The Cherokee Freedmen: U.S. Shouldn't Step In

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There's an old adage spoken in Indian Country — Indians don't need another federal solution to a tribal problem. It was, after all, the federal government that created the problem in the first place. And a federal solution to the question of the Cherokee Freedmen is the last thing Indian Country wants or needs.

The Cherokee Nation's vote to amend its constitution to restrict membership to Cherokee people whose ancestry traces back to the so-called "Blood" list is a tragic decision that exposes the Nation to justifiable criticism — even outrage. It is easy for an outsider to interpret the vote as an indication that the Nation's voters have not learned from the racist history of the United States. Regardless, what is clear is that the Cherokee Nation's vote does not violate the U.S. Constitution, which by its terms is inapplicable to Indian tribes, who were not invited to the Constitutional Convention. The Cherokee Nation, as Chief Justice John Marshall wrote in *Worcester v. Georgia*, 31 U.S. 515 (1832), is a "distinct, independent political community" — a sovereign nation. And like any sovereign nation, it is accountable to its people. If there is to be any solution or change, it must come from within.

The *New York Times* editorial of March 8, 2007, demanding that the Bureau of Indian Affairs take action to "bring the Cherokee government into compliance with the law," urges a federal solution that does nothing to resolve the underlying issues. The *Times* suggested that it is time to force tribes to comply with the reconstruction amendments. But to apply American law to tribes is to start down the path (again) of eliminating the legal, political and cultural distinctiveness of Indian communities. Tribes have been fighting a political battle since treaty times to avoid the loss of their cultures.

Long history of paternalism

These calls to bring Indian tribes into "compliance" reek of the same paternalism and federal control that created the problem in the first place. It was the United States that imposed Cherokee citizenship upon the Freedmen in an 1866 treaty in a clumsy attempt to solve an "Indian problem" and a "Freedmen problem." And before that, it was the United States that sold out the Cherokee Nation to the Southern states (leading to the Trail of Tears) so that Southern plantation owners would have more land with which to exploit the institution of slavery. And before that, it was the United States that encouraged the Cherokee Nation to adopt the institution of slavery and other trappings of "civilization." And even before that, it was the United States that institutionalized and constitutionalized slavery in 1789.

Even after the 1866 treaty, the United States' intervention into Cherokee affairs included the allotment of Cherokee lands in 1893 and the abolition of Cherokee tribal courts, probably the oldest continuously operating tribal courts in American history, in 1898. In 1906, Congress authorized the president to appoint the principal chief of the Cherokee Nation, required presidential approval of all actions of the Cherokee government and even limited the number of days when the Cherokee council could meet.
Moreover, even when Congress passed the Indian Reorganization Act recognizing tribal authority to form constitutional governments, Congress forced Oklahoma tribes like the Cherokee Nation to comply with a watered-down version that maintained total federal control over the Cherokee government. It wasn’t until 1999 that a modern and indigenous Cherokee constitution came into existence. Arguably, the Cherokee Nation has not been able to make its own decisions about the Freedmen until now.

Government’s own obligations

The United States has its own obligations that should be met. It was the government that created the "Blood" and "Freedmen" rolls using the racist "one drop" rule in order to differentiate between the groups. The United States should be held accountable for that decision and its subsequent actions in refusing to certify the Indian blood quantum of the Freedmen. Once the government recognizes the blood quantum of the disenrolled Freedmen, as it should, it retains an obligation under a 1921 act to offer governmental services to these Indian people. The federal government’s role is not to coerce the Cherokee Nation to comply with its wishes (again), but to fulfill the obligation to the Freedmen it undertook in the 1866 treaty.

This is not the first time (nor will it be the last) that commentators demand a federal solution to a tribal problem. The United States has been compelling Indian tribes to adopt destructive tribal citizenship rules since the mid-19th century, even though authority to decide tribal citizenship is fundamental to the very essence of tribal nationhood. It has only been in the last few decades that the United States has begun to opt out of tribal citizenship matters.

Reversing that course in order to force the Cherokee Nation into "compliance" with inapplicable American law is a misguided repeat of history. What tribal sovereignty means in the modern era is that Indian tribes have every right to make and to learn from their own mistakes. From an outsider’s perspective, the Cherokee Nation has made a grave error, but from the perspective of Indian Country, it is the Cherokee Nation — and no other government — that should deal with this concern.

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