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SPECIAL FEATURES

ADDRESS: TO DO THE RIGHT THING: REAFFIRMING CHEROKEE TRADITIONS OF JUSTICE UNDER LAW

*Rennard Strickland**

No people on the North American continent are more closely identified with law than the Cherokee. Even today, whenever issues of Indian law are joined in the courts, the Cherokee removal cases of the 1820s and 1830s — *Cherokee Nation v. Georgia*¹ and *Worcester v. Georgia*² — are cited. When the story of the birth of tribal constitutionalism is documented, the Cherokees are listed as the first Indian tribe to adopt a written law and establish a formal constitution. The United States, on the occasion of the two-hundredth anniversary of the United States Constitution, acknowledged the contributions of the Iroquoian peoples, of whom the Cherokees are the southern-most tribe. The legal heritage of the wampums entrusted to the Keetoowah begins at the very beginning of life on this continent. It can be said, without equivocation, that the Cherokee are truly a people of law. This morning, with the rededication of the Cherokee National Capitol, we are celebrating and reaffirming that tradition. I have taken the title “To Do the Right Thing” from an 1877 letter written by a Cherokee-speaking court officer of the Goingsnake District. The solicitor wrote to Chief Thompson: “I do not desire to keep the job just because of the salary. . . . It has become desirable to do the right thing. . . .”³ This morning I want us to visit about the law and doing the right thing.

From 1808 until 1898, the Cherokee Tribe operated tribal courts based upon their own written laws, codes, and constitutions. Throughout the nineteenth century, outside observers who came into the Nation chronicled the honesty and efficiency of the system. They also noted that support for Cherokee law was nearly universal among all tribal

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This address was delivered on Oct. 12, 1991, on the occasion of the rededication of the Cherokee National Capitol in Tahlequah, Oklahoma.

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

2. 31 U.S. (Pet.) 515 (1832).

3. Letter from Gane:nu:li:sgi Ne:wadv to Utsale:dv (Chief Thompson) (Mar. 9, 1877) (available in the Thompson Papers, Cherokee Tribal Records, Oklahoma Historical Society). This letter was published in *THE SHADOW OF SEQUOYAH — SOCIAL DOCUMENTS OF THE CHEROKEES, 1862-1964*, at 26-28 (Jack Frederick Kilpatrick & Anna Gritts Kilpatrick eds. & trans., 1965).

groups, from full-blood traditionalists to mixed-blood acculturationists. Since I have waived my usual speaking fee this morning, Chief Mankiller promised me I could plug one of my books. In *Fire and the Spirits*⁴ (available at fine book stores everywhere), I recorded many details about the operation of the Cherokee legal system and provide a chronology of key dates and a summary of the early tribal laws. Relax, you are not going to be subjected to a law professor's Socratic cross-examination and case parsing. The story is there, in the book, available for purchase in fine book stores everywhere. Suffice it to say, at the beginning of the nineteenth century, the Cherokees cast their fate into the mainstream of the American legal process. Few have done the process greater honor than the Cherokee.

In the struggle to retain their ancestral homes in Georgia in the 1830s, the Cherokee awaited the decision of Chief Justice John Marshall and the Supreme Court. The Marshall court, in the famous case of *Worcester v. Georgia*,⁵ supported the Cherokee cause and reaffirmed the Cherokee belief in the legal process. Then Jackson is purported to have issued his famous challenge to the judiciary — "Marshall has made his law, let him enforce it."⁶ Marshall and the Cherokees had the law. Jackson had the troops. In historical perspective, it is as if President Eisenhower had sent troops to Little Rock to help Governor Faubus avoid integration of Little Rock Central High School after the 1954 Supreme Court Decision in *Brown v. Board of Education*.⁷

With a Supreme Court decision in their favor, fifteen thousand Cherokees were driven by General Winfield Scott and his troops out of their beloved southern mountain homelands. Only eleven thousand finished the journey; four thousand died along the trek, which we know as the "Trail of Tears." This incident is germane to our activities this morning because it vividly illustrates the Indians' historic dilemma. As soon as a tribe adapted to new ways in an effort to survive, the United States, through force of arms or legislation, destroyed what the tribe had done. The pattern was repeated again and again.

At the close of the nineteenth century, the Cherokee and their brother tribes, the Creeks, Chickasaws, Choctaws, and Seminoles, had developed legal systems more just and efficient than those of most states. They stood ready to accept the dream that their negotiations had held out — admission to the Union as an Indian state. The

4. RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* (1975).

5. 31 U.S. (Pet.) 515 (1832).

6. Joseph G. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969); see also Anton-Hermann Chroust, *Did President Jackson Actually Threaten the Supreme Court of the United States with Nonenforcement of Its Injunction Against the State of Georgia?*, 4 AM. J. LEGAL HIST. 76 (1960).

7. 347 U.S. 483 (1954).

Cherokees had truly moved to a well-run, almost a model, court process and now waited for the long-promised Indian State which would culminate their historic compromise. Instead, the United States Congress and the instrument of their creation, the Dawes Commission, divided tribal lands, abolished Indian courts, and attempted to end forever the governing powers of the Indian nations. The Cherokees and the other Civilized Tribes were forced to abandon their Indian State of Sequoyah and were involuntarily merged into the State of Oklahoma.

In 1894, Judge Isaac C. Parker gave one of the most compelling descriptions of government and law in the lands of the Five Tribes. "There is not" he noted, "as high a percentage of crime committed by them as there is by the same number of white people in any of the Western or Southern States. [Only] about 10 percent of the higher offenses, such as murder and assault . . . were committed by Indians."⁸

The famous "Hanging Judge," praising the tribes, testified in 1895 that "there is not a pauper Indian in the whole Five Civilized Tribes. I wish I could say as much in [my state of] Arkansas; I wish I could say as much in . . . other states."⁹ As we all know, that changed and changed dramatically during the dark days of the federal interdict. Anyone familiar with the Cherokee Nation in 1991 knows that poverty and crime have become problems requiring the tribe's attention.

Here in Tahlequah we remember that Northeastern, my *alma mater*, was the Cherokee Seminary — created from the Cherokee Nation's college-level male and female educational institutions. It is easy to forget that before statehood the Cherokee Nation also operated 126 public schools out in the tribal community. Another observer noted in the mid-nineteenth century that there was not an illiterate Indian amongst them.

Perhaps our goal on this day of rededication should be to go backward. What was the title of that movie — *Back to the Future*? Our goal should be a Cherokee future when observers can once again say, as they did in the nineteenth century, "there is not a pauper nor an illiterate amongst them."

It was during this dark period that Redbird Smith, the visionary leader of the Keetoowah traditionalists, said:

My greatest ambition has always been to think right and do right. It is my belief that this is the fulfilling of the law of the Great Creator . . . I have always believed the Great Creator had a great design for my people, the Cherokees.

8. HELL ON THE BORDER app. (Jack Gregory & Rennard Strickland eds., 1972).

9. STRICKLAND, *supra* note 4, at 181 (citing Cherokee tribal documents, Earl Boyd Pierce collection, Tahlequah, Okla.).

I have been taught that from my childhood up and now in my mature manhood I recognize it as a great truth. Our forces have been dissipated by external forces, perhaps it has been just a training, but we must now get together . . . and render our contribution to mankind. We are endowed with intelligence, we are industrious, we are loyal, and we are spiritual but we are overlooking the particular Cherokee mission on earth — for no man nor race is endowed with these qualifications without a designed purpose. . . . Our pride in our ancestral heritage is our great incentive for handing something worthwhile to our posterity. It is this pride in ancestry that makes men strong and loyal for their principle in life. . . .¹⁰

Surely, it is so. The rededication of this national capitol and the reopening of the courts, which we celebrate today, is but one small example of Redbird Smith's prophetic words and of the tribal quest "to think right and do right." The recent Cherokee legislative enactment requiring the teaching of tribal history to all national employees is an official recognition of Smith's conclusion that "our ancestral heritage is our great incentive for handing something worthwhile to our posterity."¹¹

In the Dawes days, almost a century ago, it did not appear that law, much less the Cherokee Nation and its ancestral heritage, would endure for tribal posterity. In 1898, the clerk of the Cherokee Supreme Court, sitting in the capitol building here in Tahlequah, wrote the last entry on the ledger pages of the official record book. The end of the court session and the absence of the Cherokee Justices Lynch, Redbird, and Grass was duly noted. The Supreme Court record book for that final year opens with a flourish, but the court is under federal orders closing them down; the pages are then blank. Thus, in 1898 Cherokee courts closed and the formal use of the Cherokee written law summarily ended. Under federal law, Cherokee judges were no longer allowed to enforce their own tribal regulation; indeed, to have held court would have made the judges criminals.

We are here this morning to formally mark the end of that federal interdict and acknowledge the tribal rebirth of the Cherokee court system. I am deeply honored to have been asked to deliver this celebratory address, an address acknowledging the Cherokee historical tradition of government under law and anticipating the forthcoming achievements of new generations of Cherokee leadership and laws. On

10. STARR'S HISTORY OF THE CHEROKEES 481-82 (Jack Gregory & Rennard Strickland eds., 1967).

11. *Id.*

Thursday, in preparation for this speech, I went to the Archives of the Oklahoma Historical Society and once again examined the leather-bound volumes which are the official record of the seven Cherokee district courts and the Supreme Court of the Cherokee Nation. I reviewed the court volumes — district by district. It is an impressive judicial lineage, a great ancestral heritage.

As I looked at the faded pages with the flourish of elaborate, handwritten nineteenth century records of hearings and trials and appeals, I saw — in my mind's eye — that group of Cherokee deputies in Washington, in January of 1809. And I heard, in the movie of my mind, Thomas Jefferson speaking to them about the introduction of what the President called "the regular administration of laws." Jefferson, author of the Declaration of Independence, spoke the following words to the assembled Cherokee delegation: "I sincerely wish you may succeed in your laudable endeavors to save . . . your nation, by adopting industrious occupations and government of regular laws"¹²

Less than ninety years later a new President and his federal marshalls did not wish the Cherokee Nation well; indeed, they did not wish the Cherokees to continue what Jefferson had urged them to begin. And so, in 1898, the federal government forcibly closed — they believed forever — the ongoing legal system of the Cherokee Nation. We are here, today, celebrating the fact that they were wrong, so very wrong. The Jeffersonian view has prevailed, and the Cherokee Nation is again following "industrious occupations and government of regular laws." Today, we are witnessing the opening of another chapter in an heroic story. Students of Indian history are familiar with the triumphant tale of how bands of Cherokees forged themselves into a political state, created their own native alphabet, adopted a written constitution, and ultimately provided political, social, and economic leadership not only for the tribe but in a new state and for the entire nation. What is not as well understood is that the Cherokees were not an anemic people given only to simple domestic pursuits, but were a tribe of fierce warriors and intrepid hunters whose conquest had given them military dominion over the great heartland of the southern mountain ranges.

That the Cherokees were eventually to be known as one of the Five Civilized Tribes is testimony to their ingenuity. The Cherokees believed, paradoxically, that in change was the best hope of survival as an Indian people. Historical proof of the significance of this attitude is found in the testimony of Charles Hicks, a Cherokee chief and one of the earliest advocates of this policy. At the beginning of the nineteenth century, Hicks wrote to the missionary Daniel Sabin Buttrick that abandonment of old ways and adoption of new ones rep-

12. STRICKLAND, *supra* note 4, at 237-38.

resented "the [tribe's] conviction that their very existence as a people depends upon it."¹³

There is a widely held belief that between 1808 and 1809, under the tutelage of Jefferson and other leaders, the Cherokees dramatically broke with their ancient law ways and passed from a state of "savage" lawlessness to a highly sophisticated, efficiently operating "civilized" system of tribal laws and courts. To anyone familiar with law and the development of legal institutions, this is obviously rhetoric of mythical proportions. The Cherokees did not, as is commonly believed, break all threads of cultural continuity. They built upon their own ancient traditions. In 1808 the tribe drafted the first written law, prohibiting the execution of clan revenge, but this act should not be taken as evidence that all native aspects of tribal law were purged. In fact, Cherokee records affirm that traditional tribal values played and, hopefully will continue to play, a vital role in the development of the Cherokee legal system.

The historical Cherokee legal experience illustrates that it was possible to retain a tribal world view within the context of evolving Anglo-Saxon institutions. The result of the creation of a Cherokee constitution and court system, however, was not what Jefferson and the "civilizers" had expected. Instead of a weak carbon copy, an anemic shadow people, the Cherokees emerged as worthy adversaries who demanded that their own Cherokee institutions be respected. The tribe had been schooled in the ways of the white man but retained their own sense of Indian values which demanded that they, too, be extended the rights to which they were entitled by the United States Constitution and laws. There is a lesson of law and constitutionalism in the case of the Cherokees who took their struggle, rooted in the stated laws and values of both Indian and white society, to the United States' highest court in *Cherokee Nation v. Georgia*¹⁴ and *Worcester v. Georgia*.¹⁵ "In truth," the Cherokees wrote in their 1835 Memorial to Congress, "our cause is your own." The shared fate of all men under law has rarely been more poignantly evoked. The Cherokees proclaimed: "It is the cause of liberty and of justice. It is based upon your own principles, which we have learned from yourselves; for we have gloried to count your Washington and your Jefferson our great teachers . . ."¹⁶

The Cherokee experience demonstrates that law is more — much more — than powdered wigs, black robes, leather-bound statutes, silver stars, and blinded ladies with balanced scales. Law is also a

13. *Id.* at 7 (quoting Charles Hicks, in *Typescripts of Cherokee Papers*, Indian Heritage Association, Muskogee, Okla.).

14. 30 U.S. (Pet.) 1 (1831).

15. 31 U.S. (Pet.) 515 (1832).

16. WILLIAM BRANDON, *THE AMERICAN HERITAGE BOOK OF INDIANS* 374 (1961).

Cherokee religious leader listening to the spirit world while holding the sacred wampums in hand, just as it is the Cheyenne soldier-society warrior draped in the skin of a wolf. In fact, a command from the spirit world can have greater force as law than the most elaborate of codes devised by the most learned of men. For law is organic. Law is part of a time and a place, the product of a specific time and an actual place. Thus law was to the traditional Cherokee a part of a larger world view, a command from the spirit world. And it is as such that we must view the law of the Cherokees.

Despite the pompous pronouncements of long-winded professors like myself, law is really about “doing the right thing,” about creating a social order rooted in the basic values of people. The Cherokee experience offers a powerful message about cultural persistence and change. As the world moves toward the twenty-first century, this vision of the eighteenth- and nineteenth-century Cherokee can help all mankind appreciate the dual task of preserving historic values while building new traditions. This can help in understanding the universal challenge of responding to cultural and technological change while continuing “to do the right thing.”

John Haywood in his *Natural and Aboriginal History of Tennessee*¹⁷ describes the Cherokees of the eighteenth century gathering together to hear the recitation of their ancient laws. Photographs, such as the one reproduced on page 133 of *Fire and the Spirits*¹⁸ (available in fine book stores everywhere), record the nineteenth-century Cherokee chiefs in the act of delivering their annual messages here in the square at Tahlequah. Today, before this capitol, Cherokees are once again gathered to talk about law. Over the past three centuries the outward manifestation of Cherokee law and the forms of address have changed but the values central to law — the shared consensus of common ideals, the command to do the right thing — remains the same.

Today is one of those days when you hope that life is like in the movies — like in those movies where at the end of the film all of the characters of the drama, those who have fought the noble fight, who have suffered bitter disappointment, who have been called to a heavenly kingdom, are brought back across the screen, their faces superimposed upon the triumphant climax that they did not live to see. When that picture comes to my mind's eye, I think of Mary, the Cherokee woman, about whom Edward Everett Dale, the dean of Oklahoma's territorial historians, wrote. This Cherokee woman, married to a non-Indian man, refused to attend the 1907 Oklahoma Statehood ceremonies with her husband. He returned to Tahlequah

17. JOHN HAYWOOD, *THE NATURAL AND ABORIGINAL HISTORY OF TENNESSEE* 243 (1828).

18. *Strickland, supra* note 4.

and said to her: "Well, Mary, we no longer live in the Cherokee Nation" Tears came to her eyes thirty years later as she recalled that day. "It broke my heart. I went to bed and cried all night long. It seemed more than I could bear that the Cherokee Nation — my country and my people's country — was no more."¹⁹ *Not so!* On this historic day, the Cherokee Nation is making a statement. It is reaffirming the faith of the thousands of historic Marys and Redbirds and Cecils who never surrendered their love of nation. To them I say the correct statement is: YOUR nation is *evermore*. The eternal flame of the Cherokees is more than metaphor, it is truth.

We all hold in our hearts many individuals whom we wish were here with us today to share in our celebration. Without many of those men and women who made personal and historic sacrifices, this symbolic day would not be possible. If you will forgive me a personal note of pride, as a teacher, I am touched to see the contributions of many of my students, Cherokees who have become a part of this rebirth: Phillip Viles who was a key figure in the preparation of constitutional documents and also an early member and currently Chief Justice of the revitalized Cherokee Supreme Court; Chad Smith, who drafted much of the new Cherokee Code; Tina Jordan, who is the first judge of this new Cherokee court. Another of my Cherokee law students, Joel Thompson, reflecting what I tell my students about lawyers overcoming modesty, just gave me his card as director of the Cherokee Housing Authority. And there are others, the students of many others, who have contributed so much and will continue to contribute even more.

Looking at this platform party, we see Chief Mankiller who symbolizes both the historic role of the "Beloved Women" of Cherokee tradition and the gifted world-recognized chief of contemporary achievement; Ross Swimmer, who like earlier Cherokees Senator Robert L. Owen, Admiral Jocko Clark, Houston B. Teehee, and Congressman W.W. Hastings, symbolize the continuing national contribution of Cherokee People. And Merritt Youngdeer, Area Director of the BIA, who reflect the cooperative spirit of Indian peoples. Representing the links of state and tribal law is Diana Hammond of the Attorney General's Office. The renewed effort in the judicial arena of state and tribal sovereigns is symbolized by Oklahoma Supreme Court Justice Yvonne Kauger. Eric Hunter of the governor's office represents the recognition in Oklahoma that the Cherokees and Cherokee Country and the entire state are tied together, that what benefits one, benefits all, that the rebirth of Cherokee law, culture, and prosperity has been a rebirth, not just for Indian people, but for the entire region.

19. Edward Everett Dale, *Two Mississippi Valley Frontiers*, 26 CHRONICLES OF OKLAHOMA 367, 382 (1948-49).

Jobs talk and because of the Cherokees there is a lot of new conversation in eastern Oklahoma. If you'll pardon a slightly political aside, I wish the Oklahoma Tax Commission could learn the lesson which we knew here in Tahlequah even back in the days when I was a student at Northeastern. This is the lesson that Jefferson offered the Cherokees back in 1809. It is the lesson that the Indian's pursuit of law and industry benefits not just native people but the entire populace. It is the message of Redbird Smith from the dark days of the federal interdict that there is a "special mission" and a "designed purpose."

In the light of the present-day global struggles of tribal peoples around the world, it seems somehow appropriate to close with a statement of the Polish poet Czeslaw Milosz in his Nobel lecture: "Those who are alive receive a mandate from those who are silent forever. They can fulfill their duties only by trying to reconstruct precisely [the Spirit of] things. . . ." ²⁰

Toward the close of the third decade of the nineteenth century when the Cherokee Nation began to publish a newspaper, the name *Phoenix* was selected for the masthead. Today, October 12, 1991, it is clear, once again, why that was such an appropriate choice. The power of that ancient mystical bird who was consumed by fire and arose from his own ashes is inborn in the soul of the Cherokee people. Cherokees are remarkable, having survived in the face of overwhelming odds. The Cherokee accomplishment which we celebrate today is eloquent testimony to what William Faulkner described in his Nobel address as the enduring spirit of mankind. The Cherokee story is proof that humanity will not only prevail but triumph.

Could this be "the designed purpose," the "particular mission," the "Cherokee contribution to mankind" which sustained Redbird Smith and his thousands of followers in those dark days? Today, for all Americans, there is a pragmatic as well as a philosophical reason for seeking to find this Cherokee spirit. For that spirit may help redefine the American image, help America rediscover traditional values in this world of change.

How can the nation learn what the Cherokee has to offer? We can begin by teaching the philosophy, religion, art, literature, music, and dance of the Native American. The tribe is already beginning the task of creating such a curriculum. The story of the Indian is the literature of America. It is not trite to say that the Indian sings the song of our forests, of our birds, of our souls. His world is our world. He is of America. And he is America. Why, indeed, are the tales of the Brothers Grimm, Hans Christian Andersen, and the politically minded Mother Goose a better fare for American children than the friendship of

20. Quoted in RENNARD STRICKLAND, *INDIAN DILEMMA* dedication (forthcoming) (University of Oklahoma Press).

Thunder and the origin of corn? The British novelist, D.H. Lawrence, who came to love America's native people, said the Indian will again rule America. This has relevance in view of something Thoreau said: The Indian has property in the moon. By walking on the moon, we learned that our salvation must come from the earth. William Brandon, editor of the *American Heritage Book of the Indians*, has prophesied that "[t]he Business of the Indian . . . may turn out to be the illumination of the dark side of the soul, maybe even our soul."²¹

Cherokees are now watching. All Americans, Indians included, face the crisis of drugs, unemployment, dysfunctional families, urban clutter, pollution, energy, and the environment. As their fellow citizens contemplate the change of lifestyle, the Cherokee cannot help but feel a touch of irony. The free-roaming hunter, farmer, and small village lifestyle that sustained the world of the Five Tribes was destroyed by the Dawes Commission's and its concept of progress and civilization. Now the white man has turned upon himself, unable to curb his wants so that he may have created a society that will in the end destroy all of us. The crisis is, in truth, more than a family or an energy or an environmental one. American civilization faces a crisis of the spirit, a great conflict in human values.

Today, we are celebrating the fact that the Cherokee has learned the lesson of building and rebuilding a civilization, of adapting, of changing and yet of remaining true to certain basic values regardless of that change. At the heart of those values is an understanding and appreciation of the timeless — of family, of tribe, of friends, of place, and of season. It is the lesson of doing the right thing — a lesson that American civilization has yet to learn.

21. William Brandon, *American Indians: The Real Revolution*, PROGRESSIVE, Feb. 1970, at 30.