as shall be duly authorized to receive the same."[71] Parker held that Congress intended to bypass the older statutes, and he cited correspondence from the Secretary of the Interior to the Chairman of the House Indian Affairs Committee recognizing the deal the tribe had made in 1885 — a contingent fee arrangement with former Governor Crawford.[72]

Although this case did not focus on the impending Oklahoma land rushes in which the government opened sections of the new territory for settlement, the Creek and Seminole land deals were immediately responsible for the white settlement of central Oklahoma; the population of Oklahoma City, Guthrie, and surrounding towns zoomed, growing almost overnight from a few dozen at Oklahoma Station (the earlier designation) to 10,000 in Oklahoma City.[73] What the boomers tried to do in 1880 thus became reality ten years later.

The second important civil case dealing with Indian rights came before Judge Parker in 1888 in *Cherokee Nation v. Southern Kansas Railroad Co.*[74]

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71. *Id.* at 568-69.

72. *Id.* at 569-70. Burton states:

> The presence in this Creek delegation of men as keenly opposed to one another as Porter and Espar Hecher, and the Muskogee national council's prompt ratification of the agreement, suggest that the tribe was more united on this issue than on any other in its history. There was a dissident group whose leaders threatened to kill the whole delegation, but it never came out into the open and soon subsided into silence.

BURTON, *supra* note 54, at 149. The federal legislation directed that the U.S. Treasury would keep the balance of $2 million at 5% interest, the interest to be paid annually to the Creek Nation. *Crawford*, 47 F. at 568.

73. President Harrison proclaimed that the central portion of Oklahoma would open to homesteaders on April 22, 1889, at noon.

> At the appointed moment, cavalry trumpets and firearms signaled the start of "Harrison's Horse Race" from various points along the perimeter of the Unassigned Lands. Simultaneously, in the heart of the district, thousands of men, mainly members or employees of Kansas townsite companies, crawled out of freight cars or swarmed out of the long grass by the railroad tracks to scoop the real prizes — the most promising town lots in Guthrie and Oklahoma City.

BURTON, *supra* note 54, at 155. This first land rush was rife with corruption. A number of those who emerged from the railroad cars were federal officials who wore deputy marshals' badges and acted as agents for the land-grabbers. One of them was Parker's chief prosecutor, W. H.H. Clayton, who lost his position after a Senate Judiciary Committee report found that he had misused his office to buy up land before the territory was officially open for settlement. *See* Mary M. Stolberg, *Politician, Populist, Reformer: A Reexamination of "Hanging Judge" Isaac C. Parker*, 47 ARK. HIST. Q. 3, 25 n.55 (1988).

74. 33 F. 900 (W.D. Ark. 1888), *rev'd*, 135 U.S. 641 (1890).

The Cherokee Nation filed for an injunction to stop a railroad from building a line south of the Kansas border across Cherokee lands.[75] An Act of Congress on July 4, 1884, granted the Southern Kansas Railway Company (Southern Kansas) a right-of-way to build a line across the Cherokee lands.[76] The Cherokee National Council passed an Act on December 12, 1884, to protest with the Secretary of the Interior;[77] the Act also instructed the tribe's Washington delegates to resist any building or maintenance of a rail line.[78] In 1886, the Southern Kansas filed a map with the Department of the Interior locating its proposed line, and in April of that year, the Cherokee Nation renewed its protest and rejected any purported compensation provided for in the 1884 statute.[79] The Department of the Interior ignored the protests, appointed three commissioners to assess compensation, and approved the construction of the line.[80] The commissioners assessed compensation at a little over $7300 for the right-of-way for the main line and branches.[81]

The Cherokee Nation strongly resisted the rail line, knowing that it would be a magnet for white settlers.[82] The Indian tribes were well aware of the troubles that came with the railroads, especially the introduction of intoxicating liquor and the theft of timber for crossties.[83] The Cherokees also felt that even if they could not stop the construction of the line, the compensation awarded by the commissioners was wholly inadequate; the Nation thought that the right-of-way was worth at least $500 per mile.[84]

The suit asked for an injunction to stop further construction, removal of the ten miles of track already built, or, in the alternative, an appeal from the monetary award of the commissioners as being inadequate.[85] The railroad attorneys filed a demurrer on the grounds of lack of jurisdiction, want of equity, and improper joinder of legal and equitable causes of action.[86]

In a lengthy opinion, Judge Parker explored the nature and basic status of the Cherokee Nation.[87] He concluded that the Nation owned the land in fee

75. *Id.* at 902-03.

76. Act of July 4, 1884, ch. 179, 23 Stat. 73. The line was to run from the Kansas border to Dennison, Texas.

77. *Cherokee Nation*, 33 F. at 902.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. BURTON, *supra* note 54, at 54-55.

83. FORT SMITH ELEVATOR, June 29, 1887, at 5.

84. *Cherokee Nation*, 33 F. at 902.

85. *Id.* at 903.

86. *Id.* at 904.

87. *Id.*

simple, with a possibility of reverter in the national government — the condition being abandonment by the tribe or its extinction.[88] However, the Cherokee Nation, politically, did not enjoy the status of a sovereign. It was not a state, nor an independent political entity but, rather, a dependent Indian tribe.[89] Not being a sovereign, the right of eminent domain — an attribute of sovereignty — rested in the United States, not in the Cherokee Nation.[90] Consequently, the United States could legislate to take Cherokee Nation lands for public purposes like a railroad.[91] Finally, as to the valuation of the land, Parker held that, because the bill for equitable relief failed, the plaintiff could not join the alternative request for money damages and would have to seek relief on the law side of the federal court.[92] Thus, Judge Parker sustained the demurrer and dismissed the bill without prejudice.[93] The Nation appealed to the Supreme Court. In an opinion written by Justice Harlan,[94] the Court upheld Parker's reasoning and decision on both the sovereignty issue and the improper joinder.[95] Justice Harlan held, however, that the district court could bend the joinder rules slightly and treat the compensation issue as an appeal from the commissioners' valuation as provided in the statute.[96] The Court remanded the case to Parker, and in 1892 he awarded the Nation the original amount set by the commissioners plus the costs of appeal to the Supreme Court.[97] The railroads, with all their promise and troubles, could not be kept out of Indian country. The bitter disappointment of the Cherokee Nation was ameliorated, however, when enterprising Cherokees found that profit and prosperity could follow through the opening of national markets for cattle, grain, and other products.[98]

Judge Parker and Railroads

Even though the railroad won the right to continue its line across the Cherokee lands, and Parker's jurisdictional views meant that federal courts

88. *Id.* at 905.
89. *Id.* at 907.
90. *Id.*
91. *Id.* at 910.
92. *Id.* at 915.
93. *Id.*
94. Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641 (1890).
95. *Id.* at 651, 653-54.
96. *Id.* at 641.
97. *Id.* at 661.
98. During 1889, for example, the Cherokee Nation was negotiating a lease to run for fifteen years with the Cherokee Strip Live Stock Association that was worth $6.6 million. BURTON, *supra* note 54, at 159. The Choctaw Nation had valuable coal mining leases. *Id.* at 109.

could not override congressional grants of right-of-way, Parker was no friend of the railroads. He authored several opinions with a railroad as a party that show that the railroads could not expect favorable treatment in his court.

In personal injury cases, Judge Parker would often give favorable jury instructions for plaintiffs and uphold large damage awards. For example, in *Shumacher v. St. Louis & San Francisco Railway Co.*,[99] a railroad employee was on top of gravel cars when, in a switching operation, the cars were run down an incline and the brakeman was unable to stop or slow the cars.[100] The cars slammed into the train, throwing the plaintiff onto the tracks.[101] The train ran over the employee's foot, and doctors eventually amputated his leg.[102] The plaintiff sued for $15,000 in damages, and the jury awarded $8000.[103] The railroad moved for a new trial based on the judge's refusal to give several defense instructions.[104] Parker denied the motion and pointed out that the conductor had a duty to

> know that one brakeman managing one brake could not control that train of 10 loaded cars. . . . It seems to me from the testimony that there was an entire absence of that prudent and proper care which, when there is a failure to exercise it, shows that conscious indifference to consequences which makes a state of case in which there is constructive or legal willfulness.[105]

Parker also stated that, in light of the evidence, he was justified in giving the plaintiff's instruction on the injury being produced by a willful act.[106] Finally, Parker noted that although at one time he thought the damages were excessive, he would not interfere in the absence of a showing that the jury was swayed by prejudice, preference, partiality, passion, or corruption.[107]

In the autumn of 1889, Parker was in a position to chastise the Southern Kansas Railway, whose invasion of Indian country he upheld less than a year earlier. In *Briscoe v. Southern Kansas Railway Co.*,[108] the plaintiff brought a suit against the railroad for negligently killing his horses. The railroad challenged the verdict for the plaintiff in a post-trial motion on the grounds

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99. 39 F. 174 (C.C.W.D. Ark. 1889), *rev'd sub nom.* St. Louis & S.F. Ry. Co. v. Schumacher, 152 U.S. 77 (1894).
100. *Id.*
101. *Id.* at 175.
102. *Id.* at 176.
103. *Id.*
104. *Id.*
105. *Id.* at 177.
106. *Id.* at 180.
107. *Id.*
108. 40 F. 273, 275 (C.C.W.D. Ark. 1889).

that the court did not have jurisdiction under the statute that had authorized the building of the railroad and that, in any event, the court could not hold the Southern Kansas liable because it had leased the operation of the railroad to the Atchison, Topeka & Santa Fe prior to the incident.[109] Judge Parker overruled the motion for a new trial, held that the Western District court had jurisdiction under the statute, and found the lease unauthorized.[110]

As to jurisdiction, the statute that authorized the railroad provided that the federal district courts for the Western District of Arkansas, the Western District of Texas, and the District of Kansas would have concurrent jurisdiction, without regard to the amount in controversy, in suits between the Southern Kansas and the nations or tribes through whose territory the railroad ran.[111] These courts also shared jurisdiction over "'controversies arising between the inhabitants of said nations or tribes and said railway company . . . without distinction as to citizenship of the parties.'"[112] The railroad argued that the statutory provision only applied to controversies over the right-of-way and not to common law torts.[113] Parker disagreed:

> If this proposition is true, the nation or tribe, or the inhabitants thereof, were left by congress without any remedy for torts committed by the railroad company, for, as there is no remedy for torts such as was sued for in this case at the place where the same was committed, there could be no remedy anywhere. As the plaintiff could not sue in the Indian country, he could not sue anywhere.[114]

On the question of the lease, Parker found that the enabling statute said nothing about any right of the railroad to lease the operation of the line and, even if Kansas law permitted such a lease, the express language of Congress prevailed.[115] Parker found that the use of the words "assigns" and "successors" did not imply that the corporation could transfer its property and franchise by lease.[116]

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109. *Id.* at 278.

110. *Id.*

111. *Id.* at 275.

112. *Id.* (quoting Act of July 4, 1884, ch. 179, 23 Stat. 73).

113. *Id.* at 275-76.

114. *Id.* at 276.

115. Judge Parker wrote, "'The said Southern Kansas Railway Company shall accept this right-of-way upon the express condition, binding upon itself, its successors and assigns, that they will [not try to get more land from the tribes].'" *Id.* at 279 (quoting Act of July 4, 1884, ch. 179, 23 Stat. 73).

116. *Id.*

As another example, in 1892 Judge Parker heard a wrongful death case brought by the widow and children of the yard master of the Frisco line in Fort Smith.[117] The jury brought in a very large (for that time) verdict for the plaintiff of $17,820.[118] Judge Parker rejected a motion for a new trial that was based on eleven grounds.[119] The tenth ground — that the damages were excessive and "rendered under the influence of prejudice or passion" — generated a strong response from Parker.[120] Initially, he noted that the deceased's age, physical strength, life expectancy, and training indicated that the amount of damages was not shocking to a sense of justice.[121] Then, Judge Parker, in addressing the rule that grief could not be the basis for damages in such a wrongful death action, said:

> When we have a statute so barbaric, and almost brutal, as to prohibit the consideration by the jury of that terrible agony, grief, and suffering of the faithful wife and little children for their loss by death of such a husband and father as Dwyer, we should award fairly compensatory damages. The award should be made with a reasonably liberal spirit. Under this statute, man is considered only as an animal, a beast of burden, like a horse or a mule, with nothing to be considered when he is killed by negligence but his earning capacity.[122]

Accordingly, Judge Parker went as far as he could possibly go to help plaintiffs who were the victims of railroad negligence.

Parker would, however, sometimes rule against overreaching plaintiffs. For example, in *Stephens v. St. Louis & San Francisco Railway Co.*,[123] the plaintiff, an Arkansas resident, filed suit against the Frisco in Arkansas state court in Washington County alleging that he had been thrown off a train in Missouri in the middle of his journey from one point in Missouri to another.[124] The plaintiff claimed damages of $4999.[125] The railroad filed to remove the case to federal court.[126] On the same day, the plaintiff amended his complaint to ask for damages in the amount of $1999.[127] The plaintiff then sought to

117. Dwyer v. St. Louis & S.F. Ry. Co., 52 F. 87 (C.C.W.D. Ark. 1892).
118. *Id.* at 87.
119. *Id.* at 87-90.
120. *Id.* at 89.
121. *Id.* at 90.
122. *Id.*
123. 47 F. 530 (C.C.W.D. Ark. 1891).
124. *Id.* at 530-31.
125. *Id.*
126. *Id.* at 531.
127. *Id.*

have the case remanded to state court on the ground that the amount in controversy was less than the requisite $2000.[128] Judge Parker obtained a transcript of the Washington County Circuit Court proceedings and found that — contrary to the plaintiff's assertions — the petition for removal was filed at 1:30 p.m. on May 15 and the amendment was not asked for by plaintiff until at least 5:00 p.m. on that day.[129]

In that same case, and in another one that same year,[130] Parker had to decide the jurisdictional issue of whether the Frisco was a Missouri or Arkansas corporation, or both. In the *Stephens* case, the plaintiff argued that the federal court did not have jurisdiction because both the plaintiff and the defendant were Arkansas residents.[131] In *James v. St. Louis & San Francisco Railway Co.*, a few months earlier, Parker had overruled the Frisco's demurrer to jurisdiction in a wrongful death case brought by a Missouri widow based on negligence in Monett, Missouri.[132] Parker found that the Frisco, a Missouri corporation, had become a domestic Arkansas corporation under the provisions of an 1889 Arkansas statute.[133] The two cases, taken together, established that the Frisco railroad was a citizen of both states for diversity jurisdiction purposes.

Another interesting railroad case, not involving personal injuries — but of great interest in Fort Smith — addressed the construction of a bridge across the Arkansas River, connecting the city with Indian country.[134] From the time the Western District Court came to Fort Smith in 1871, those in Indian country could only get to the city by ferry or skiff. As the city grew and commerce with the Indians increased, the City of Fort Smith sought to construct a bridge. A bridge was also in the mind's eye of railroad tycoon Jay Gould, who sought to control most of the railroads leading into the Indian Territory. His control of the Missouri Pacific line included the Kansas and Arkansas Valley Railroad, a line that ran to Fort Smith. On the other side of the river, Gould's interests included the Kansas & Texas, a north-south line through Indian Territory. In 1891, the Kansas and Arkansas Valley began to construct a bridge over the river including a foot path and a wagon path.[135] Plaintiffs

128. *Id.*

129. *Id.*

130. James v. St. Louis & S.F. Ry. Co., 46 F. 47 (C.C.W.D. Ark. 1891).

131. *Stephens*, 47 F. at 531.

132. *James*, 46 F. at 47.

133. *Id.*

134. Payne v. Kan. & Ark. Valley Ry. Co., 46 F. 546 (C.C.W.D. Ark. 1891), *rev'd*, 49 F. 114 (C.C.A. Ark. 1892).

135. James Oakley Murphy, The Work of Judge Parker in the United States District Court for the Western District of Arkansas — 1875 to 1896, at 21 (1939) (unpublished Master's thesis, University of Oklahoma) (on file with author). The wagon and footpath were important

brought suit in Judge Parker's court to enjoin the condemnation of land for construction of bridge approaches for use by wagons and persons on foot on the theory that the railroad's right-of-way grant did not include the right to build a wagon or foot bridge on the right-of-way.[136] The plaintiff was the operator of a ferry across the Arkansas River, who stood to lose business if people could cross the bridge by wagon or on foot.[137] Parker refused to dissolve the temporary injunction he had granted because the grant of right-of-way was for a railroad bridge and, in Parker's view, the construction of a wagon and foot approach amounted to imposing an additional servitude on the plaintiff's land.[138]

Parker expressed regret in his opinion:

> I have arrived at the conclusion that defendant has now no power to condemn the land of plaintiffs for use as an approach for a wagon and footway bridge; and to get the right, and use the same for such purpose, defendant must either go to congress for authority to exercise the right of eminent domain, or negotiate with plaintiffs for the use of the right-of-way as an approach to its wagon and footway bridge. It is in my judgment a matter of great regret that authority to condemn has not been given, as it works delay in the completion of a great thoroughfare, which will be an important agency in securing the development, progress, and prosperity of the country, and consequently of great and lasting benefit to the people.[139]

Attorney John H. Rogers, who would succeed Parker on the court, immediately appealed to the newly created Circuit Court of Appeals, and, on January 5, 1892, the appellate court reversed and dissolved the injunction.[140] The formal dedication of the new bridge attracted some 25,000 people to Fort Smith, and a banquet for 200 distinguished guests was held in the Main Hotel on the evening of the dedication, lasting until 3:00 a.m. the next day.[141]

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to Gould because the bridge was to be a toll bridge. *Id.*

136. *Payne*, 46 F. at 548.

137. *Id.* at 550.

138. *Id.* at 560-61.

139. *Id.* at 561.

140. Kansas & A.V. Ry. Co. v. Payne, 49 F. 114 (C.C.A. Ark. 1892). The court determined that the footbridge was within the legislative grant and that if it caused increased damages to the plaintiff's lands, a remedy at law for additional compensation was available. *Id.* at 119.

141. Kidder, *supra* note 12, at 69.

Miscellaneous Civil Cases

Although Judge Parker's opinions in civil cases may have been few over the years, a wide variety of interesting cases came into his court. For example, in one trademark infringement case, Judge Parker held that the similarity of defendant's plug tobacco to the plaintiff's product would create confusion among members of the general buying public, thus warranting an injunction.[142] Parker utilized the test of comparing the two products with his own eyes.[143] As another example, in *United States v. Culver*,[144] Parker cancelled two land patents on the ground that the defendants made false representations in making a cash entry for agricultural lands with full knowledge that the lands were mineral lands and thus not open to entry.[145]

Judge Parker also adhered to the majority rule in dismissing a cause of action for mental suffering against a telegraph company for failure to deliver a wire. In *Crawson v. Western Union Telegraph Co.*,[146] the plaintiff complained that a telegraph company failed to deliver a telegram — sent from Sallisaw to Van Buren beseeching him to come to Sallisaw on the evening train to see his mother-in-law who was dying and wanted all her family in attendance — and that he was thus prevented for a period of twenty-four hours from going to the bedside of his mother-in-law.[147] The plaintiff claimed that he suffered great anguish and uneasiness of mind.[148] Parker stated the issue as whether the plaintiff could recover for mental suffering alone, unaccompanied by any other injury.[149] Parker sustained the defendant's demurrer, recognizing that the Supreme Courts of Indiana, Alabama, Kentucky, Tennessee, and Texas had upheld causes of action for mental suffering alone due to negligent delay in delivering telegrams.[150] Parker stated, however, that these cases lacked support in other states or in English common law.[151]

142. Liggett & Myer Tobacco Co. v. Hynes, 20 F. 883 (W.D. Ark. 1884). See the famous dissenting opinion of Judge Jerome Frank in *Triangle Publications, Inc. v. Rohrlich*, 167 F.2d 969, 976-77 (2d Cir. 1948) (Frank, J., dissenting), discussing the problem of how judges and courts of law can determine if there is actual confusion among products or confusion over names in the absence of independent scientific surveys.

143. *Liggett*, 20 F. at 885.

144. 52 F. 81 (C.C.W.D. Ark. 1892).

145. *Id.* at 82-83.

146. 47 F. 544 (C.C.W.D. Ark. 1891).

147. *Id.* at 545.

148. *Id.*

149. *Id.*

150. *Id.* at 546.

151. *Id.*

Parker also faced another unusual issue in a habeas corpus proceeding brought by a Fort Smith police officer who the Fort Smith police court judge had jailed for contempt for refusing to return a woman to jail. Police had jailed the woman for nonpayment of a $5 fine and $1.50 in court costs, and later released her by order of the mayor because of her health.[152] In *In re Monroe*, Parker granted the writ on behalf of both the police officer and the woman, finding that the Fort Smith ordinances authorized the mayor to release prisoners from the local jail for reasons of health.[153] In the course of the opinion, Judge Parker said:

> [D]oes the federal court have jurisdiction to issue a writ in behalf of the liberty of a citizen who is alleged to be illegally restrained? How far may the federal court go in its investigation of the legality of the process, which, as is alleged, is in restraint of the liberty of a citizen of the state, or of the United States? There seems to be a misconception in the public mind as to the power of the federal court in this regard, and it is a mystery in my mind how that misconception can exist in the face of the constitution and laws of the United States. There is no invasion of any prerogative or power of the state by the exercise of jurisdiction of this kind, because there is no prerogative that belongs to any state, nor is there any power or jurisdiction in a state to deprive any citizen of liberty without due process of law.[154]

Perhaps we should remember Judge Parker as a civil libertarian judge instead of as the "hanging judge."

Conclusion

The handful of civil case opinions written by Judge Parker show him as a studious and humane jurist. He was very careful to follow the law and abstained from what today is called judicial activism, but his liberal attitudes are clearly apparent. Most historians and biographers agree that Parker came to Fort Smith as what we would call a political hack.[155] He sought the judgeship because he was a Republican in a Democratic state and was one of a number of departing Republican congressmen in 1874 who needed an appointment.[156] That said, once he assumed this role, Parker continually grew

152. *In re* Monroe, 46 F. 52, 52-53 (C.C.W.D. Ark. 1891).

153. *Id.* at 58-59.

154. *Id.* at 53.

155. *See, e.g.*, TULLER, *supra* note 1, at 49-50; N.Y. TIMES, Mar. 11, 1875, at 1.

156. After Parker became judge, he attempted to get his brother-in-law appointed as a special attorney in the court, writing to the Attorney General with fulsome praise for Thomas Burnett,

as a jurist dedicated to overseeing and improving the only real justice system for the vast Indian Territory. While in Congress in the early 1870s, he advocated and presented a bill that would have opened Indian Territory to white settlement.[157] After he had served on the bench in Fort Smith for a few years, his position had turned 180 degrees. During his tenure, he worked to protect Indians from the incursion of settlers and from the depredations of whites. By the 1890s, the Indian nations saw Parker as one of their closest friends, and strongly opposed the reduction of his jurisdiction over Indian country.[158]

In an interview with a newspaper in 1896, he said of Indians, "Twenty-one years of experience with them has taught me that they are a religiously inclined, law-abiding, authority-respecting people. The Indian race is not one of criminals. There have been sporadic cases of crime among them, it is true, but as a people they are good citizens."[159] Parker was convinced that gradual assimilation into the majority society would be the salvation of the Indians, but he opposed the opening of Oklahoma Territory to white settlement. Realizing that white settlement was inevitable, Parker hoped that the federal government would not immediately fulfill the demands to open the territory. He lost that battle, but not for want of trying.[160] Parker expressed the view that the Western District Court had a duty to protect the Indians:

> The territory was set apart for the Indians in 1828. The government at that time promised them protection. That promise has always been ignored. The only protection that has ever been afforded them is through the courts. To us who have located on this borderland has fallen the task of acting as protectors.[161]

Even though the context of these remarks looks to the criminal jurisdiction of the court, his civil cases reflect similar views.

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the brother-in-law, who was a St. Louis attorney. Parker did not disclose the familial relationship in his correspondence. *See* Stolberg, *supra* note 73, at 13-14. Parker also joined Senator Powell Clayton in securing a position for Thomas Brizzolara as deputy prosecutor. *Id.* *See generally* TULLER, *supra* note 1.

157. CONG. GLOBE, 41st Cong., 2d Sess., pt. 1, at 830 (Feb. 5, 1872).

158. INDIAN CHIEFTAN, Nov. 19, 1896; INDIAN JOURNAL (Muskogee, Indian Territory), Apr. 30, 1888.

159. FORT SMITH ELEVATOR, Sept. 18, 1896, at 1.

160. *See* Robert H. Tuller, "The Hanging Judge" and the Indians: Isaac C. Parker and U.S. Indian Policy, 1871-1896, at 63-74 (1993) (unpublished Master's thesis, Texas Christian University) (on file with author); *see also* TULLER, *supra* note 1, at 118-20. Tuller concluded that, on the whole, Parker reflected the same ambivalent, ethnocentric, and paternalistic view of Indians held by most whites in the same period.

161. FORT SMITH ELEVATOR, Sept. 18, 1896, at 1.

Off the bench, Judge Parker was admired by the residents of Fort Smith. They viewed him as a kind, benevolent man. Years after Parker's death, Henry L. Fitzhugh, a Fort Smith lawyer who had appeared in Parker's court in his youth, said, "He was the kindest and most considerate judge to the young lawyer whom I have ever seen upon the bench."[162]

When Judge Parker died in November, 1896,

> [i]t was a state funeral, as nearly as the little city where he had lived knew how to make it. Notable personages came from far and near. Public and private business was suspended. Flags stood at half mast. The National Cemetery, where he was buried, was too small for the thousands who accompanied his body to its last resting place. The most fitting and appropriate tribute of all came when Chief Pleasant Porter, of the Choctaws, placed upon his grave a simple garland of wild flowers.[163]

Perhaps the best tribute to Judge Parker is found in a single footnote in a massive treatise. Professor John Henry Wigmore wrote the final revision of volume one of *Greenleaf on Evidence* just prior to releasing his own treatise, *Wigmore on Evidence*. In the work, published in 1899, the text discusses the issue of flight as evidence of guilt, and Wigmore inserted a footnote containing an editorial comment: "See the reasoning in the charges of Parker, J. (late the Federal District Judge for Western Arkansas and one of the greatest American trial judges), in Starr v. U.S., 164 U.S. 627, and Alberty v. U.S., 162 id. 499."[164]

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162. Harry P. Daily, *Isaac C. Parker: One of the Greatest American Trial Judges!*, *in* PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL SESSION OF THE BAR ASSOCIATION OF ARKANSAS 88, 97 (1932).

163. *Id.* at 107. Chief Pleasant Porter was a Creek, not a Choctaw. *See supra* note 62 and accompanying text. This error appeared in a book, HOMER CROY, HE HANGED THEM HIGH 222 (1952). It was, unfortunately, restated by the United States Supreme Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 199 n.10 (1978).

164. 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 14p, at 69 n.25 (John Henry Wigmore ed., 16th ed. 1899).