NEW HORIZONS IN INDIAN COUNTRY?

WHAT LIES AHEAD
New Horizons in Indian Country

By Kirke Kickingbird

T
he 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 today. 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 quid pro quo because demand issues had to be settled between the Indian tribes and the United States.

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. 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 Kirke Kickingbird, Mary Smith, Charlie Hobbs, and Bobo Dean.

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Standing Rock
By Carla F. Fredericks, Rebecca Adamson, and environmental impacts of large extractive and known for centuries—that the human, social, cultural, what indigenous communities across the globe have place while the federal courts’ action continues.

pronged approach to defending tribal rights has played a battlefield by going beyond domestic litigation and proceeds through the courts, the tribes have expanded the face of ever-expanding exploitation in the fossil fuel movement to protect indigenous and human rights in the context of indigenous human rights—contextualize the rights to culture; health; water; property; assembly; personal security; participation in government; and free, prior, and informed consent.

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demonstrations. [829x142]failed to take to protect their rights.

steps the United States government had able to highlight the tribes’ history and shared with the special rapporteur will meetings, tribal leaders had the opportu-
nity 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.

U.N. representatives, and participate in discussions on the rights of indige-
nous peoples. While addressing the Human Rights Council, Chairman Archambault discussed the United States’ and the com-
pany’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’ human rights outside the confines of a Wash-
ington 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 Washing-
town, 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
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he controversy surrounding the Dakota Access Pipeline (DAPL) is ubiquitous—gal-
vanzing 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 proven 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 invis-
ible to the American mainstream. Projects like this, and the governments that allow them, implicated and oftentimes violate internationally recognized human rights and collective indigenous rights, includ-
ing 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 corporate engagement, 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.

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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
Indian tribes as sovereign 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 the U.S. District Court for the District of Colorado. 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); U.S. v. Phippen, 238 U.S. 21 (1915); and 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 Federalized recognized tribes as sovereign governments and have addressed issues such as state police jurisdiction on tribal lands, sovereign immunity, religious freedom, accounting for trust funds, exhaustion of tribal court 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 Tribe v. State of Utah, 790 F.3d 1190 (10th Cir. 2015), Gorsuch was the concurring judge in the 2015 decision in which the state 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 bring an action regarding a tax imposed on income from tribal lands. The District Court dismissed the tribal members’ claims. We reverse. Ute Tribe at 1207.

The laws of trust and trustees, Gorsuch suggests, apply as 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 map out the scope of district courts’ jurisdiction. “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.

Exhaustion of Tribal Remedies
In United Indians Financial Services v. Sac & Fox Nation, 668 F.3d 697 (10th Cir. 2012), a non-Indian bank sought to enforce a promissory note held by a tribal member under the Treaty Clause. The federal court rejected exhaustion of tribal remedies, where other circuits are scaling back support for exhaustion principles. Indian Law Questions Gorsuch May Consider Before He Steps Down
Although the Court considers a broad range of issues affecting tribal nations, one fundamental question confronting the case law is the existence of federal jurisdiction to protect Indian Country?” The common question of federal authority in Indian affairs is whether the federal government has the authority to regulate Indian tribes and Indian lands. Recognized tribes in the United States have unqualified criminal authority, but Indian tribes in other countries do not.

Justice Anthony Kennedy raised similar concerns recently during oral argument. In this case, the government is arguing that Congress has not authorized formal litigation in Indian courts. The government argues that Congress must have authorized formal judicial litigation in Indian courts before the case is now admitted.

Justice Gorsuch’s opinions have commonly articulated the importance of federal Indian law that caused a great legal debate for many decades. Justice Van Devanter decided this case in 1911. The case eventually reached the U.S. Supreme Court in 1938, where Justice Van Devanter was joined by Justice Stone and Justice Jackson in a minority opinion. The case was argued for the plaintiff by Justice Willis Van Devanter.

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The Northwest Ordinance is included in the text of the Constitution. The Northwest Ordinance states that “...the 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 Treaty Clause is also a fundamental source of federal authority within Indian Country to be accompanied by trust duties. To settle the processes 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 the framers’ understanding of the federal trust obligations to Indian tribes.

The utmost good faith shall always be observed towards the Indians: their lands and their personal property shall not be taken from them without their consent, and, in their property, right or title, they shall not be invaded or disturbed, unless in just and lawful wars authorized by Congress, but laws found in justice and humanity, and no time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.” U.S.C. 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 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.

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 “unravelled among such treaties in its influence on the American Founders.” Peter and Nicholas Onuf, _Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1758–1814_ (2009). 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 reglar terms of Indian 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 Vattel focused, the society cannot exist and perpetuate itself otherwise than by 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 Role in the Clarification and Punishment of 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 literal 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 significant experience with federal Indian law and appears to be both attentive to the details and respectful to the fundamental principles of tribal sovereignty 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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**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? A 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 has abrogated the tribe’s immunity and passed federal law to the contrary. In the 1970s, Congress passed Public Law 280, giving six states six 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 withdrew most or all federal criminal/jurisdiction subject to tribal consent and include those tribes in its influence on the American Founders. Peter and Nicholas Onuf, _Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1758–1814_ (2009). Vattel focused on natural laws that govern the rights and obligations between nations, particularly navigation, trade, war, and laws regarding citizenship status. See, Andrew Kent, “Congress’s Under-Appreciated Role in the Clarification and Punishment of Offenses against the Law of Nations,” 85 Tex. L. Rev. 843 (2007).

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Tribal Disenrollment Demands a Tribal Answer

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

Legal Services

By David E. Wilkins, A Most Grievous Display of Behavior: Self-Determination in Indian Country. 2013. M.R.C. 1: 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 1891 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 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 IRA contained provisions instituting membership through enrollment discussions. For a discussion of how federal bureaucrats asserted power over tribal membership, see the “model” constitutions 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 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 IRA 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 IRA officials, see law-school.unm.edu/trib/volumes/vol8/TL113SPRUHAN.pdf.) This history shows the concept of formal membership and blood quantum is a purely tribal one and that the history of the process is certainly flawed. However, the common theme in this turbulent history is the band of federal officials and efforts to arrive at non-tribal goals. This is why the idea of self-determination has largely withdrawn from tribal membership determinations—except when a tribe has a provision by treaty regulation that calls for federal review of changes to their constitutions or by-laws—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 Cabah Tribe of Layoyiwee Rancheria v. deutsche, 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 rather than the courts are not part, but also that enabling non-tribal institutions to mold tribes themselves may compromise tribes’ most central power of self-definition. The “high-water mark” for formal recognition of IRA constitutions by the U.S. Depart-
well, see, e.g., United States v. Wheeler, 435 U.S. 313, 322 n.18 (1978); citing Cherokee Intermarriage Cases, 230 U.S. 76 (1916) and Roff v. Burney, 468 U.S. 218 (1987) to note, unless limited by treaty or statute, a tribe has the power to determine tribal membership. Equal Employment Opportunity Comm’n v. Karuk Tribe (D. Oregon No. C8-1077, 1091 (9th Cir. 2001)) (holding that a dispute between a tribal member and a tribal institution is “entirely intramural,” and that generally a tribal member and a tribal institution is Housi ng Auth. Reservations, 22 (Roxanne Ortiz, ed.) Self-Determination and a shell of “state-like” sovereignty exists. tant core of tribal institutions, over which scholars have examined this concept as they are, and do so on tribal terms. Tribal engage in internal con- 

The question then becomes, which insti- 

tution or entity must adjudicate rights in questions of membership? The answer is that tribes are capable as a sovereign, may consider and decide who a member of their own community, and that no other institution should assume such power over a tribal government. The pri- 

macy reason is self-evident: A group itself is defined by the members in it, so the act of making decisions about membership is the fundamental act of self-governance. At the heart of arguments examin- 

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tributing to the current trend of disenrollment in a semantic partitioning of which tribal democracy is contrary to precept of cultural sovereignty. As scholars have highlighted as critical in membership questions (see www.nativeamericanbar.org/wp-content/uploads/2014/01/Opinion-No.-1.pdf)—but the argument that the way to provide it is by diminishing tribal sovereignty is contrary to perception 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, indepen- 

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mination. Norman is a descendant of the Muscogee (Creek) Nation, Kickingbird is a member of the Choctaw Nation of Oklahoma, and Bailey is a citizen of the Choctaw Nation of Oklahoma.
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, 95 F. Supp. 2d 196 (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 Alaska 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.

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 . . . 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 “most 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.

Heather Kendall Miller is a senior staff attorney with the Native American Rights Fund in Anchorage, Alaska.

Who Stole the Acoma Shield?
By Gregory A. Smith and Ann Berkley Rodgers

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 portion of the U.S. 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 well as federal courts in the U.S., in an effort to prevent the market-based effect of the theft.

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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 ball 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 discov-
ered the tomb of King Tutankhamun in 1922, there was an explosion of interest in Egyptology, in general, and mummies, in particular. For instance, scientists and others organized public unwrap-
pings of mummies, turning desecration into spectacle. Today, the British Museum has over 120 human mummies in its col-
lection, 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 exhume 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
many of the mummies would not be destroyed or protected.” Despite this theo-
retical 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 Parthe-
non was completed in 438 B.C. adorned by sculptures, panels, and a large frieze. After 2,200 years gracing the Parthe-
non, many of these were removed by Lord Elgin (between 1801–1810), who claimed 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-

The Prize of Pizarro, Walt Disney’s Uncle Scrooge #7, September 1954

There has 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 the protest against the discovery of mummies and the desecration of sacred graves around the world. Much of it has arisen in reaction to the extraordinary acts of destruction, such as the demolition of the Buddha of Bam-
ian by the Taliban or the looting of the ancient city of Palmyra by ISIS.

In the case of the Bamian Buddha, the Taliban took the view that they belonged to the Talibi-
ban government and that it could do with them as it pleased. In 1999, Mullah Mo-
hammed Omar, the leader of the Taliban, actually issued a decree in support of their preservation. His reasoning was that there were no Buddhists left in Afghanistan (what happened to the ancient Egyptians, after all?!) the statues were no longer being worshipped and so there was no affront to Islam. He report-
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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 5, 2016, at the National Museum of the American Indian in Washington, D.C. Several major Indian tribes were involved, including the National Congress of American Indians, the oldest and largest Native organization, the American Association on Indian Af-

fairs, whose Working Group on Interna-
tional Repatriation has been a leader in this area for years, and the National Associa-
tion of Tribal Historic Preservation Offi-
cers, representing the historic preservation officials for scores of tribes. In addition, the Hoopa Valley Tribe sent representa-
tives, and Acoma’s congressman, Steven 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 estab-
lished in 1989. As part of our authorizing legislation, as enacted by the Congress, the Smithsonian was directed to return to the
Nations of the United States, certain items that were within our collections. That included human remains . . . 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 resolu-
tion that marked a deeper look at our culture, we might come to realize that we all did.

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, and 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 see repatriation; explicitly supported restrictions on export, and encouraged all levels of government to work together on these issues. (Note that since the PROTECT Patrimony Resolu-
tion specifically referenced 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 co-counsel Ann Berkley Rodgers, and by Aaron M. Sims, an Acoma member, both of Chestnut Law Offices, Albuquerque, New Mexico, which serves as a legal advisor to Acoma.) The U.S. Department of Justice also invoked a mutual legal assis-
tance treaty with France to secure support from French authorities in the investiga-
tion of the shield and to prevent its sale.

Government Accountability Office Report
In addition to the language in the PRO-
TECT Patrimony Resolution calling on the Comptroller General to study this area, the chairman of the House Judiciary Committee, Bob Goodlatte (R-Virginia), 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 in 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 legisla-
tion. (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 re-
lations, 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.

Fundings for Expanding 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 Comm-
nittee 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 legisla-
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According to the language in the PRO-
TECT Patrimony Resolution calling on

The Committee recommends $1,000,000 to support the de-
velopment of a Cultural Items Unit within the Division of Law Enforcement tasked with inves-
tigating 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 

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.
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 Annual Conference, the National Congress of American Indians, the United States Capitol, the United Nations, Joe’s Pub at the Public in New York, Yale School of Law, 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 Yukak 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 Indigenous 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.

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 (Ahtahkacan, from the Native village of Teltin). 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 shamed 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-Chairman Debrah 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 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 42:21–23. As a citizen of the Cherokee Nation and a partner at Pipes-Tem Lew 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.sliveroffullmoon.org.

Mary Kathryn Nagle is a citizen of the Cherokee Nation and a partner at Pipes-Tem Lew Firm, 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.
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 Divisibility, 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’s 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 Rosano 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 Swett 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 Law magazine.

Tell the Client’s Story: Mitigation in Criminal and Death Penalty Cases
Edward Monahan and James Clark, Editors

Tell the Client’s Story provides litigation teams the best strategies for effective mitigation work in criminal and capital cases. Top mitigation experts from across the nation will help readers to successfully litigate complex criminal cases. Using practical case studies, surveys, checklists, and appendices, this book will give readers approaches to cogently and persuasively present mitigation evidence to decision makers.

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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, 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, 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.

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