

ICWA AND VAWA: PRESERVING TRIBAL SOVEREIGNTY TO PROTECT OUR WOMEN AND CHILDREN

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VAWA & ICWA BOTH RECOGNIZE AND UPHOLD:

- Tribal Sovereignty
- Tribal Jurisdiction
- The inherent right of Tribal Nations to protect their women and children
- Tribal jurisdiction over non-Indians
- The legitimacy of Tribal Courts
- The inherent right of Tribal Nations to determine their own citizenship requirements
- The inherent right of Tribal Nations to determine how women and children will be treated on tribal lands
- The reversal of a colonial legal framework that historically stripped Indian Nations of their women and children in an attempt to eradicate Indian Nations all together
- The trust duties and obligations Congress owes to Indian Nations that requires them to pass legislation that classifies the Nations' citizens as "Indians" under the law

VIOLENCE AGAINST WOMEN ACT, 25 U.S.C. § 1304

- “[T]he powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.” 25 U.S.C. § 1304
- “A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:
 - (1) **Domestic violence and dating violence**
 - An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.
 - (2) **Violations of protection orders**
 - An act that--
 - (A) occurs in the Indian country of the participating tribe; and
 - (B) violates the portion of a protection order that--
 - (i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;
 - (ii) was issued against the defendant;
 - (iii) is enforceable by the participating tribe; and
 - (iv) is consistent with [section 2265\(b\) of Title 18](#).”

VAWA: PLANNING FOR A HABEAS CHALLENGE

- VAWA requires that if any term of imprisonment is imposed, all rights described in TLOA, 25 U.S.C. § 1302(c) enhanced sentencing, apply.
 - (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution
 - (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
 - (3) require that the judge presiding over the criminal proceeding—
 - (A) has sufficient legal training to preside over criminal proceedings; and
 - (B) is licensed to practice law by any jurisdiction in the United States;
 - (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
 - (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

VAWA: PLANNING FOR A HABEAS CHALLENGE

- Additional enumerated Defendants' rights under 25 U.S.C. § 1304:
- Tribal court must provide the right to a trial by an impartial jury, specifically:
- (3) the right to a trial by an impartial jury that is drawn from sources that—
 - (A) reflect a fair cross section of the community; and
 - (B) do not systematically exclude any distinctive group in the community, including non-Indians; and
- (4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.
- **Tribal court must ensure defendants are timely notified of the right to *habeas corpus* and right to petition for stay of detention. Specifically:**
- “An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303 of this title.”

INDIAN CHILD WELFARE ACT, 25 U.S.C. § 1902

- Indian child
- Child custody proceeding
- Tribal notification and involvement
- Active efforts to prevent break-up of family
- Standard burdens of proof and expert testimony
- Preferred placements
- Preferred tribal jurisdiction
- Private adoption consent

“INDIAN CHILD” UNDER ICWA

- **25 U.S.C. § 1903(4)**
 - Member of federally recognized Tribe, including Alaskan Native Villages; OR
 - Eligible for membership in a Tribe AND is the biological child of enrolled member

ICWA REQUIRES TRIBAL NOTIFICATION TO ALLOW FOR TRIBAL INTERVENTION

- **25 U.S.C. § 1912(a)** – notice to Tribe in any involuntary proceeding
- **25 U.S.C. § 1911(c)** – Tribe may intervene in any foster care placement or termination of parental rights

ICWA CREATES PLACEMENT PREFERENCES THAT PRIORITIZE PLACEMENT OF INDIAN CHILDREN IN INDIAN FAMILIES

- **25 U.S.C. § 1915**
 - (a) Adoption – 1) extended family 2) child's Tribe 3) members of other Tribes
 - (b) Foster care – 1) extended family 2) tribally approved or specified foster home 3) Indian home 4) institution approved by Tribe
 - ABSENT GOOD CAUSE

PREFERRED TRIBAL COURT JURISDICTION

- 25 U.S.C. § 1911(a) – exclusive jurisdiction for reservation domiciled children
- 25 U.S.C. § 1911(b) – for off-reservation domiciled children, State Court “shall” transfer to Tribal Court upon request absent objection by parent or good cause to the contrary

ICWA UNDER ATTACK: NATIONAL COUNCIL FOR ADOPTION, ET. AL. V. SALLY JEWEL, ET. AL., CASE NO. 15-CV-675 (E.D. VA.)

- “ICWA violates the due process and equal protection rights of ‘Indian children’ as well. Non-Indian children placed in foster care and adoptions benefit from a determination that the placement is consistent with their best interests. For ‘Indian children,’ however, placement decisions are driven primarily by ICWA’s placement preferences. Indeed, under the 2015 Guidelines, an ‘Indian child’s’ best interests may not be considered even as part of an analysis of whether ‘good cause’ exists to depart from ICWA’s placement preferences. ICWA’s subordination of the best interests of ‘Indian children’ discriminates against those children on the basis of their ‘Indian’ ancestry in violation of their equal protection rights secured by the Fifth Amendment. And when ICWA’s placement preferences are applied in order to remove an “Indian child” from a foster or pre-adoptive family with whom the child has bonded, they violate that child’s liberty interest in maintaining his familial bonds in violation of the Fifth Amendment’s guarantee of due process.” Compl. ¶ 7.
- “Most Indian tribes have only blood quantum or lineage requirements as prerequisites for membership. *See, e.g.,* Paul Spruhan, *The Origins, Current Status, & Future Prospects of Blood Quantum as the Definition of Membership in the Navajo Nation*, 8 Tribal L.J. 1, 5 (2007); Miss. Band of Choctaw Indians Const. art. III, § 1; Cherokee Nation Const. art. IV, § 1; Choctaw Nation of Okla. Const. art. II, § 1; Muscogee (Creek) Nation Const. art. III, § 2. As a result, most children are classified as ‘Indian children’ under the 2015 Guidelines’ interpretation of ICWA based solely on their ancestry. Indeed, some tribes purport to automatically enroll children upon birth based solely on their ancestry, regardless of whether a parent has consented or is enrolled. *See Nielson v. Ketchum*, 640 F.3d 1117, 1122 (10th Cir. 2011) (describing the Cherokee Citizenship Act, which ‘provides that every newborn child who is a Direct Descendant of an Original Enrollee shall be automatically admitted as a citizen of the Cherokee Nation for a period of 240 days following the birth of the child’) (internal quotation marks omitted).” Compl. ¶ 109.

ICWA UNDER ATTACK: GOLDWATER LITIGATION IN UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA, CASE NO. 15-CV-1259

- “Children with Indian ancestry, however, are still living in the era of *Plessy v. Ferguson*. Alone among American children, their adoption and foster care placements are determined not in accord with their best interests but by their ethnicity, as a result of a well-intentioned but profoundly flawed and unconstitutional federal law, the Indian Child Welfare Act (ICWA), codified at 25 U.S.C. §§ 1901–1963.” Compl. ¶ 3.
- “Most Indian tribes have only blood quantum or lineage requirements as prerequisites for membership. *See* Miss. Band of Choctaw Indians Const. art. III, § 1; Cherokee Nation Const. art. IV, § 1; Choctaw Nation of Okla. Const. art. II, § 1; Muscogee (Creek) Nation Const. art. III, § 2; Gila River Indian Community Const. art. III, § 1; Navajo Nation Code § 701; Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10153, B.3 (February 25, 2015) (‘New Guidelines’ or ‘BIA Guidelines’). Consequently, ICWA’s definition of ‘Indian child’ is based solely on the child’s race or ancestry . . . Some of the tribes consider individuals with only a tiny percentage of Indian blood to be Indian, even if they have little or no contact or connection with the tribe. *See, e.g.,* Cherokee Nation Const. art. IV, § 1.” Am. Compl. ¶¶ 60-61.

VAWA § 904 SDVCJ UNDER ATTACK: SISSETON TRIBAL COURT

- In *Sisseton Wahpeton Oyate v. Javier Artega*, Defendant Artega argued:
- The Sisseton-Wahpeton Oyate lacks inherent criminal jurisdiction to prosecute non-Indian defendants
- The exercise of delegated federal authority violates the United States Bill of Rights
- The assertion of delegated criminal jurisdiction over a non-Indian violates Article II and Article III of the United States Constitution
- The Sisseton-Wahpeton Oyate Lacks the ability to adjudicate the current case because it is limited by the Sisseton-Wahpeton Oyate's Tribal Code

THE *DOLLAR GENERAL* CASE

- The Fifth Circuit Court of Appeals upheld Mississippi Choctaw Tribal Court jurisdiction over tort claims brought by a tribal member against a non-Indian corporation based on the contractual relationship between the store owned by Dollar General and the Mississippi Band of Choctaw Indians.
- The store is located on tribal trust land leased to the non-Indian corporation (Dollar General) and the store agreed to participate in a youth job-training program operated by the Tribe.
- A young tribal member who participated in the program was sexually assaulted by the store manager during the course of his employment. Following his assault, he and his parents brought an action against the corporation in Tribal Court.
- The Petitioners' argue that the Tribal Court cannot adjudicate the sexual assault tort case because the defendant is non-Indian. However, because the sexual assault took place on tribal land, the tribe maintains its position that the tribal court is the appropriate forum.
- **Based on oral argument, this case may come down to whether tribal jurisdiction over non-Indians violates the United States Constitution.**

VAWA SOVEREIGNTY INITIATIVE

- The NIWRC and Pipestem Law have joined forces to establish the VAWA Sovereignty Initiative (VSI)
- VSI is a national project focusing on the defense of the constitutionality and functionality of all VAWA tribal provisions.
- VSI is an important step forward in defending the VAWA tribal legislative victories and other important advancements in federal law and policy related to the protection of Native women and children.
- Under the VSI:
 - an amicus brief was filed in the *Dollar General* case and the Quilt Walk for Justice was organized on the day of oral arguments
 - Amicus briefs were also filed in *Voisine v. United States* and *United States v. Bryant*.



WOMEN RESTORE SOVEREIGNTY



PROTECTING SOVEREIGNTY IN THE SUPREME COURT

- Although the Executive and Legislative Branches of the Federal Government currently recognize the inherent right of our Tribal Governments to protect their citizens, the inherent sovereignty of our Indian Nations is under attack in the United States Supreme Court.
- If we don't understand what happened in cases like *Oliphant*, if we don't understand how the Court reached its decisions in *Duro* and *Lara*, we stand to lose the fight to preserve SDVCJ in VAWA, and the ICWA.
- A review of the following cases highlights the Court's trajectory, and should guide our strategy and response:
 - *Oliphant v. Suquamish Tribe* (1978)
 - *Mississippi Band of Choctaw Indians v. Holyfield* (1989)
 - *Duro v. Reina* (1990)
 - *United States v. Lara* (2004)
 - *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.* (2008)
 - *Adoptive Couple v Baby Girl* (2013)
 - *Dollar General Corporation v. Mississippi Band of Choctaw Indians* (2016)

Oliphant v. Suquamish Tribe (1978)

- **Attorney for Oliphant:** They do not want to be subject to independent tribal powers over which they have no control except with resort to the judiciary, but if they maybe not left alone, if they are to be subject to tribal criminal code, then the best choice would be that they would have the right to vote which I believe and argue that they have under the constitution.
- **Justice Stewart:** And none of the jurors would be of the same ethnic background as any of this defense?
 - **Barry D. Ernstoff:** That is correct and it may be impermissible under the Indian Civil Rights Act.
- **Barry D. Ernstoff:** Since 1968, there has been the Indian Civil Rights Act and these petitioners had no problem invoking that act in attempting to get review on what they consider to be the violation of their statutory right.
 - **Justice Stewart:** Yes, those are statutory rights, but American Citizens have constitutional rights, do they not? . . . and therefore, these defendants are deprived of their constitutional rights that are accorded to most American Citizens, if not all others? . . . Well, even if we buy that position 100%, the question would still remain whether or not that historic sovereignty included the power to try and convict non-tribal members of criminal offenses and violation of tribal law, that is certainly historically before the white man got here, it did not?

MISSISSIPPI BAND OF CHOCTAW INDIANS V. HOLYFIELD (1989)

- **Edwin R. Smith:** The... the statute provides a vested interest in the tribe in the placement of its Indian children, and that is precisely what's at stake here. We're alleging that the children were wrongfully taken from the tribe, and therefore they... they have suffered a wrong. They have suffered an injury.
 - **Antonin Scalia:** Well, I suppose you could say the Tenth Amendment gives the State of Nevada a vested interest, too. I mean, does the tribe have any more interest in the ability to apply its laws by virtue of this statute than the states do by virtue of... of our constitutional structure?
- **Edward Miller:** I would certainly think that it would be, Your Honor, because if we were to say to an Indian woman or an Indian father that you are not able to allow these children to be adopted by persons other than non-Indians and you're not allowed to invoke the jurisdiction of the court in the state within which you live, then I think we would be denying to an Indian woman the rights that all other women enjoy.

Duro v. Reina (1990)

- **Anthony M. Kennedy:** [W]hat is the constitutional principle that would be violated if the United States were to say that Duro could be tried by this tribe?
- **John Trebon:** Number one, no right to counsel. Indigents do not have a right to counsel in tribal court. The penalty that can now be imposed in tribal court for each count is one year. No right to counsel. Secondly and most fundamentally, I would argue, is that by the tribal constitutional law, no one but a tribal member can sit in a jury in tribal court; therefore, Mr. Duro, his ethnological group and any other group of non-members cannot sit on tribal juries in tribal court. And, of course, the Fifth Amendment grand jury requirement doesn't apply to Indian tribes either. And, of course, other constitutional rights that are outside of the Bill of Rights that apply are generally you don't have the right to vote. The consent of the governed notion of this country... you don't have the right to vote, you don't have the right—
- **Anthony M. Kennedy:** Based on... based on that analysis, if... if we were to find that there was a void here, I take it Congress couldn't cure it by giving the Indian tribes additional jurisdiction without then laying itself open to the charge that they're surrendering the rights of citizens?

United States v. Lara (2004)

- **Justice Rehnquist:** Are you saying that Congress could require the trial of non-Indians before a--an Indian tribal court?
 - **Mr. Kneeder:** Yes. I--I believe the--this Court's decision in--in *Oliphant* says so in several respects. What the Court--in several locations. What the Court said in *Oliphant* is that the--the tribes necessarily lost their dependent--excuse me--by virtue of their dependent status, lost their ability to prosecute non-Indians except in a manner acceptable to Congress. So the--the Court necessarily assumed that Congress could reconstitute this authority in the Indian tribes.
 - **Justice Breyer:** This is maybe--it's very interesting. Suppose--I would think on your approach then that the rights that the individual tribe gets is a function of the Due Process Clause. And--and is there any basis? After all, Indian tribal members are persons within the United States to whom the Due Process Clause is applicable. Imagine a tribe that does not give you counsel in a criminal trial. That could happen. All right? Now, is there a basis under the Due Process Clause for distinguishing between whether the defendant in such a case is, A, a member of that tribe; B, a non-tribe member but an Indian; C, a non-Indian?
- **Justice Rehnquist:** Getting back to the--to the point, why is it—let's assume for the moment—it's just an assumption--that the--that the tribes had as a historical matter the sovereign authority to try non-member Indians and that Congress took that away. Could Congress then give it back?

Plains Commerce Bank v. Long Family Land and Cattle Company, Inc. (2008)

- **Justice Ginsburg:** Mr. Frederick, before you finish, I would like for to you give your best answer to a lurking, underlying concern, and that is the the Chief Justice brought up the outsider subjected to courts where the outsider has no vote. That happens when you sued in a State that's not your own, but there is the right to remove and also at the end of the line is this Court. And I think in the case of the tribal courts, neither of those exist. There's no -- you can't remove to a State or Federal court, and this Court has no review authority over a tribal court's judgment.
- **Mr. Banker:** I think it is crucial when you think about nonmember defendants in tribal court and whether they can have their rights adjudicated there to think about the structural problems, the lack of a right to remove, the lack of a right to have this Court provide a substantive review. There is no --
 - **Justice Kennedy:** What general principle underscores the validity of your point that it's -- is it a republican form of government law, Due Process Clause? What is the general principle you rely on to say we have to look to the structure of these courts? If the structure is insufficient, then it violates what prohibition in the Constitution?
 - **Mr. Banker:** I think it is a question of due process. . . .
 - **Justice Kennedy:** Due process for whom? The tribal courts aren't governed -- aren't creatures that are subject to the Due Process Clause.
 - **Mr. Banker:** Well, that's exactly the point. I mean it is the due process right of the nonmember.
 - **Justice Kennedy:** What is -- what is the constitutional prohibition that is a restriction on assigning cases to a court that does not follow the Due Process Clause if it's an Indian court? It's not the same as if we assign this to the American Arbitration Association. What's the difference?

Adoptive Couple v. Baby Girl (2013)

- **CHIEF JUSTICE ROBERTS:** So return to what is a hypothetical question and not what the statute provides. Under your argument, a tribe that did not require any blood requirement, but simply enrollment, could be considered an Indian child.
 - **MR. ROTHFELD:** Well, the -- the child would have to be a -- would have to be biological parents --
 - **CHIEF JUSTICE ROBERTS:** Yes, yes, you have somebody who has no Indian blood, he enrolls in my hypothetical tribe, has a biological child. That child would be an Indian child and the father would be entitled to the protections you're arguing for.
 - **MR. ROTHFELD:** Well, that's -- that's true in theory. But of course, A, that is not our case. B, if that were to occur and whether or not that would be sort of a legitimate basis for determining membership of a -- in an Indian tribe I think would be --
 - **JUSTICE BREYER:** But that is a problem. Because, look, I mean, as it appears in this case is he had three Cherokee ancestors at the time of George Washington's father. All right? Now, you say, oh, well, that's a different issue. But I don't see how to decide that case without thinking about this issue because if your view is taken and you accept that definition, a - a woman who is a rape victim who has never seen the father could, would, in fact, be at risk under this statute that the child would be taken and given to the father who has never seen it and probably just got out of prison, all right? And you don't know that this beyond reasonable doubt standard would satisfy that.
- **Lisa Blatt:** Well, there was no way to return this child to anybody other than the mother. And I want you to keep in mind about this case, is your decision is going to apply to the next case and to a apartment in New York City where a tribal member impregnates someone who's African-American or Jewish or Asian Indian, and in that view, even though the father is a completely absentee father, you are rendering these women second-class citizens with inferior rights to direct their reproductive rights and their -- who raises their child.

Dollar General Corporation v. Mississippi Band of Choctaw Indians (2016)

- **Mr. Goldstein:** I'm very pleased to discuss the threshold point, and that is that, with respect to nonmembers, the Tribes do not have the authority to subject us to such sweeping tort law duties.
- **Justice Kennedy:** Could Congress pass a law saying that all 500 plus Indian Tribes in the United States have unlimited criminal authority, could impose life sentences on nontribal members, American citizens?
- **Justice Kennedy:** My my hypothetical is that the Congress gives Indian powers Indian tribes complete powers, both civil and criminal, over all persons on tribal Reservations. No Federal review, nothing.
- **Justice Kennedy:** Well, if the Congress of the United States gives the UN authority over our citizens just so long as it says there has to be due process, they're not a constitutional entity.
- **Justice Kennedy:** I don't know what authority Congress has to subject citizens of the United States to that nonconstitutional forum.
- **Chief Justice Roberts:** If we're going to evaluate the due process concerns on a case by case basis, as a general matter, does it violate due process for a nonmember to be subjected to a jury verdict where the jury consists solely of tribal members?

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