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ADDRESS: JUSTICE IN INDIAN COUNTRY

*Kalyn Cherie Free**

Thank you to the University of Oklahoma and the *American Indian Law Review* for inviting me to speak tonight. It is a privilege and an honor to speak at the university. Thank you also to my friends, family, and colleagues who are in attendance. I appreciate your support.

Many people made sacrifices to ensure that I was able to attend this university, pursue a career in Indian law, work at the United States Department of Justice, and stand here before you.

First, I would like to recognize both the past and present leaders and citizenry of my tribe, the Choctaw Nation. The Choctaw Nation persevered hardship, tragedy, and ill-spirited federal policy to carve out and reestablish our nation within this state and vigorously protect and advance our sovereign rights as a nation. To them, I am eternally grateful.

Second, I would like to recognize the modern day Indian warriors, who carried on the battle with the clarity of vision to guarantee that I and other Indian students could attend the University of Oklahoma College of Law. Two of those warriors are in the audience tonight. One is Chief Elmer Manatowa, who led the Sac and Fox Nation for fifteen years. Chief Manatowa's social and legal battles on behalf of his tribe and all tribes in Oklahoma helped to chart the course we are on today. Chief Manatowa's vision took his tribe to the United States Supreme Court and further confirmed the sovereignty of the Indian nations of Oklahoma.

We also have with us Browning Pipestem, renowned Indian lawyer and scholar. We are grateful to Browning for knocking down barriers for later Indian law students and for teaching Indian and non-Indian students the foundations of federal Indian law. Browning's numerous successes in the courthouses created the law upon which we base our most fundamental legal arguments on behalf of tribes. I stand here with gratitude for the opportunities allowed me because of these people.

My topic tonight is "Justice in Indian Country." I will highlight the Clinton administration's efforts in Indian Country, discuss environmental protection issues in Indian Country, and then focus on Indian affairs in Oklahoma.

This is the first time since the Nixon presidency that an administration has recognized the proper place of Indian nations within the federal system. The

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Clinton Administration is committed to strengthening the sovereignty of Indian nations and dealing with the Indian nations on a government-to-government basis.

On April 29, 1994, President Clinton reaffirmed the policy of self-determination for Indian tribes in his executive memorandum on government-to-government relations with Indian tribes. The President's historic government directive requires all federal agencies and departments to work directly with tribal governments and consult with tribes prior to taking a federal action that will affect federally recognized tribal governments.

In response to President Clinton's executive memorandum, Attorney General Janet Reno signed the "Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations With Indian Tribes" on June 1, 1995. This policy reflects the Department's commitment to carry out our trust responsibilities in Indian Country in a manner consistent with the government-to-government relationship and dictates that we strive to enhance tribal sovereignty at all times. Underscoring the Attorney General's sovereignty policy, Attorney General Reno has placed all Indian issues (whether it be criminal prosecution in Indian Country, environmental protection, or tribal courts) on her list of priorities for the Department. A few of the Department's accomplishments and initiatives are:

(1) Creation of the Office of Tribal Justice — This new office provides a permanent channel for tribes to communicate their concerns to the Department and is designed to be responsive to those concerns. In addition, the office is charged with coordinating Indian policy within the Department.

(2) The Clinton Administration believes that the capacity for self-governance through tribal justice systems is central to tribal sovereignty, which is why the Department initiated the tribal courts project. The centerpiece of the Department's efforts is the tribal-court partnership project in which the Attorney General designated forty-five tribal governments as partnership projects. The goal of the program is to strengthen tribal justice systems, particularly strengthening the systems' abilities to respond to family violence and juvenile issues.

While the federal government has a significant responsibility for law enforcement in much of Indian Country, tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities. They are local institutions closest to the people they serve. With adequate resources and training, they are most capable of crime prevention and peace keeping. Fulfilling our trust responsibility to Indian nations means not only adequate federal law enforcement in Indian Country, but enhancement of tribal justice systems as well.

This project will provide technical assistance and training opportunities to tribal courts, and is working with state and federal judiciaries and bars, to improve relations and increase respect between the tribal courts and the federal and state benches and bars.

(3) Local AUSA Liaisons — Attorney General Reno requested each U.S. attorney with jurisdiction over Indian Country to establish a tribal liaison position to address the needs of Indian tribes within his or her jurisdiction. The Justice Department also provides training to the U.S. Attorneys' offices on the unique jurisdictional, cultural, and political aspects of tribal law enforcement.

(4) Federal Prosecutions — One of the Justice Department's top priorities is to improve law enforcement in Indian Country. In cooperation with interested tribal governments, we have facilitated the convening of federal court on or near reservations. The goal is to increase available resources for the prosecution of misdemeanor crimes committed by non-Indians on the reservation, over which tribal courts do not have jurisdiction. Since federal courts are often located far from Indian reservations, active prosecution of nonfelony domestic violence, child abuse, weapons offenses, vehicle violations, substance abuse, and theft is limited. As a result, misdemeanor crime by non-Indians against Indians is perceived as being committed with impunity. This discourages victims from reporting crimes and police from making arrests, and it encourages the spread of crime because prosecution is unlikely.

One partial solution is the convention of federal court, using a magistrate judge, on or near reservations where federal courts already have jurisdiction but are not fully exercising it because of inconvenience due to distance, lack of resources, or other reasons. This involves no expansion of federal jurisdiction but is merely moving the federal forum closer to Indian Country, thereby focusing attention on previously unredressed misdemeanors.

(5) The Office of Juvenile Justice & Delinquency Prevention has funded four tribal governments since 1992 to develop community-based programs for delinquent Indian youth or those at risk of having contact with the Juvenile Justice System. In addition, under the Crime Control Act of 1994, four tribal governments have been awarded drug court planning grants, 164 tribal governments have received community-oriented police services grants, and two tribal governments have received grants to plan boot camps.

(6) The Department has significantly increased its number of Indian attorneys working both at the main Justice Department in Washington, D.C., and also in the U.S. Attorneys' offices throughout Indian Country. We now have twenty-seven Indian attorneys working for the Justice Department, which is the largest number of Indian attorneys in the Department of Justice's history and more than double the number of Indian attorneys under previous administrations.

(7) In affirmative litigation, the Department consistently asserts the rights of tribes to control their resources. The Environment Division is currently litigating to secure the water rights of tribes throughout the west, to protect the treaty rights of northwestern tribes to harvest shell fish, and to preserve

the Mille Lac Tribe's Treaty-based rights to hunting and fishing in the Great Lakes region.

We are also working hard to protect the health and safety of Indian people by enforcing pollution control statutes in Indian Country. We have, for example, prevented the illegal disposal of waste sludge on the Torres Martinez Reservation in California and halted the release of toxic gas from a chemical plant on the Tohono O'Odham Reservation in Arizona.

We are bringing environmental polluters to justice by suing to collect penalties for a pipeline company's oil spill on the Flathead Reservation in Montana, and to remedy groundwater contamination problems caused by improper oil operations on the Sac and Fox Reservation here in Oklahoma. We have also sued to clean up and recover damages for more than one hundred years of pollution at the Commencement Bay Superfund site in Tacoma, Washington, where the Puyallup and Muckleshoot tribes own land and have fishing rights.

The ability of tribal governments to protect the health and safety of their people in Indian Country is at the core of tribal sovereignty. This ability is under a continuing threat in the 104th Congress, where there are a number of pending amendments to environmental protection laws that would limit tribal authority to protect their members and nonmembers from environmental hazards. These proposed amendments to the environmental statutes not only attack tribal regulatory authority but are aimed at diminishing the effectiveness of the current federal statutes, which will allow for more pollution across the United States and less prosecution.

Most of the federal environmental laws were enacted in the early 1970s and envisioned a scheme where the Environmental Protection Agency (EPA) would generally set environmental standards, and state governments were delegated authority to set specific standards and enforce the standards at the local level. Tribal governments and lands were overlooked in this national scheme. In the mid- to late 1980s, many of the federal environmental protection statutes were amended to include provisions that allowed Indian tribes to regulate environmental protection in Indian Country in the same manner as a state government. The EPA and the states have environmental protection programs in place which, for the most part, stop at the boundaries of Indian Country.

Tribes have the inherent authority to legislate their own environmental protection laws and can also avail themselves of provisions in the federal environmental statutes called "treatment as a state" or TAS. Several tribes have petitioned the EPA for TAS approval and received delegation from the EPA to enforce various federal environmental programs on their lands. This has resulted in jurisdictional conflicts with state governments, non-Indian landowners, agricultural interests, and industrial interests. These conflicts are being played out in the federal courts, but the challengers to tribal regulatory

control are also making a strong effort to change the federal laws and diminish tribal authority over environmental quality in Congress.

The Department of Justice is vigorously defending suits filed by the states of Wisconsin and Montana against the EPA for delegating environmental regulatory authority to tribes in those states. Industry claims they do not want to be subject to a government in which they do not have a vote. First of all, corporations don't vote but obviously their owners, shareholders, and employees do. Second, the argument ignores the fact that, by engaging in transactions in Indian Country, these companies consent to abide by tribal law. This often is the case outside of Indian Country as well. For example, I live in Virginia, work in Washington, D.C., vote in Oklahoma, and pay taxes in Oklahoma and Virginia. I do not have a voice in the laws of Virginia or Washington, D.C. As a member of this transient society, we travel to other states and countries daily and we must abide by the laws of the jurisdictions in which we travel. When you look behind the jurisdictional arguments launched by the states, it is apparent that industry is behind these attacks. The concern by industry is that tribes will vigorously enforce environmental protection laws within their boundaries and that pollution caused by industry both within the borders of Indian Country and outside Indian Country, which harms the environment, will be regulated by a government in which they have relatively little political clout. Thus, they will have to operate their businesses in a manner that minimizes negative impacts on the environment.

These states are waging these modern-day Indian wars against tribal sovereignty at the behest of the regulated industry. If the states are successful, not only will this be a major blow to the sovereignty of Indian nations, but it will place Indian Country in peril and jeopardize the health and welfare of the natural environment for Indians and non-Indians alike. This is why groups like the Sierra Club are lining up with the Indian nations to fight these battles. The environmental groups' focus is protection of the natural environment, and they recognize that Indian nations, as the original stewards of the environment, are the most appropriate sovereign to regulate pollution sources within their boundaries. Also, the tribes are culturally and legally bound to their land. Because they do not want to nor can they move their reservations, they must protect them from environmental degradation. Tribes do not have the freedom to move somewhere else when their environment becomes contaminated.

You may recall a few years ago national media coverage which focused on industry's efforts to site both hazardous and nonhazardous waste dumps within Indian Country and the responses to those efforts. The reason cited for this action was the "lack of regulation by federal, state and tribal authority within Indian Country." I never read, in any of these accounts, that the tribes did not have the authority to turn their lands into dumpsites. Now, only when tribes are trying to take a proactive approach and regulate pollution sources, do we suddenly hear that we may not have the authority to regulate. Corporate

America, which is hiding behind the states, for years took advantage of what I call the TTAD process — treat tribes as dumps — and were more than willing to dispose of their waste in Indian Country, taking advantage of the lack of regulation by any sovereign. Now, they argue that the tribes lack jurisdiction to regulate within their tribal boundaries. When polluters were treating tribes as dumps, the lack of tribal regulation was not a problem, but when the tables turned and tribes took advantage of Congress' TAS provisions — treating tribes as states — interestingly enough we are seeing challengers coming out of the woodwork to try and prevent the tribes from exercising regulatory jurisdiction over their lands.

As an environmentalist, I am deeply concerned about the future of environmental protection throughout the United States. The federal environmental laws are under major attack by the 104th Congress with attempts by regulated industry to gut these laws obvious in all the proposed amendments. The federal laws set the minimum standards for environmental protection. States and tribes are fully capable of making their respective laws more stringent than the federal standards. Polluters know this, which is the main reason why they do not want tribes to regulate the environment, for they fear they cannot successfully influence tribal governments in the same fashion as they influence Congress.

This is a survival issue for tribes. It is critical that tribes be able to protect their land. An example is the Wisconsin tribes, which depend on wild rice beds for sustenance, economic self-sufficiency, and spirituality. Exxon has gained approval by the State of Wisconsin to site one of the largest copper/zinc mines in the world less than five miles north of the Sokaogon Chippewa Tribe of Mole Lake. Air and water quality impacts will virtually destroy the lakes and wild rice beds which the Mole Lake Tribe and other Wisconsin Tribes have depended on since time immemorial. Preliminary drilling of monitoring wells last year caused the water table to drop so low that the rice harvest was significantly reduced last year.

The Sac and Fox Nation here in Oklahoma has had their water so contaminated that they haven't had fresh water on their land in several decades. In order to meet the daily needs of the Sac and Fox Nation, they are forced to pipe clean water in from off the reservation at burdensome costs. Their economic development opportunities have been stunted because of this lack of water.

Now that we are talking about Oklahoma Indians, let's take a look at Indian affairs in Oklahoma. I must admit that I have followed the current war at the Capitol on the motor fuels tax with much interest. The tribes in Oklahoma are only beginning to take baby steps toward the full extension of their sovereign rights. Unfortunately, Oklahoma tribes historically had to fight the state on every move forward they tried to make. It is difficult to progress with the state fighting everything the tribes do, every step of the way. However, despite the ill will and legal suits filed against the tribes by the

state, the tribes have managed to flourish. One must wonder what the tribes could do if their efforts were not constantly thwarted by the state.

Much ado has been made by the state and the media about purported "lost revenues" to the state due to the state's inability to collect motor fuels taxes from the eighteen Indian-owned gas stations. Neal McCaleb, in a recent *Tulsa World* article, claimed that Oklahoma will lose \$2 million this year because of its inability to collect motor fuels taxes from the Indians. A total of 47.7% of the motor fuels taxes collected by the state is used to finance construction and maintenance of roads and bridges, and the remaining 53.2% goes into the state's general fund. Thus, according to McCaleb, these Indians are cheating the state of \$954,000, which would go to maintenance and construction of roads and bridges, and we all know that Indians drive on state-maintained roads and bridges!

In response, I point out that this \$2 million is not "lost revenue." The state never received this money, they never collected it, and therefore it is disingenuous to claim it as a loss. More importantly, it is interesting to know that in the most recent five-year period for which we have statistics, the Bureau of Indian Affairs funneled \$65 million into Oklahoma transportation projects. That is \$13 million per year, \$12 million more each year over what the state alleges it is losing in construction and maintenance costs. In addition, this \$65 million has provided 1885 jobs in the state, \$40 million in personal income, and \$4 million paid in state and local taxes. And, guess what? The non-Indians in the state are driving on those "Indian" roads. Perhaps the tribes should charge tolls for non-Indian usage of their roads? I am not suggesting that this is appropriate, but I do know that tribes in New Mexico, who have been fought by their state house, are mounting a counterattack to New Mexico, which will have a significant negative economic impact on that state. I hope that Oklahoma does not force the tribes' hands.

About eight years ago, the Oklahoma Department of Tourism hit upon a brilliant ad campaign to increase tourism to the state, which worked. That ad campaign was, first, "Discover Native America," and is now "Oklahoma Native America." You see this everywhere, from billboards to maps to license plates to travel brochures to drivers licenses. Tourism in Oklahoma has skyrocketed, bringing in \$3 billion annually to the state coffers. The Department of Tourism conservatively attributes one-third of these dollars to the "Discover Native America" campaign. Thus, \$1 billion in tourism goes to the state because of the thirty-six Indian tribes in the state.

The tourism dollars brought in by the tribes is pretty mind-boggling, but let's look at the direct economic impact that the tribes have on the Oklahoma economy. In an economic impact study conducted for the Oklahoma Indian Affairs Commission, five tribes were analyzed — the Cherokee, Chickasaw, Wyandotte, Sac and Fox, and Kiowa. These five tribes represent 29% of the Indian population in the state, but do not include the Choctaw and Creek

nations, two of the more populous and economically progressive tribes in the state. These five tribes spent nearly \$318 million in the state in 1994. A total of \$181 million of this is from tribal enterprises and \$136 million is from federal grants to the tribes. Assuming the other tribes contribute similarly, then \$954 million, nearly a billion dollars, is spent in the state by the Indian tribes annually! Also, in 1994 alone, the federal government provided \$422 million in federal grants for health care, HUD, higher education, elementary and secondary education, and BIA to Oklahoma tribes. These figures total more than \$2 billion a year into Oklahoma's economy. I think the state can easily withstand a "\$2 million purported loss."

According to the 1990 census, Oklahoma tribes comprise just over 8% of the population in the state, and the Indian tribes employ just under 18% of the work force in Oklahoma. How many other employers in the state employ as many Oklahomans? Even with Indian preference, it is obvious that the tribes employ more non-Indians than Indians.

And what about state income tax? Yes, Indians do pay income taxes. A total of 7% of the income tax collected in Oklahoma is paid by tribal members, and 5.2% of the sales tax collected is paid by tribal members. And yes, those non-Indians working for the tribes are paying their income taxes to the state.

What does the state do with this Indian money? It uses it to file burdensome and costly lawsuits against the tribes, taking cases all the way to the United States Supreme Court, and sponsors legislation in the state house in every effort imaginable to hamper the tribes. Never before have I seen such a perfect example of looking a gift horse in the mouth!

Tribes are not the albatross around the state's neck that the *Daily Oklahoman* and your state leaders would have you believe. In fact, the very opposite is true. I want to think that a majority of the people in Oklahoma are simply unaware of these facts — I hope that is the case. The Indian tribes are doing their part to educate the officials in the state house. So far, we are still fighting an uphill battle.

If the state would join forces with the tribes, call off the war, and allow the tribes to focus their attention on progress instead of constantly defending against attacks on tribal sovereignty, this state and the Indian nations could do wonders for each other. Oklahoma tribes have their sights set high. They should be able to take advantage of the initiatives set in place by the Clinton Administration. They should be regulating their own environments, building up their tribal courts, and proceeding with economic development, instead of devoting inordinate resources towards battles with Oklahoma. As the United States Supreme Court said many years ago, the states are the tribes' deadliest enemies. Oklahoma's actions confirm this. It is past time for the state to stop the war and join the tribes in building a sound economic and social future from which all Oklahomans can benefit.

Thank you.

