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# DAVID CORNSILK ON FREEDMEN CITIZENSHIP RIGHTS AT CHEROKEE

As context for my overview with David Cornsilk (Cherokee Nation) and the question of African American slave descendants who are part of their nation, it should be noted that many enslaved black people accompanied the Cherokee when the U.S. federal government forcibly removed the tribe from their traditional homeland in what became North Carolina and Georgia in the 1830s. The Freedmen became full citizens of the Cherokee Nation after Emancipation, as part of the Treaty of 1866, between the Cherokee Nation and the United States, as documented in *Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma*, by Circe Sturm.

The Cherokee signed the 1866 treaty in defeat, after the Civil War, since they had fought for the Confederacy. The treaty committed that the slaves, who had been freed by tribal decree during the war, would be absorbed as citizens in the Cherokee Nation. However, by the late 1880s, during the allotment period, when the U.S. government opened up tribal lands in Oklahoma to white settlers, thus breaking its agreement with the tribes, Congress created a new census of the Five Civilized Tribes, of which the Cherokee are one, along with the Seminoles, the Chickasaws, the Choctaws, and the Muscogee. This new census was created by the Dawes Commission, named after the Dawes Allotment Act of 1887, and it is this same census that the Cherokee Nation would later use to determine the eligibility of Freedmen to become citizens of the tribe. Prior to this Dawes census, the previous census of the tribe had noted both the Native and the African ancestry of the Freedmen and counted those of mixed ancestry as Cherokee. However, under the new census, census takers reclassified those who looked black (or had known African ancestry) as Freedmen, without noting their Indian ancestry. Nonetheless, whether classified as Indians or Freedmen, they were considered citizens of the Cherokee Nation under the 1866 treaty.

Despite the guarantee of the Freedmen's citizenship rights through the 1866 treaty, by 1983 the Cherokee Nation had expelled many descendants of slaves by requiring them to show a degree of Indian blood through the Dawes Rolls.

Thus began a long legal battle by the Freedmen descendants and some Cherokee citizens to be re-enfranchised. By March 2006 the Cherokee Supreme Court reinstated them, but that ruling incited a special election within the Cherokee Nation on February 3, 2007, when 75 percent of the Cherokee voters cast their ballot in favor of an amendment limiting citizenship. The election specifically asked voters whether to amend the Cherokee Nation's constitution to limit citizenship to those who can trace their heritage to the "Cherokee by Blood" Rolls, part of the census known as the Dawes Rolls of 1906.

David Cornsilk is a recognized tribal genealogist, historian, and legal advocate and a civil rights activist. He joined the program for an interview on the recent vote in the Cherokee Nation that disenfranchised the Freedmen. Cornsilk self-identifies as a "by-blood citizen" of the Cherokee Nation and lives in Tulsa, Oklahoma. As he shared, he is the son of John and Tinsy Cornsilk and the father of J. W. and Elena Cornsilk, all of Tahlequah, Oklahoma. He received his early education in schools around Tahlequah, which is the hub of the Cherokee Nation, and spent some time in various states. He graduated from Northeastern State University with a bachelor's degree in biology. Cornsilk worked in education for a number of years and started a tribal newspaper called the *Cherokee Observer*, which has been an active publication since 1993, in addition to his longtime work as a legal advocate. He began working as a civil rights activist to protect the rights of Cherokee Freedmen in 1988, five years after their first unlawful expulsion. Cornsilk filed a lawsuit against the Cherokee Nation Tribal Council on behalf of Freedman descendant Lucy Allen in 2004. In March 2006 the Cherokee Supreme Court ruled that Freedmen have long-standing citizenship rights rooted in the Treaty of 1866 and recognized by the Cherokee Constitution. The Freedmen case remained in federal litigation and eventually went to the District Court of the District of Columbia with the Honorable Thomas Hogan presiding. The Freedmen case was finally decided on August 30, 2017. The ruling was in favor of the Freedmen descendants, who are now able to register as citizens of the Cherokee Nation.

This interview took place on March 12, 2007.

**J. Kēhaulani Kauanui:** The Cherokee Nation expelled many descendants of slaves in 1983 by requiring them to show a degree of Indian blood through the Dawes Rolls. What prompted that expulsion in 1983, given that the treaty provisions had been honored before that time since the 1866 treaty?

**David Cornsilk:** Well, in doing research on the activity that was taking place at that time, we found that there was a belief by the principal chief then, Ross Swimmer, who is currently serving in a trust position with the Bureau of Indian Affairs, that he believed there was a bloc vote of Freedmen who would vote against him in the upcoming chief's race. And in order to prevent them

from voting, he required a certificate of Indian blood degree card that basically excluded them from enrollment.

**JKK:** So a very instrumental exclusion to keep himself in power?

**DC:** That's what we believe, yes.

**JKK:** I see. Now, recently Principal Chief of the Cherokee Nation Chad Smith has defended this recent vote from February 3, 2007, by arguing that it was simply a matter of self-determination, while some opponents of the ballot question argue that attempts to remove the Freedmen from the tribe were motivated by racism. Can you please tell us, what are these tensions between the assertions of self-determination to define the tribal citizenry and the racist legacy left by the Cherokee tradition of slaveholding?

**DC:** Well, the basic premise of tribal sovereignty is the authority to determine who you are, who constitutes the citizens of your nation. The problem that we face in this instance is that that determination is being made on a racial line. The rolls that were made of the Cherokees that we use to determine our citizenship were made in an era of rabid racism in the United States, 1902, and so the fact that persons of African ancestry were put on a separate roll in 1902 should not exclude them from citizenship today, and that's exactly what's happening. The Freedmen Roll is constituted of persons of African descent, most of them having some Cherokee blood, just the same as the "Cherokee by Blood" section, but their section was not recorded, because in the era in which that roll was made it was believed that African blood tainted you to a degree that your other blood didn't count.

**JKK:** Right, and that's one of the racist holdovers from the institution of slavery and the Jim Crow laws, right?

**DC:** And so what we're doing now is we're punishing descendants today for a racist act that happened against their ancestors a hundred years ago.

**JKK:** Right. What about tribal leaders who claim that the Freedmen don't have any Cherokee ancestry?

**DC:** Well there's only two possible answers to that statement. The first one is that they're ignorant of their own tribal history. Or they're lying. And I believe the latter.

**JKK:** And also, as I pointed out in my introduction, even for those who may not have Cherokee ancestry, the treaty still provides for them to be enfranchised in the Cherokee Nation, no?

**DC:** Exactly. The Cherokee Nation, whenever the first person was adopted into the tribe who had no Cherokee blood, stopped being just a tribe and became a nation. We became an ethnically plural nation, the Cherokee tribe being a part

of that nation along with now the Delaware tribe, the Shawnee tribe, the Freedmen, some adopted whites, some adopted Creeks. We are an ethnically plural nation that is currently trying to remove the black members of our tribe.

**JKK:** I recall when we met back in the summer of 2004 at a conference organized by the descendants of Freedmen of the Five Civilized Tribes, with president Marilyn Vann as a key figure of this Oklahoma City-based organization. What impressed me there were the links being made between those who already had their rights as citizens, although few in number there in attendance, and those who are still fighting for their place in the Cherokee Nation. Can you tell us about the coalitions between so-called “by blood” citizens such as yourself and members of the Freedmen organization in terms of working toward social justice? Do many other Cherokee citizens accompany you in your support of the Freedmen’s legal rights?

**DC:** Well, I think probably we would be if an educational campaign were out there. The principal chief sent out material that painted the Freedmen as newcomers, as persons who are trying to access services, benefits, only that they had no Indian blood. And I believe that given the proper amount of time and education, the Cherokee people would come to realize the folly of their actions and would stand beside the Freedmen. But there are a large number of—well, I don’t want to say large—but there are a number of Cherokee citizens by blood who support the Freedmen. I think the vote indicates that, because for every person who voted there’s approximately a hundred people who believe the same way that they believe.

**JKK:** Now, in terms of an educational campaign, what do you think it would take for people to really have to confront their own family histories as a part of a broader tribal history of this legacy of slavery?

**DC:** Well, I think that if each Cherokee citizen would do what I have done and look at their own family history, their own connections to the tribe, to slavery, to the descendants of the Freedmen who are connected to their own particular families, they would find exactly the same thing I have found. That just because the Freedmen can be looked at and identified phenotypically differently from us—they may have curly hair or African features—when you look at the paperwork, you find that the Freedmen are inextricably intertwined in the Cherokee Nation. What we have done, we have basically cut off an arm of our nation, and I believe that in so doing we face the possibility of a national hemorrhage, because once you start chopping pieces of yourself away, what part is next? Will we now see the thin-bloods questioned as to their rights? Are you really an Indian if you’re  $\frac{1}{512}$  degree of blood? Will we say to the Delawares, the Shawnees, “You’re not really Cherokee Indians, so let’s chop you out”? It’s just a slippery slope and it’s frightening.

**JKK:** It sounds like a literal disembodiment of the nation's citizenry in terms of cutting out family. Family expulsions.

**DC:** Well, and, is it really legitimate, I ask, that once made a citizen, someone could be unmade? That's the question I would ask. You know, the American Indians were made citizens of the United States in 1924. You know, of course, some were made citizens under particular legislation, the Cherokee being one, but could now the people of the United States say, "Well, you know, we don't particularly like these people, you know, we don't like their brown skin or their straight black hair, so let's do a petition and let's vote them out." And it's, really, it sets a bad precedent. It has shamed the Cherokee Nation. You know, our tribal culture is one of inclusion, and this has shown that we have an underlying racist view that has festered in our nation since the Civil War.

**JKK:** Are there any visions or discussions about the Freedmen who have been expelled? To create their own tribal entity and seek separate federal recognition?

**DC:** There has been some discussion of that, and the Treaty of 1866 makes some provision for self-governance for the Freedmen if the Cherokee people do what we've done, basically, exclude them from participation in our government. I am reluctant to embrace that, because I have a strong belief in the inclusive philosophy of our people, and I would hate to see, and I have hated to see, division in our nation. You know, there's strength in unity, and this has created so much disharmony and disunity in our nation. And I believe that in the end, the Freedmen will be citizens in the Cherokee Nation. I believe in justice and that justice will prevail.

**JKK:** I want to go back to something you said. You drew the analogy between the Freedmen being citizens and the Delaware. What about the Delaware? What's parallel about that given that so many Delaware want to break away in terms of having their own recognized nation outside of Cherokee?

**DC:** Well, one thing that has exposed a hypocrisy in our tribal government is that they have used the 1866 treaty to enslave the Delawares, while using opposing language saying the 1866 treaty is not valid in reference to the Freedmen.

**JKK:** I see, so a total contradiction.

**DC:** A very total contradiction.

**JKK:** What about the family, the very profound way that you put it around chopping pieces of oneself away? It would seem, then, that if people really looked seriously at their family histories they would find that the Freedmen that they seek to exclude are their own kin, that is, that they trace to the same forebears.

**DC:** That is true, and I just did some research on a very prominent Cherokee family. I won't state their name, because I don't know if they would want me to, but I found that their ancestor, who appears on the Dawes Roll, was the patriarch of a very large, prominent, and very wealthy formerly slaveholding family, and the Dawes Commission in 1902 was asking him if he was familiar with this one particular woman who was of "Negro descent" and was listed on the Freedmen Roll. And he said, "Yes, that is my colored cousin." And they said, "Are you familiar with her death?" And he said, "Yes, she passed away right here in my home."

And then they said, "Where was she buried?" "She was buried in our family cemetery." Now that tells you that there was a very strong tie between that Freedman individual and that particular Cherokee family. And that is how the Cherokees viewed their former slaves, family members after the Civil War and prior to Oklahoma statehood. It was the influx of southern, white racists into Oklahoma after statehood that forced the Cherokees to adopt a very rabid form of racism that was imported. It was not indigenous to our people. You know, the first law passed in the state of Oklahoma was segregation of railcars.

**JKK:** You filed the lawsuit against the Cherokee Nation in 2004 on behalf of Freedmen descendant Lucy Allen. Can you tell us more about the specific circumstances of that lawsuit?

**DC:** Well, Lucy Allen came to me in 2004. She's an elderly Cherokee woman of Freedmen descent, and she was hurt. She had been denied access to her civil rights in the Cherokee Nation, as had all of the Freedmen since 1983, and whenever she asked me "What can we do?," well, I believe strongly in tribal self-determination, that being the right to live under our own laws and have our own court. And so I said, "Let's take it to court; let's take it to tribal court." I trusted that our tribal court would look at the issue fairly and justly and come to a just conclusion. And so we did. And the basic argument that we made was that the 1976 constitution was inclusive of all the citizens of the Cherokee Nation. It said if you have an ancestor on the Dawes Roll that you were in. If you don't, you're not it. And Lucy Allen, both of her parents appear on the Dawes Roll as Freedmen. She also had Cherokee blood that was not recorded by the Dawes Commission, because her family was of African descent. So we made our argument, and it was really kind of funny. I'm not a lawyer. I'm just an average guy who loves law, and the argument that I made got some snickers but it was basically that if you go to a hamburger stand and you order the deluxe cheeseburger, then you get everything that comes on the deluxe cheeseburger. If you don't want onions on it, you have to say "no onions." And when the Cherokees reorganized in 1976 they said, "We want one Cherokee Nation to go," and they didn't say "hold the Freedmen." And so, we got all the citizens, and rightly so.



**JKK:** Now, from '76 to '83 it wasn't an issue. So, what did it take in all those years? From 1983, when you said Ross Swimmer perpetuated that exclusion, and then your lawsuit on behalf of Lucy Allen comes in 2004, what happened in the interim years?

**DC:** Well there were some minor skirmishes. Well, I don't want to say minor. They were major, they just were moving us forward in this battle. In 1983, Reverend Roger H. Nero—he was an original enrollee on the Dawes Roll—filed suit because he was not permitted to vote. And that went to the federal court and the Tenth Circuit Court in Denver, and that court ruled that the Cherokee Nation had its own court, and therefore his argument was an internal matter of the tribe and should go to tribal court.

He subsequently passed away, and was not able to complete that process. And so then, in 1988, I began a campaign trying to get the officials of the Cherokee Nation to reverse what had happened to the Freedmen. I wrote a letter to the Chief Mankiller, and she responded in the press by saying the Freedmen have no Indian blood and therefore should not be members of the tribe. And so I realized that this was not going to be solved politically, it would have to be determined by the courts. And so that's when I filed a case for a woman named Bernice Riggs, who also had Cherokee blood, and the final ruling of the court was that she had Cherokee blood, but because her ancestors were on the Freedmen Roll she was excluded from enrollment. They applied the *Martinez v. Santa Clara Pueblo* doctrine that says the tribe has the right to determine its own citizenship.

**JKK:** Right, the 1978 U.S. Supreme Court ruling.

**DC:** But it was a misapplication because, previous to that, the tribal court had already ruled that the council did not have the authority to add requirements to constitutional provisions. They had previously added a residency requirement to the office of the principal chief, and the tribal court struck it down as unconstitutional, because it was extra-constitutional. And that's what happened in the Lucy Allen case: the blood requirement was struck down because it was extra-constitutional.

And the court reversed itself in the Allen case, saying that because the provision was extra-constitutional Lucy Allen and all the Freedmen should be members of the tribe. And what's interesting is in the reversal: one of the judges, who had been a judge in the Riggs case, reversed himself and wrote a special concurrence stating why he had reversed himself and why he had been convinced that the Freedmen were citizens of the nation.

**JKK:** Wow, that is remarkable.

**DC:** It is very remarkable, and shows that given the right information, the right conclusion can be reached.



**JKK:** Now, in wrapping up, I want to ask you, I want to go back to something you said about the principal chief of the Cherokee Nation, Chad Smith, painting the Freedmen as newcomers. Now, advocates of expelling the Freedmen call it a matter of “safeguarding” tribal resources, which news reports have said include a \$350 million annual budget from federal and tribal revenue, and Cherokee share of the gaming industry that for U.S. tribes overall takes in over \$22 billion a year. The grassroots campaign for expulsion has given heavy play to warnings that keeping Freedmen in the Cherokee Nation would encourage thousands more to sign up. Now, news reports say that since the ruling last March 2006, more than two thousand Freedmen descendants had enrolled in citizens of the tribe. Was that spike in enrollment what prompted this recent ballot initiative?

**DC:** I believe that the potential for new voters is what prompted this petition. It’s not a matter of protecting tribal resources, because the Cherokee Nation goes on in hundreds of communities around Oklahoma and around the United States begging for Cherokees to enroll. Our tribal enrollment increases by a thousand citizens every month, and that’s phenomenal. That’s not just births, those are Cherokees whose great-great-grandma moved away, and suddenly they decide to come back. So it’s not about protecting tribal resources from new citizens, it’s about protecting Chad Smith’s ability to get reelected in the June election. He is afraid of the Freedmen vote, just the same as Ross Swimmer was, because he has been so virulently racist against them, and so he wanted them excluded. His supporters on the council attempted to get a special election several times and were defeated, and when they were finally able to get it on the June ballot, well that wasn’t good enough, because that still allowed the Freedmen to vote in the June 2007 election for the principal chief. And so he wanted them excluded ahead of time.

**JKK:** I see. Very similar to the 1983 situation.

**DC:** Identical.

**JKK:** I understand the court challenges by Freedmen descendants seeking to stop the election were denied, but that a federal judge left open the possibility that the case could be refiled if the Cherokees voted to lift their membership rights. What do you think is the next step, legally, given this recent vote?

**DC:** Well, I’m not going to address that, because the attorneys right now are in conference trying to determine what their next step is, and I really don’t want to jeopardize the information that I have in my head that they have shared with me.

**JKK:** Fair enough.

**DC:** Because we don’t want the other side to know what’s going to happen until

it happens. But I do believe that the federal court will take action, and I believe that the Bureau of Indian Affairs will also be required, although reluctant, to take action.

**JKK:** Would you like to leave us with any last thoughts on this issue that we can take with us and meditate on?

**DC:** Well, I think the most important thing for the average American citizen to keep in mind is that the Cherokee Nation draws down approximately \$300 million in tax money from their pockets. And they are using that money to fund an election to discriminate against their own citizens, and I think it would be incumbent upon every U.S. citizen to approach their representative and ask them, "Is this an appropriate use of my tax money?"