

## INTERVIEW

### **BARBARA SMITH, CHIEF JUSTICE, CHICKASAW NATION SUPREME COURT, ADA, OKLAHOMA**

*Barbara Smith is Chief Justice of the Supreme Court of the Chickasaw Nation. She is currently serving her third three-year term on the Supreme Court. She previously served as District Court Judge for the Chickasaw Nation.*

*Interviewed by Aaron Arnold\**

#### **In your experience, how important is it for tribal court judges to be members of the tribes in which they sit?**

I think it's very important. The problem has been in recent years that a whole lot of tribes didn't have people they can draw from. The Chickasaw Nation—we're pretty fortunate because we have a tradition and history of being well-educated, so we have had people to draw from. If you're a tribal judge [for the Chickasaw Nation], you have to live within the nation boundaries. I was living in Norman [Oklahoma]; I had to move across the river into the nation in order to be a tribal judge.

When I first started I didn't think it really mattered, but the longer I have done this . . . I do see that it is important for judges to be Native first and I think it is important, really important if you can, to draw from your own citizenship for your tribal judges. Like the states or the United States, we don't

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\* Aaron Arnold is director of the Tribal Justice Exchange at the Center for Court Innovation.

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draw outside our citizenship in order to bring judges into our area.

**I know that some tribes contract with non-Native judges for the reason that they don't have any tribal members who are attorneys or not enough to draw from to be judges. In your opinion, would it be preferable to use a tribal member who is not an attorney rather than use someone else from outside the community who is an attorney?**

I think it is important to have law-trained judges. The problem is it's not always easily accessible, so you do have to go with what is accessible to your tribe. Some places, they are so far away from things and there aren't a lot of tribes to draw from, so you have to draw your best person that you can find [to serve as a judge]. In my opinion, it's preferable that they be Native American first and foremost, but sometimes that's not possible.

**What would you say are the biggest differences between the role of a judge in a tribal court system and a judge in a state court system?**

I'm not sure. Speak a little more about that.

I've heard some tribal judges say things such as, "A state court judge is under constraints to hear cases with a certain amount of speed and is concerned primarily with preserving a certain process, where we tribal court judges have more flexibility to look at the person before us as a whole and decide how can we really go about approaching this case in a way that heals the people who it affects and we can take our time a little more and we can take a more holistic approach to justice." That seems to be a common theme.

I think that is part of the culture of Native American people and tribal justice systems. I think the irony is that that's where state and federal judges are going. I practice law, so I see a lot of different judges outside of tribal courts, and they are changing. They are really changing to more of what we have known as our traditional culture and working with the community to try to make it a more healing situation. I'm very hopeful. Have you seen all of the problem-solving courts that the federal government is funding with all these grants? See, they're changing. They're moving back to where we were

before *Ex parte Crow Dog*.<sup>1</sup> It is shifting back. I think the better way is to have a more therapeutic jurisprudence and I think tribal people have known that for a very long time. The non-Indian courts and the Indian courts are coming at it from different directions, but I see us heading into the same river and going the same direction.

**What do you see as the biggest obstacles facing tribal courts today?**

One, I think there is still some bias, either racially or culturally, in the non-Indian system against the recognition of tribal courts as real courts. We need to see both sides of the road, so that we can help the non-Indian court judges understand how we work, how both sides work. I think that's really better than trying to isolate. I know in Oklahoma we have some judges who still have biases against tribes. Those are hard to overcome, but I think education and reaching out—maybe doing what New Mexico and Wisconsin and other states have done to bring both types of judges together to understand one another<sup>2</sup>—that brings respect and knowledge.

**What do you see as some of the most common misperceptions that people from outside tribal court systems have about tribal court systems? You mentioned that there's an overall**

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1. 109 U.S. 556 (1883). This case involved a murder on an Indian reservation in the Dakota territory. *Id.* at 557. Crow Dog, a member of the Brule Sioux Nation, killed Spotted Tail, a Brule Sioux chief. *Id.* The families of Crow Dog and Spotted Tail agreed, consistent with traditional Sioux principles of justice, that Crow Dog would provide “restitution” to Spotted Tail’s family in the form of money, horses, and other provisions. See Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733, 737 (2008). Neighboring whites, unsatisfied with this perceived miscarriage of justice, demanded that Crow Dog be punished. *Id.* Crow Dog was subsequently prosecuted by federal authorities and sentenced to death. *Id.* at 737-38. Shortly before his scheduled execution, the U.S. Supreme Court decided in *Ex parte Crow Dog* that the federal government had no jurisdiction over crimes that occur between Indians on Indian land. See *Crow Dog*, 109 U.S. at 572. Crow Dog was freed. *Id.* Congress responded to this decision in 1885 by passing the Major Crimes Act, 18 U.S.C. § 1153 (2006), which conferred upon the federal government authority to prosecute serious crimes — murder, kidnapping, rape, assault, incest, arson, and burglary — that occur between Indians on Indian land. *Id.* § 1153(a). Together with later legal developments, the Crow Dog case and the Major Crimes Act have had the practical effect inhibiting tribes’ ability to respond to crime using traditional methods of justice.

2. [Ed. Note – In this issue, Paul Stenzel (*Full Faith and Credit and Cooperation Between State and Tribal Courts: Catching Up to the Law*) details some of these state-tribal collaborative efforts in New Mexico, Wisconsin, and other states.]

**racial and cultural bias at times. Do you see any specific misperceptions that state practitioners have?**

There are a lot of things that people outside the tribe don't understand. And some that people inside the tribe don't understand. They don't really get why we're sovereign. They really don't understand that. My brother and I teach tribal sovereignty at the University of Oklahoma. Students sometimes say, "We were conquered. So why are we sovereign?" They just don't understand tribal sovereignty. You have to understand that or you don't ever understand why there are tribal courts and how they work. The news media and everyone used to make fun of President Bush when he was asked about why tribes were sovereign and his response was, "Well, because they're sovereign."<sup>3</sup> That was a more difficult question to answer than we were giving him credit for. So those are things that have to be cleared up. Why are tribes still sovereign?

Students also don't get why we even have our own courts. They don't really. I get questions like, "Are those real courts? If you appeal it, does it go to the Supreme Court . . . the United States Supreme Court?" They just have no clue as to how this all works. Part of that is because we were all educated by the same public school system. A lot of lawyers still ask me, as a lawyer and as a judge, "Where do I appeal my case?" They don't understand that the appellate process is within the tribal court system. And that's it—that's your appeal. You're done.

Tribal sovereignty [is the biggest misperception] but then, from there, it's very easy to explain why we have tribal courts.

**You've already started to address my next question. How important do you think it is for state and tribal court systems to begin developing collaborative relationships and how do you feel that they can most effectively do that?**

I think it's very important. In Oklahoma we have 39 tribes. It's important because our jurisdictions cross one another constantly, so it's important for tribal judges and state judges to have a mutual respect and understand each other's jurisdiction, which is not an easy quest. It's very complicated.

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3. See Carl Hulse, *Bush Leaves Behind Giggling Democrats as He Hits Trail*, N.Y. TIMES, Aug. 10, 2004, available at <http://www.nytimes.com/2004/08/10/politics/trail/11TRAIL-TRIBAL.html>.

You have counties, you have municipalities, and in Oklahoma they're all right within tribal jurisdictions. So we're all in there together.

As tribes get more economically developed and their court systems grow, it is a growing problem for everyone to understand how to work through this. I have found it difficult in Oklahoma because a lot of state judges don't want to give up any of their power or jurisdiction. But then there are other state judges who are just dying to know because it reduces their dockets, it reduced the problems they're going to run into. In Oklahoma we're going to try to start small with certain areas like the Chickasaw Nation and see if we can get a little conference together of just the judges so we can take off our posturing and deal with "Who are we?" and "Why is it that we can do this?" I think most judges, if you can explain to them and teach them your perspective, they're appreciative of that. Again, it's about teaching and helping everyone understand. But we're not there yet in Oklahoma.

**I've seen you at a couple of conferences make presentations on the role of peacemaking in tribal justice systems. I wonder if you could speak a little bit about what peacemaking means to you and what you think the proper role of peacemaking is for tribal justice systems.**

I was introduced to peacemaking when I first became a tribal judge. The judicial branch sent me out on a journey to learn about peacemaking because they had heard about the Navajo's peacemaking and they wanted to have that within their court system. I went to Wisconsin and Judge Dave Raasch<sup>4</sup> was kind of my guide through all of this. I met peacemakers from the Mohican tribe and from the Ho-Chunk tribe. And really, they taught me about peacemaking.

As an attorney, I just assumed it was mediation. . . just another word for mediation. In this journey that I went on I learned that it is so much more than that. Mediation is about an issue. Mediation is you go in and you've got some issues you need to resolve. Peacemaking is about relationships. If you heal the relationship or help people learn how to heal the relationship—because it's a lifetime tool—then they can solve is-

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4. [Ed. Note – An interview with Judge Raasch also appears in this issue.]

sues themselves. But you have to heal the relationship first. That's really what peacemaking is all about: it's about the relationship.

When you go to non-Indian courts to resolve some kind of issue, there are usually two parties; there's a plaintiff and a defendant and those are the two people involved. Those are the only two people that really have any chance to say something. It's also limited because of the rules of evidence and the rules of the court. So the lawyers get to talk a lot, but the parties don't really get to speak very much. And so peacemaking tries to resolve that issue. In peacemaking, there may be two people at the center of the issue, but there are many people around those people that this affects. Once you bring people in to talk about things, everybody gets to talk. One of the things these peacemakers taught me was there's great healing in being able to tell your story; in being able to tell your story without judgment; to tell your story without criticism; to tell your story without anger. You just get to tell your story.

At the end there's also great healing in listening, in hearing the story of other people. We really don't listen very well. That was one thing that Dorothy Davids, the Mohican peacemaker, taught me. I kept wanting to interrupt and ask questions and finally she [said], "You aren't listening. You have to learn how to listen, to listen without thought of what you're going to say about what I'm saying." It was kind of a revelation, because as lawyers, that's all we do. We are listening so we'll know what we are going to say about what you said. In peacemaking, one of the things that everyone has to agree to is that you will listen; as long as that person has the talking piece, you listen without comment, without any kind of judgment or criticism. It has changed how I practice law, because I have become a better listener and people need to be able to tell their story—their whole story, no matter how long it is, they need to be able to tell it. We're kind of in a society right now of sound bites and text messaging, little bitty bits and people don't really get to speak and tell their story very often. I think that's hurtful. Peacemaking allows everyone to come together and talk, say what they want to say.

I'll give you an example. We had a young girl who was a minor; she was 16, but she wanted to petition the court for ma-

jority and to move out of her grandfather's house, where she lived with her sister. One of the judges said, "Why don't you go and talk to the peacemakers?" Part of what we do is we have them, if they can, write out their problem and each party gets to do that. It was all set up and she had written out her story and she had given it to the peacemakers. When the time comes for peacemaking, the grandfather and the sister show up, but she does not. What we have learned is that that's okay. We're still going to have the peacemaking circle. There are two people there that are going to tell their stories and get to listen to each other and they get to hear why this little girl wanted [to move out]. So the peacemaking continued anyway, without this little girl. The peacemakers later asked me, "What do you think? Do you think that was a good thing? We really didn't know what to do. We didn't know whether to go ahead." I said, "I think that's really good." The grandfather and the sister, they go back home and the little girl who wanted to move out is still living there. What we learned from that was that these two people healed and the little girl who had filed this petition, she decided to stay because their relationship had changed. It was resolved, even though she wasn't there. They changed; they were able to help her. And she stayed; she decided not to do the petition, and everything worked out well.

**It sounds like in the Chickasaw system the district court judges would refer people to the peacemakers if they feel it would be useful. It's almost like a separate or parallel system to the more standard adversarial court.**

It is, with some additions. Peacemaking is a tool the judges can use. But our peacemaking is also available if you do not have a court case and you just want to take your family over, or take your brother over; you guys just want to go and meet with the peacemaker, you can do that. You do not have to file a court case in order to do that.

**Is peacemaking used in criminal cases?**

You know we don't do much criminal [law] right now. It can be. I have talked with a lot of tribes where it is used. I met with a parole officer—he's the parole administrator for a big region in Wisconsin—he uses this for people who come out of prison. They sit in circles and they use peacemaking to help

those people who are trying to come back into society. He said that it's just been huge because it reduces recidivism of the people he's dealt with returning from prison.

Let me tell you a story. I have a nephew who was attacked by some young man when he was 16. My nephew was beaten pretty badly and had to have major surgery. It was really frightening to our family. I don't think we'd ever felt that kind of anger towards other people. That just wasn't part of our nature. But the anger was so great and hurtful and everything was about the anger, and everything was about the fear. . . all of these negatives issues. This went on for a long time, like several years. It appeared that this problem was between the victim and the perpetrator; it wasn't. This affected the victim's family, friends—a huge circle of people. I don't know, but I would guess that it affected the perpetrator's family and friends. It's a wide community that one crime affects and that is where the healing and the peacemaking, I think, is so important. We always look to peacemaking to help with child custody or divorce and visitation—family matters. We really should look at it to help in the criminal area too, because it helps to heal the community, whether your community is your family, or whether the community is your family and friends, or your community is your whole tribe, or your whole city. That's what's missing in our criminal system.

**The question I always come back to in my own mind is—is this something that can be tried outside tribal justice systems or is it too intertwined with Indian culture and tradition?**

I have used it outside tribal justice systems. A family in Norman asked me to do a peacemaking circle because they had a child who was doing drugs and their whole family was just fragmented by it. We had our peacemaking circle and this was the first time that they were able to sit down and talk. They had not been able to do that as a family for a year or two, they had been so fragmented. And they cried—they just talked and listened to one another. We didn't solve all their problems. In the end, the young man, he got up and left. He said, "I just can't do this anymore." But I talked to them later. They went on vacation; they were able to talk to one another. And they are not



tribal people. So I don't think this is limited to tribal people at all.

**With that in mind, how can a state court system, to which this entire concept would seem foreign, begin to try to incorporate a peacemaking approach into its existing structure?**

Well, it's interesting. I went to the Oklahoma Supreme Court—they have a mediation program where they train mediators to go around and help with mediation in state district courts.<sup>5</sup> I went up and helped them learn about peacemaking and we talked about what they could do with it.

I ended up at the other end of it a couple of months back [as a lawyer]. This mediator came into this mediation—there were three lawyers there and they started to speak and I finally I just went, “You know what, I want to recommend that all the lawyers leave the room.” And so we did. And the mediator turned to me, he said, “You know, I heard you at the Supreme Court, and I used that in my mediation, and I am so glad that you suggested that the lawyers leave.” So we left them there. They did a peacemaking circle. They didn't bring in all the extra people they could have. And they came to a consensus, an agreement. It's there. It's really a philosophy that your mediators—or other people who are trying to help resolve issues—it's a philosophy they have to adapt.

**In the context that you just described where you were working with a mediator from the state system, I imagine the mediator was not Native American, right?**

No, he was not.

**So he stepped in as a peacemaker of sorts in that situation. Do you feel that someone from a non-Native background can acquire the mindset or the skills needed to become an effective peacemaker?**

Oh yes, because it's about relationships. It isn't about issues, it's about relationships and it's about helping people navigate through those.

It's difficult to get lawyers to step into the light. Law school and lawyering, it is intense and great training and we

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5. Oklahoma established this program through the Dispute Resolution Act, OKLA. STAT. ANN. tit. 12, §§ 1801-1813 (West 2009).

learn to be adversaries on issues and it's difficult to change that. So it's a hard sell. It took a while for me to understand what they were talking about—all those other people. But it really has changed the way I practice law. It's changed the way I approach every case, because lawyers are really the leaders in cases—the judge is there to “do the courtroom,” but lawyers are leaders in cases.

In one case, one of my young lawyers had been handling a guardianship that had gotten way out of hand. I said I'll go help and there we were in court and it was funny. Here we were in state court and the only Native American in the group was me and we went outside and stood in the foyer. And we were in a circle, because that's the way people gather. We were in a circle and everyone was saying whatever they wanted to say and we got it resolved and when we got back to the office the young lawyer turned to me and said, “You used that peacemaking.” And I thought, I didn't even realize I had done that. He was right, I had. That's when I kind of realized there are other ways to practice law than “the fight.” We can be healers.

**What do you feel state courts can learn about the administration of justice from tribal courts, and have you come across any specific examples of programs that state courts are using or can use that come from a tribal tradition?**

I've already mentioned one—all of these new problem-solving courts that state courts are using: mental health courts, juvenile courts—I've even seen prostitution courts.<sup>6</sup> All types of courts that are trying to help people. I know they're shooting for healing people and helping them return to society, but I think that they can learn a great deal.

We have a great judge in Cleveland County that I admire, Judge Lucas. When he came in as judge he was pretty—you know how some judges can be demeaning and overpowering and trying to frighten the people and he has changed so. I gave him one of the peacemaking books that I always have people read, and hopefully that was helpful to him. But he has changed so that when he does the drug courts he uses more of a

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6. See, e.g., Sam Merten, *Courting Hookers*, DALLAS OBSERVER, July 9, 2008, available at <http://www.dallasobserver.com/2008-07-10/news/courting-hookers/> (detailing Dallas County's efforts to create a prostitution court).

therapeutic jurisprudence, because he is kind and hopeful and encouraging and the clients want to do well for him. They need that; it is a healing process just in itself. He could be mean and threatening, and he could do those things, but those things don't work. I do think state courts could learn from that: that people are people. They need encouragement; they need to want to do this for you—not only you, but for themselves. They need that healing moment, even if it's a moment.

The other thing that I think [state courts] are missing the mark on is that they need to address the culture of the people they're dealing with, because people need a cultural base. Most Americans these days, especially those in trouble—they have no base. They have no sense of who they are and how they got here . . . pride in their connection. They need that and they don't really get that. I think it's a huge error and I think that's something that tribal people have been able to hold on to, even though there have been many attacks against our cultural base. We still have it. I know I am Chickasaw. I know who my ancestors are. I know some history; I'm learning more. It's healing to a person who's floundering in this world, it's healing to know what your base is—your cultural, or ancestral, or your community base. There are a lot of people in the United States who wouldn't even know where to start, just wouldn't know where to find out who they are. They're just here. They're just today and that's not enough. I do think state courts should take that and help people learn about who they are. Once you know who you are, you have a better chance at being able to move forward.

**Let me follow up on that: can you think of any specific ways in which a judge or a court can promote those kind of values and help people find a connection to their culture and their history?**

I was a teacher before I was a lawyer, before I was a judge. I think that should be a part of whatever counseling or program [that people are ordered to complete]. I think there should be a separate, "I'm going to help you find out who you are, who your people were, where you're from. I'm going to help you build a cultural base." That should be the groundwork that goes along with any of the counseling, or any of the anger man-

agement, all of those things, because that helps you find peace in who you are.

I have a young man who's in trouble in the state juvenile system and as I was sitting with him in detention on Monday and talking to him I said, "Are you Native American?" And he said, "Yeah, yeah. I'm Chickasaw and Choctaw." And I said, "Are you a citizen of one of those tribes?" And he said, "No, no. My Mom, she never . . . My Dad is, but they never did, you know, get my citizenship." I thought, you know, there's a start for this young man. There's where someone needs to help him start. He needs a guide through this to help him get connected. So many of these people—and he was one of them, they're not connected to anything. He can't read, so he can't be successful in school. He has a learning disability. He is Native American, but doesn't really know anything other than he might be Chickasaw or Choctaw. That's the place to help him build who he is. And from there he has a chance.

**I want to try to flip that question around and pose it the other way. Do you feel that tribal courts can take the ideas that are being developed in state courts systems—like wellness courts and mental health courts and restorative justice initiatives—and incorporate those back into tribal courts?**

The road goes both ways. I think we can all learn from each other and take the best parts of each other—it would lead to nothing but a positive outcome. I think it's important that we stay abreast of all this. I always think whatever is good for people will be good for both courts.

**In the state court systems, we're always looking for ways to innovate, ways to improve the way justice is administered. How common is innovation in tribal court systems and how do you mesh the desire to innovate and improve with the desire to adhere or to return to traditional practices?**

I think there's a misconception that traditional practices are stagnant and I don't think that tribal people were ever stagnant. People have a tendency to say, "the traditional way was this way and that was the only way it was." We are people of evolution; we evolve and we change. Native people were very good at changing with the seasons, changing with the terrain, changing with the situation and adapting, so when you talk

about innovation and traditions I think they are easily melded together. And I do know there are people on both sides of that that disagree with me and feel that traditional is just one way. But we are making traditions every day as we move forward in this world and we have always moved forward in this world. We have never stayed in one place. I think that it's the only way to go: tradition and innovation—they should be together.

**It seems that tribes across the country are working to redefine how they want to structure their own justice systems and that the federal government is starting to make it possible for tribal communities to handle justice in their own ways. Assuming that you agree with that premise, do you think that tribes are doing a good enough job of sharing with each other the kinds of ideas and practices and best practices that they're developing in their individual communities?**

I think that we're giving it a good try here. You have to remember we're at the early stages of this. The Chickasaw Nation—we're pretty well developed, but we've only been doing this since 2003. That's not very long. I will say that the federal grants we've received have enabled us to travel to other places, to meet other people from other tribes. We have—for a century or more, been isolated. We didn't even know about each other because of the assimilation approaches to tribal people. Are we doing a good enough job? I think we're doing a great job. Can it be moved forward and better and bigger? I think it will every day. I think it will evolve and we will be more connected and we know more about one another. I love it, and if my father were alive, he'd love it. He was a Native person. He and his sisters would be amazed at what's happening today in Indian country. They would be just amazed and thrilled.