



THE INVISIBLE FAMILIES

Child Welfare and American Indian Active-Duty Service Members and Veterans

By Kathryn E. Fort and Peter S. Vicaire

There is little written on child welfare issues as they involve Native military families. In the recent case of *Adoptive Couple v. Baby Girl*, the Supreme Court erased them entirely. The federal government, tribes, and states can address issues affecting Native military families in a number of ways, including:

- Kinship placement in contested adoptions put on hold due to deployment.
- Ensuring memorandums of understanding between military bases and states include reference to the Indian Child Welfare Act (ICWA).
- Identifying and educating attorneys—including judge advocates—on both ICWA and the Servicemembers Civil Relief Act.
- Training Veteran Treatment Court judges on issues specific to Native veterans.
- Modeling specialized state ICWA dockets on Veteran Treatment Courts.
- Opening conversations between child welfare courts and veterans courts, and assigning one judge per family.
- Encouraging the development of tribal court veterans treatment dockets and engaging with the Veterans Administration (VA) through Veteran Justice Outreach Specialists (VJOs).

The ICWA, 25 U.S.C. §§ 1901 et al., one of the most important pieces of federal legislation for American Indian families, has been subject to Supreme Court review only twice since its passage in 1978. The first, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), was a ringing endorsement of the law, a call to the states to respect its jurisdictional provisions and to not allow individual state definitions of legal terms to undermine its purpose. When Mississippi wanted to adopt a state-specific definition of domicile to defeat tribal jurisdiction because the children involved were born off-reservation though their parents were domiciled on the reservation, the Supreme Court held the federal law must have uniform applicability across all states. The second, *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013), was far less enthusiastic and curtailed the law's application in certain cases. More damaging has been the states' responses to *Adoptive Couple v. Baby Girl*, especially that of the Alaska Supreme Court in *Native Village of Tununak v. State*, 334 P.3d 165 (Alaska, 2014), which applied the holding of the opinion to the involuntary removal of a child by the state far beyond the fact pattern of the original decision, a contested adoption.

There are many troubling aspects to the opinion in *Baby Girl*, but what this article seeks to illuminate are the pieces left out of

the opinion: the military service of the Native father, and the intersection of child welfare, ICWA, and Native military service. While it would be difficult to pin down just one aspect of the opinion that enraged Indian country the most, certainly the Supreme Court's complete erasure of the biological father's military service from the record would be near the top.

Citizens of Indian Nations serve in the United States military at higher rates per capita than any other ethnic group.¹ Pride in that fact drives tribal recognition and honor of Native veterans and service people. Codetalkers from World War II may be the most famous example of American Indian service during wartime, where soldiers used the knowledge of their own languages (knowledge the United States tried to eliminate through forced federal assimilationist policies) as the basis for codes during the war. Recently, Congress awarded its highest honor, the Congressional Gold Medal, to Codetalkers from 33 tribes for their bravery and service. At tribal powwows, veterans normally open the festivities during the grand entry, when they are honored by carrying in the eagle staffs and flags and honored with a victory or veterans song when the eagle staffs and flags are posted. More recently, the first woman to die in combat in the Iraq war was a Hopi woman, and a mountain peak in Arizona is now named for her. In 2012, the Crow tribal legislature passed a resolution honoring the nearly 30 years of service of Command Sgt. Major Julia Kelly.² Further, the U.S. Department of Veterans Affairs (VA) has named three medical facilities after Native American servicemen.³ For the Supreme Court to ignore a record of military service, to erase it as part of the Court's narrative to explain someone as an absent father, is a particularly egregious insult.

Congress passed ICWA in 1978 to prevent the ongoing, wholesale removal of Indian children from their homes. When an Indian child—defined in 25 U.S.C. § 1903(4) as an enrolled member of a tribe, or a child eligible for enrollment as well as the biological child of an enrolled member—is involved, the Act applies in four defined proceedings. Those proceedings, listed in 25 U.S.C. § 1903(1), include foster care, pre-adoptive placement, termination of parental rights, and adoptions. This means the involuntary removal of children, usually by state agencies, and both voluntary and contested adoptions, are governed by the law. The law differentiates and defines pre-existing exclusive tribal jurisdiction over children residing on a reservation, and concurrent, or transfer, jurisdiction over children residing off a reservation. The law allows for the transfer of cases back to tribal court jurisdiction; but if the case stays in state court, there are specific provisions regarding the placement of removed children, heightened standards of evidence for removal and termination, and the requirement of the party seeking removal or termination to provide active efforts to prevent the break up of the Indian family.⁴

While ICWA is applied far more often in involuntary child welfare cases, voluntary adoption cases usually garner the most media attention, and the fact pattern of the *Baby Girl* case mirrors other litigated adoption cases. In *Baby Girl*, a non-Indian woman and a Cherokee citizen man were unmarried when the woman became pregnant. The mother wanted to put the child up for adoption, unbeknownst to the father, who later objected when he found out. ICWA, however, applies regardless of the mother's wishes. The stated congressional goal of ICWA is *both* to preserve Indian families *and* the "continued existence and integrity" of tribes

through their children. This means that a tribe's interest in its children is on par with the parent's interest and arguably superior to the state's interest. This creates a tension among the rights of the mother, the father, and the tribe—not to mention the child's interest—that can lead to messy litigation. Depending on the participants in the case, it can also lead to media frenzy, where there is usually very little discussion of the purpose of the law and a lot of discussion of the benefits of adoption. However, in this case, there was one additional wrinkle: The father was actively serving in the U.S. Army and stationed at Fort Sill, Oklahoma, when the mother became pregnant. He was days away from deployment to Iraq when he was notified of the adoption.⁵

Reading the *Baby Girl* case with the knowledge of the father's service and deployment during the months of pregnancy and the first year of his daughter's life provides context for his actions and those of the adoption attorneys in the case. The father, stationed four hours from his home and the mother, used text messaging to communicate with the mother. The father testified that this incredibly common form of communication was the only way mother would communicate with him—as opposed to phone calls—given the difficulty of meeting in person. In the media coverage of the case, the father's use of text messages illustrated his perceived laissez-faire attitude toward the mother's pregnancy. However, the Supreme Court gave those messages the weight of his relinquishment of parental rights, stating that "Birth Father, who had relinquished his parental rights via text message to Birth Mother, claimed a federal right under the ICWA to block the adoption and obtain custody." 133 S.Ct. 2552 at 2566.

The father claimed his relinquishment of custody was to the mother, knowing he was going to be deployed. The deployment cycle and how it affects service members would have also informed his decision about his ability to take custody of a child.⁶ Service members who are being deployed must have a plan for the care of the children for whom they have custody. In this case, since the father did not have custody of the baby, he assumed the child would be staying with the mother while he was away. The attorneys for the adoptive parents, rather than notifying father immediately, waited four full months after his daughter's birth, days before he was set to leave for Iraq, to serve him with the adoption papers from South Carolina. Those papers were not compliant with the requirements of ICWA for voluntary termination of parental rights. According to 25 U.S.C. § 1913(a), even if the father had wanted to voluntarily relinquish his parental rights, he would have had to do so in writing, in front of a judge of competent jurisdiction, who would also have had to certify that the consequences of the action were explained to the father in full detail at least 10 days after the birth of the child.

However, because the termination of the father's parental rights was not voluntary, he invoked the requirements of an *involuntary* termination, which requires additional burdens on those who seek to terminate parental rights, far beyond that of an inconclusive text message. Under ICWA, the requirements are different for a voluntary proceeding than that for an involuntary one. When a parent's rights are being involuntarily terminated, there are a number of burdens on the party seeking to do the termination. Those burdens became what the Supreme Court decision turned on: specifically, the requirements of active efforts to prevent the breakup of the Indian family, a heightened standard of evidence,

and placement preferences under ICWA in a contested adoption where the state law gives no protections to the father.⁷

The Supreme Court describes the child as “taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father ...”⁸ The Court does not mention the reason for the delay of more than two years to settle the adoption, which had nothing to do with the father’s delay but rather his year-long deployment and the time the case spent in the lower court upon his return. The Court does not describe the father’s initial lawyer as a judge advocate, a member of the military’s Judge Advocate General (JAG) Corps, nor explains why or how the JAG was able to obtain a significant five-month stay of the proceedings. The reader of the Supreme Court opinion only learns that the eventual trial over the adoption happens when the child is 2 years old.

the best interest of the child standard, simple delay is not enough. The best interest of the child, the standard by which family courts operate, is relatively amorphous but can include placement permanency above all other considerations.¹³ Given the length of time of an average deployment, the placement of a child during that time can govern the rest of a case. In the case of a contested adoption or foster-care proceeding (such as the case where a nonmilitary parent comes under state child-welfare jurisdiction while the military parent is away), placement for a year or more in a nonkinship home has the consequence of setting up the service member to argue against placement permanency for the child, regardless of the fitness of the service member as a parent.

In addition, courts can be hesitant about, and even ignorant of, the SCRA when asked to apply it in child welfare cases.¹⁴ Like ICWA, it is a federal statute with the intent to slow down certain

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The Servicemember’s Civil Relief Act and Active-Duty Native Families

The statute the father’s JAG used to stop the case was the Servicemember’s Civil Relief Act (SCRA), 50 App. U.S.C.A. § 522 (2008), recently amended to include child welfare proceedings. During the initial build up in Iraq, the Bush administration was concerned with the outdated provisions of the SCRA, then called the Soldier’s and Sailor’s Civil Relief Act. To fulfill the purpose of the Act—to allow service members to focus on their work rather than legal issues at home—the Act had to be significantly amended. The call-up of reservists and National Guard meant that many families who were unaccustomed to long deployments were being asked to handle great changes in short amounts of time. The overhaul of the Act in 2004 eliminated gendered language that excluded women and included reservists and National Guard members on active duty in its coverage.⁹ The law allows for some civil cases, such as enforcement of car liens, foreclosures, and other civil issues, to be stayed. The Act requires certain information from the service member, but if she provides it, the court must stay the case for at least 30 days. The overhaul did not, however, directly address issues of child custody. Not until 2008 did Congress amend the Act to include “any child custody proceeding.”¹⁰

The vast amount of academic and practitioner scholarship on the intersection of military and family law focuses heavily on divorce and custody issues, especially as it pertains to active-duty service members. Some states also have laws governing a change in custody arrangement during a deployment.¹¹ Less has been written on the intersection of *involuntary* child welfare proceedings and the military. Involuntary proceedings, which can include contested adoptions, child welfare cases, and some guardianships, are essentially the cases where ICWA also applies. SCRA provides some protection in this area—it did allow the father in the *Baby Girl* case to delay the South Carolina adoption proceeding long enough for his attorney and the Cherokee Nation’s attorneys to make compelling arguments for the return of his child.¹²

However, in a field of law governed by the passage of time and

child custody cases for the benefit of the family and child. In the *Baby Girl* case, the father’s attorney asked a family court judge to apply not one, but two, federal statutes that are directly opposed to the current state and federal policy of moving children quickly to “permanency.”¹⁵ While some JAGs and military family-law attorneys are familiar with SCRA and Indian law and some family-law attorneys are familiar with ICWA, far fewer are familiar with both. Given the current demographics, there is and will be a continued need for attorneys familiar with *both* the military *and* Indian-law aspects of a case.

This is a difficult overlap to address for any number of reasons, including that the locus of military family practice, on or around a base, is not necessarily the locus of an Indian-law practitioner, on or near a reservation or in an urban area. But since ICWA cases follow the child, ICWA cases can arise anywhere, particularly since service members tend to be in childbearing and child-rearing age groups.

Lori Piestewa, the first woman killed in combat in Iraq, was emblematic of current Native service members: a young, single mother raising two children. In 2012, half of Native service members were 24 years old or younger, compared with 35 percent of all other service members. More Native women than women of other groups serve, and all Native service members are far less likely to be officers.¹⁶ In addition, providing support for current Native service members far from home can be a challenge for tribes, particularly for those with limited resources. For that reason, other nonprofits should be considering ways to support active-duty Native service members, such as providing education and cultural resources to JAGs and military attorneys on laws, especially ICWA, specific to tribal citizens.

The issues surrounding child welfare cases in active-duty families is dealt with primarily through the Department of Defense (DoD) Directive 6400.1, initially promulgated in 1981 and reissued in 2004.¹⁷ Child welfare cases are handled by the military branches’ Family Assistance Programs (FAPs) and through memorandums of understanding (MOUs) with local state agencies. As far back as 1986, 46 military installations had MOUs with local child protec-

tion agencies. There are a number of potential jurisdictional issues, including jurisdiction of child welfare issues overseas, jurisdiction over nonmilitary spouses, and jurisdiction where there is no MOU. There is also the question of how varying degrees of child neglect are, or are not, handled by the military or state under an MOU. Finally, it remains to be seen whether any of the MOUs currently in existence mention the application of federal laws, such as ICWA, to child welfare cases.

Fully addressing the intersection of jurisdiction over Native active-duty families and the application of ICWA is beyond the scope of this article, but the top states with military populations include California, North Carolina, Washington, Michigan, New York, Florida, and Arizona,¹⁸ which overlap with states with top American Indian populations, according to the U.S. Census.¹⁹ Although the legal issues of *Indian* child welfare on base and in active-duty families is not addressed in the literature, the minimum federal standards afforded by ICWA should follow the Indian child. For areas where there is a MOU in place, the requirements of ICWA bind the state and arguably apply to the case regardless. If the case is in state court, ICWA applies whether the MOU addresses it or not. The interest of a tribe in its children does not change even if the child is in a potential jurisdictional black hole.²⁰

Native Veteran Families and Veteran Treatment Courts

Once the family is no longer on active duty, children of Native *veterans* undoubtedly receive the protections of ICWA and also deserve culturally appropriate services for their parents. Often the perception of what are considered veterans issues in both tribes and society at large are conflated with elder issues. In particular, this can skew veterans' services to older men who served, usually in Vietnam or Korea. The needs of those veterans, while still necessary to address, are different from the young, single parents who have returned home in the past 10 years. In fact, Native veterans today are more likely to be younger than their non-Native counterparts, more likely to be women than in the past, more likely to have children, more likely to have a service-connected disability, and more likely to have served fewer than five years. They also have the lowest median personal incomes compared with other veterans.²¹

While these statistics do not mean children of Native veterans are more likely to be the subject of a child welfare case, they do indicate that the stressors on many Native families may be especially difficult for Native veterans. Involuntary removal of children by the state, particularly in Native families, is often attributed to neglect. Substance abuse can be a driving factor. Native veterans may face returning home with post-traumatic stress disorder (PTSD) or traumatic brain injuries (TBI). Moreover, half of all Native veterans live in eight states: California, Florida, Michigan, Arizona, New Mexico, Texas, Oklahoma, and Washington. Native families are also subject to more scrutiny by the states, and states with significant disproportionality rates for Native children in care include California, Michigan, and Washington.²² Those states should consider how to identify any Native veteran parents in their child welfare cases and ensure that they are receiving the services they are due, in addition to those required by ICWA. When tribes consider services for their veterans, family support and family legal services should be at the top of their lists, along with tribal veterans treatment courts (VTC).

This summer the *Family Court Review* put together a special issue looking at the intersection of family courts and military families. In one article, the authors draw an explicit link between family courts and state VTCs. In another, Gen. Evan Seamone called for a core curriculum on military family issues for state courts, based on a survey of family court judges by the National Council of Juvenile and Family Court Judges. Finally, Judge Janice M. Rosa described establishing a family court for military families.²³ The issues of military families are getting attention, but the specific legal and cultural needs of Native families have not yet entered the discussion, which include the application of ICWA and access to culturally appropriate services. While there is improvement in training and collaboration on the broader topic, and the special issue is invaluable, two areas in particular remain understudied—Native military families and involuntary child welfare dockets.

The rise of VTCs is one way to get information on veterans' issues to state court judges. The VTC model, started in 2008 in Buffalo, New York, by Judge Robert Russell, provides a way for veterans who qualify to receive treatment instead of going to jail for certain offenses. Because potential military enlistees cannot have any significant criminal history, and because any felony requires a waiver "in meritorious cases" from the Defense secretary before the enlistee can enter the armed forces, it is difficult, if not impossible, for a criminal to join the military.²⁴ Therefore, it is entirely possible, and even likely, that when a veteran is in court, she is facing her first criminal charge. Various studies have drawn the explicit link between veterans who have been exposed to prolonged stressful conditions and/or suffer from TBI and anger and irritability issues, as well as susceptibility to substance abuse and antisocial or criminal conduct.²⁵

Essentially a diversionary court, like a drug court or healing to wellness court, a VTC allows defendants charged with nonviolent, substance-abuse-related crimes to enter voluntary drug-treatment programs as a condition of probation.²⁶ VTCs partner with a team of professionals, including a veteran mentor, a VTC liaison, social workers, psychologists, and a veterans justice outreach specialist (VJO) to coordinate VA services between the court, the VA, state agencies, and other service providers.²⁷ Having a VTC in a county ought to increase communication on the intersection of child welfare dockets and the VTC docket, except for one major barrier: a lack of cross-docket communication. The VTC, concerned with criminal charges, rarely communicates with the quasi-criminal child welfare docket or the confidential adoption one, and vice versa. Outside of a few model exemplars at the state level, those dockets remain silos.²⁸

For Native families in particular, this is deeply unfortunate. In addition to the number of Native veterans who may be involved in both a VTC and a child welfare case, parallels between the courts' responses to both two communities—veterans and Native families who are struggling—can be striking. Judges need education and training surrounding both groups. They are both subject to federal laws and support that has to be run through state courts. State courts are asked to identify veterans and are required to identify Native children, which some courts see as additional work. Further, there is scholarly work on intergenerational trauma when it comes to both the children of combat veterans and to children of genocide survivors. An ICWA case's "active efforts"²⁹ and VTC's treatment plan often address similar issues. The structure of the

VTC and the role of a VTC liaison—to help the veteran navigate systems and agencies for assistance and support—is an interesting model for a state on what an ICWA court, perhaps beyond simply a specialized docket, could look like. Finally, there is, or ought to be, an understanding in the legal community that the status quo is not working for either group.

On the other side, state court judges running VTC courts could do with training that incorporates information often covered in ICWA training, especially cultural competency, when it comes to Native families. Trainings or handbook-style informational handouts should include information specific to Native veterans and tell how to ensure the services they receive are tribal-specific where available. Developing training materials for state judges on issues facing Native veterans is one area where ICWA advocates, tribal healing to wellness court advocates, and veterans advocates could partner.

The intersection and conflict of federal law, state law, tribal law, military law, and legal ethics is inevitable in cases of voluntary adoptions and child welfare cases involving Native children from military families.

One way to stop the siloing effect mentioned above is to give each family one judge. The National Council of Juvenile and Family Court Judges (NCJFCJ) has an initiative called Project ONE that encourages state courts to consolidate a family's legal issues in front of one judge rather than many. Unfortunately, because of overwhelmed dockets and an inability to coordinate caseloads, some states have difficulty in just getting one jurist per child welfare case. This would be particularly important for a parent involved in both a child welfare case and a VTC or drug-court case. For example, one article on tribal healing to wellness courts describes the importance of keeping a drug-court participant busy.³⁰ If the judge in the VTC does not know about the requirements of the family-court docket, there is a potential for scheduling conflict, particularly as it affects court hearings and parental visitation. The schedule of a VTC case can run anywhere from 18 to 36 months, allowing for the time it takes for a person to heal and to address substance abuse issues. The schedule of a child welfare case can be much faster than that, even though the parent might be suffering from the same problems. The healing of a parent is required for the healing of a family. Separating those two projects entirely makes success more difficult for both.

Beyond that work, there is nothing stopping tribes from starting their own VTCs. Of course, "cultural considerations should be at the forefront of any discussion about the possibility of adopting the VTC model ... in a tribal justice system. If a VTC, or VTC-informed practice, is consistent with the values espoused in tribal law and custom, its chance for success is far greater."³¹ The VA Office of Tribal Government Relations has been presenting the idea across the country and has created a guidebook for those tribal justice systems that are interested in implementing a VTC. A few tribes have applied for Department of Justice coordinated tribal assistance solicitation grants to develop veterans dockets. In addition, an organization called Justice For Vets has created a veterans treatment court planning initiative, which offers free training and technical assistance to assist qualified courts, tribal or

state, in their planning and development of VTC programs.³² Prior to the six-month process, the court must identify all individuals who will have roles in the functioning of the VTC.³³ In addition to these individuals, and depending on availability due to the location of the VTC, there is also the possibility of collaboration with state agencies, veteran service organizations, vet centers, and other veterans support organizations.

Tribes with already successful drug-treatment courts or healing to wellness courts are well positioned to draw on the VA to coordinate services owed to veterans in addition to those provided by the tribe. Further, a tribal court with limited resources or few veterans on its docket does not have to implement a fully developed VTC to provide veterans with specialized, diversionary attention. Every VA medical center (VAMC) has at least one VJO, and many facilities have up to four. These VJOs are specifically tasked to work with courts "to avoid the unnecessary criminalization of mental

illness and extended incarceration among Veterans by ensuring that eligible justice-involved Veterans have timely access to [VA] services as clinically indicated. [VJOs] are responsible for direct outreach, assessment, and case management for justice-involved Veterans in local courts and jails, and liaison with local justice system partners."³⁴ VJOs are not limited to serve veterans in state courts; they can, and do, work for tribal courts as well.

Finally, for some smaller tribes, there is already only one judge per family. Because of this, judges know that participants in their drug courts are also in their family courts. Tribes building innovative court systems already have one judge for one family, regardless of the docket. In addition, in some states, tribal and state judges are working on ways to transfer drug-court cases to tribal jurisdiction for tribal citizens who need the services of the tribe. Doing the same for veterans, and then using the ability to transfer in child welfare cases from state court to pull in related family cases, is one way tribes could keep families together on one docket, under tribal jurisdiction, rather than splitting them up.

Back to *Adoptive Couple v. Baby Girl*

Returning to the earlier case, would any of the projects described above have helped the father in the *Baby Girl* keep his daughter? Probably not directly. The case of *Adoptive Couple v. Baby Girl* case was not a child welfare case. Nonetheless, the termination of his parental rights was not voluntary. As noted above, an involuntary termination of parental rights under ICWA, whether due to the state's actions or the other parent's, requires certain findings under the law. ICWA is unequivocal on this point. Despite this, the Supreme Court ultimately found against the father, holding that because he never had custody of his daughter, there was no "continued custody" to create the heightened standard of evidence of beyond a reasonable doubt required in section 1912(f) to terminate parental rights, nor were the active efforts provisions in section 1912(d) required before his rights were terminated.³⁵ Even Justice Sonya Sotomayor's blistering dissent unaccountably leaves

out the father's service record. Indeed, his perceived disinterest in his child is never discussed in the context of his military service in the Court's opinion. Moreover, by all accounts, in the nearly two years his daughter spent with him after the South Carolina decision and before he relinquished custody in the face of unending pressure by the adoptive couple, the father was nothing but a fit parent.

The intersection and conflict of federal law, state law, tribal law, military law, and legal ethics is inevitable in cases of voluntary adoptions and child welfare cases involving Native children from military families. In ICWA cases, Native service members can be in the unenviable position of asking a state court to apply not one but two federal laws—the ICWA and the SCRA. In addition, the absence of a service member in the life of the child, dictated by the terms of his service and by deployment, can be used by courts as contrary to the best interest of the child for permanency. Finally, once service members come home as veterans, possible injuries, especially TBI and PTSD, make them more vulnerable to the possible removal of their children. Tribes are in a particularly critical place to provide services and specialized dockets for these cases, and attorneys must be attuned to the changing landscape of the law under *Adoptive Couple* and how the needs of both active-duty and veterans' families require specialized representation.

Though the military is primarily a force of young volunteers, young veterans with families are as invisible to the U.S. Supreme Court as American Indians. The Court wrote its narrative in a way that denied a veteran father his child, his tribal citizenship, and his service. The only good that can come from such an outcome is preventing another case where the invisibility of Native military families drives the judicial decision-making that separates them. ☉



Kathryn E. Fort is the staff attorney for the Indigenous Law and Policy Center at Michigan State University College of Law. She also teaches the Indian Child Welfare Act class at the College of Law. Peter S. Vicaire is a tribal government relations specialist for the Veterans Affairs Office of Tribal Government Relations. Special thanks to Victoria Sweet, Carrie Garrow, Matthew L.M. Fletcher, and Wenona T. Singel. © 2015 Kathryn E. Fort and Peter S. Vicaire. All rights reserved.



Endnotes

¹Jennifer Miller, *Native Americans Enlist for Turf and Tribe*, CHRISTIAN SCIENCE MONITOR, Aug. 20, 2007; see also CEHP INCORP. for THE DEP'T OF DEFENSE, 20TH CENTURY WARRIORS, NATIVE AMERICAN PARTICIPATION IN THE U.S. MILITARY 3 (1996).

²L.R. 12-05, April 2012 Regular Session (Crow Tribal Leg. 2012).

³Jack C. Montgomery VAMC in Muskogee, Oklahoma; Ernest Childers Outpatient Clinic in Tulsa, Oklahoma; and the Charles George VAMC in Asheville, North Carolina.

⁴See 25 U.S.C. § 1911 (jurisdiction); *id.* at § 1915 (placement

preferences); *id.* at § 1912 (active efforts, which are “remedial services and rehabilitative programs designed to prevent the break-up of the Indian family”).

⁵See *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012) (discussing facts surrounding father's service and actions not included in the Supreme Court decision), *rev'd by Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013).

⁶See Shelley A. Riggs & Angela Cusimano, *The Dynamics of Military Deployment in the Family System: What Makes a Parent Fit for Duty?*, 52 FAM. CT. REV. 381, 386 (2014) (2014) (describing the deployment cycle in the context of family relationships).

⁷*Cf. Ebert v. Bruce L.*, No. 6976 (Alaska, Dec. 26, 2014) (Alaska state law requiring more for the biological father's consent to adoption).

⁸133 S.Ct. at 2556.

⁹Sara Estrin, *The Servicemember's Civil Relief Act: Why and How This Act Applies to Child Custody Proceedings*, 27 LAW & INEQ. 211, 214-5 (2009).

¹⁰50 App. U.S.C.A. § 522 (2008).

¹¹See, e.g., MICH. COMP. LAWS § 722.27(1)(c) (2005) (requiring the moving party to demonstrate under the clear and convincing evidence standard that a change in custody during deployment is in the best interest of the child in order to obtain a temporary custody order that must be reversed upon the return of the service member from active duty).

¹²*Adoptive Couple*, 731 S.E.2d at 657 (ordering the return of the child to her father under the Indian Child Welfare Act).

¹³See *in re Alexandria P.*, 176 Cal.Rptr.3d 468, 494-496 (Cal. Ct. App. 2014) (using a best interests standard to deviate from ICWA's placement preferences due to the length of time the child had spent with the foster family and her bond with them).

¹⁴Jon Monk, *U.S. Navy Officer Deployed on Submarine Fights for Custody of Daughter*, TOLEDO NEWS (June 21, 2014), available at www.toledonewsnow.com/story/25833158/us-navy-officer-deployed-on-submarine-fights-for-custody-of-daughter (judge in Lenawee County, Michigan, initially refused to delay custody case under the SCRA even though the service member had complied with the law's requirements to do so. The case began as an abuse and neglect case against the nonmilitary mother, with custody going to military father).

¹⁵B.J. Jones, *Differing Concepts of “Permanency”: The Adoption and Safe Families Act and the Indian Child Welfare Act in FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT* at 30 127 (Matthew L.M. Fletcher, Wenona T. Singel, & Kathryn E. Fort, eds., 2009).

¹⁶U.S. DEP'T. OF VETERANS AFFAIRS, AMERICAN INDIAN AND ALASKA NATIVE SERVICEMEMBERS AND VETERANS 6-10 (Sept. 2012) (using data compiled from the 2010 Census and the Dep't of Defense).

¹⁷RALPH BLANCHARD, NAT'L CTR. ON CHILD ABUSE & NEGLECT, PROTECTING CHILDREN IN MILITARY FAMILIES: A COOPERATIVE RESPONSE 1 (1992).

¹⁸Evan R. Seamone, *Educating Family Court Judges on the Front Lines of Combat Readjustment*, 52 FAM. CT. REV. 458, app. D (2014).

¹⁹U.S. CENSUS BUREAU, 2010 CENSUS SHOWS NEARLY HALF OF AMERICAN INDIAN AND ALASKA NATIVES REPORT MULTIPLE RACES (2012), available at www.census.gov/newsroom/releases/archives/2010_census/cb12-cn06.html.

²⁰Compare Major Lisa M. Schenck, *Child Neglect in the Military Community: Are We Neglecting the Child?*, 148 MIL. L. REV. 1 (1995) (describing the jurisdictional difficulty of child neglect cases on base or overseas) with Lt. Col. Jeffery P. Sexton, *Home Schooling Away from Home: Improving Military Policy Toward Home Education*, 182 MIL. LAW REV. 50 (2004) (describing cases holding state abuse laws to apply to families on federal enclaves).

²¹U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 14 at 11-13, 17, 24.

²²Alicia Summers & Steven Wood, NCJFCJ, *Disproportionality Rates for Children of Color in Foster Care (Fiscal Year 2012)*.

²³Hon. Janice M. Rosa, *Mission Critical: A Call to Action for Juvenile and Family Courts, The U.S. Armed Forces, and Veterans Affairs*, 52 FAM. CT. REV. 511 (2014).

²⁴10 U.S.C. § 504(a) (depending on the branch of service, waivers are required for some misdemeanors in one branch, while not in others. For example, the Marine Corps requires a waiver for a single use of marijuana, while other branches are not as stringent).

²⁵See Eric B. Elbogen *et al.*, *Criminal Justice Involvement, Trauma, and Negative Affect in Iraq and Afghanistan War Era Veterans*, 80 JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY 1097 (2012); Charles W. Hoge *et al.*, *Mental Health Problems, Use of Mental Health Services, and Attrition from Military Service After Returning From Deployment to Iraq or Afghanistan*, 295 JOURNAL OF THE AMERICAN MEDICAL ASS'N 1023 (2006); K.L. Mills *et al.*, *Trauma, PTSD, and Substance Use Disorders: Findings From the Australian National Survey of Mental Health and Well-Being*, 163 AMERICAN JOURNAL OF PSYCHIATRY 4 (2006).

²⁶FLIES AWAY *et al.*, TRIBAL LAW AND POLICY INST., TRIBAL HEALING TO WELLNESS COURTS: THE KEY COMPONENTS vii (2014).

²⁷52 FAM. CT. REV. 417 (2014).

²⁸Seamone, *supra* note 18 at 484. The author has also inquired informally with both VTC judges and ICWA family court

practitioners in various jurisdictions around the country, and neither appears to be aware of the other.

²⁹"Active efforts" is not fully defined by ICWA for individual cases, but federal guidelines do exist, 44 Fed. Reg. 67,584, 67,592 (Nov. 26, 1979).

³⁰Joseph Thomas Flies Away & Carrie E. Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence*, 2013 MICH. ST. L. REV. 403, 414 (2013).

³¹U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF TRIBAL GOVERNMENT RELATIONS, RESOURCES FOR JUSTICE-INVOLVED VETERANS: A GUIDE FOR TRIBAL JUSTICE SYSTEMS, 18 (2012).

³²*About Us*, Justice for Vets, www.justiceforvets.org/about (last visited Jan. 9, 2015). Justice for Vets is the leading organization in advocating for funding, assisting with legislation, training and technical assistance, and influencing public policy for VTCs. *Id.* It is part of the National Association of Drug Court Professionals (NADCP), a 501(c)(3) non-profit organization. *Id.*

³³2015 Veterans Treatment Court Planning Initiative, Justice for Vets, justiceforvets.org/2015-vtcpi (last visited Jan. 9, 2015).

³⁴Homeless Vets, U.S. DEP'T OF VETERANS AFFAIRS, www.va.gov/HOMELESS/VJO.asp (last visited Jan. 9, 2015).

³⁵See Jack Trope, *Understanding the Supreme Court's Decision in Adoptive Couple v. Baby Girl*, 61 THE FEDERAL LAWYER 34 (2014) (for a full description of the case, the holding, and its implications).

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⁴The justices vote on every case, but theoretically write majority opinions only 11 percent of the time.

⁵Five were decided per curiam, one was a grant of a stay, and one was remanded without opinion.

⁶With nine justices on the Court, the expected random assignment would be 11 percent of all cases.

⁷This count includes three opinions where the vote as 8-0, with one justice not participating in the case.

⁸Mark Twain claimed that British Prime Minister Benjamin Disraeli said that there are only three kinds of lies: lies, damned lies, and statistics. Make of my statistics what you will. (No one has ever found such a statement in any of Disraeli's speeches or writings.)

⁹*Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 464-465 (1989).

¹⁰*Id.*

¹¹*Tuscarora v. Federal Power Commission*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

¹²*Rice v. Rehner*, 463 U.S. 713, 732 (1983).

¹³*Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1830).

¹⁴I had the opportunity in 2004 to meet the great Billy Mills,

Olympic 10,000-meter gold medal winner and an Oglala Lakota (Sioux) Indian, at one of the parties for the opening of the National Museum of the American Indian. I asked if we could have the official photographer for the event take our picture together. Mills graciously consented. Then he looked at the wine glasses that each of us held and said, "I guess we should both put these down. You know what they say about Indians and alcohol." That's how powerful that stereotype is.

¹⁵*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

¹⁶This outcome has been modified by provisions of the 2013 reauthorization of the Violence Against Women Act now codified at 25 U.S.C. § 1304.

¹⁷This outcome has been changed by an amendment to the Indian Civil Rights Act now codified at 25 U.S.C. § 1301.2.