VOL. 43 NO. 1

human rights

American Bar Association Section of Civil Rights and Social Justice

NEW HORIZONS IN INDIAN COUNTRY?

WHAT LIES AHEAD

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Introduction

New Horizons in Indian Country

By Kirke Kickingbird

The spring 2017 meeting of the Section of Civil Rights and Social Justice was held in St. Louis in late April. It was a joint meeting with the Section of State and Local Government, the Public Contract Law Section, and the Forum on Affordable Housing.

St. Louis has always been a unique site at the conjunction of the Mississippi, Ohio, and Missouri Rivers. Around the year 800 or 900 across the Mississippi in Illinois, a thriving Native American Mississippian Culture city of 50,000 inhabitants existed. This community with residential and temple mounds sprawled across both sides of the river and encompassed the present site of St. Louis as well. The Illinois site is known as Cahokia, named after a tribe that lived in the area but came to the area much later than its mound builders. The city had 120,000 earth mounds that resembled the stone architecture north of Mexico City.

It was events a thousand years later that have a present impact. Cahokia had been a commercial center because of the rivers. It remained a commercial center when President Jefferson bought the Louisiana Territory from France.

Cahokia's mounds on the east bank of the Mississippi were the significant architectural feature long ago. The Gateway Arch on the west bank in downtown St. Louis is the significant architectural feature today. The Arch symbolizes St. Louis as the Gateway to the West.

The economic growth of St. Louis began with its founding as a fur trading center in 1763. Much of the initial trade was with the Osage Nation. The French traders Laclede and Chouteau reached out to tribes farther up the Missouri and had a monopoly on the fur trade with Santa Fe, New Mexico. The trading posts of the Chouteau family first reached south into northeast Oklahoma and then into south central Oklahoma close to the Red River.

The Louisiana Purchase Treaty bought what Spain and France possessed in the Louisiana Territory. Article VI of the treaty makes clear that it was essentially a quitclaim deed because ownership issues had to be settled between the Indian tribes and the United States.

Article: VI
The United States promise to execute Such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by mutual consent of the United States and the said tribes or nations other Suitable articles Shall have been agreed upon.

This was consistent with the long-standing treaty relationships established between the tribes and Britain, France, Spain, and the United States. Prior to the Louisiana Purchase, the United States had signed about two dozen Indian treaties. By 1871, the United States had signed over 400 treaties and agreements with tribal governments.

The expanding United States population required new land. The only way to achieve this was for the United States to purchase land from the Indian nations.

continued on page 5

PHOTO: (LEFT AND UPPER RIGHT) WILSON ADAM SCHOOLEY; (LOWER RIGHT) MOVIE POSTER FOR *SLIVER OF A FULL MOON*

VOLUME 43 NUMBER 1

humanrights

humanrights is an official publication of the ABA Section of Civil Rights and Social Justice

Thanks to our invaluable guest editors
Kirke Kickingbird, Mary Smith, Lauren van Schilfgaarde, Patty Ferguson-Bohnee, Geoffrey D. Strommer, Jerry Gardner, and Lawrence R. Baca

Printed on recycled paper

Human Rights (ISSN 0046-8185) is published four times a year by the Section of Civil Rights and Social Justice (CRSJ) of the American Bar Association, 321 N. Clark St., Chicago, IL 60654-7598. An annual subscription ($5 for Section members) is included in membership dues. Additional annual subscriptions for members are $3 each. The yearly subscription rate for nonmembers is $18 for individuals and $25 for institutions. To order, call the ABA Service Center at 800/285-2221 or email service@americanbar.org. *Postmaster:* Send notices by Form 3579 to *Human Rights*, 321 N. Clark St., Chicago, IL 60654-7598.

INDIGENOUS RIGHTS *of* Standing Rock

Federal Courts and Beyond

By Carla F. Fredericks, Rebecca Adamson, Nick Pelosi, and Jesse Heibel

The controversy surrounding the Dakota Access Pipeline (DAPL) is ubiquitous—galvanizing indigenous communities and allies across the globe to stand with Standing Rock. One positive outcome has been a historic, revitalized movement to protect indigenous and human rights in the face of ever-expanding exploitation in the fossil fuel industry. However, the fight against DAPL has been historic in more than just size and scope. As the case proceeds through the courts, the tribes have expanded the battlefield by going beyond domestic litigation and appealing directly to international human rights bodies and initiating broad corporate engagement. This multi-pronged approach to defending tribal rights has played a key role in not only sustaining the conversation, but also expanding the forums in which the conversation takes place while the federal courts' action continues.

The circumstances surrounding DAPL have proven what indigenous communities across the globe have known for centuries—that the human, social, cultural, and environmental impacts of large extractive and infrastructure projects threaten a wide range of indigenous and human rights, including those enshrined in the United Nations Declaration on the Rights of Indigenous Peoples. While many have identified the rights threatened by such projects, the DAPL has exposed a reality of Indian tribes that was previously invisible to the American mainstream. Projects like this, and the governments that allow them, implicate and oftentimes violate internationally recognized human rights and collective indigenous rights, including the rights to culture; health; water; property; assembly; personal security; participation in government; and free, prior, and informed consent.

It is ironic that a global controversy over indigenous rights takes place in the United States, litigated in a court system that still adheres to case law based on the Doctrine of Discovery, a fifteenth-century concept used to invalidate indigenous land possession and expropriate lands to the colonial forces of western Europe. *See City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), where the court cites the Doctrine of Discovery as guiding principle in federal Indian law. The DAPL controversy has shown the world that modern-day aggressions against indigenous peoples are alive and well in the United States, and connects this country's past oppression with present-day injustices. As such, the litigation surrounding the planning, construction, and operation of DAPL provides a contemporary opportunity to analyze—within the context of indigenous human rights—protections and remedies provided by federal statutes and case law.

This case involves treaties between the federal government and the Great Sioux Nation, which under Indian law canons of construction, are interpreted in favor of Indian interests. *See* Felix S. Cohen, Handbook of Federal Indian Law, 222 n.42; *Worcester v. Georgia*, 31 U.S. at 582 (1832). This case also involves the National Environmental Policy Act and National Historic Preservation Act, enacted to address, prevent, and mitigate adverse impacts on the environment and historic properties. These statutes contain similar, yet distinct, government-to-government consultation requirements when federal actions implicate tribal rights and resources. Working together, these treaties and statutes seemingly provide a broad legal basis by which the federal courts could adequately protect the human and indigenous rights implicated by DAPL and similar projects.

But as the docket approaches its one-year anniversary in July, the case still sits in the United States District Court, seemingly buried in motions for summary judgment and debates over the administrative record. As oil is about to flow underneath Lake Oahe, it is safe to say that, at this point, the courts have failed to protect the rights threatened by the construction and operation of the pipeline.

In fact, as we await a decision on the major issues, the stage is set for the battle to be waged in new arenas, reaching new audiences, and escalating the conversation far beyond the United States judicial system. When lack of immediate court remedies became clear, tribal leaders and activists began to invoke the energy of the movement to seek protection of their rights outside the confines of a Washington, D.C., courtroom. Although the exercise of protected First Amendment rights and North Dakota's violent reaction to such exercise were responsible for turning the international spotlight on Standing Rock, other, less-headline-grabbing forms of activism played important roles in the fight against DAPL. Specifically, through direct appeals to international human rights bodies and continued focus on corporate engagement, tribal leaders and activists have looked past the limitations of the federal courts for ways to effectively protect their indigenous and human rights.

International Advocacy

On September 21, 2016, Standing Rock Sioux Chairman David Archambault II traveled to Geneva, Switzerland, to address the United Nations Human Rights Council's 33rd Session, meet with various U.N. representatives, and participate in panel discussions on the rights of indigenous peoples. While addressing the Human Rights Council, Chairman Archambault discussed the United States' and the company's violation of the tribe's indigenous rights and law enforcement's human rights abuses against individuals participating in demonstrations.

Chairman Archambault also met with the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz. During their meeting, Chairman Archambault invited the special rapporteur to the Standing Rock Sioux Reservation. Five months later, Tauli-Corpuz came to Standing Rock during a United States visit focused on indigenous peoples vis-à-vis energy development. The special rapporteur met with the Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, and the Yankton Sioux Tribe governments currently fighting DAPL in federal courts. During their meetings, tribal leaders had the opportunity to interact and share their views on how the United States treats indigenous peoples. The fact finding and information shared with the special rapporteur will help shape her official Country Report, which will be released later this year.

While many inroads have been made at the United Nations, tribal nations also looked to regional human rights bodies for redress and protection as construction of the pipeline continued. The Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, and Yankton Sioux Tribe jointly requested and were granted a thematic hearing before the Inter-American Commission on Human Rights (IACHR) to discuss indigenous peoples in the United States relative to extractive infrastructure projects. Testifying before the commission on December 7, 2016, tribal leaders and representatives from all three tribes were able to highlight the tribes' history and connection with the land, law enforcement actions against those in the camps, and the steps the United States government had failed to take to protect their rights.

In conjunction with the hearing before the IACHR, the tribes also filed an official Request for Precautionary Measures (https://www.dropbox.com/s/rjgt7xfprm97uza/Standing%20Rock%2C%20Cheyenne%20River%20%26%20Yankton%20Sioux%20Tribes%20-%20Request%20for%20Precautionary%20Measures%20-%20FINAL%20Dec%2002%2C%202016%20-%20with%20exhibits.pdf?dl=0), which urges the Inter-American Commission to call on the United States to adopt measures to prevent the violation of human rights and irreparable harm resulting from the construction of the pipeline and the violence from state actors against demonstrators and supporters gathered in prayer and protest. The request points to the United States' failure to adequately assess potential environmental and social impacts of the project. Drawing on relevant U.S. and international law, the tribes argued that ongoing construction and continued harassment of those peacefully gathered pose an ongoing and imminent threat of irreparable harm to the sacred sites and resources of the tribes and rights of all those involved.

Corporate Engagement

Supporters of Standing Rock have sought support from investors and engaged directly with banks that have financial ties to DAPL. As a result, the relevant companies self-reported that they incurred major financial and reputational damage. In September 2016, Energy Transfer Partners (ETP) reported to the federal court that "it could lose $1.4 billion in a year if delays continue . . . even a temporary delay would mean losses of over $430 million." Similarly, the banks that invested in DAPL suffered reputational harm as a result of consumer activism against their role in the pipeline.

These efforts focused on the growing acceptance of the financial industry's adherence to the Equator Principles to guide its discussions with financial institutions, investors, and the public. The Equator Principles are a "risk management framework, adopted by financial

PHOTO: WILSON ADAM SCHOOLEY

institutions, for determining, assessing and managing environmental and social risk in projects and are primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making." (For more about the principles, go to www.equator-principles.com/index.php/about-ep.) As a result of the Standing Rock Sioux Tribe's focus on corporate investment and responsibility, individuals, tribes, cities, and organizations have closed more than $5 billion worth of bank accounts at financial institutions invested in DAPL. The city of Seattle divested $3 billion from Wells Fargo.

Tribal leadership also met one on one with 12 out of 17 banks with project-level loans to DAPL to directly inform them of the tribe's opposition and explain the disproportionate social, environmental, and health-related risks the project imposed on the tribe and its members. The tribe asked each bank to use their influence as lenders to pressure DAPL to conduct a full environmental impact statement and remove the project from the tribe's treaty territory. Three banks (BNP Paribas, DNB, and ING) sold their shares in the DAPL loan in response to the tribe's opposition, sending a strong message that the ETP's treatment of indigenous peoples is unacceptable business practice.

Additional pressure was levied on banks through the banks' own shareholders. An investor statement, signed by investors worth over $1.7 trillion assets under management, called on banks to address and support the tribe's request to move DAPL out of their treaty territory. Signatories included institutional investors and pension funds such as the California Public Employees Retirement System, the New York State Common Retirement Fund, and the New York City Employee Retirement System, as well as faith-based funds and socially responsible investment firms such as Boston Commons Asset Management and Calvert Investments.

Investors also stood with Standing Rock through the filing of shareholder resolutions with three companies with minority ownership stakes in DAPL: Enbridge, Marathon Petroleum, and Phillips 66. (A resolution could not be filed with ETP because of the company's master limited partnership structure, which prevents shareholders from filing resolutions.)

The Dakota Access Pipeline controversy has shown the world that modern-day aggressions against indigenous peoples are alive and well in the United States.

The resolution presented to Marathon Petroleum asked the company to report on its processes for assessing environmental and social risks and received support from 35 percent of voting shareholders. A resolution filed with Enbridge made a similar request, and although it also failed, 30 percent of all shareholders supported it. The resolution with Phillips 66 was withdrawn in response to the company's agreement to engage in further dialogue with its shareholders about human and indigenous rights. Additionally, a resolution was filed with Wells Fargo asking the bank to adopt an Indigenous Rights Policy and received support from 17 percent of shareholders, but ultimately was rejected. The most significant sign of progress came from U.S. Bank, which announced at its shareholders' meeting in May 2017 changes to its environmental policy—the new policy states that they no longer provide project financing for the construction of oil or natural gas pipelines. (For more about the policy, go to https://www.usbank.com/community/environmental-sustainability.aspx.)

Conclusion

The adoption and continued support of these and other tactics may very well ensure that the reemerging indigenous rights movement will continue to effect change in the centuries-long struggle to recognize and protect indigenous rights. It is particularly important to continue dialogue with corporations and banks where a project like DAPL can have lasting impacts. For example, at the time of this writing, the DAPL has already leaked 84 gallons of oil even before becoming operational. Indeed, international human rights bodies and corporate boardrooms may not change the final outcome for this particular battle, but these expanded strategies employed by Standing Rock have been useful in garnering additional support globally and will lead to improved laws for indigenous peoples.

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Rebecca Adamson is founder and president of First Peoples Worldwide, an indigenous-led organization that engages the private sector to promote business models that uphold indigenous rights. Since 1970, Adamson has worked directly with grassroots indigenous communities to establish new models of values-driven development, including the first micro loan fund in the United States, the first indigenous rights investment screen, and the first shareholder advocacy training for Indian Country.

Nick Pelosi is corporate engagement director at First Peoples Worldwide. In that role, he provides corporate engagement training and capacity building to tribes, and performs research and risk analysis for companies operating on indigenous land.

Jesse Heibel is an attorney and research fellow at the Getches-Wilkinson Center for Natural Resources Energy and the Environment, where his work includes protecting the water rights of traditional farming communities in Colorado's San Luis Valley and addressing energy development impacts on Native American communities.

Cupa Cemetery, Warner Springs, California. The Cupeño Indians were forcibly removed from their ancestral village at Cupa (Warner Springs) in 1903 and relocated to the Pala Reservation, approximately 40 miles to the west. The Cupeño refer to the three-day journey as their personal "Trail of Tears." The Cupeños' removal was a consequence of nearly 140 years of colonial oppression, first at the hands of Spanish missionaries and then under the United States. The Cupeño removal, which was the last forced Indian relocation of its kind, provides just one example of the long-term effects of federal Indian policy. Although the land was privately owned, the Cupeño appealed to the U.S. Supreme Court to recognize their traditional title, only to have their plea rejected in favor of the white landowner. The Cupa Cemetery, which is still in use, is now protected as part of a cultural trust that is administered by the Pala Band of Mission Indians.

PHOTO: WILSON ADAM SCHOOLEY

Introduction

continued from inside front cover

At first, many of the treaties dealt with boundaries and trade relationships. The purchase of the tribal lands required payments, often in goods and services, and the United States kept records about tribal membership. The United States' goal was to limit its liabilities for payments. The practice would also come to influence tribal concepts about membership status and play a role in current tribal membership controversies.

Popular wisdom has the United States giving land to tribes in the treaties. But in reality, the tribes owned the land and sold it to the United States.

The treaty opening the Gateway to the West had a variety of consequences. Growing demand for more land by the white population east of the Mississippi resulted in President Jackson's Indian Removal Act in 1831. Congressman Davy Crockett opposed the policy on the floor of Congress and effectively ended his political career by speaking against the Indian Removal Act and in support of the Indian nations. The Louisiana Territory provided land to which the tribes could be removed. To acquire land on which to remove the eastern tribes, the United States had to negotiate treaties with the tribes that held the lands in the Louisiana Territory.

The theory under which Indian lands were held was that the legal title was held by the United States and the beneficial title was held by the tribes. This structure was designed to prevent any claim to the lands by any foreign power such as Britain, Spain, or France. This arrangement gave rise to the "guardian-ward" relationship between the United States and Indian tribes.

In early U.S.-tribal history, the Indian Country was such a separate territory that a passport was required of U.S. citizens before entry. Increased interaction between tribes and the United States required the treaties to address the issue of jurisdiction over civil and criminal matters. Tribes found their exclusive jurisdiction of Indian Country whittled away over the years.

This issue of *Human Rights* magazine encompasses a variety of issues that arose out of the opening of the Gateway to the West. This opening was a pathway that showed the impact of presidential policies on Indian nations. Highlights of those policies from 1803 to the present include Peace and Friendship, Removal, Assimilation, Reservations, Allotment, Reorganization, Termination, and the current Self-Determination. Our article on disenrollment shows the modern-day fallout out of membership disputes influenced in part by the early treaty payments. The article on Public Law 280 demonstrates the continued problems of jurisdiction in Indian Country, including issues related to violence against women. The boundary issues of early treaties still exist with the proximate impact of pipelines on the Standing Rock reservation. Construction in Indian Country also has an impact on maintenance of culture and preservation of artifacts. Just as travelers once plunged into the unknown Oregon Country from St. Louis, the wild and untamed Alaskan territory proves a challenge today. And throughout the struggles in the past and the present, we need heroes and champions to speak on behalf of the Indian nations and fight for the honor of the United States and justice for Indian nations. This issue of our magazine speaks not just to ancient history, but also to the present realities confronting Indian nations.

Kirke Kickingbird, of the Kiowa Tribe, is the first Native American to chair the ABA Section of Civil Rights and Social Justice and was the first elected to the ABA Board of Governors. He is a former president of the Native American Bar Association and past board chair of Oklahoma Indian Legal Services. He has devoted his entire career to improving the lives of Native American people.

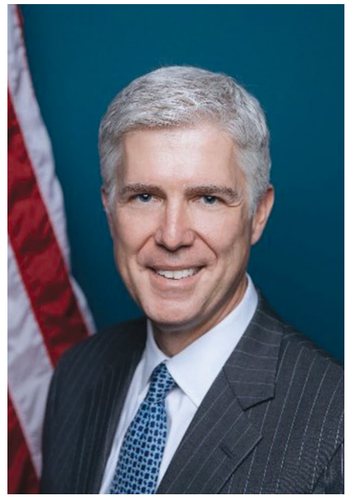
PHOTO: (LEFT) WILSON ADAM SCHOOLEY; (RIGHT) THE WHITE HOUSE

JUSTICE GORSUCH AND FEDERAL INDIAN LAW

By John Dossett

On April 7, 2017, the Senate voted to confirm Justice Neil Gorsuch to fill the vacancy on the U.S. Supreme Court created by the death of Justice Antonin Scalia. Justice Gorsuch has served on the Tenth Circuit since 2006, and his judicial record received significant media attention during the Senate confirmation hearings. Although it was a contentious confirmation process, now that it is over, there is perhaps an opportunity to consider areas of his record that received less media attention at the time. One of these is his experience in federal Indian law.

Justice Gorsuch hails from the West, with the Tenth Circuit encompassing six states: Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming; and the territory of 76 federally recognized Indian tribes. Western experience has been lacking on the Court in recent years and is a vitally important perspective. As an example, Justice Sandra Day O'Connor came to the Court in 1981 as a former attorney, legislator, and judge for the State of Arizona, and participated in the 2001 historic visit to Indian reservations to learn more about tribal judicial systems and federal Indian law. Justice O'Connor was very important to Indian tribes because she was interested in federal Indian law and took it seriously. She was more pragmatic and restrained in her decisions regarding tribes and more familiar with



Justice Neil Gorsuch was sworn into office on April 10, 2017, as the 101st associate justice of the U.S. Supreme Court.

Indian tribes as functioning governments recognized in the U.S. Constitution. Her retirement in 2006 left a gap in this area.

A historical example is Justice Willis Van Devanter. As a young attorney, Van Devanter moved to Wyoming and served as chief justice of the Wyoming Territory. In 1897, President McKinley appointed Van Devanter to be assistant attorney general at the U.S. Department of the Interior, where he gained experience and appreciation for federal Indian law. Van Devanter joined the Eighth Circuit in 1903 and was nominated to the Supreme Court by President Taft in 1911. During his time on the Court, Van Devanter wrote a string of important decisions regarding tribal land rights, including *U.S. v. Sandoval*, 231 U.S. 28 (1913); *Alaska Pacific Fisheries v. U.S.,* 248 U.S. 78 (1918); and *U.S. v. Creek Nation*, 295 U.S. 103 (1935). Van Devanter's work was later codified into the statutory definition of "Indian Country."

Gorsuch appears to share a similar interest in Indian law. Justice Gorsuch has significantly more experience with Indian law cases than other recent Supreme Court nominees. His opinions have commonly recognized tribes as sovereign governments and have addressed issues such as state police incursion onto tribal lands, sovereign immunity, religious freedom, accounting for trust funds, exhaustion of tribal remedies, and Indian Country criminal jurisdiction. The following is a brief summary of five of his decisions in federal Indian law.

Tribal Sovereignty

In *Ute Indian Tribe v. State of Utah*, 790 F.3d 1255 (10th Cir. 2015), the Ute Tribe argued the State of Utah and several local governments were unlawfully displacing tribal authority by prosecuting tribal members in state court for conduct on tribal lands. Gorsuch's decision describes the history of reservation policy for the Ute Tribe and demonstrates an appreciation for the federal responsibility to protect tribal sovereignty from state intrusion: "Indeed, the harm to tribal sovereignty in this case is perhaps as serious as any to come our way in a long time. Not only is the prosecution of Ms. Jenkins itself an infringement on tribal sovereignty, but the tortured litigation history that supplies its backdrop strongly suggests it is part of a renewed campaign to undo the tribal boundaries. . . ." *Ute Tribe* at 1005. The decision was soon followed by *Ute Indian Tribe v. Myton,* 835 F.3d 1000 (10th Cir. 2016), where Gorsuch again addressed repeated local government efforts to prosecute tribal members for crimes committed within reservation boundaries. This opinion gains force from resolute adherence to precedent in favor of tribal jurisdiction ("an inkling of Sisyphus's fate") and takes the unusual step of reassigning the case to a new federal district court judge because of failure to give effect to previous rulings.

Trust Responsibility and Canons of Construction

In *Fletcher v. United States*, 730 F.3d 1206 (10th Cir. 2013) Gorsuch provides a legal history of the trust responsibility between the federal government and tribes, including individual Indian account holders:

> After settlers displaced the Osage Nation from its native lands, the federal government shunted the tribe onto the open prairie in Indian Territory, part of what later became the State of Oklahoma. At the time, the government had no idea those grasslands were to prove a great deal more fertile than they appeared. Only years later did the Osages' mammoth reserves of oil and gas make themselves known. When that happened, the federal government appropriated for itself the role of trustee, overseeing the collection of royalty income and its distribution to tribal members. That role continues to this day. In this lawsuit, tribal members seek an accounting to determine whether the federal government has fulfilled the fiduciary obligations it chose to assume. The district court dismissed the tribal members' claims. We reverse. *Fletcher* at 1207.

The laws of trust and trustees, Gorsuch suggests, apply so long as consistent with Congress's statutory directions. Rather than deference to the Department of the Interior's interpretation, Gorsuch uses the statutory canons of construction to support his analysis. "If any doubt remains (and we harbor none), we would still reach the same conclusion because, again, statutory ambiguities in the field of trust relations must be construed for, not against, Native Americans." *Fletcher* at 1212.

Religious Freedom

In *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014), an enrolled member of the Northern Arapaho Tribe housed in a special protective unit sought access to a sweat lodge located in the general prison yard. State prison officials asserted that the cost of security for transport to the sweat lodge was unduly burdensome, and Yellowbear filed for injunctive relief under the Religious Land Use and Institutionalized Persons Act (RLUIPA). The United States District Court for the District of Wyoming granted summary judgment for prison personnel. The Tenth Circuit reversed and remanded with Gorsuch writing for a unanimous panel that the existence of a compelling government interest to deny a prisoner's request under RLUIPA must be based on more than generalized security and cost concerns. Instead, the government must demonstrate its compelling interest in the context of the particular burden the government has placed on the particular claimant. "[T]he deference this court must extend to the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat." *Yellowbear* at 59. The opinion was quoted by Justice Sonia Sotomayor's concurrence in *Holt v. Hobbs*, 135 S.Ct. 853, 867 (2015).

Exhaustion of Tribal Remedies

In *United Planners Financial Services v. Sac & Fox Nation*, 654 Fed. Appx. 376 (10th Cir. 2016), the Sac & Fox Nation brought suit in tribal court alleging a breach of contract. United Planners responded by asking a federal district court to enjoin the tribal court lawsuit. The district court held that United Planners had failed to exhaust its tribal court remedies. Gorsuch's opinion upheld the district court and rejected *United Planners*' argument for an exception based in bad faith. "And as United Planners candidly acknowledged during oral argument, nothing prevents the company from raising those defenses in tribal court. An available tribal court remedy thus remains unexhausted and should be tried before a federal court intercedes, just as the district court recognized." *United Planners* at 377. Gorsuch's opinion is notable mostly as part of the Tenth Circuit's continued adherence to the principle of exhaustion of tribal court remedies, where other circuits are scaling back support for exhaustion principles.

Indian Law Questions Gorsuch May Consider as Supreme Court Justice

Although the Court considers a broad range of issues affecting tribal nations, one fundamental question continues to arise in recent years: What are the sources of federal authority in Indian Country?

The common view of federal authority in Indian affairs is of a "plenary" power drawn from the Indian Commerce Clause, the Treaty Clause, and sources outside the text of the Constitution. Beginning with *United States v. Kagama*, 118 U.S. 375 (1886) and running to *United States v. Lara,* 541 U.S. 193 (2004), a long series of Supreme Court decisions have synthesized congressional authority over Indian affairs into a nearly unlimited authority based in a guardian-ward relationship as well as "preconstitutional powers necessarily inherent in any Federal Government." *Lara* at 200-01. The decisions rely on precedents from past eras where the Supreme Court showed great deference to Congress asserting control over Indian tribes and tribal lands.

However, tribal leaders and legal advocates have long objected to the notion of an omnipotent source of power not found in the text of the Constitution, and, in recent years, the Supreme Court has been asking questions about this plenary source. Justice Clarence Thomas has raised the most direct concerns, as his concurrence in *Lara* challenged the plenary power doctrine. "As this case should make clear, the time has come to reexamine the premises and logic of our tribal sovereignty cases." "I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power. . . . I cannot locate such congressional authority in the Treaty Clause, U.S. Const., Art. II, §2, cl. 2, or the Indian Commerce Clause, Art. I, §8, cl. 3." *Lara* at 214. Since 2004, Justice Thomas has raised these questions in three subsequent decisions; *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013); *United States v. Bryant*, 136 S. Ct. 1954 (2016); *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863 (2016).

Justice Anthony Kennedy raised similar concerns recently during oral argument in *Dollar General v. Mississippi Choctaw,* 579 U.S. ___ (2016), a case involving tribal civil jurisdiction over a tort committed by a non-Indian store manager. Justice Kennedy led a series of questions challenging Dollar General's assertion that Congress could authorize tort litigation in tribal courts. "Could Congress pass a law saying that all 500plus Indian tribes in the United States have unlimited criminal authority, could impose life sentences on nontribal members, American citizens? What are the limits?" After receiving a negative response from Dollar General's counsel, Justice Kennedy continued: "Well, if there is a limit on that, why isn't there a limit on what Congress could do with reference to tort law?" *Dollar General* resulted in no decision, with the judgment of the Fifth Circuit affirmed by an equally divided Court. Given the tenor of the oral argument in *Dollar General*, it appears that questions about the source of federal authority in Indian affairs will resurface in future cases.

> Justice Gorsuch's opinions have commonly recognized tribes as sovereign governments.

In this context, Gorsuch's experience with Indian law and federal lands issues may be useful in examining other sources of federal authority in Indian Country. The Territory or Property Clause, Art. IV, Section 3, provides that, "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The Territory Clause is also a fundamental source of federal authority within the territory defined as "Indian Country."

Prior to 1948, "Indian Country" was an undefined term in the federal criminal law that caused a great legal debate for many decades. Justice Van Devanter played a great role in resolving this debate, which resulted in three decisions: *U.S. v. Celestine*, 215 U.S. 278 (1909); *U.S. v. Sandoval*, 231 U.S. 28 (1913); *U.S. v. Pelican*, 232 U.S. 442 (1914), all relying on the Territory Clause. The statutory definition of "Indian Country" at 18 U.S.C. §1151 reflects the holdings of these cases, nearly verbatim. The Supreme Court upheld this definition in *Seymour v. Superintendent*, 368 U.S. 351 (1962), and the role of the Territory Clause in Indian Country has been relatively unnoticed since that time.

The Territory Clause offers a deep well of authority accompanied by principled limitations. The Constitution's framers were steeped in the common law of property rights and understood their acquisition of territorial authority in Indian Country to be accompanied by trust duties. To settle the process for admission of new states, the 13 original states agreed to transfer Western land claims to the federal government under the principles in the Northwest Ordinance, setting the stage for the Constitutional Convention. The original purpose of Article IV, Section 3, was to provide for federal authority for the Northwest Ordinance, for the creation of new states, and for the governance of Indian Territory. The Northwest Ordinance sets out the framers' understanding of the federal trust obligations to Indian tribes:

> The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them." 1 U.S.C.A. Organic Laws.

The Northwest Ordinance is included among the Organic Laws of the United States, along with the Declaration of Independence, the Articles of Confederation,

and the Constitution. The Territory Clause and the Northwest Ordinance provide a source of authority and accompanying principles for federal laws in Indian Country.

The Constitution also grants Congress the power to define "offenses against the law of nations," in Art. I, Sec. 8, Cl. 10. There is no doubt that the Founders considered the indigenous peoples of the United States to be nations. John Rutledge of South Carolina, who chaired the Committee of Detail during the Constitutional Convention, wrote "Indian Affairs" next to "the Law of Nations" in his copy of the draft constitution. Records of the Federal Convention of 1787, at 594 (M. Farrand rev. ed. 1937). On September 17, 1789, one year after ratification, President Washington wrote to the Senate: "It doubtless is important that all treaties and compacts formed by the United States with other nations whether civilized or not, should be made with caution, and executed with fidelity. . . ." Washington went on to urge Congress to ratify "the treaties with certain Indian nations" including the Six Nations of New York and the Wyandot. *From George Washington to the United States Senate*, September 17, 1789.

Hovenweep Castle, Hovenweep National Monument, UT/CO

What is an offense against the law of nations? Reference is often made to Emer de Vattel's seminal *The Law of Nations* first published in 1758. This voluminous work is said to be "unrivaled among such treatises in its influence on the American Founders." Peter and Nicholas Onuf, Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776–1814 (1993). Vattel focused on natural laws that govern the rights and obligations between nations, particularly navigation, trade, war, and laws regarding citizenship status.

The Indian Child Welfare Act regulates the custody of Native children and provides placement preferences for family members. 25 U.S.C. Chapter 21. Vattel recognized citizenship of children as a subject of *The Law of Nations*: "As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it." Vattel, *The Law of Nations*, p. 100. The Offenses Clause, with its broad language and firm anchor in Vattel's conceptual work, provides additional authority to regulate relationships among tribal and state governments. See, Andrew Kent, "Congress's Under-Appreciated Power to Define and Punish Offenses against the Law of Nations," 85 Tex. L. Rev. 843 (2007).

In this era, given Supreme Court limitations on the Commerce Clause and skepticism toward plenary power, both the Territory Clause and the Offenses Clause provide textual sources of federal authority in Indian affairs that merit further consideration. With his Western experience and inclination toward textual interpretation, we can hope that Justice Gorsuch will champion this more fundamental understanding of federal authority in Indian Country.

Conclusion

During his time on the Tenth Circuit, Gorsuch wrote 18 legal opinions and participated in an additional 42 cases relating to federal Indian law or Indian interests that provide a window into his views. Of course, as with any appointment to the Supreme Court, it is impossible to predict how Justice Gorsuch will decide cases in the future. It is encouraging, however, that Justice Gorsuch has signficant experience with federal Indian law and appears to be both attentive to the details and respectful to the fundamental principles of tribal soveriegnty and the federal trust responsibility. This level of familiarity is noteworthy on a Supreme Court where most of the justices came to the Court with much less experience.

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PHOTO: WILSON ADAM SCHOOLEY

Unraveling Public Law 280: Better Late than Never

By Carole Goldberg

When one tribal member throws a punch at another on reservation land, which government can prosecute—tribal, federal, or state? Although the tribe invariably has jurisdiction, the federal government does not. Only more serious offenses can be prosecuted by a U.S. attorney under these circumstances. And state jurisdiction is out of the question unless Congress allows it. In 1953, Congress passed Public Law 280, giving six states criminal jurisdiction they would otherwise not have and allowing other states to opt in. In those six states, Congress also withdrew most federal Indian Country criminal jurisdiction. The law was part of a larger federal policy, post-World War II, to "terminate" tribes. More than 300 tribes and nearly a quarter of reservation Indians were affected.

Public Law 280 is now almost 65 years old. Ordinarily a jurisdictional regime has planted deep roots by the time it has been in place that long, making radical change nearly impossible. Expectations have developed, budgets have become entrenched, and resignation to the status quo has set in. Not so for Public Law 280. Decades after its enactment, in a very different policy environment, Public Law 280 is unraveling.

Tribal criticism of Public Law 280 set in early but with only limited effect. Tribes in the six states named in the law (Alaska, California, Minnesota (except Red Lake), Nebraska, Oregon (except Warm Springs), and Wisconsin (except Menominee)), as well as tribes in others states that opted in (Washington, Florida, Montana, and Idaho), had not agreed to swap federal criminal jurisdiction for the much broader state criminal jurisdiction. The affront to tribal sovereignty alone was ground for criticism. To make matters worse, state criminal justice has functioned poorly on reservations. Local authorities have sometimes failed to serve tribal communities and sometimes have reacted with excessive harshness. Furthermore, since the 1970s, when tribal law enforcement and court systems were developing and receiving federal funding support, Public Law 280 tribes were told they did not need the federal funds because states had taken over. Growth of tribal justice systems suffered in Public Law 280 states.

Limited relief from these consequences of Public Law 280 came in 1968 with amendments that made *future* state jurisdiction subject to tribal consent and permitted states to withdraw from the arrangement. No tribes have agreed to state jurisdiction since that change. But tribes already saddled with state jurisdiction could not extricate themselves unless they could persuade their state(s) to go along.

Four recent developments signal that Public Law 280 is unraveling.

1 **Political challenges are gaining force.** The Tribal Law and Order Act of 2010 acknowledged deficiencies in state criminal justice by allowing Public Law 280 tribes to request restoration of federal criminal jurisdiction (on top of state jurisdiction). Several tribal requests are pending or have already been accepted, including White Earth in Minnesota. A January 2017 memo from the Justice Department to U.S. attorneys also affirmed continued concurrent federal jurisdiction in the opt-in Public Law 280 states. Finally, the bipartisan Indian Law and Order Commission, strongly recommended in its 2013 report that tribes be allowed to opt out of Public Law 280, regardless of state "permission."

2 **The funding picture is improving.** Although the U.S. Department of the Interior still refuses to fund tribal justice systems for Public Law 280 tribes, the Justice Department has been supplying grants since the 1990s. Moreover, some Public Law 280 tribes have been successful at gaming and other economic enterprises, directing revenues to building tribal police and courts. The Indian Law and Order Commission Report also recommended parity of funding for Public Law 280 tribes, and recent federal legislation funded a study of the associated costs.

3 **States are becoming more receptive to retrocession.** The economic success of some gaming tribes has produced political influence at the state level. One product of that influence has been legislation to facilitate removal (retrocession) of state Public Law 280 jurisdiction at tribal initiative. After Washington passed such a law in 2012, the Yakama Nation quickly moved to achieve that long-desired goal.

4 **Cooperative arrangements are enhancing the tribal role.** Even where Public Law 280 jurisdiction persists, states are ceding more authority to tribes, such as the joint tribal-state court serving the Leech Lake community in Minnesota and the state laws giving tribal police state peace officer status in states such as Oregon.

Termination policy was disavowed in 1970. Since then, Congress and presidents of both parties have voiced respect for tribal self-determination. The unraveling of Public Law 280 is long overdue.

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Tribal Disenrollment Demands a Tribal Answer

By William R. Norman Jr., Kirke Kickingbird, and Adam P. Bailey

PHOTO: WILSON ADAM SCHOOLEY

Few topics in Indian law carry more weight or import than the issues around tribal membership—including enrollment and disenrollment. The question of tribal membership and affiliation is not only determinative for many federal questions such as criminal jurisdiction and eligibility for programs made available only to Indians, but it lies at the very heart of the most essential tribal question: Who are we?

The question is also controversial in Indian Country, as tribes nationwide have engaged in membership disputes that have threatened or resulted in "disenrollment" of members or entire families that were previously considered part of the tribe. One count puts the number of tribes with disenrollment proceedings at nearly 80, and that those actions have affected more than 11,000 people. https://indiancountrymedianetwork.com/news/native-news/belongs-epidemic-tribal-disenrollment. The topic has given rise to numerous websites opposing the practice, including a dedicated social media movement, http://stopdisenrollment.com, and national media coverage, https://www.nytimes.com/2017/01/18/magazine/who-decides-who-counts-as-native-american.html. In March 2017, the University of Arizona's College of Law held a two-day conference focusing on the topic. https://law.arizona.edu/tribal-disenrollment-who-belongs-conference.

Our aim in this article is not to determine the cause of disenrollments—which range from claims of inappropriate initial enrollments to efforts to seize larger shares of gaming profits—but to argue that tribal sovereignty precludes demands that the questions of citizenship and enrollment be addressed by federal or other non-tribal institutions, and to state that tribes alone must decide whether disenrollment is appropriate for their communities. There are many important aspects to this debate that are outside the scope of this article—what drives disenrollment, the effects of disenrollment on individuals, and what the idea of tribal membership means vis-a-vis indigeneity and the racial aspects of Indianness—but are worthy of full discussion elsewhere. The debate on the cause of disenrollment is also for others to engage as the focus here is on how any response must be tribally based.

Tribal sovereignty demands tribal exclusivity over decisions in this arena, and that recent calls for outside influence—from approving jurisdiction of federal courts to intervention by the Bureau of Indian Affairs (BIA)—must be rejected. There is undoubtedly room for political and rights-based arguments to be made against disenrollment, but—given that citizenship reaches to the very core of tribal identity—these arguments must be addressed to the tribes themselves to prevent further erosion of tribes' power over themselves as entities.

Tribal Citizenship and Enrollment

Tribes, like the United States and the States, are sovereign governments recognized in the U.S. Constitution. *See* Hon. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L. J. 1, 1 (1997). Like other governments, tribes define their own polities, including setting the requirements to be a citizen. There is no one definition of tribal citizen (or members), and the definitions between tribes vary widely from lineal descent from a person on an identified "roll" of members, to rules that require a "blood quantum" or degree of Indian ancestry, to a mix of ancestry and residency requirements. *See* Carole Goldberg, *Members Only: Designing Citizenship Requirements for Indian Nations*, 50 Kan. L. Rev. 437, 441–45 (2002). Regardless of the definition, tribal members are considered "Indian" for formal legal purposes. Note that federal definitions of "Indian" vary and may include people who are not tribal members, such as descendants of tribal members of federally recognized tribes who were residing on Indian reservations on June 1, 1934, and people who have a blood quantum of one-half or more Indian blood (Indian Reorganization Act, 25 U.S.C. § 5129).

The power to define one's own membership is purely a tribal prerogative, but has been influenced greatly—primarily in the last century—by the federal government. Note that tribal power to determine membership is wide, but may be affected by treaty or statutory language that sets membership criteria. *See, e.g.*, Coquille Restoration Act, Pub. L. No. 101–4, 103 Stat. 91 (1989). Before efforts to delineate members, membership and group identities were formed around shared lands, culture, and family frameworks that did not require formal definitions. *See* David E. Wilkins, *A Most Grievous Display of Behavior: Self-Decimation in Indian Country*, 2013 Mich. St. L. Rev. 325, 329 (2013). Federal efforts to determine tribal membership began when the purchase of Indian lands by treaty required the federal government to provide payment in the form of goods, services, or money to tribes. Limiting the membership pool limited the federal payment obligations. Federal efforts to define tribal citizenries continued in connection with the efforts to destroy tribal landholdings through small allotments to individual Indians. Most famously, in 1893 the Dawes Commission created tribal rolls for the Five Civilized Tribes, forced them to dissolve their reservations, and used "excess" lands for non-Indian settlement. The formation of the rolls was contested. For example, many Native people refused to be listed, others were left off the list, some included themselves with a lower blood quantum to avoid government control, and some who were not eligible found their way on the rolls anyway. *See, e.g.*, Rose Stremlau, Sustaining the Cherokee Family: Kinship and the Allotment of an Indigenous Nation 144 (2011).

The 1934 Indian Reorganization Act (IRA) created another mode of membership, as the "model" constitutions provided for tribes by the BIA contained provisions instituting membership rules that we see often today, such as parental membership requirements, residency, and blood quantum that were derived from federal goals rather than tribal goals. (For a discussion of how federal bureaucrats asserted power over tribal membership decisions through interpretation of the IRA, *see* Goldberg, 437, 445–48. Even for those tribes that did not adopt IRA constitutions, the influence of the BIA was present in tribal codes and constitutions that were passed in the 1930s, 1940s, and 1950s. (For a discussion of the origins of the Navajo Nation's one-quarter blood quantum requirement as introduced by BIA officials, see http://lawschool.unm.edu/tlj/volumes/vol8/8TLJ1LSPRUHAN.pdf.)

This history shows the concept of formal membership is in no sense a purely tribal one and that the history of the process is certainly flawed. However, the common theme in this turbulent history is the hand of federal officials and efforts to arrive at non-tribal goals. In today's era of self-determination, the federal government has largely withdrawn from tribal membership determinations—except when a tribe has a provision in its constitution that calls for federal review of changes to their constitutions or bylaws—and usually resists calls for intervention in such actions due to having no authority under tribal law. However, the federal government does play some role when disenrollments result in competing governing bodies, as it may need to choose which government to work with in order to provide services to tribal members. *Aguayo v. Jewell*, 827 F.3d 1213 (9th Cir. 2016).

Primacy of Tribal Sovereignty Demands Tribal Exclusivity in Enrollment Discussions

The U.S. Supreme Court stated in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 72 n.32 (1978), that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *See also Cahto Tribe of Laytonville Rancheria v. Dutschke*, 715 F.3d 1225, 1226 (9th Cir. 2013). Federal courts have steadfastly recognized that tribal membership decisions are beyond their jurisdiction to reach, and repeatedly reject cases asking them to intervene in tribal disputes. *See Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005). It is appropriate that they do so, partly due to the fact that the federal courts are ill-equipped to make identity-constituting decisions for communities of which the courts are not a part, but also that enabling non-tribal institutions to mold tribes themselves usurps tribes' most central power of self-definition.

The "high-water mark" for formal recognition of tribal rights to self-constitute is arguably the 2008 U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) (www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf), which recognizes indigenous peoples' rights to self-determination and autonomy in internal affairs and the right to determine their own identity of membership. *See* arts. 4, 12, 13, 20, 31, and 33 regarding protecting cultural, political, and membership rights. The rights described in the UNDRIP hew to those recognized as reserved to tribes in U.S. case law as

well. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978) *citing Cherokee Intermarriage Cases*, 230 U.S. 76 (1906) and *Roff v. Burney*, 468 U.S. 218 (1897) to note that, unless limited by treaty or statute, a tribe has the power to determine tribal membership. *Equal Employment Opportunity Comm'n v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1081 (9th Cir. 2001) (holding that a dispute between a tribal member and a tribal institution is "entirely intramural," and that generally applicable federal laws do not apply when touching on "exclusive rights of self-governance.") The tribal rights must also be considered alongside other rights, like those in UNDRIP Article 9, which states that indigenous peoples *and individuals* have the right to belong to an indigenous community or nation, in accordance with the traditions of the community. The question then becomes, which institution or entity must adjudicate rights in questions of membership?

It is our assertion that only the tribe itself, as a sovereign, may consider and decide who is a member of their own community, and that no other institution should (or properly can) assume such power over a tribal government. The primary reason is self-evident: A group itself is defined by the members in it, so the act of defining membership is the fundamental act of self-determination. Despite the outside influence of the federal government in forming tribal membership standards, tribes now engage in internal conversations about who they are, and do so on tribal terms. Tribal scholars have examined this concept as "cultural sovereignty," arguing that the cultural self-determination is the important core of tribal institutions, over which a shell of "state-like" sovereignty exists. *See* Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, in Economic Development in American Indian Reservations, 22 (Roxanne Ortiz, ed.) (1979); Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 Stan L. & Pol'y Rev. 191 (2001).

> There is no one definition of tribal citizen, and the definitions between tribes vary widely.

Whether, and how, a tribe will use disenrollment as a means of self-definition is a question for the tribe to answer. Some tribes have decided that the process is inappropriate for their community, and have banned its use. The Federated Indians of Graton Rancheria has amended its Tribal Constitution to prohibit disenrollment (except in limited cases), and explicitly states the Tribal Council may not terminate citizenship rights, www.gratonrancheria.com/disenrollment. Note that recently the Robinson Rancheria in California re-enrolled more than 60 members who had been disenrolled eight years prior and is now in the process of revising its documents to prevent future disenrollments, www.willitsnews.com/general-news/20170214/robinson-rancheria-reverses-disenrollment. Other tribes have used the disenrollment process to reverse errors or malfeasance, such as the San Pasqual Band of Mission Indians, which disenrolled members because the BIA had enrolled an individual with no blood relation to the band. *Alto v. Jewell*, No. 15-56527 (9th Cir., Sep. 20, 2016) (memo. op.); *Alto v. Black*, 738 F.3d 1111, 1124 (9th Cir. 2013). There are many *tribal court* cases that review disenrollment and membership decisions, naturally coming down on both sides of the issue. These cases illustrate not only that tribes are capable of handling these questions internally, but also do so in a way that reflects tribal values. *See, e.g., Alexander v. Confederated Tribes of Grand Ronde*, No. A-15-008, 13 Am. Tribal L. 353 (Grand Ronde Tribal Ct. App., Aug. 8, 2015), available at https://weblink.grandronde.org/WebLink8/DocView.aspx?id=69560&dbid=0 (holding the tribe was barred by laches and equitable estoppel from disenrolling members); *Cherokee Nation Registrar v. Nash*, No. SC-2011-02, 10 Am. Tribal L. 307 (Cherokee (OK) Nation Sup. Ct., Aug. 22, 2011) (upholding the right of the tribe to change membership criteria and effect disenrollment). *See also* www.narf.org/nill/ilr/enrollment.html (collecting tribal court opinions on membership and enrollment).

This is not to say that disenrollments are not hotly contested and often result in very messy, protracted struggles that play out in media coverage, sharp court filings, or the political arena. At the core of these battles lie concerns about due process and fairness, as well as quite real struggles with identity and belonging. When considering enrollments questions, the Little River Band of Ottawa Indians' Tribal Court of Appeals explained:

> Tribal membership for Indian people is more than mere citizenship in an Indian Tribe. It is the essence of one's identity, belonging to a community, connection to one's heritage and an affirmation of their human being place in this life and world. […] Tribal membership completes the circle for the member's physical, mental, emotional, and spiritual aspects of human life. *Samuelson v. Little River Band of Ottawa Indians-Enrollment Comm'n*, 2007 WL 69900788, at *2 (Little River Ct. App., June 24, 2007).

Because this is so, it is unsurprising that discussions surrounding disenrollment are sounding in emergency terms—"epidemic," "wave," and "new wave of genocide" are a few recent headlines—because the issue is so central to individual and group identity. In this urgent environment, some are calling for outside intervention by federal or international bodies to prevent or roll-back disenrollments.

For example, some scholars and commentators raise the possibility that in the absence of tribal solutions, disenrolled tribal members should have remedies in federal court or via administrative review by federal agencies. Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 Ariz. L. Rev. 383 (2015); David Wilkins, *Two Possible Paths Forward for Native Disenrollees and the Federal Government?*, https://indiancountrymedianetwork.com/news/opinions/two-possible-paths-forward-for-native-disenrollees-and-the-federal-government. Others call for an amendment to the Indian Civil Rights Act to legislatively reverse *Santa Clara Pueblo v. Martinez* and partially abrogate tribal authority over membership to give federal courts jurisdiction to review membership cases. *See* Eric Reitman, Note, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power over Membership*, 92 Va. L. Rev. 793 (2006). Scholars also mention that disenrollment disputes could be handled through human rights approaches like a "truth and reconciliation" commission or U.S. enforcement of international human rights against tribal governments. *See* Galanda & Dreveskracht at 453–68, 469–72.

At the heart of arguments examining federal litigation or administrative review of disenrollment is the idea that while the power to define membership is tribal, disenrollment is a federal construct that should be available for federal review or control (and thus subject to due process and other constitutional limitations). As we explain above, membership questions are the central questions of tribal identity, and the federal government has shown an inability to handle these questions in ways that are informed by tribal culture and tribal priorities and thus appropriate for tribes. Even considering that some problems are of federal making, conceding any power now that was properly tribal in the first place is a retreat from self-governance and tribal sovereignty.

It would be dangerous to now engage in a semantic partitioning of which tribal powers are truly inherent and which are the product of government influence: The history of the federal-tribal relationship is one rife with usurpation of tribal power under swindle, force, and neglect, and an intrusion into tribal sovereignty in a core area of tribal power like membership could readily lead to diminution of other powers such as territorial governance or sovereign immunity (particularly where there are non-tribal interests). Courts—even when membership is not the issue in cases—have shown they may impose their own ideas of who an Indian should be; take as an example Justice Samuel Alito's opening sentence in *Adoptive Couple v. Baby Girl*, 70 U.S. ___ (2013), which raised and questioned the sufficiency of a child's blood quantum despite the fact the tribe in the case did not use quantum for membership. To bring central questions of tribal identity into these fora would give judges leeway to narrow tribal membership on their whim.

The justification for non-tribal answers is that core rights such as due process would be protected under U.S. constitutional standards or their international analogues. Due process is indeed an important aspect of rights protection—and one that the Native American Bar Association has highlighted as critical in membership questions (*see* www.nativeamericanbar.org/wp-content/uploads/2014/01/Formal-Opinion-No.-1.pdf)—but the argument that the way to provide it is by diminishing tribal sovereignty is contrary to precept of self-determination. Similarly, a human rights framework may be a fruitful way to think about disenrollment, but the case must be made to the tribes themselves to adopt *tribal* laws and rules to respond.

Tribes may be well served to create institutions like accountable, independent tribal courts and Courts of Appeal that are empowered to handle disenrollment. Others may find that an intertribal forum would be the best, particularly if pursuing human rights solutions. *See, e.g.*, Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 San Diego L. Rev. 567, 611–25 (2012). We also believe that, depending on the circumstance, tribal strategies for conflict resolution like peacemaking courts or other traditional dispute resolution may be best to produce culturally appropriate responses and solutions to disenrollment. Note that the Native American Rights Fund has collected examples of tribal peacemaking codes and processes, http://peacemaking.narf.org/models/laws.

These responses may provide the protections to disenrolled members that many seek, but if not, in recognition of tribal self-determination, *external* pressure on tribes is the answer, not internal intervention. Former Assistant Secretary of Indian Affairs Kevin Washburn discusses the possibility of U.S. "diplomatic" pressure for what it sees as unfair human rights practice in disenrollment, including sanctions up to an extreme one: loss of a tribe's federal recognition. Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 Harv. L. Rev. F. 200, 228-29 (2017). The upside of such a response is that it recognizes the right of tribes to self-constitute and leaves the tribal polity intact even while intervening in disenrollment. Even in the event of termination of federal recognition, a tribe can continue as a self-determined entity with the possibility federal restoration in the future; can one say the same for a tribe whose authority to define its own people has been stripped from it?

We believe it is for tribes to decide whether they want or need to keep disenrollment as an option for their own communities. We also believe that tribes are perfectly able to limit or cease disenrollment on their own terms. Tribal self-governance and sovereignty are bedrock principles of tribal success and must also serve as the foundation for critical conversations over membership and enrollment. While focusing on tribally based responses may be frustrating politically and slow in progress, the long-term benefit of protecting tribal rights and tribal sovereignty from further erosion is well worth the effort.

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Legal Developments: Trust Lands in Alaska

By Heather Kendall Miller

Federal officials often draw from their experience of Indians on reservations in the continental United States and mistakenly assume that the legal principles applicable there do not apply in Alaska. This is due in large part to the perception that Alaska's history is somehow "different," and that the 1971 Alaska Native Claims Settlement Act (ANCSA) altered the legal principles that apply to federally recognized tribes in Alaska.

But in fact and law, federally recognized tribes in Alaska have the same legal status as other federally recognized tribes singled out as political entities in the Commerce Clause of the United States Constitution. *Akiachak Native Community v. Salazar*, 935 F. Supp. 2d 195 (D.D.C. 2013).

Lands into Trust

Prior to enactment of ANCSA, Congress adopted statutes that imposed trust responsibilities on the Secretary of the Interior (Secretary) over lands in Alaska for Alaska natives, including statutory obligations over Alaska native allotments, fiduciary responsibilities over restricted native town sites, general trust authority over India Reorganization Act (IRA) tribal reserves, and specific responsibilities related to leases on executive order reserves.

In 1934, Congress, in section 5 of the IRA, authorized the Secretary to take real property into trust on behalf of tribes and individual Indians. The IRA was amended to apply to the Territory of Alaska in 1936. The 1936 amendments gave the Secretary authority to designate certain lands in Alaska as reservations and take lands into trust. A total of six reservations were created in Alaska pursuant to the Act.

Aerial view of Craig, Alaska, from the south

Congress enacted ANCSA in 1971, revoking all existing reservations in Alaska (except for the Metlakatla Reserve). Importantly, however, ANCSA did not repeal any portion of the IRA or any portion of its 1936 amendments.

In 1980, the U.S. Department of the Interior, for the first time, promulgated a regulatory process to make fee-to-trust transactions more uniform. Those regulations created the Alaska Exception, expressly excluding acquisition of trust land for tribes or tribal members situated in Alaska, other than Metlakatla, based on a 1978 Solicitor's Opinion, stating to do so would be an abuse of discretion.

Litigation

Litigation commenced in 2006 to challenge the Alaska Exception. The plaintiff tribes argued that this exclusion of Alaska Natives—and only Alaska Natives—from the land into trust application process was void under the IRA section 476(g), which prohibits the Secretary from classifying, enhancing, or diminishing the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes. The State of Alaska intervened to argue that ANCSA required the differential treatment. The Secretary defended the regulation by reference to ANCSA and argued that while ANCSA did not revoke secretarial authority to take lands into trust, it supported the policy and practice of the Secretary's discretion to exclude Alaska tribes from the land into trust regulatory process.

Decision

On March 31, 2013, Judge Rudolph Contreras granted summary judgment to the plaintiff tribes. The court rejected the State's argument that ANCSA's extinguishment of aboriginal claims and Congress's declaration of purpose implicitly extinguished the Secretary's authority to take lands into trust in Alaska, and held that the Secretary was conferred authority to take land into trust in Alaska in 1936 with the IRA's application to Alaska, and that authority had not been revoked by ANCSA or any other legislative action.

Having established that ANCSA did not revoke the Secretary's authority to take Alaska lands into trust, the court next examined the legality of the Alaska Exception and found it was inconsistent with the congressional mandate that the Secretary not diminish the privileges available to tribes relative to the "privileges . . . available to all other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. § 476(g).

BIA Revision of Its Regulations

During the pendency of Alaska's appeal, the Secretary repealed the Alaska Exception. After notice and comment, the Secretary's repeal of the regulation went into effect in January 2015. Alaska requested, and was granted, an injunction blocking any acquisition of trust lands pending the resolution of its appeal.

In July 2016, the Court of Appeals ruled that Alaska's appeal was "moot for lack of a live controversy" because the challenged regulation no longer existed. With the district court injunction lifted, the Secretary gave notice of her intent to acquire approximately 1 acre of land underlying the Craig Tribal Association tribal office. This is the first parcel acquired under the 1936 Alaska IRA since the 1980 Alaska Exception was promulgated.

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Who Stole the Acoma Shield?

By Gregory A. Smith and Ann Berkley Rodgers

Kurt Riley, governor of the Pueblo of Acoma, with Conroy Chino, Acoma elder

PHOTO: (LEFT) U.S. FOREST SERVICE; (RIGHT) NATIONAL MUSEUM OF THE AMERICAN INDIAN, SMITHSONIAN INSTITUTION

In the mid-1970s, someone burgled a home at Sky City, the ancestral, mesa-top village of the Acoma people, and removed a ceremonial shield in violation of Acoma law. Decades later, that shield reappeared in a Paris auction house for sale to the highest bidder, having been recently shipped there, according to the French authorities, from an undisclosed person in the American Southwest.

For Acoma, the shock of the theft of the shield was greatly compounded by its subsequent offer for sale and publication of its image on the Internet. Unfortunately, this was nothing new. Acoma had previously, but unsuccessfully, fought the auctioning of sensitive tribal cultural patrimony in the French court system, as have several other tribes.

As a rule, tribes do not discuss culturally sensitive matters in public. There are spiritual reasons for this, as well as a deep-rooted concern regarding cultural appropriation and the market-based effect of a tribe publicly validating the significance of an item. This reticence, however, makes it difficult to recover certain items. Acoma, after internal discussions, realized that if the French courts were not going to be of assistance, additional actions were needed to address popular misconceptions about the nature of certain sensitive items of tribal cultural patrimony. As the image of the shield was already spread across the Internet (but not to be repeated here), Acoma decided, without revealing sensitive cultural knowledge, to take on the public perception of Native culture and to do whatever Acoma could do to get the shield returned to the pueblo.

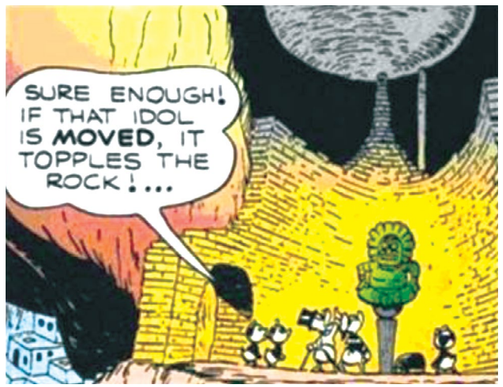
Public Perceptions of Native Culture

Popular culture plays an enormous role in "normalizing" behavior that in another context would be obviously outrageous and immoral. For people of a certain generation, the opening scene in *Raiders of the Lost Ark*, where Indiana Jones enters a jungle temple, steals a golden figurine, while avoiding various booby traps, including a hall of arrows and a giant rolling boulder, is one of the most iconic in all of film. On its face, it was evident that the builders of the temple did not want that figurine disturbed, much less stolen, but audiences were thrilled by the fun of it all. It is more than ironic that this scene was directly inspired by Scrooge McDuck, who was originally conceived as a greedy miser in the vein of his own namesake, Ebenezer Scrooge, from Charles Dickens's work, *A Christmas Carol*. In *The Seven Cities of Cibola*, Scrooge, his nephews, and the Beagle Boys find an "idol" in a cave. Just like Indiana Jones, the Beagle Boys disturbed the "idol," releasing a giant rolling boulder.

The popular exploitation of indigenous culture has a long, romanticized history,

closely associated with imperial or colonial expansion. After Howard Carter discovered the tomb of King Tutankhamun in 1908, there was an explosion of interest in Egyptology, in general, and mummies, in particular. For instance, scientists and others organized public unwrappings of mummies, turning desecration into spectacle. Today, the British Museum has over 120 human mummies in its collection, with a number on display. When those individuals were buried, it was with the belief that their bodies would lie undisturbed; not that they would be exhumed and possibly unwrapped and displayed for millions of tourists to see every year. If the ancient Egyptians were alive today, they would be marching in outrage outside the British Museum and most readers of this magazine would rally to their cause. For Native Americans, that outrage is not theoretical but rather very present and very real. Sad examples are the Internet auctions that regularly display pairs of beaded moccasins showing little or no wear. Tragically, most of these shoes were interred with the dead and meant to be used in the afterlife, not to become items of commerce.

There have been efforts, especially since the 1990s, to bring attention to the destruction or theft of items of cultural heritage, with numerous conferences and a growing body of literature. Some of this has been spurred by indigenous protests around the world. Much of it has arisen in reaction to extraordinary acts of destruction, such as the demolition of the Buddhas of Bamiyan by the Taliban or the looting of the ancient city of Palmyra by ISIS.



The Seven Cities of Cibola, Walt Disney's Uncle Scrooge #7, September 1954

In *The Prize of Pizarro,* Scrooge and Donald escaped through a hall of arrows, just as Indiana Jones escaped through a tunnel of arrows.

The Prize of Pizarro, Walt Disney's Uncle Scrooge #26, June 1959

In the case of the Bamiyan Buddhas, the Taliban took the view that they belonged to the Talibani government and that it could do with them as it pleased. In 1999, Mullah Mohammed Omar, the leader of the Taliban, actually issued a decree in support of their preservation. His reasoning was that because there were no Buddhists left in Afghanistan (what happened to them?) the statues were no longer being worshipped and so there was no affront to Islam. He reportedly added that: "The government considers the Bamiyan statues as an example of a potential major source of income for Afghanistan from international visitors. The Taliban states that Bamiyan shall not be destroyed but protected." Despite this theological view and the perceived economic advantages of protecting the statues, Mullah Omar reversed himself and the statues were largely destroyed in 2001.

Another example of cultural exploitation and appropriation are the Elgin Marbles, also known as the Parthenon Marbles, held by the British Museum. The Parthenon was completed in 438 B.C. adorned by sculptures, panels, and a large frieze. After 2,200 years gracing the Parthenon, many of these were removed by Lord Elgin (between 1801–1810), who claimed to have "bought" them from the Ottoman Empire. In 1816, they were acquired by the British Museum, where they are displayed today. The British Museum argues, among other positions, that the Marbles are so important that they belong to world culture and so are not the property of Greece and, further, that it is best if they remain on display at the British Museum, where they will be viewed by people from around the world. A similar argument has been made in the United States about important Native American materials. This self-serving argument dismisses the value of returning the Marbles to Athens, and thus placing them within the context of the Parthenon itself, while at the same time acknowledging and respecting their central importance to Greek culture.

Scientific Inquiry

During the 1800s, in the name of science (and sometimes profit), expeditions were launched to collect Native remains and Native artifacts from across the United States, including from burial sites and battlefields. In time, American museums and universities came to hold tens of thousands of Native remains and hundreds of thousands of cultural items. From the Native perspective, this pillaging and ransacking of Indian Country had devastating spiritual and cultural consequences that are still being felt today.

Native peoples saw echoes of this history in the fight over the remains of "Kennewick Man," whom they called the "Ancient One." The remains of Kennewick Man were found on a bank of the Columbia River in Washington state in July 1996. One of the most intact ancient skeletons found in the Americas, it was dated back approximately 9,000 years. In response to its discovery, the Umatilla and other tribes sought the return of the remains, in accordance with the Native American Graves Protection and Repatriation Act (described below), so they could be reinterred in a manner consistent with tribal traditions and beliefs. However, the scientists involved in examining the remains quickly declared, based on an analysis of the features of the skull using a technique straight out of the nineteenth century, that the remains were not associated with modern Native Americans, but rather were Polynesian or Southeast Asian in origin. In the early 2000s, genetic analysis was not sufficiently advanced to analyze such ancient DNA and, after much litigation, the Ninth Circuit Court of Appeals, in 2004 ruled that a cultural connection to modern Native American tribes could not be proved, and so scientific study could continue and the U.S. Army Corps of Engineers would remain the custodian of the skeleton. However, over time, DNA techniques improved and the remains were subject to advanced DNA analysis. This led a team of Danish scientists to announce in June 2015 that the remains were most closely linked to living Native Americans, including those in the Columbia River region where they were found. Armed with this scientific validation of their cultural knowledge and belief, the related tribes took their fight to Congress, and in 2016, Congress directed the return of the remains to tribal control. The Ancient One was reinterred by the tribes in February 2017 at an undisclosed location, in accordance with traditional beliefs and practices.

PHOTO: WALT DISNEY

Native American Graves Protection and Repatriation Act

Perhaps it is difficult to answer the question of what we owe the ancient Egyptians, but it should not be so difficult to answer that question for living Native peoples. Significantly, the United States does provide protection for certain Native human remains, funerary objects, sacred objects, and cultural patrimony through the Native American Graves Protection and Repatriation Act (NAGPRA, 25 U.S.C 3001–3015, 18 U.S.C 1170), passed in 1990. NAGPRA establishes procedures and legal standards for the repatriation to Indian tribes, Native Hawaiian organizations, and lineal descendants of covered remains and cultural items when located on federal lands or held by federal agencies and federally funded museums, educational and other institutions, and state and local governments. Of course, this is good. If we believe that the law should reflect societal values, then NAGPRA reflects an understanding that the cultural items it covers properly belong with certain Native caretakers. And yet, this law only applies to the federal government and federally funded institutions and is tied to objects taken from federal and tribal lands. This value has not been extended to the many remains and sensitive items held in private hands or obtained from private lands, in which circumstance the respect for tribal beliefs is secondary to deference to the popular view of private property rights. Although tribes do not agree with this outcome, they often request that private holders of this patrimony contact them to determine their proper disposition and return them when that is appropriate.

International Standards

As part of a far-reaching statement on the rights of indigenous peoples, the United Nations General Assembly adopted in 2007 the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). A small number of countries, including the United States, voted against UNDRIP; however, with some qualifying statements, the United States affirmed UNDRIP in 2009. UNDRIP addresses cultural resources in relevant part:

> …
> *Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,
> …
> *Article 11*
> 1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.
> 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
>
> *Article 12*
> 1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
> 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Although international norms support the restoration of ceremonial objects and human remains to indigenous peoples, federal law has not kept up. Ironically, the United States, recognizing that we are a market country for stolen cultural material originating outside the United States, has strict laws to prevent the importation of stolen cultural heritage from other countries. In some respects, the United States has led the way in global efforts to end illegal trafficking in cultural heritage of other nations. However, the reverse is true as to cultural material originating from the United States. United States' law lacks explicit export restrictions that would curb

illegal trafficking in Native American cultural heritage.

Indian Country Takes a Stand

With the Paris auction scheduled for May 30, 2016, Acoma coordinated with various federal agencies, including the State, Interior, and Justice Departments, to hold a press conference on May 25, 2016, at the National Museum of the American Indian in Washington, D.C. Several major Indian organizations were involved, including the National Congress of American Indians, the oldest and largest Native organization, the American Association on Indian Affairs, whose Working Group on International Repatriation has been a leader in this area for years, and the National Association of Tribal Historic Preservation Officers, representing the historic preservation officials for scores of tribes. In addition, the Hoopa Valley Tribe sent representatives, and Acoma's congressman, Stevan Pearce (R-New Mexico), presented on the resolution he introduced in Congress on this issue (discussed below).

The press conference was opened by the museum director, Kevin Gover (Pawnee), who noted that: "This museum was established in 1989. As part of our authorizing legislation, as enacted by the Congress, the Smithsonian was directed to return to the Native nations of the United States, certain items that were within our collections. That included human remains . . . and it included sacred objects. . . . Unfortunately, the reach of the laws of the United States ends at the borders."

A Legislative Strategy

Out of Acoma's effort to seek the return of the shield emerged a strategy: first, to raise awareness and lobby Congress to pass the joint House-Senate resolution condemning illegal trafficking in tribal cultural patrimony introduced by Representative Pearce; second, to seek court action ordering the seizure of the shield; third, to secure reliable data by having Congress direct the Government Accountability Office (GAO) to conduct a study and prepare a report on this issue; fourth, to seek an increase in funding for the Bureau of Indian Affairs (BIA) (Interior Department) law enforcement specifically designated to address cultural property crimes and implementation of NAGPRA; and, finally, change federal law to create an explicit export ban on items obtained illegally under NAGPRA, the Archaeological Resources Protection Act, and the Antiquities Act, thereby strengthening the hand of the United States in negotiations for return of items with foreign countries. As described below, four of these five goals have been accomplished, while work continues on the fifth.

Joint Congressional Resolution

Rep. Pearce introduced the "Protection of the Right of Tribes to Stop the Export of Cultural and Traditional Patrimony Resolution," or the "PROTECT Patrimony Resolution." This resolution soon had 16 co-sponsors, including two who are now senior officials in the Trump administration: Interior Secretary Ryan Zinke and Office of Management and Budget Director Mick Mulvaney. A similar resolution was introduced in the Senate by Senator Tom Udall (D-New Mexico), who was joined by his fellow New Mexico Senator Martin Heinrich (D-New Mexico), as well as Senators John McCain (R-Arizona) and Lisa Murkowski (R-Alaska). The joint resolution became effective on December 1, 2016.

> The People of the Pueblo of Acoma . . . call upon the People of France to help us in our hour of need. Something very disturbing . . . has been occurring in Paris auction houses. . . . It's the illegal practice of trafficking and selling Native American cultural property—items considered sacred, sacrosanct, used in worship and never to be given away or sold.
>
> *—Governor Kurt Riley, Pueblo of Acoma, Letter to the People of France, May 24, 2016*

The PROTECT Patrimony Resolution condemned the theft and illegal sale and export of tribal cultural items; called upon key federal agencies to consult with Native Americans, including traditional Native American religious leaders, to address ways to stop illegal conduct and secure repatriation of tribal cultural items to Native Americans; supported the Comptroller General of the United States, who heads up the GAO, in determining the scope of illegal trafficking and the steps needed to secure repatriation; explicitly supported restrictions on export; and encouraged all levels of government to work together on these issues. (Note that the PROTECT Patrimony Resolution specifically references supporting resolutions from the National Congress of American Indians, United South and Eastern Tribes, Inc., All Pueblo Council of Governors, and the Inter-Tribal Council of the Five Civilized Tribes.)

Federal District Court Action

Even as legislative work was being done, the U.S. attorney for New Mexico sought a court order calling for the seizure of the shield. On August 31, 2016, a federal district court judge issued a warrant for arrest *in rem* for the shield. (Acoma was represented in this matter by coauthor Ann Berkley Rodgers, and by Aaron M. Sims, an Acoma member, both of Chestnut Law Offices, Albuquerque, New Mexico, which serves as general legal counsel to Acoma.) The U.S. Department of Justice also invoked a mutual legal assistance treaty with France to secure support from French authorities in the investigation of the shield and to prevent its sale.

Government Accountability Office Report

In addition to the language in the PROTECT Patrimony Resolution calling on the Comptroller General to study this area, the chairman of the House Judiciary Committee, Bob Goodlatte (R-Virginia), the chairman of the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, James Sensenbrenner (R-Wisconsin), and Acoma's congressman, Steve Pearce, requested that the GAO look into the federal effort in this area and the scope of the market in illegally trafficked Native American cultural items. The GAO agreed to this request and, as of the writing of this article, is actively researching this issue with a report likely to be issued by summer 2017. Such a report will further facilitate the development of federal legislation. (Note that the effort to seek the return of sensitive items is not just focused on a legal approach, but also has an important relational dimension. For example, the Antique Tribal Arts Dealers Association recently launched an initiative to encourage the voluntary return of sensitive materials. This initiative includes educating collectors and dealers, assisting them in identifying sensitive objects, and facilitating a dialogue with tribes about when such items should be returned.) Through building better relations, dealers and collectors can deepen their appreciation for the items in their care and tribes can secure the return of those items that properly should be back home with them.

Funding for Expanded Cultural Property Law Enforcement

The tribal coalition advocating for stronger federal protections for cultural patrimony also sought funding for expanded law enforcement activities by the BIA related to NAGPRA. The House Appropriations Committee agreed and included the following language in its FY 2017 appropriations bill:

> The Committee recommends $1,000,000 to support the development of a Cultural Items Unit within the Division of Law Enforcement tasked with investigating violations of the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001 et seq.), and related law. Although domestic laws such as NAGPRA can be enforced to address the theft of tribal cultural items with both criminal and civil penalties, without active Federal support, tribes are left only to do what they each can independently afford to do to stop the theft and sale of their cultural items. Therefore, the Committee supports the BIA in developing the capacity to coordinate investigations of violations of NAGPRA and related law.

Subsequently, the House and Senate reconciled their appropriations bills into the FY 2017 Omnibus Appropriations, where this language was strengthened from a recommendation to a direction providing expressly for a "$1,000,000 program increase to implement the Native American Graves Protection and Repatriation Act" in the BIA Law Enforcement budget.

Safeguard Tribal Objects of Patrimony (STOP) Act of 2016

Also in the last Congress, legislation was introduced in both the Senate and the House to create an explicit export ban on certain items of tribal cultural patrimony. This legislation, sponsored by Senator Heinrich (D-New Mexico) along with eight cosponsors, was the subject of a Senate field hearing in Albuquerque in the fall of 2016, but did not advance further in the last Congress. The House sponsor of the STOP Act of 2016 was Rep. Ben Ray Lujan (D-New Mexico), with Rep. Michelle Lujan Grisham (D-New Mexico) as a cosponsor. A revised version, based on comments from various sources, was introduced in the Senate on June 21, 2017.

Who Stole the Acoma Shield?

It is easy to say that an individual stole the Acoma shield, but that is not the ultimate truth. Rather, it was stolen by a system of beliefs and values which denigrated the shield's purpose and existence as intended by its creator. The larger society considered it principally as an art or historical object or a curiosity with a determined monetary value. The villains in this tale are Indiana Jones, American and European scientists, a consuming public, museums and universities, Wild West pulp fiction novelists, and a market that values objects that are "authentically" sacred or ceremonial. In the end, who stole the Acoma shield? If we take a deeper look at our culture, we might come to realize that we all did.

Gregory A. Smith is a partner in the Washington, D.C., office of Hobbs, Straus, Dean & Walker, LLP, a law firm dedicated to the representation of tribes and tribal organizations.

Ann Berkley Rodgers is a member of Chestnut Law Offices, P.A., which represents Pueblo Tribal governments and businesses. Her areas of practice are primarily water, land, and cultural resources.

A Legal Perspective on *Sliver of a Full Moon*

By Mary Kathryn Nagle

The reauthorization of the Violence Against Women Act (VAWA) in 2013 secured a significant victory for Native women and the tribal nations that seek to protect them. In the United States today, Native women face rates of abuse, murder, and sexual assault higher than any other population in the United States. Statistics gathered by the U.S. Department of Justice and tribal governments demonstrate that non-Indians commit a majority of these violent crimes. Thus, the restoration of tribal criminal jurisdiction over non-Indians is a critical sovereign right that tribal governments can exercise to ensure safety for Native women.

My play, *Sliver of a Full Moon,* documents this victory, including the stories of the women who made it possible.

On May 3, 2017, we staged *Sliver of a Full Moon* for its 16th performance in Pendleton, Oregon, with the Confederated Tribes of the Umatilla Indian Reservation (CTUIR). Since June 2013, we have taken the play to the National Indigenous Women's Resource Center's *Women Are Sacred Conference*, the National Congress of the American Indians, the United States Capitol, the United Nations, Joe's Pub at the Public in New York, Yale Law School, the Eastern Band of Cherokee Indians, Radcliffe College at Harvard University, Mandan, Hidatsa and Arikara Nation, the Institute for American Indian Arts in Santa Fe, NYU Law School, Stanford Law School, the Smithsonian National Museum of the American Indian, the Alaska Federation of Natives, the Yurok Tribe, and now—most recently—the CTUIR. Additionally, a mini-performance of *Sliver of a Full Moon* and panel discussion were provided at the American Bar Association's Midyear Meeting in February 2017.

Sliver of a Full Moon documents the legal and jurisdictional issues raised in the wake of *Oliphant v. Suquamish Indian Tribe*, a 1978 Supreme Court decision that stripped Indian nations of the ability to exercise their inherent criminal jurisdiction over non-Indians who come onto tribal lands and commit crimes. *Oliphant* left Native women and children at a higher risk of domestic violence than any other group in the United States. The play then follows the bipartisan legislative battle to reauthorize VAWA in 2013 with a tribal jurisdiction provision that restored a portion of tribes' jurisdiction to protect Native women and children from non-Indian perpetrated violence.

PHOTO: MOVIE POSTER FOR *SLIVER OF A FULL MOON*

Sliver of a Full Moon's cast features five courageous Native women who stepped forward to share publicly their stories of abuse by non-Indians and their efforts to counter staunch opponents to the tribal provisions: Billie Jo Rich (Eastern Band Cherokee), Diane Millich (Southern Ute Indian Tribe), Lisa Brunner (White Earth Ojibwe), Melissa Brady (Hidatsa/Lakota/Dakota), and Nettie Warbelow (Athabaskan, from the Native village of Tetlin).

Sliver of a Full Moon is about the power of sharing our own stories. For too long, survivors have been told they must remain silent. *Sliver of a Full Moon* breaks that silence and works to create healing spaces in our own tribal communities where survivors are honored and supported, not ashamed and silenced.

Professional actors join the five survivors to play several others who were key in the 2013 reauthorization of VAWA, including Congressman Tom Cole, former Tulalip Tribes Vice-Chairwoman Deborah Parker, and Eastern Band Cherokee Secretary of State Terri Henry.

Sliver of a Full Moon is more important now, given the current national political climate. Although the restoration of jurisdiction in VAWA 2013 constitutes an important step forward, this victory has recently come under attack. During his recent confirmation hearing before the Senate Judiciary Committee, (now) Attorney General Jeff Sessions, (who voted as a senator against VAWA 2103 reauthorization) expressed doubt as to whether he would uphold the tribal jurisdiction provision of VAWA 2013. Sessions stated that he was "not able to answer" whether he would "seek to overturn [the tribal] provision of VAWA as the AG."

And just over a year ago, in the *Dollar General v. Mississippi Band of Choctaw Indians* argument before the Supreme

President Barack Obama signs VAWA 2013.
(Official White House Photo by Chuck Kennedy)

Court, Justice Anthony Kennedy expressed doubts that tribal jurisdiction over non-Indian American citizens could be "constitutional" because according to Justice Kennedy, tribes are "nonconstitutional entities . . . [because they] are not governed by the Due Process Clause." Tr. at 42:21–25.

As a citizen of the Cherokee Nation and a partner at Pipestem Law Firm, I work to protect and preserve the inherent sovereignty of Indian nations to protect all of their citizens. My hope is that by hearing the stories of our survivors in Indian Country, Americans will begin to question a legal framework that prohibits tribal nations from protecting their own citizens.

In the words of survivor Lisa Brunner (White Earth Ojibwe), "The partial restoration of tribal jurisdiction in VAWA 2013 is just a sliver of the full moon we need to ensure all of our women are safe. Until all of our tribes' jurisdiction is fully restored, no one is safe."

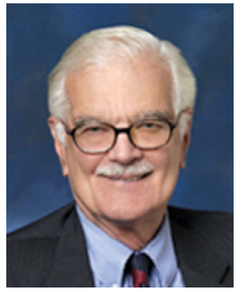
For more information about *Sliver of a Full Moon*, please visit www.sliverofafullmoon.org.

Mary Kathryn Nagle is a citizen of the Cherokee Nation and a partner at Pipestem Law, a firm dedicated to the preservation and restoration of tribal sovereignty and jurisdiction. She has represented tribes and tribal citizens in state, federal, and tribal courts, and has filed numerous briefs in appellate courts, including the U.S. Supreme Court.

Human Rights Heroes

continued from back cover

Charlie Hobbs



Bobo Dean

Finally, we honor two men with mighty legacies in federal Indian law who died within weeks of each other this year: Charlie Hobbs and Bobo Dean. They were both at the forefront of developments in the law that led to the successful self-determination era we are in today.

Charlie, who began as a clerk for then Circuit Court Judge Warren Burger, was a named attorney in over 100 cases resulting in written decisions on Indian rights and argued five Indian law cases before the U.S. Supreme Court. He litigated landmark cases like *United States v. Mitchell*, 463 U.S. 206 (1983), establishing the right of tribes to damages due to the federal government's mismanagement of trust assets, and *Menominee Tribe v. United States*, 391 U.S. 404 (1968), holding that the tribe kept its existence though its status as federally recognized was terminated by Congress. Charlie was awarded the Lifetime Achievement Award by the DC Chapter of the Native American Bar Association.

Bobo was a pioneer in the field of Indian self-determination and deeply involved in drafting and implementing the Indian Self-Determination and Education Assistance Act. He had a BA and JD from Yale University, and was a Rhodes Scholar. He worked with tribes all around the country, including Florida's Miccosukee Tribe, to negotiate the first contract with the Bureau of Indian Affairs; tribes in Alaska as they became among the first to exercise their rights under the Self-Determination Act; and tribal organizations in Alaska as they negotiated the Alaska Tribal Health Compact, which transferred virtually all Indian Health Service programs to tribal control. Both men combined brilliant minds with courtly charm and will be profoundly missed.

Wilson Adam Schooley is a reformed trial lawyer, current certified appellate specialist, actor, author, and law professor in San Diego, California.

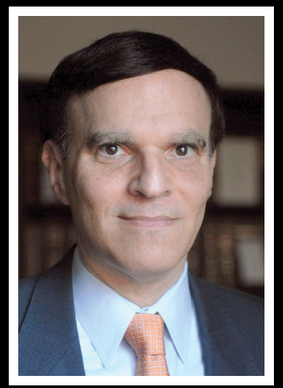
Coalition of Large Land Base Tribes (COLT)

COLT's member tribes must govern a land base of 100,000 or more acres. COLT tribes often have unique needs due to the distance, location, and populations which are served. This makes it that much more important for COLT to be the voice for large land base tribes in addressing these needs. COLT serves to educate and advocate for legislative, regulatory, and policy reforms to improve issues unique to large land base tribes.

COLT protects and supports the sovereign rights of member tribes to enhance, control, utilize, and develop our respective land bases to best support our tribal citizens.

COLT's executive director of administration is attorney Melissa Holds the Enemy, whose husband, Marcus RedThunder, is founder of **RedThunderVision.com**, a growing a social media community of Native American digital storytellers. Marcus invites all to join the vision and help protect, preserve, and perpetuate Native American culture and tradition.

Thurgood Marshall Award
2017



HONORING
Judge Katzmann

KEYNOTE
Dean Erwin Chemerinsky

8.12.17
ABA Annual Meeting
New York, New York

The 2017 Thurgood Marshall Award will be presented to the **Honorable Robert A. Katzmann** at the 2017 Thurgood Marshall Award Dinner on Saturday, August 12, during the ABA's 2017 Annual Meeting in New York, New York.

Robert A. Katzmann is the chief judge for the U.S. Court of Appeals for the Second Circuit. He became chief judge on September 1, 2013. At his appointment in 1999, he was Walsh Professor of Government, professor of law and professor of public policy at Georgetown University; a fellow of the Governmental Studies Program of the Brookings Institution; and president of the Governance Institute.

A lawyer and political scientist by training, Judge Katzmann received his A.B. (summa cum laude) from Columbia College, A.M. and Ph.D. in government from Harvard University, and a J.D. from the Yale Law School, where he was an article and book review editor of the *Yale Law Journal*. After clerking on the U.S. Court of Appeals for the First Circuit, he joined the Brookings Institution, where he was a research associate, senior fellow, visiting fellow, and acting program director. His books include: *Judging Statutes*; *Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy*; *Institutional Disability*; *Courts and Congress*; editor and project director of *The Law Firm and the Public Good*; co-editor of *Managing Appeals in Federal Court*; editor and contributing author of *Daniel Patrick Moynihan: The Intellectual in Public Life*; and editor and contributing author of *Judges and Legislators*.

He chaired the U.S. Judicial Conference Committee on the Judicial Branch and serves as a member of the U.S. Judicial Conference. He also is a commissioner on the Supreme Court Fellows Commission.

Judge Katzmann received the American Political Science Association's Charles E. Merriam Award. He is also the recipient of the Learned Hand Medal for Excellence in Federal Jurisprudence of the Federal Bar Council; the Chesterfield Smith Award of the Pro Bono Institute; the Stanley H. Fuld Award of the New York State Bar Association; the Michael Maggio Memorial Pro Bono Award of the American Immigration Lawyers Association; the Public Interest Scholarship Organization Lifetime Achievement Award; and the Green Bag's "Exemplary Legal Writing" honoree recognition. His lectures include: the James Madison Lecture of New York University School of Law; the Orison Marden Lecture of the NYC Bar Association; and the Robert L. Levine Distinguished Lecture of Fordham University School of Law. He is a fellow of the American Academy of Arts and Sciences.

Renowned educator, litigator, and legal scholar Dean Erwin Chemerinsky will give the Keynote Address at the 2017 Thurgood Marshall Award Dinner.

In July 2017, Dean Chemerinsky will begin his term as the new dean of the UC Berkeley School of Law. Chemerinsky is also the founding dean of the University of California, Irvine School of Law, which began classes in the fall semester of 2009, and is the author of numerous books and articles on the U.S. Supreme Court and constitutional law. His casebook *Constitutional Law* is one of the most widely read legal textbooks in the country. Chemerinsky has also written nearly 200 law review articles in the nation's top journals. He's argued appellate cases before the U.S. Supreme Court and the U.S. Court of Appeals. He writes monthly columns for the *ABA Journal* and the *Daily Journal*, and occasional op-eds in newspapers nationwide. In January 2017, he was named the most influential person in legal education in the United States by *National Jurist* magazine.

americanbar.org/groups/crsj/awards/thurgood_marshall_award.html

Section of
Civil Rights and
Social Justice
AMERICAN BAR ASSOCIATION

Human Rights Heroes

By Wilson Adam Schooley

"Hero" is not a word to wield lightly. We typically choose just one to honor in each issue. But the field we cover this issue is full of underappreciated champions. So, in this issue of *Human Rights*, we honor four extraordinary lawyers for their work in Indian Country.

Kirke Kickingbird

Kirke Kickingbird, of the Kiowa Tribe, is the first Native American to chair the ABA Section of Civil Rights and Social Justice and was the first elected to the ABA Board of Governors. He is a former president of the Native American Bar Association and past board chair of Oklahoma Indian Legal Services. He has devoted his entire career to improving the lives of Native American people. His many roles in that effort include general counsel to the U.S. Congress American Indian Policy Review Commission, whose report has shaped Indian policy since 1977. He has been chief justice of the Supreme Court of the Cheyenne and Arapaho Tribes of Oklahoma, chairman of the Oklahoma Indian Affairs Commission, and special counsel on Indian Affairs to Oklahoma Gov. Frank Keating. Kirke has written extensively on Indian law, including *One Hundred Million Acres* and *Indians and the U.S. Constitution: A Forgotten Legacy*, which was honored by the U.S. Bicentennial Commission.

Mary Smith

Mary Smith, a member of the Cherokee Nation and secretary-elect of the ABA, is the first Native American officer in ABA history. Like Kirke, she is a past president of the Native American Bar Association, where she led a landmark study of Native Americans in the legal profession. She headed the Indian Health Service, which she joined to honor her grandmother, born in 1905, who had 16 siblings, six of whom did not live past the age of three because of the lack of adequate health care. Mary recently visited the land where her grandmother was born and found a small cemetery with unmarked graves—surely the graves of her six great aunts and uncles—and wondered what difference her ancestors would have made in our world had they lived. She believes Indian Country is at a defining moment in our nation's history and that nothing is more central to the future of Native people than health care—a fundamental human right.

continued on page 23