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A NATION IN CRISIS: THE GOVERNMENT OF THE CHEROKEE NATION STRUGGLES TO SURVIVE

Denette A. Mouser*

I. Introduction

It was the pot-shot heard 'round the nation. The Cherokee Nation, that is. And it was aimed directly at the Constitutional foundations of the second largest Native American tribe in the United States. I speak, of course, of the recent constitutional crisis endured by the government and citizens of the Cherokee Nation when Principal Chief Joe Byrd's actions began a chain reaction of seeming atomic proportions. This article, however, will not be a scathing editorialization of the behavior of tribal leaders. Instead, it will provide a narrative of the events leading up to the formation of the Massad Commission, a brief overview of the Commission's Report and recommendations, and an epilogue as to some of the events which followed Chief Byrd's acceptance of those recommendations.

II. Historical Narrative

A. Mounting Tensions

Indications of an impending crisis began as early as the summer of 1996. Director of the Cherokee Nation Marshal Service, Pat Ragsdale, pursued several apparently unrelated investigations.¹ These investigations, primarily criminal in nature, included: a drive-by shooting; an alleged rape by a non-Indian law enforcement official of a woman in an Indian housing addition; drug busts in Adair County, Oklahoma; and complaints lodged against Joel Thompson, Director of the Cherokee Nation Housing Authority and close associate of Principal Chief Joe Byrd.² Byrd pressured Ragsdale to squelch his investigation of Thompson, and Ragsdale complied until he received evidence which strongly implicated Thompson in wrongdoing.³

The allegations against Thompson ranged from criminal libel to misappropriation of funds.⁴ One allegation centered on a supposed "hidden

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1. Urgent Message to the Cherokee People 3 (n.d.) [hereinafter Urgent Message] (unpublished 1998 pamphlet circulated in opposition to Chief Byrd) (on file with author).

2. *Id.*

3. *Id.*

4. *Id.* Other allegations included: misuse of Housing Authority personnel; violations of tribal, state and federal telecommunications laws related to illegal surveillance; lies regarding threats to Thompson's life; and Thompson's illegal concealment of a handgun which he carried

bank account" that financed Byrd's summit at a local State Park lodge, paid \$5000 for a car rental, and the use of Housing Authority money to prepare and mail Byrd's campaign materials.⁵ Byrd, in an apparent violation of tribal law, then ordered Ragsdale to cease his investigation of Thompson.⁶ According to the Cherokee Nation's Tribal Ethics Act, the employees and elected officials perform their jobs under an affirmative duty to "expose corruption wherever discovered."⁷ By ordering Ragsdale to cease his investigation of Thompson, Byrd not only violated the Ethics Act, but also his oath of office.⁸

At that same time, council members of the Cherokee Nation Tribal Council made repeated requests to Byrd for documents related to financial records of tribal business.⁹ Among the documents requested were those showing payments to a Tulsa law firm in which Byrd's brother-in-law was a partner, and records related to a manufacturing deal in India.¹⁰ Article X of the Cherokee Nation Constitution requires the Secretary-Treasurer of the tribe to provide the Council with "financial statements reflecting the results of operations of all tribal activities" and to prepare a consolidated balance sheet in conformity with generally accepted accounting principles.¹¹ Byrd refused to force compliance with the requests, and Council members petitioned the Cherokee Nation Judicial Appeals Tribunal (the Tribunal) for a ruling on the disclosure of the contracts.¹² In August of that same year, the Tribunal ruled that the documents were indeed a matter of public record and should be provided to the Council.¹³ Byrd and his administrators continued their refusal to provide the documents.¹⁴

B. Flying Allegations

Months passed with tension between Byrd and other tribal officials escalating. Then, in late February 1997, Tribal Prosecutor A. Diane Blalock alleged that Byrd had misused tribal funds and requested that Chief Justice Ralph Keen issue a search warrant of Byrd's office based upon Ragsdale's

into his workplace.

5. *Id.*

6. *Id.*; see also 28 CHEROKEE NATION CODE ANN. § 4(K) (West 1993) (section of Tribal Ethics Act).

7. 28 CHEROKEE NATION CODE ANN. 4(K).

8. Urgent Message, *supra* note 1, at 3.

9. *Id.* at 12.

10. *Id.* at 6.

11. CHEROKEE NATION CONST. art. X.

12. Urgent Message, *supra* note 1, at 12.

13. *Id.*

14. *Id.*

sworn affidavit.¹⁵ The Tribunal issued the warrant, which was served by tribal marshals on February 25, 1997.¹⁶

Cherokee marshals made copies of the subject financial records constituting five boxes of documents, but left the originals with Byrd.¹⁷ Outraged at the search of his office, Byrd fired Ragsdale and Lt. Sherry Wright, who were immediately reinstated by Justice Dwight Birdwell.¹⁸ Birdwell also warned that anyone who interfered with the Tribunal's orders or the investigations conducted by the Marshal Service would face charges of contempt.¹⁹

For weeks, both Byrd and Ragsdale claimed to have called upon the Federal Bureau of Investigation to assist in the investigations of the misuse of tribal funds and the alleged obstruction of justice.²⁰ In response, the FBI instituted its own investigation into tribal activities which may have violated United States federal laws, including illegal wiretaps of some tribal officials.²¹ Byrd, refusing to recognize the "reinstated" Ragsdale and fourteen other tribal marshals, hired his own armed security force.²² Byrd's actions provoked A. Diane Blalock into filing a complaint against him, alleging conspiracy to obstruct justice²³ and accusing him of diverting more than \$60,000 in tribal funds to pay a Washington, D.C. law firm.²⁴

C. The Illegal Council Meeting

Just four days later, on April 15, 1997, Byrd conducted a Council meeting attended by only eight of the fifteen Council members, and a vote to begin impeachment of the entire Judicial Appeals Tribunal was passed.²⁵ Before convening the meeting, Byrd had sought and received advice from Thomas Seymour, a non-Indian attorney from Tulsa, Oklahoma, as to the legality of a Council meeting in which less than two-thirds of the Council members would be in attendance.²⁶ Seymour, unfortunately, erroneously interpreted the Cherokee Constitution and advised Byrd that attendance of less than a quorum (10 of the 15 members) of Council members was still sufficient to legally conduct tribal business.²⁷ According to Seymour, a simple majority of

15. *Id.*

16. *Key Developments in the Cherokee Nation Strife*, NORMAN TRANSCRIPT (Norman, Okla.), Aug. 13, 1997, at 3 [hereinafter *Key Developments*].

17. Urgent Message, *supra* note 1, at 12.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Key Developments*, *supra* note 16.

23. *Id.*

24. Urgent Message, *supra* note 1, at 13.

25. *Id.*

26. *Id.*

27. *Id.*

Council members (eight, or 51%) was all that was necessary to satisfy the requirements of the Constitution.²⁸

By April 24, the Tribunal had ruled that the April 15 Council meeting was illegal due to lack of a quorum,²⁹ and a contempt citation was issued against Byrd.³⁰ When Byrd failed to appear on the contempt citation, a warrant for his arrest was issued.³¹ Further, a grassroots petition for Byrd's ouster began circulating among the tribal membership.³²

Relentless in their determination to gain control of tribal business and tribal government, the eight Byrd-loyalist Council members announced a plan to amend the Cherokee Constitution so that a simple majority of Council members would be all that was required to legally conduct business.³³ More disturbingly, the eight member Council conducted a "court of removal" and carried through with their vote to impeach the entire Tribunal.³⁴ Byrd's administration confidently announced that he would not recognize the actions of the impeached court, and he remained free from the warrant issued for his arrest.³⁵ In response to their "illegal" impeachment, and operating despite a lack of funds, members of the Tribunal continued to carry out their functions in the Cherokee Courthouse.³⁶

D. Taking the Courthouse

Then, on June 20, 1997, Byrd ordered his security force to conduct an armed takeover of the Courthouse.³⁷ The takeover, conducted in a pre-dawn raid, left vacant the 1880s-era building which housed not only the Cherokee Nation's judicial branch of government but also the Cherokee Marshal Service.³⁸ The predawn raid came only hours after a federal judge in Muskogee, Oklahoma,³⁹ dismissed a lawsuit filed by Ragsdale and the other fired marshals requesting the United States government compel their

28. *Id.*; see CHEROKEE NATION CONST. art. V., § 4 (Legislative) ("No business shall be conducted by the Council unless at least two-thirds (2/3) of members thereof regularly elected and qualified shall be in attendance, which number shall constitute a quorum.").

29. Urgent Message, *supra* note 1, at 13.

30. Charles T. Jones, *Cherokee Chief Removes Marshals from Courthouse*, DAILY OKLAHOMAN (Oklahoma City), June 21, 1997, at A-1 [hereinafter *Cherokee Chief Removes Marshals*].

31. *Id.*

32. Urgent Message, *supra* note 1, at 13.

33. *Id.*

34. *Id.*

35. *Key Developments*, *supra* note 16.

36. Paul B. Thomas, Editorial, *Justice Destroyed in Cherokee Nation*, DAILY OKLAHOMAN (Oklahoma City), Aug. 21, 1997, at A-10 [hereinafter *Justice Destroyed*].

37. Urgent Message, *supra* note 1, at 14.

38. *Cherokee Chief Removes Marshals*, *supra* note 30.

39. U.S. District Judge Frank Seay dismissed the suit which alleged that the Bureau of Indian Affairs wrongfully intervened in tribal law enforcement. See *Key Developments*, *supra* note 16.

reinstatement.⁴⁰ Angry tribe members attempted to storm the building later that morning but were turned back by Byrd's armed security force.⁴¹

The impeached justices and fired marshals were literally locked out of their offices.⁴² Within three weeks, Prosecutor A. Diane Blalock and all the court clerks were fired.⁴³ Documents seized in the February 25 search of Byrd's office were turned over to the FBI by the fired marshals, and fifty to sixty weapons taken from the marshals' area of the Courthouse were transferred to the Bureau of Indian Affairs by Byrd's security force.⁴⁴ Byrd issued a prepared statement to the press, declaring, "The controversy at the Cherokee Nation is winding down, and we are now able to get back moving the Cherokee Nation forward for the betterment of our tribe."⁴⁵ Byrd's optimistic appraisal of the situation was grossly in error.

E. Repercussions

With no Tribunal and a locked Courthouse, the citizens of the Cherokee Nation had no access to an independent judiciary,⁴⁶ and no method for handling child custody and other disputes.⁴⁷ One Council member called for an end to "this long, long national nightmare" and others expressed a desire for orderliness and restoration of the Tribunal.⁴⁸ On August 10, 1997, the "impeached" Tribunal ordered Ragsdale and the "fired" marshals to take back the Cherokee Courthouse on August 13 at noon.⁴⁹

On August 12, 1997, the full membership of the Cherokee Nation Council met to decide whether to reinstate the impeached tribunal.⁵⁰ Just after midnight on the 13th, Deputy Chief Garland Eagle broke a 7-7 deadlock in a decision which upheld the impeachment of the tribe's highest court.⁵¹ The vote capped a long night of agitated debate among the Tribunal justices and the Council, accented by a rehashing of the events covering the previous six months and Byrd's plea for support from the tribal citizenry.⁵² Name-calling, apologies, and Watergate analogies escalated audience commentary, with one especially boisterous spectator eventually escorted out of the meeting.⁵³ One

40. *Cherokee Chief Removes Marshals*, *supra* note 30.

41. *Id.*

42. *Key Developments*, *supra* note 16.

43. *Justice Destroyed*, *supra* note 36.

44. *Cherokee Chief Removes Marshals*, *supra* note 30.

45. *Id.*

46. *Justice Destroyed*, *supra* note 36.

47. *Council Upholds Impeachment of Justices in Deadlock Decision*, NORMAN TRANSCRIPT (Norman, Okla.), Aug. 13, 1997, at 3 [hereinafter *Council Upholds Impeachment*].

48. *Id.*

49. Urgent Message, *supra* note 1, at 14.

50. *Council Upholds Impeachment*, *supra* note 47.

51. *Id.*

52. *Id.*

53. *Id.*

report quoted a Councilman as referring to the justices during the debate as "you boys" and "idiots."⁵⁴

Later that day, an unarmed Ragsdale served the Tribunal's eviction notice, requiring Byrd's security forces to vacate the Courthouse.⁵⁵ Byrd's forces refused to step aside, and a melee resulted in which non-Indian police forces from five Oklahoma counties, officers from the Oklahoma Highway Patrol, and the Bureau of Indian Affairs police removed impassioned citizens and Ragsdale's team.⁵⁶ Hundreds of Marshal Service supporters participated in the fracas,⁵⁷ and six people suffered injuries.⁵⁸ Among those injured was noted Cherokee artist Lisa Tiger, who alleged she was grabbed by the hair and thrown to the concrete steps of the Courthouse.⁵⁹

F. The Washington Summit

The Cherokee Nation's internal turmoil and external physical conflicts captured the attention of U.S. Interior Secretary Bruce Babbitt who, along with U.S. Attorney General Janet Reno, called leaders of the tribe to Washington, D.C.⁶⁰ The unprecedented intervention of the United States government occurred against a backdrop of possible federal remedies including: (1) President Clinton's authority to remove Byrd from office;⁶¹ (2) Congressional action to cease federal funding for the tribe; (3) removal of various federal programs; and (4) reinstatement of the BIA as trustee for the tribe, ending Cherokee Nation self-government.⁶²

On August 22, 1997, with fears of additional violent confrontation during the approaching Cherokee National Holiday,⁶³ Byrd traveled to Washington, D.C. along with former Cherokee Nation chief Ross Swimmer and members

54. Urgent Message, *supra* note 1, at 14.

55. *Id.*

56. *Id.*

57. Charles T. Jones, *Cherokee Leaders Summoned to D.C.*, DAILY OKLAHOMAN (Oklahoma City), Aug. 22, 1997, at A-1 [hereinafter *Cherokee Leaders*].

58. Urgent Message, *supra* note 1, at 14.

59. Sam Fox, *Cherokee Attorney Files Suit in Tribal Courthouse Incidents*, DAILY OKLAHOMAN (Oklahoma City), Aug. 22, 1997, at A-10.

60. *Cherokee Leaders*, *supra* note 57.

61. Patrick B. McGuigan, Editorial, *Clinton Administration Misses Chance to Help Cherokees*, DAILY OKLAHOMAN (Oklahoma City), Aug. 29, 1997, at A-6 ("Longstanding treaties and federal laws, as well as a specific provision in the Cherokee Constitution, permit U.S. presidents to remove, for misconduct, leaders of the 'Five Civilized Tribes' (Cherokee, Choctaw, Chickasaw, Creek, and Seminole)."); see also *Byrd Returns to Talks Seeking Tribal Peace*, DAILY OKLAHOMAN (Oklahoma City), Aug. 25, 1997, at A-3 [hereinafter *Byrd Returns to Talks*]. Philip H. Viles, Jr., an ousted justice of the Judicial Appeals Tribunal, noted that a 1906 federal law gives the president the power to remove the chief. *Id.*

62. *Cherokee Leaders*, *supra* note 57, at A-2.

63. Jean Pagel, *Cherokee Justices Improperly Ousted, Review Finds*, DAILY OKLAHOMAN (Oklahoma City), Aug. 27, 1997, at A-1. The annual holiday occurs during Labor Day weekend, drawing thousands of tribal members to Tahlequah to celebrate Cherokee culture and tradition.

of the two rival tribal legislative factions.⁶⁴ During the day-long meeting, Babbitt proposed a temporary moratorium on all legal action, the reopening of the tribal courthouse, and an outside review of whether the Judicial Appeals Tribunal should be recognized.⁶⁵

Hope for a swift reconciliation turned into frustration when the more than eight hours of negotiation failed to produce an accord. Byrd balked at the provision which would have provided for the recognition of the ousted Judicial Appeals Tribunal, and returned to Tahlequah.⁶⁶ Claiming fatigue as his reason for leaving the marathon session on Friday, Byrd stated, "I think everything I did was according to the constitution."⁶⁷ Byrd spokesperson Lisa Finley stated that Byrd walked away from the meeting because the plan would have called for him to overstep his powers under the tribe's Constitution.⁶⁸ Upon Byrd's departure, Babbitt warned that Congress may intervene in the crisis if the disputes were not resolved.⁶⁹ With the summit apparently ended, Babbitt left the nation's capitol and went on vacation.⁷⁰

Meanwhile, Cherokee elders called for a rally in front of the federal courthouse in Muskogee, hoping to convince the BIA to recognize the ousted Tribunal and to enforce that court's orders.⁷¹ Additionally, Oklahoma Governor Frank Keating took steps to devise an "action plan," calling on the Oklahoma Department of Public Safety to prepare a contingency plan in the event additional unrest occurred during the upcoming Cherokee holiday.⁷² Byrd's spokesperson, in an apparent effort to quell rising tensions, stated that Byrd had not flatly rejected the terms of the proposal now on the table and was still thinking about agreeing to it.⁷³

Following a weekend of uncertainty and apprehension, reports broke that Byrd had returned to Washington, D.C. on Monday, August 25. Downplaying his return to negotiations, spokesperson Finley stated, "Nothing has been

64. *Cherokee Leaders*, *supra* note 57.

65. *Byrd Returns to Talks*, *supra* note 61.

66. *Byrd to Meet With Officials Over Cherokee Tribe Infighting*, NORMAN TRANSCRIPT (Norman, Okla.), Aug. 25, 1997, at A-3 [hereinafter *Byrd to Meet with Officials*].

67. Eddie Glenn, *Massad: Justice Ouster Invalid*, TAHLEQUAH DAILY PRESS (Tahlequah, Okla.), Aug. 26, 1997, at 1.

68. *Byrd Returns to Talks*, *supra* note 61. Finley indicated that the chief has no authority to reinstate the tribal justices, and that the Tribal Council is the only arm of the Cherokee government which has the power to do so.

69. *Byrd to Meet with Officials*, *supra* note 66.

70. McGuigan, *supra* note 61.

71. *Byrd Returns to Talks*, *supra* note 61.

72. *Id.* at 3; see also Glenn, *supra* note 67, at 3 (quoting Governor Keating: "It will be an embarrassment to the state of Oklahoma and it will be a disgrace if one person puts their hand on another person."). Keating also stated that further conflict "will harm the sovereignty and integrity of the Cherokee Nation." *Id.*

73. *Byrd to Meet with Officials*, *supra* note 66.

signed," but added, "It is looking pretty optimistic."⁷⁴ Later that day, word came that an accord had been reached and that Byrd had signed an agreement he termed a "peace settlement."⁷⁵ The agreement (consisting of the same terms Byrd had earlier refused to embrace) required Byrd to accept the opinion of an independent commission's investigation into the constitutionality of the impeachment of the Judicial Appeals Tribunal, the reopening the Cherokee courthouse, and a moratorium on any legal action related to the dispute.⁷⁶ Returning to Oklahoma the following day, Byrd collapsed on a flight from Washington about thirty minutes outside of Dallas.⁷⁷ Complaining of chest pain, Byrd was attended by waiting medics when the plane landed.⁷⁸ At Irving Health Care Systems in Irving, Texas, tests revealed that Byrd had not suffered a heart attack.⁷⁹ According to Byrd's spokesperson, Byrd "had been pulling late nights in negotiations and was exhausted . . . He's okay."⁸⁰

III. The Massad Commission

The independent commission involved in providing a legal analysis and opinion regarding the Cherokee nation's constitutional crisis came to be known as the "Massad Commission." Originally contacted in June 1997 by Tribal Council members, attorney Anthony Massad assembled and chaired a three-member panel of legal experts in preparing a comprehensive report on the tribe's laws and constitution in relation to the current disputes.⁸¹ Massad, a former State Senator and former president of the Oklahoma Bar Association, enlisted retired District Judge Robert Layden of McAlester, Oklahoma, and University of Oklahoma law professor Daniel Gibbens to render a nonbinding opinion.⁸²

A. The Preliminary Report

Completing more than two months of analysis, the Massad Commission delivered its preliminary report on August 26 to Tribal Council members at the tribal complex in Tahlequah, just one day after Byrd signed the peace settlement in Washington, D.C.⁸³ A planned public hearing for later that day had to be postponed after the Commission spent almost six hours answering

74. *Id.*

75. McGuigan, *supra* note 61; *see also* Glenn, *supra* note 67.

76. McGuigan, *supra* note 61.

77. Donna Hales, *Chief Byrd Collapses on Airplane*, MUSKOGEE DAILY PHOENIX & TIMES-DEMOCRAT (Muskogee, Okla.), Aug. 27, 1997, at 1A.

78. *Id.*

79. *Id.*

80. *Id.*

81. Pagel, *supra* note 63.

82. Glenn, *supra* note 67, at 3; *see also*, Pagel, *supra* note 63.

83. Glenn, *supra* note 67, at 1, 3.

questions posed by the Tribal Council members.⁸⁴ Agreeing to hear comments and issue a final report, the Commission promised to stay in Tahlequah through the week if necessary.⁸⁵

Findings included in the preliminary report's conclusions were: (1) the impeachment of the Judicial Appeals Tribunal was unconstitutional; (2) the Tribunal had no right to reinstate Ragsdale until Ragsdale had completed an administrative review process; and (3) that the Tribal Council cannot operate or conduct business with less than a two-thirds quorum (ten members) of the full membership.⁸⁶ Byrd commented, "I am looking forward to finding out more about the investigation. They're not done."⁸⁷

The next day, on August 27, the historic Cherokee Courthouse reopened, revealing a sobering symbol of the turmoil which divided the second largest Native American tribe in the United States. Found lying on the floor of the courthouse, split cleanly down the middle, was the Cherokee Nation seal.⁸⁸

B. The Final Report

The Commission remained in Tahlequah, taking testimony in public hearings lasting three days.⁸⁹ One of the more than thirty citizens commenting to the Commission was Tribal Council member Troy Poteete, who told the Commission he had been "stonewalled" in his efforts to obtain copies of tribal financial records.⁹⁰ The Commission also heard from Byrd's predecessor, Wilma Mankiller, who pledged her help in resolving the conflict and attributed the tribe's leadership problems to "little experience and poor advice," and a rough transition from her administration to Byrd's.⁹¹ Some Cherokee citizens siding with Byrd alleged Mankiller was behind the tribe's turmoil, and that she was attempting to oust her successor.⁹² Mankiller, currently battling cancer and other health problems, termed the allegations "nonsense."⁹³ Byrd urged concessions on all sides and vowed that "little hitches" would not sidetrack peace.⁹⁴

On Friday, August 29, with the beginning of the Cherokee National Holiday only hours away, the Commission released its final report. None of

84. *Id.* at 3.

85. *Id.*

86. Hales, *supra* note 77.

87. Pagel, *supra* note 63.

88. Kelly Kurt, *Split Tribal Seal Symbolizes Rift Among Cherokees*, DAILY OKLAHOMAN (Oklahoma City), Aug. 30, 1997, at A-6 [hereinafter *Split Tribal Seal*].

89. Rob Martindale, *Panel Critical of Tribal Factions*, TULSA WORLD, Aug. 30, 1997, at A-1.

90. *Commission Continues Hearing Testimony in Cherokee Tribal Feud*, NORMAN TRANSCRIPT (Norman, Okla.), Aug. 28, 1997, at 5.

91. Kelly Kurt, *Cherokee Chief Asks All Factions to Come Together*, DAILY OKLAHOMAN (Oklahoma City), Aug. 29, 1997, at A-1, A-18 [hereinafter *Cherokee Chief Asks All Factions*].

92. *Split Tribal Seal*, *supra* note 88.

93. *Id.*

94. *Cherokee Chief Asks All Factions*, *supra* note 91.

the three branches of Cherokee government escaped the criticisms found within the report's nineteen recommendations.⁹⁵ One Commission recommendation urged that Byrd "refrain from terminating the employment of persons who . . . challenge the correctness or lawfulness of his performance as Principal Chief."⁹⁶ Another recommendation suggested the Council refrain from initiating impeachment actions against the Appeals Tribunal justices "at this time and in the foreseeable future" in order to improve relations between the two branches.⁹⁷ Noting citizen testimony which indicated the Justices have exceeded their authority and failed to follow their Code of Judicial Ethics, the Commission reminded the Justices that the "possibility of penalty for misconduct and the power of removal held by the Council" remains as a proper means of judicial control.⁹⁸

Chief Justice Ralph Keen, noting that the Justices chose not to testify before the Commission, stated, "I object strongly to the conclusions of fact they arrived at by hearing only one side of the story."⁹⁹ In a concession designed to help keep the peace during the upcoming holiday, Byrd agreed to forego the his State of the Nation speech, traditionally made during the celebration.¹⁰⁰ Additionally, Byrd stated, "It is time to see children laughing and elders talking. And it is also a time for us to begin to heal."¹⁰¹

IV. Overview of the Massad Commission Report and Recommendations

The full text of the Massad Commission Report can be found in this issue of the *American Indian Law Review*, beginning at page 375.

A. Legal Determinations

The Massad Commission Report actually consists of two related synopses. The Commission submitted its first (or preliminary) report to the Tribal Council on Tuesday, August 26, 1997, and discussed the legal determinations of the panel. Each of the three panel members researched a separate branch of the Cherokee Nation government: executive, legislative, and judicial.

95. Kelly Kurt, *Commission Issues Cherokee Report*, DAILY OKLAHOMAN (Oklahoma City), Aug. 30, 1997, at A-6 [hereinafter *Commission*].

96. *The Massad Commission Report to the Tribal Council of the Cherokee Nation*, 23 AM. INDIAN L. REV. 375, 405 (1998-99) [hereinafter *Massad Commission Report*] (reprint of 1997 report) (No. 11 under "Recommendations," in "Part II: Review and Factual Conclusions of Testimony Received by Special Commission Regarding Government of Cherokee Nation August 1997").

97. *Id.* at 403 (No. 10 under "The Executive Branch").

98. *Id.* at 397 (subhead "Conduct of Justices" under "The Judicial Branch").

99. *Commission*, *supra* note 95; see also Martindale, *supra* note 89, at A-3 (reporting that Keen said the justices did not testify before the Commission because they had already stated their case before the Tribal Council).

100. *Split Tribal Seal*, *supra* note 88.

101. *Id.*

Anthony M. Massad took on the task of determining the rights and authority of the Tribal Council (legislative branch); Judge Robert Layden was assigned the area of the judiciary; and Professor Daniel Gibbens examined the executive branch under the Cherokee Constitution and laws.¹⁰²

1. *The Legislative Branch*

Massad examined the Cherokee Constitution and Cherokee statutory requirements, reporting his determinations regarding: the number of Council members sufficient to constitute a quorum at Council meetings; preparation and availability of financial records; authorization to make financial expenditures; open inspection of records; and the duties of the Controller and the Executive and Finance Committees.¹⁰³ Massad concluded that the lack of a quorum at the Council meeting in which the Judicial Appeals Tribunal was impeached invalidated the Council's action.¹⁰⁴ Further, Massad recommended that "a complete review and reworking of the codes of the Cherokee Nation would be helpful in alleviating much of the controversy."¹⁰⁵

2. *The Executive Branch*

Gibbens' determinations concerned the duties and powers of the Principal Chief.¹⁰⁶ According to Gibbens, the Cherokee Constitution enumerates the appointment powers of the Chief, including the power to appoint the Judicial Appeals Tribunal, six cabinet officers, administrative assistants, and a marshal and deputy marshals.¹⁰⁷ Further, Gibbens examined the removal powers enumerated in the Constitution, concluding that the power to remove the Principal Chief, the Deputy Chief, and other elected officers resides within the Tribal Council.¹⁰⁸ Notably absent from the list of those the Council may remove from office is the Judicial Appeals Tribunal, who are in fact appointed, not elected. Gibbens commented that "there is no Constitutional provision specifying how the Judicial Appeals Tribunal justices are removed from office."¹⁰⁹ Further, Gibbens suggested, "If the Tribunal is deemed to be in error in performing . . . [their] task[s], the remedy is not in the hands

102. *Massad Commission Report*, *supra* note 96, at 376 ("Introduction" under "Part I: Synopsis and Review of the Cherokee Nation Constitution and the Cherokee Code Law August 1997").

103. *Id.* at 378-81 ("Council of the Cherokee Nation").

104. *Id.* In the Report, Massad comments, "Any law or action taken by the Council where less than ten members are present in attendance would be null and void and of no effect." *Id.* at 381.

105. *Id.*

106. *See generally id.* at 388-91 ("Executive Power Of the Cherokee Nation").

107. *Id.* at 388-89 (No. 2 under "Executive Power Of the Cherokee Nation").

108. *Id.* at 390 (Nos. 7-8 under "Executive Power Of the Cherokee Nation").

109. *Id.* (No. 8 under "Executive Power Of the Cherokee Nation").

of either the Council or the Principal Chief. Rather it is in the provisions of Article XV for amending the Constitution."¹¹⁰

3. *The Judicial Branch*

Layden's determinations are set out in four parts.¹¹¹ Part I provides a general discussion of the judiciary and judicial independence. Part II examines the Cherokee Constitutional provisions for the judiciary branch of Cherokee government, including: appointment of members of the Tribunal; terms of the Tribunal, jurisdiction of the Judicial Appeals Tribunal; and removal provisions. In this section of his report, Layden concurs with Gibbens that the Cherokee Constitution provides no method for removal of appointed officers.¹¹²

In Part III, Layden notes that the Cherokee Nation Code provides for ensuring litigants receive due process of law and prompt and speedy relief.¹¹³ Then, apparently because of the dispute regarding the Council's removal of the Judicial Appeals Tribunal, Layden again addresses removal provisions, noting that cause for removal under the Code consists of, "malfeasance or misfeasance in office, neglect of duty, mental or physical incompetence to perform the duties of the office, or the Justice being convicted of a felony . . . after becoming a Justice."¹¹⁴ Layden concludes that, according to Cherokee statutes, and following a recommendation for removal, the Justice involved should be afforded an opportunity to present a defense to the charges, and that a Justice may be removed from office by a two-thirds vote of the Council.¹¹⁵

In Part IV, Layden addresses certain specific areas including: jurisdiction; employee rights upon termination; authority to issue arrest warrants and search warrants; the lack of judicial authority to appoint marshals; and the basis for removal or impeachment of Justices of the Judicial Appeals Tribunal.¹¹⁶

B. *Factual Determination*

After receiving sworn testimony from more than thirty persons, on Friday, August 29 the Massad Commission issued its supplementary report containing a discussion of each branch of the Cherokee government and nineteen recommendations for action. The only copy of the transcribed testimony is

110. *Id.* at 390-91 (No. 9(a) under "Executive Power Of the Cherokee Nation").

111. *See generally id.* at 381-88 ("Judicial Department of the Cherokee Nation").

112. *Id.* at 383 ("Constitution of the Cherokee Nation").

113. *Id.* at 383-84 (subsection "A. Trial Court" under "III. Statutes of the Cherokee Nation").

114. *Id.* at 385 (subsection "B. Judicial Appeals Tribunal — Statutory Enactments" under "III. Statutes of the Cherokee Nation").

115. *Id.*

116. *Id.* at 386-88 ("IV. Answers to Particular Questions").

held by the Tribal Council, and the report notes that use or distribution of the transcripts is controlled by that body.¹¹⁷

1. *The Legislative Branch*

Of primary concern to the panel members was the Council's inability to obtain essential operating and financial information.¹¹⁸ The panel commented, "Without having the necessary documentation and information upon which to base their important decisions and actions, it is obvious that the problems now facing the Nation were and are inevitable."¹¹⁹ The Report strongly recommended that an oversight committee "capable of audit, accountability, and other needed information for budgetary matters" be formed.¹²⁰ Other testimony indicated that there exists legislation passed by the Council which is not completely followed, or worse, completely ignored.¹²¹ Recognizing the divisiveness within the Council, the Report called upon Council members to, "bond together for one purpose and one purpose only, viz, the proper functioning operation of the Cherokee Nation and the establishment of laws for the betterment of the citizens."¹²²

2. *The Judicial Branch*

In reporting on the judicial branch of the Cherokee Nation, the panel noted that it had previously determined that the removal proceedings against the Judicial Appeals Tribunal were void, and that it would not further comment on that issue.¹²³ The panel, however, did discuss other issues which arose from testimony it received. These included: jurisdictional problems; improper conduct of Justices (failure to provide due process, exceeding judicial authority, violation of Code of Ethics); and examples of situations in which a judge should have recused himself from a case.¹²⁴ The Report then turns to the issues of the validity of the appointment of Justice Keen to the Judicial Appeals Tribunal (and whether his term has expired), the nature of the office of Public Prosecutor, and the question of the missing or misplaced \$200,000 belonging to the Cherokee Nations Enterprises corporation.¹²⁵

117. *Id.* at 392 ("Introduction" to "Part II: Review and Factual Conclusions of Testimony Received by Special Commission Regarding Government of Cherokee Nation August 1997").

118. *Id.* at 393 ("The Legislative Branch").

119. *Id.*

120. *Id.*

121. *Id.* The panel illustrated its point by discussing the Employee Administrative Procedures Act passed by the Council. The Act required the establishment of an Appeals Board, but one was never put in place. Cherokee Nation employees were therefore denied their right to appeal terminations for cause or otherwise.

122. *Id.*

123. *Id.* at 396 (subhead "Judiciary" under "The Judicial Branch").

124. *Id.* at 396-99 (subheads, "Trial Courts and Appellate Courts," "Removal of Justices," "Conduct of Justices," and "Recusal of Judges," under "The Judicial Branch").

125. *Id.* at 399-400 (subheads "Appointment of a Justice," "Office of Public Prosecutor," and

3. *The Executive Branch*

In its report, the panel issued ten findings regarding the actions of the Executive Branch. Included among those findings: although the removal of Marshal Pat Ragsdale and his deputies was valid, it was not in the best interests of the tribe;¹²⁶ the search warrant for the Nation's Executive Offices was executed and carried out properly;¹²⁷ the Chief should revise procedures within his office so that all documents pertaining to government operations are readily available to the members of the Tribal Council;¹²⁸ and additional staff should be employed to smooth the functioning of the office of the Chief and the Tribal Council.¹²⁹ Paramount was the panel's conclusion that the Principal Chief conduct himself in a manner such that he not only expects loyalty but also encourages criticism from the other two branches of Cherokee government without threat of reprisal.¹³⁰

4. *The Recommendations*

Following the review of testimony related to each branch of Cherokee government, the panel specified nineteen separate recommendations. Those recommendations included, but were not limited to, the following topics: law enforcement; the prosecutor and independent investigators; jurisdiction of the Judicial Appeals Tribunal and trial court; reinstatement of the Justices of the Judicial Appeals Tribunal; method for removal of judges and application of the Canons of Judicial Ethics; termination review for Marshal Pat Ragsdale; possible amendments to the Cherokee Constitution and statutes; and availability of documents and records.¹³¹

V. *Epilogue*

As may be expected, the Massad Commission Report is not the end of this story. Council member Barbara Starr-Scott stated, "I think the commission is a starting point. We can use it as a building block."¹³² In fact, as this article is being written, the saga continues. Following is a limited list of events which continue to come to the attention of law enforcement, tribal officials, tribal citizens, and the press:

"Misplaced Funds" under "The Judicial Branch").

126. *Id.* at 400, 401 (Nos. 1, 3 under "The Executive Branch").

127. *Id.* at 401 (No. 2 under "The Executive Branch").

128. *Id.* at 401-02 (No. 5 under "The Executive Branch").

129. *Id.* at 402-03 (Nos. 6-8 under "The Executive Branch").

130. *Id.* at 403 (No. 9 under "The Executive Branch").

131. *Id.* at 404-05 (Nos. 1-19 under "Recommendations").

132. Kelly Kurt, *Cherokees Taking Up Suggestions of Panel*, DAILY OKLAHOMAN (Oklahoma City), Sept. 3, 1997, at A-11.

September 10, 1997: Judicial Appeals Tribunal Justices allege Byrd refused to abide by the peace settlement when he failed to turn over the court files and equipment necessary to conduct normal judicial operations.¹³³

September 23, 1997: Council members allege tribal accounting official Don Vaughn illegally paid auditors \$75,000 more than was appropriated by the Council. Vaughn agreed the payments were illegal.¹³⁴

October 16, 1997: Reports surface of huge bank overdrafts (as high as \$5 million) and shuffling funds between various tribal accounts. Harold DeMoss, chairman of the Financial Committee, comments that the Council cannot determine the financial condition of the tribe.¹³⁵

October 25, 1997: Housing Authority Director Joel Thompson claims to be cooperating fully with an FBI investigation into the financial affairs of the agency. One newspaper reports, however, that Thompson refused to turn over additional subpoenaed records regarding billing from a Washington, D.C., law firm.¹³⁶

October 28, 1997: Tribal records show that Byrd has paid hundreds of thousands of dollars in tribal funds for legal fees in relation to potential criminal charges he faces. Meanwhile, the Tribal Council proposes legislation aimed at forcing the chief to reveal how much the tribe is paying outside attorneys.¹³⁷

November 24, 1997: Five members of the Cherokee Nation Marshal Service finally are reinstated and placed on administrative leave according to the terms of the August peace settlement.¹³⁸

December 5, 1997: Marshal Pat Ragsdale alleges Byrd fulfilled "neither the spirit nor the specifics" of the peace settlement and that Byrd continues to refuse to return the Judicial Appeals Tribunal Justices' records.¹³⁹

June 2, 1998: A television news report indicates there have been no Tribal Council meetings since mid-March 1998, due to Council member boycotts.¹⁴⁰

133. *Justices Say Byrd Blocking Agreement*, NORMAN TRANSCRIPT (Norman, Okla.), Sept. 10, 1997, at 7.

134. *Audit Finds Problems, Cherokees Discover*, DAILY OKLAHOMAN (Oklahoma City), Sept. 23, 1997, at A-22.

135. *Lots of Cherokee Hot Checks Charged*, DAILY OKLAHOMAN (Oklahoma City), Oct. 16, 1997, at A-6.

136. *Tribal Official Says Files Released*, DAILY OKLAHOMAN (Oklahoma City), Oct. 25, 1997, at A-7 (on file with author).

137. Charles T. Jones, *Cherokee Council Demands Chief Release Tribal Records*, DAILY OKLAHOMAN (Oklahoma City), Oct. 28, 1997, at A-5.

138. Charles T. Jones, *Cherokees Reinstate 5 Marshals*, DAILY OKLAHOMAN (Oklahoma City), Oct. 25, 1997, at A-7.

139. *Cherokee Factions Meet with Federal Officials*, DAILY OKLAHOMAN (Oklahoma City), Dec. 5, 1997, at A-1.

140. *News: KOTV-6* (KOTV television 6 p.m. news broadcast, Tulsa, Okla., June 2, 1998).

June 9, 1998: Kevin Gover, head of the Bureau of Indian Affairs, announces plans to meet with the feuding factions of the Cherokee tribe in hopes of helping find a resolution to its continuing problems.¹⁴¹

June 19, 1998: Housing Authority Director Joel Thompson is indicted for embezzling funds from the Housing Authority coffers.¹⁴²

Tribal elections are scheduled to take place in 1999.

141. Kelly Kurt, *BIA Chief to Meet With Cherokee Leaders*, BARTLESVILLE EXAMINER-ENTERPRISE (Bartlesville, Okla.), June 9, 1998, at A5.

142. *News: KOTV-6* (KOTV television 6 p.m. news broadcast, Tulsa, Okla., June 19, 1998).