March 15, 2024

To: IllumiNative
From: Mary Kathryn Nagle
Re: Judiciary Research Report

INTRODUCTION

In 2017, IllumiNative published a research report, Reclaiming Native Truth ("RNT"), documenting the invisibility of Native Americans in all aspects of American society, from arts and entertainment to government. As a part of this research, the report examined the perceptions of Native people, Tribes, and tribal sovereignty. The conclusions in that report reverberated across many echelons of American society, highlighting the deep invisibility of Native people. Nowhere was this perhaps more apparent than in law and policy, and in particular, the development of federal Indian law in federal courts. At the time of the report's release in 2017, there had never been a Native law clerk on the United States Supreme Court (let alone a Native Justice). And with only one Native Article III Judge then sitting on the federal bench (the Honorable Diane Humetawa), it was clear that federal courts were not institutions to which Native people had much access or participation.

Since the release of RNT in 2017, several Native Americans have been appointed to serve as Article III judges in federal courts.[1] And, quite notably, Justice Gorsuch hired the first citizen of a Tribal Nation to clerk at the United States Supreme Court. In turn, the Supreme Court has upheld tribal sovereignty and the continued legitimate existence of Tribal Nations in monumental decisions such as *McGirt v. Oklahoma* and *Brackeen v. Haaland*. Many Indian law practitioners and academics are opining something has shifted. This subsequent research and report attempts to document, and perhaps even explain, the shift.

To be clear, there is never one, solitary reason for progress. Although the Supreme Court has gone from a Court that refers to Indian Nations as "savages"[2] to a Court that characterizes Tribes as "separate sovereigns pre-existing the Constitution[,]"[3] this shift is the result of centuries of progress made in larger American society, as well as the institutions of law and the federal courts.

It is tempting, in today's political climate, to attribute this growing respect for and commitment to the continued sovereignty of Tribal Nations to the success of one political party's agenda over that of another. That, however, would be a highly inaccurate conclusion. While cursory consideration might cause one to attribute this recent shift to a progressive moment or "woke" agenda, the reality is that, in the last century, the Supreme Court's two most significant decisions

[1] The Appendix at the end of this report contains a list of current Native American Article Federal Judges, as of March 2024.

[2] *Johnson v. M'Intosh*, 21 U.S. 543, 590, 5 L. Ed. 681 (1823) (referring to Indians Nations as "the tribes of Indians inhabiting this country were fierce savages . . . .").

[3] *United States v. Bryant*, 579 U.S. 140, 149 (2016) (internal quotation marks and citations omitted).

addressing the injustices Tribal Nations and Native people face have been authored by Justices appointed by a Republican president.[4]

The issues and findings explored in this report, therefore, transcend contemporary American politics. We find ourselves at a crossroads where the role that Tribal Nations played in the formation of the United States and the drafting of the United States Constitution has finally been recognized by the Nation's highest court. We currently have more Native Article III Judges than at any other point in American history. It is a moment. And the question is, *where will we go from here?*

SUMMARY OF FINDINGS

Anyone following the Supreme Court's recent decisions concerning federal Indian law can easily note a dramatic shift. Before 2014, Tribal Nations lost 95% of the cases they brought to the Court. This incredibly high loss rate prompted the National Congress of American Indians ("NCAI") and the Native American Rights Fund ("NARF") to create the Tribal Supreme Court Project—a working group comprised of federal Indian law practitioners who advocate on behalf of Tribes and tribal sovereignty whenever a federal Indian law case lands at the Supreme Court. And by all accounts, the work this group has undertaken has been highly successful. But as this report will further document, the work this group has performed is just a part of the larger story.

While the work of the Supreme Court Project clearly led to Indian Country's victories in cases like *McGirt*, *Brackeen*, and countless others, there is more to learn. At the root of this shift is the cementing of federal Indian law as a legitimate doctrine. Prior to 2014, federal Indian law consisted of Judge-made common law, where decisions were often tethered not to a plain interpretation of a statute or language in the U.S. Constitution, but rather, were decided on an outcome determinative basis where—more often than not—the Tribe lost. This was problematic because it resulted in Tribes losing a majority of the cases they litigated before the highest court. But it was likewise problematic because it rendered federal Indian law unmoored and boring, leaving law students less inclined to study it.

For the best and the brightest at the Nation's top, elite law schools, federal Indian law was *not* a subject of interest. It was seen as a subject with little intellectual integrity since the majority of federal Indian law cases were decided without adherence to any development of actual jurisprudence or doctrine. More recently, however, the Court has moved away from Judge-made common law, and instead, has begun to adhere more closely to constitutional doctrines such as separation of powers, the Indian Commerce Clause, etc. While for non-lawyers these doctrines and phrases may not hold significant meaning, for a young graduate from Yale Law School clerking on the D.C. Circuit, the chance to work on a case concerning the development of a constitutional law question is far more interesting than a case where everyone just knows the outcome is simply that, despite what a treaty or the Constitution says, Indians do not win.[5]

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[4] Justice Neil Gorsuch authored *McGirt v. Oklahoma* and Justice Amy Coney Barrett authored *Brackeen v. Haaland*.

[5] The author of this report does not believe that non-elite law schools are unimportant or irrelevant. In fact, the author of this report graduated from Tulane Law School and received an excellent education. The fact of the matter is, however, that the vast majority of law students who go on to clerk in

To be sure, the cementing of federal Indian law as a legitimate area of jurisprudence worthy of intellectual study does not guarantee Tribes will win all of their cases. This research and report was not undertaken to secure a guaranteed path for Tribes or Native people in any certain cases, or any case at all. Instead, the observation is simply that there is a correlation between the development of federal Indian law as a legitimate subject worthy of study at elite law schools and the rise of Indian law cases decided based on adherence to doctrine and jurisprudence, in contrast to previous cases that were, historically, adjudicated on more of an outcome-determinative basis.

Ultimately, this research reveals that very few, if any, of the cases that involve a negative outcome for Tribes and Native people result from hatred or animus for Native people. Instead, the research reveals that negative outcomes in the federal courts for Native people and Native Nations derive more from ignorance and a complete lack of education on Tribes and tribal sovereignty (as well as, of course, harmful laws passed by Congress that the courts are required to follow, but legislative issues are a research query for a separate report). This reality provides a great deal of hope for the notion that the recent progress achieved in the federal courts for Tribes and tribal sovereignty will continue if Native Nations and Native practitioners continue their efforts to educate not just the federal judiciary, but American society as a whole, on who Tribes are, both historically and contemporarily today.

METHODOLOGY

The research for the drafting of this report consisted of more than two dozen interviews. The identity of the individuals interviewed will not be revealed and will be kept anonymous. Consequently, information regarding certain aspects of this report that might reveal the specific identity of an interviewee will not be included.

Broadly speaking, the more than two dozen individuals interviewed include: U.S. Supreme Court law clerks, federal district court judges, federal appellate judges, law clerks at both federal and appellate federal courts, state court judges,[6] individuals working in U.S. Attorney Offices, individuals working in Federal Public Defenders Offices, law professors, and practitioners who argue before the U.S. Supreme Court and other federal courts. They varied in age, experience, and geographic location. The majority of individuals interviewed are not tribal citizens and do not identify as Native.

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federal courts graduate from a top ten law school, with Yale Law School, Harvard Law School, Stanford Law School, NYU Law School, and Columbia Law School contributing the highest numbers of clerks. Likewise, the majority of federal judges, including Supreme Court Justices, graduated from an elite law school. Consequently, what these students study and what these law schools teach is of critical importance when it comes to impacting the substantive knowledge of decisionmakers in federal courts. The author offers no opinion on the legal profession's reliance on a hierarchy that places elite law schools at the top.

[6] Although most questions of federal Indian law and tribal sovereignty are questions of federal law subject to adjudication in federal court, state courts preside over the majority of cases governed by the Indian Child Welfare Act. There is no question that the perspectives of state court judges are relevant.

Some of the judges interviewed have written and published federal court decisions that would be deemed by the Native community as extremely "helpful" or "positive" for Indian Country. Some judges interviewed have written and published federal court decisions that would be characterized by the Native community as "harmful" for Indian Country. The research and drafting of this report would not have been possible if these judges could not have spoken on confidential, anonymous terms, and the names of these cases will not be mentioned and there will be no direct discussion of them in this report.

Finally, it should be mentioned that the author of this report is not unbiased. As a citizen of the Cherokee Nation and an attorney who advocates for the restoration of tribal sovereignty and jurisdiction, I am not without my own bias that impacts the research and writing of this report. This report should be read through the lens of an advocate who believes deeply that we have yet to fully restore the tribal sovereignty the framers of the United States Constitution intended for Tribal Nations to retain.

FULL FINDINGS

Although some of these findings overlap, for the sake of clarity and organization, the full findings of the report have been separated into several categories, as follows.

I. Americans Need to Learn in Elementary School that There are Three Sovereigns in the United States.

Several of the individuals interviewed commented on the fact that many of their colleagues on the federal bench do not have animus against Tribal Nations, but, until landing a judgeship in a federal court, they simply had no experience with or education on Tribal Nations and tribal sovereignty. Specifically, there was no curriculum in elementary school to teach them that Tribal Nations are the third sovereigns within the larger system of United States government. This is remarkable since the United States Constitution clearly includes Tribes as the third sovereign (in addition to the federal government and the individual States). However, if an individual goes through K-12 education, college, and law school without ever having a teacher or professor teach him that Tribal Nations are legitimate sovereigns whose sovereignty pre-dates the United States and in fact helped inform the democracy of the United States itself, it is a tall order to expect that individual to adjudicate his first Indian law case with a respect for tribal sovereignty and Indian Tribes that no educator has ever encouraged him to have.

We learn respect for the federal and state governments in elementary school. Presumably one might aver that the reason for this is that most children are citizens of the states where they attend school and the United States, but they are not likely to be citizens of Tribal Nations. Just the same, if the goal is to encourage federal court decisions that respect for Tribal Nations, tribal sovereignty, and tribal jurisdiction, then this respect needs to be taught in elementary school alongside respect for the federal and state governments.

Many Indian law cases in federal courts concern questions of *jurisdiction*. Does the Tribe have civil jurisdiction over claims brought against a non-Indian who sexually assaulted an Indian child on tribal lands? Does the State or the Tribe have jurisdiction to criminally prosecute an Indian

who commits crimes on tribal lands? Should the Tribe or the State have jurisdiction to decide where an Indian child should be placed once the parents' rights to the child have been terminated? It is not instinctual for a Judge to conclude that a government has jurisdiction over these sorts of important matters if the Judge has never been taught to respect the government whose jurisdiction is in question. We simply cannot expect non-Native federal Judges and Justices to acquire this respect for Tribal Nations on their own. And they are not going to acquire this respect if their only encounter in elementary school with Tribes is dressing up as a Pilgrim or an Indian at Thanksgiving. As one interviewee put it, we are naturally skeptical of things we are unfamiliar with.

Until our schools treat tribal governments as though they are truly on par with state and federal governments, we will continue to see inconsistent and outcome-determinative decisions in the federal courts that undermine tribal sovereignty and jurisdiction.

Still, if reforming elementary school curriculum is not possible (at least, not in the near future), one way to make a significant difference in this area is to create state/federal/tribal court judicial fora across the various states where Tribes exist today. There are a few States that have such fora (for instance, Minnesota,[7] Michigan, California, and New Mexico), and federal and state court Judges interviewed in these States report that the opportunity to bring federal, state, and tribal court judges together fosters a great deal of interjurisdictional understanding, cooperation, and respect. State and federal court judges in these three States report a higher incidence of respect for tribal courts, and therefore a higher incidence of belief that Tribal Nations are legitimate sovereigns. Creating more of these for a would be an important step in fostering more respect for tribal courts and the sovereignty of Tribal Nations.

II. Having Native Law Clerks and Natives on the Federal Bench Makes a Difference

Since the publication of RNT in 2017, the number of Native law clerks and Native Article III Judges has increased dramatically—but this is only because the numbers seven years ago were so incredibly miniscule. Just the same, there can be no question that the increase in Native law clerks and Judges has already made a dramatic difference in the way in which federal Indian law questions are adjudicated in the federal courts. Since RNT was published in 2017, the federal bench has gained no less than four Native Judges: Judge Ada Brown, Northern District of Texas; Judge Lauren King, Western District of Washington; Judge Sunshine Sykes, Central District of California; and Judge Sara Hill, Northern District of Oklahoma. Before their appointments, the number of Native Article III Judges was *one*. Thus, the number of federal district court judges has more than quadrupled since RNT was published. Of course, there still has never been a Native federal appellate court judge, nor have we seen our first Native Justice on the Supreme Court.

[7] Minnesota has a website for their judicial forum: https://www.mncourts.gov/Help-Topics/TCSCF.aspx. Also it is worth noting that the Minnesota American Indian Bar Association does an excellent job preparing and distributing educational materials that educate judges and practitioners on Tribal Nations and tribal sovereignty. Some examples of their curricula include: https://www.understandnativemn.org/wpcontent/uploads/2024/01/2024_MN_Native_American_Essential_Understandings.pdf

Several interviewees spoke about the importance of having more Native judges on the federal bench. One individual explained that district court judges talk frequently with one another. This is because ethical limitations preclude them from seeking advice from outside third parties. Thus, if one judge is presiding over a patent law case but lacks experience in patent law, that judge will likely ask questions of another federal district court judge that has significant experience in patent law. The same can be said of essentially ever other subject matter, from employment law to administrative law to class actions. But if a federal judge knows of *no* other judge with experience in federal Indian law, then that judge has no one to ask. Because the vast majority of federal district courts have never had a Native Article III judge, and most judges have never hired a Native law clerk, questions of federal Indian law are adjudicated with less experienced consideration than other federal questions of law. This, in part (and in addition to the fact that federal Indian law is not a mainstreamed area of study in law schools), is what has rendered federal Indian law rudderless and seemingly outcome-determinative in federal courts.

As one judge put it: it simply changes the conversation to have someone from the larger Native community on the bench. What would otherwise be a flawed assumption or prejudice becomes a question asked of a colleague. And when Article III judges have access to colleagues who are Native, decisions are less likely to be based on erroneous assumptions or misunderstandings of the role Tribal Nations play as the third sovereign within the United States.

Indeed, the seating of the first Native Article III Judge in the Ninth Circuit, Judge Diane Humetawa, has led to the creation of a permanent Committee on Tribal Relations.[8] This Committee is comprised of Judges, probation officers, prosecutors, public defenders, and other court staff, and the Committee holds regular meetings to discuss issues arising concerning federal Indian law. The Committee is creating curriculum to educate all judges and employees within the Ninth Circuit, and they are creating a panel for the Ninth Circuit Judicial Conference. This work is invaluable and should be copied throughout Circuits across the Nation. It should be noted that a similar committee is in the works and will be meeting soon in the Tenth Circuit. Time for other circuits to follow suit!

III. Federal Indian Law Must be Taught, and it Must be Mainstreamed

Federal Indian law is a *federal* subject matter because Tribes are one of the three sovereigns listed in the United States Constitution, and further, because the Constitution assigns Congress—and not the individual States—the requisite authority to deal in relations with federally recognized Indian Tribes. Tribes maintain a sovereign-to-sovereign relationship with the United States, and as a result, the majority of legal questions that arise concerning Tribes and statutes relating to them involve questions of federal law. For any federal judge presiding over an area with one or more federally recognized Tribe, that judge is almost guaranteed to preside over an Indian law case. That judge, however, is very likely to have attended a law school that does not teach Indian law. The result of this is that most of the decisions concerning a key part of U.S. Constitutional law, specifically federal Indian law, are decided by individuals with no education on the subject matter. This is another reason why so many regard federal Indian law as unmoored and intellectually inconsistent.

[8] The Committee's website is: https://www.ca9.uscourts.gov/circuit-executive/tribal-judges-and-leaders/

The solution to this is simple. Law schools need to teach federal Indian law. However, in addition to offering federal Indian law as a separate course, law schools need to insert federal Indian law cases into mainstream law classes. For instance, ABA-approved law schools teach a class called "Federal Courts." Anyone seeking to clerk at a federal court (or one day become a federal Judge) takes this course to learn key issues of federal court civil procedure and other areas of law unique to the federal courts. Federal courts routinely address motions to transfer cases from tribal courts to federal courts, or cases where a litigant has not exhausted his or her tribal court remedies, and all of these scenarios should be taught and covered in a mainstream Federal Courts class. However, currently, they are not.

Currently, the only Indian law case that is routinely taught in a mainstream class is *Johnson v. M'Intosh*, which is often taught in Property. However, that case refers to Native people and Tribal Nations "as an inferior race of people" and "savages,"[9] and thus, for obvious reasons, does not offer a non-Native law student any real perspective on how or why Tribal Nations are legitimately the third sovereign identified in the United States Constitution. It is a significant problem that the only Indian law case most judges read before arriving on the federal bench is *Johnson v. M'Intosh.*[10]

It must be stressed that, because Tribes are identified in the Constitution, the law concerning the United States's relations with Tribes is a matter of *constitutional* law. Federal Indian law is just as constitutional in nature as Second Amendment jurisprudence, or due process issues related to access to family planning and/or abortion regulations. Currently, however, it is not treated as such.

Since RNT was published in 2017, several elite law schools have begun to offer Federal Indian Law as a consistently offered course. This is a dramatic and welcome improvement. But, as discussed above, federal Indian law needs to be covered in mainstream classes where it is relevant, including but not limited to: Civil Procedure, Federal Courts, Constitutional Law, Criminal Law, family law, and Taxation.

Similarly, Federal Indian Law is not a course offered in what is referred to as "baby judge school." All new federal Judges, after confirmed by the U.S. Senate, come to Washington, D.C. to attend a series of seminars that prepare them for the federal bench. These seminars cover a wide array of subjects that new judges will face. However, all of the judges interviewed shared that they were given no education on Federal Indian Law at "baby judge school." Given that federal courts are the exclusive arbiter of questions of Federal Indian Law, it should be taught at "baby judge school."

There has also been a remarkable increase recently in the number of Native faculty at law schools across the country. The opportunity for non-Native law students to meet and interact with a Native lawyer in law school is important and undoubtedly helps to assuage some of the false

[9] *Johnson v. M'Intosh*, 21 U.S. 543, 569, 590 (1823).

[10] Examples of cases that could be caught in mainstream courses include: *United States. v. Cooley* (criminal law); *Brackeen v. Haaland* (family law); and *Oklahoma v. McGirt* (constitutional law, separation of powers).

understandings or prejudices that exist in the larger American society concerning Tribal Nations, tribal courts, and tribal institutions of governance. Another point of progress is the advent of Native deans of law schools. For quite some time, Dean Renard Strickland was the only Native to be Dean of a Law School. But more recently we've seen the addition of several, including Dean Stacy Leeds (ASU Law School) and Dean Kevin Washburn (University of Iowa Law School). The increase in Native faculty and administrators at law schools will continue to result in progress.

Ultimately, the absence of mainstreamed Indian law at elite law schools is likely one of the largest contributors to the intellectual inconsistency in Federal Indian law. Given that 95% of the students who go on to clerk in federal courts attend the top ten law schools across the country, the quickest and most efficient way to address the discrepancy in Federal Indian law outcomes in federal courts would be to ensure that these schools incorporate Federal Indian law cases into their mainstream courses. Any effort to achieve this should not make it a matter of culture war. Incorporating Federal Indian law into law school curricula is not a woke agenda item for progressives. Instead, advocates for inclusion should focus on the fact that Federal Indian law is a matter of constitutional law and should be taught in the same fashion that other portions of the U.S. Constitution are studied.

IV. Indian Gaming is Critical to Tribal Sovereignty but is Poorly Perceived

Many of those interviewed commented on how the increase in successful and profitable Indian Gaming, following the passage of the Indian Gaming Regulatory Act ("IGRA") in 1988, has resulted in better advocacy on behalf of tribal sovereignty and the issues litigated by Tribes. The logic to this is fairly simple to follow; as a result of revenues from Indian Gaming, Tribes are now able to employ better skilled attorneys. This in turn gives Tribes a voice in how Federal Indian law is crafted—a voice that Tribes previously did not have.

One area where this is most noticeable is the work performed by the NARF Tribal Supreme Court Project. Thanks to the Project, scores—if not hundreds—of attorneys representing Tribes come together to discuss the potential impacts of any case before the Supreme Court where tribal sovereignty or jurisdiction is at issue. They strategize about the best approach on a case-by-case basis, and this has resulted in greater advocacy and representation before the Supreme Court. In turn, this has arguably resulted in better outcomes for Tribes whose sovereignty and authority is on the line before the Court. The Project was conceived in 2001, and as one advocate has noted, you can see the shift begin in 2014, with Justice Kagan's decision in *Michigan v. Bay Mills Indian Community*—with perhaps a climax in the 2020 decision in *McGirt*. This is of course no guarantee that Tribes will now win every case that comes before the Court (for instance, Tribes lost *Oklahoma v. Castro-Huerta*). But it certainly improves the quality of law-making that comes from the Nation's highest court.

However, this trend also offers cause for concern. Several interviewees remarked that, among non-Natives, there is great sympathy for Native Americans who have little to no money. But there is a definite lack of sympathy for "rich Indians." This lack of sympathy is at its zenith when one of the litigants is a wealthy Tribe whose wealth is derived from successful gaming. Misconceptions and perceived corruption abound when it comes to Indian gaming, and these

prejudices permeate the United States's legal institutions. While some Americans are against any kind of gambling full-stop (for religious or moral reasons), many others do not have a stand against gaming per say as much as they have a prejudice against *Indian* gaming. Many individuals have an opinion about Indian gaming despite having never set foot in an Indian gaming casino and never having worked on an actual court case concerning a question of law pertaining to Indian gaming. And yet, this negative perception permeates how individuals think of tangential issues of federal Indian law, from tribal sovereignty immunity to the impacts of federal employment law on tribal lands.

V. Judges From West of the Mississippi Tend to Have a Greater Understanding of Tribal Sovereignty and Federal Indian Law

In general, Judges from district and appellate courts West of the Mississippi tend to have a better understanding of federal Indian law, and a concomitant respect for tribal sovereignty and authority. Numerous interviewees voiced this observation. This, of course, is not an accident. During the early Nineteenth Century, United States policy was to forcibly remove all Tribes to west of the Mississippi. As a result of these forced removals—as well as genocidal policies designed to wipe out Tribes altogether—there are far more Tribes west of the Mississippi today than in the east. As a result of this discrepancy, judges sitting on district and appellate courts west of the Mississippi are far more likely to have presided over an Indian law case, met a tribal leader, set foot in a tribal court, or have had experience with Tribal Nations and their citizens.

The challenge presented with this reality is that the vast majority of Justices on the Supreme Court are selected from courts (or law schools, or other institutions) east of the Mississippi. For many on the Supreme Court, a federal Indian law case at the Supreme Court could be one of their first brushes with the subject matter. Historically speaking, this has not boded well for Tribal Nations and their advocates. Thus, many of those interviewed suggested that advocating for the selection of more Judges from west of the Mississippi—or simply more judges with any kind of federal Indian law experience—will greatly improve the quality of the adjudication of federal Indian law questions from the federal bench.

VI. Presidents and the Senate Judiciary Committee Do Not Pick Supreme Court Justices Based on Their Federal Indian Law Jurisprudence

Somewhat related to the aforementioned point above, it is clear that Justices are not selected for the Nation's highest court based on their federal Indian law experience. While this conclusion may seem justified—indeed, federal Indian law makes up a small percentage of the Court's docket, and it is not like the President or the Senate have the ability to screen every candidate for every single legal issue they might ever face—it is clear that federal Indian law is the constitutional issue that receives the least amount of consideration in the selection and confirmation process. For instance, during her confirmation hearing, Justice Brown Jackson was not asked a single question about federal Indian law. Neither were Justices Thomas or Alito.

For those who were asked about federal Indian law, the questions mostly concerned the doctrine of state sovereign immunity as it relates to Indian gaming (i.e. what is known as the "Seminole

case," wherein the Supreme Court concluded that IGRA did not waive the States' sovereign immunity in relation to tribal-state gaming compacts).[11]

The other category of questioning related to federal Indian law concerns the Court's decision in *Rice v. Cayetano*. In that case, the Court struck down a provision of Hawaiian law that permitted only Native Hawaiians to vote for who would administer a program set aside for Native Hawaiians. Justices Kavanaugh and Roberts were both asked questions about this case. Questions about this case, however, seem to have less to do with federal Indian law and more to do with the larger constitutional question of affirmative action at large, as that issue continues to garner a lot of attention from elected leaders and the American society at large.

Although Native women are more likely to be murdered, assaulted, and/or abused than any population in the United States, and although these high rates of violence are directly linked to the Court's 1978 decision in *Oliphant v. Suquamish Indian Tribe*—of the nine current sitting Justices on the Court, Justice Gorsuch is the only Justice to have received a question about this issue during his confirmation hearing. Specifically, Senator Franken asked him the connection between the Court's role in eroding tribal sovereignty and the high rates of violence against Native women.

The only current sitting Justice to receive extensive questions concerning federal Indian law is Justice Barrett. She received a litany of written questions from Senator Hirono concerning many aspects of federal Indian law. Although Justice Barrett's answers were rather guarded and she did not reveal a whole lot in terms of her thoughts on Indian law jurisprudence, the questions indicate that at least one Senator on the Judiciary Committee believes candidates for the Supreme Court should be evaluated, in part, on their expertise in this particular subject matter.

And that is the crux of the matter. If advocates for Tribal Nations and tribal sovereignty want a Supreme Court equipped and prepared to handle federal Indian law cases, then advocates need to ask their representatives in Congress (as well as the President) to act in a manner that clearly communicates that federal Indian law is a valuable area of expertise for any Justice. If those selecting Justices for the Court do not place federal Indian law on par with issues like the Second or Fourteenth Amendments, we cannot expect the individuals they select to value an experience that is not a part of their own selection criteria. Ultimately, advocates should focus on educating the Members of the Senate Judiciary Committee, as well as their staffers, on how and why tribal sovereignty and federal Indian law are critical issues that should be included in any and all confirmation hearings going forward.

VII. Federal Judges are Influenced by Art, Entertainment, and Media

Many interviewees confirmed that individual judges care greatly about public perception. This seems rather straightforward, no one wants to be a part of an institution that the public perceives to be corrupt, incompetent, or erroneous. Most people want to be held in high regard.

[11] Both Justices Sotomayor and Kagan were asked about this case in particular.

However, Indian Country advocates often fail to make the connection between the ways in which issues of tribal sovereignty and jurisdiction are portrayed in the media and the outcomes in federal courts. The link, though, is clear. For instance, Tribal Nations were victorious in the case of *Oklahoma v. McGirt*. But following this decision, the Governor of Oklahoma spent millions of dollars paying for a PR campaign to discredit the decision, characterizing it as one that jeopardizes public safety in Oklahoma. Not too long after this media campaign, the Court issued its decision in *Oklahoma v. Castro-Huerta.* In that decision, the Court did not overturn its decision in *McGirt*, but, the Court sided with Oklahoma and the Court's rationale for doing so was clearly based on the concerns raised in the Governor's media campaign (*i.e.*, public safety).

One only need to look to the example of Justices Scalia and Ginsburg attending opera together to understand that judges absorb and consume media and entertainment in the same manner as all other Americans. This reality is often overlooked, but several of those interviewed confirmed they do in fact listen to, read, and watch various forms of media and entertainment. There can be no question that these media inform the opinions and perceptions that Judges have of Tribal Nations and tribal sovereignty.

For instance, and by way of personal experience, I will share the following anecdote. During the majority of her time on the Supreme Court, Justice Ginsburg was not known as a Justice who understood or appreciated tribal sovereignty. She authored opinions like *City of Sherill v. Oneida Indian Nation of New York*, wherein Justice Ginsburg concluded that finding in the Tribe's favor was akin to "rekindling embers of sovereignty that long ago grew cold." Needless to say, *City of Sherill* has lived on in infamy as one of the worst decisions from the Supreme Court Tribes have ever had to endure. In 2018, she attended the performance of my play *Sovereignty* at Arena Stage in Washington, D.C. Following the performance, she wrote me a very kind personal note, stating that she very much enjoyed the play. In her final years from 2018 until 2020, she authored and joined decisions that would be considered pro-tribal sovereignty. In fact, the final decision she participated in was the Court's July 9, 2020 decision in *Oklahoma v. McGirt*, wherein she joined Justice Gorsuch's opinion to affirm the continued existence of the Muscogee Reservation. By no means do I intend to claim that her shift in jurisprudence was solely because of my play. I know she also frequented the Santa Fe Indian Art Market over the years where she met and visited with many Native artists. The point here is that art has an impact. It is an impact that can be hard to measure. But that does not mean we should discount it. It is an opportunity to make up for the lack of education about Tribes and tribal sovereignty in the American education system.

VIII. Poor Outcomes for Tribal Nations Can Result From Erroneous Factual Assumptions

Although specific cases will not be mentioned (in order to protect the anonymity of all interviewees), there were several instances where an individual interviewed had decided a case against a Tribal Nation based, in part, on a factual assumption that is wrong. These assumptions range from the ways in which tribal courts do or do not operate, to misunderstandings of how Congress has recently updated certain statutes (which of course could be characterized as a "legal" misunderstanding, except the erroneous conclusion was not a different interpretation of the statute, it was simply ignorance to the fact that Congress updated it). As a result of this research, it has become clear that these misunderstandings may or may not be discussed by the

litigants in their briefing. Thus, this further supports the above-mentioned points that improving elementary and law school curricula, as well as narratives in the media at large, are imperative initiatives to improving outcomes for Tribal Nations in the Supreme Court, and all courts.

IX. In General, Perceptions of Native Americans Are Positive—Unless Cases Concern Land-use

Several individuals interviewed noted that the perception of Tribes and Native people, as litigants, is fairly positive among non-Natives in the Judiciary. That is, there is no overarching animus against Native people. The individuals that comprise the federal bench have a great appreciation for Native people. However, several individuals who were interviewed remarked that this positive perception of Native people and Tribes is altered when a case concerns land-use. That is, there is a feeling in American society at large that Tribes should lose when the question is who should own or govern land within the United States. Perhaps this feeling is based on an unconscious fear that Indians are going to "take all the land back." The cause of this feeling was not sufficiently researched to reach such a conclusion here in this report. But, it is an observation echoed throughout the various interviews undertaken.

Finally, it should be mentioned that, because of the Supreme Court's decision in *Oliphant* and the Major Crimes Act, the majority of cases federal judges receive involving Native people are criminal in nature. Many district court judges reported that the majority of their criminal docket consists of Indian defendants. This statistic is remarkable simply because Native Americans are less than 1% of the United States's population. It is thus noteworthy that Native Americans comprise over 50% of any one judge's criminal docket. Many judges reported feeling sympathy for Native defendants. Because the current state of law renders them subject to federal prosecution for crimes committed on tribal lands (as opposed to state, except in PL-280 States or the handful of other States where federal law diverges), Native defendants often face higher sentencing than those facing prosecution for the same crime in state court. Many non-Native judges spoke about this discrepancy as unfair and unjust.

Several others voiced concern that for some jurisdictions, the federal courthouse could be several hours away from the reservation or tribal community where Native jurors would be located. Because many potential Native jurors do not own a car and there are no public transportation options from many tribal communities to the federal courthouse, many Native defendants face a jury that does not contain any of their peers. These sorts of injustices are common throughout federal courts, and it most certainly impacts the perceptions hold of Native Americans at large.

CONCLUSION

Much progress has been made in recent years to combat the invisibility of Native Americans in American society, and the impacts of this progress are evident in the federal courts, as well as decisions issued by the United States Supreme Court. However, as this research demonstrates, there is much more progress to be made. Overall, the federal judiciary is comprised of well-intentioned individuals who do not bear animus towards Native people. However, the limitations and failures of the American educational system have created a situation where the majority of

individuals deciding the fate of Tribal Nations and Native people have little to no education on the role Tribes played in the crafting of American democracy, and the respect they deserve for their place in the U.S. Constitution. These deficiencies should and can be corrected. The hope is that this report provides a path for further progress.

APPENDIX

Native American Article III Federal Judges (as of March 2024)

- The Honorable Diane Humetawa, United States District Court, District of Arizona (Hopi Tribe)
- The Honorable Ada Brown, United States District Court, Northern District of Texas (Choctaw Nation)
- The Honorable Lauren King, United States District Court, Western District of Washington (Muscogee (Creek) Nation)
- The Honorable Sunshine Sykes, United States District Court, Central District of California (Navajo Nation)
- The Honorable Sara Hill, United States District Court, District of Northern Oklahoma (Cherokee Nation)

Significant Cases Discussed in Report

- *Johnson v. M'Intosh*, United States Supreme Court, 1823: This case concerned a land ownership dispute between two white landowners. No Tribe was a party to the case, but one of the white landowners claimed to have gotten the land from a Tribe. The Court concluded that Tribal Nations could no longer maintain legal title to their lands because they were comprised of "savages" and the Doctrine of Discovery dictated that the land belongs to Christian individuals who "discover" it. This decision was authored by Chief Justice Marshall.
- *Oliphant v. Suquamish Indian Tribe*, United States Supreme Court, 1978: In this case authored by Justice Rehnquist (not yet Chief Justice), the Court declared that Tribes could no longer exercise criminal jurisdiction over non-Indians who commit crimes on tribal lands.
- *Rice v. Cayetano*, United States Supreme Court, 2000. In this case, the Court struck down a provision of Hawaiian law that permitted only Native Hawaiians to vote for who would administer a program set aside for Native Hawaiians on the premise that the law utilized a race-based classification prohibited by the Fourteenth Amendment's Equal Protection Clause. Justice Kennedy authored this decision.
- *City of Sherill v. Oneida Indian Nation of New York*, United States Supreme Court, 2005: In this case, Justice Ginsburg wrote an opinion concluding that the Oneida Indian Nation could not revive its "ancient sovereignty" over parcels of land the Tribe purchased in the late '90s within the borders of its reservation.
- *Michigan v. Bay Mills Indian Community*, United States Supreme Court, 2014: In this opinion authored by Justice Kagan, the Court concluded that Michigan's lawsuit against a Tribe, the Bay Mills Indian Community, was precluded under the doctrine of tribal sovereign immunity.
- *Oklahoma v. McGirt*, United States Supreme Court, 2020: In this monumental case, the State of Oklahoma asked the Court to conclude that the Muscogee (Creek) Nation no longer had a reservation. The Supreme Court rejected Oklahoma's request, and instead, in

a majority opinion authored by Justice Gorsuch, the Court concluded that the Muscogee Reservation, as established by a treaty signed by both the United States and the Muscogee (Creek) Nation, remained in existence because Congress had never taken any legislative action to disestablish or eliminate it.

- *United States v. Cooley*, United States Supreme Court, 2021: The Court affirmed the inherent right of Tribal Nations to effectuate a traffic stop of a non-Indian traveling across tribal lands when the non-Indian engages in sufficient suspicion to justify a traffic stop. In this case, the defendant argued that because the Court had eliminated tribal criminal jurisdiction over non-Indians in *Oliphant*, Tribes should be without authority to stop non-Indians suspected of committing crimes on tribal lands. The Court rejected this argument and concluded that Tribes have authority to detain and if they do not have the authority to fully arrest and prosecute, they can transfer the non-Indian to the sovereignty that has the requisite jurisdiction. Justice Breyer authored this decision.
- *Oklahoma v. Castro-Huerta*: Authored by Justice Kavanaugh, the Court broke away from prior precedent proclaiming that States are without jurisdiction on tribal lands unless or until Congress grants States such jurisdiction. Instead, in this case, the Court concluded that States have inherent criminal jurisdiction on tribal lands to prosecute crimes committed by non-Indians against Indian victims.
- *Brackeen v. Haaland*, United States Supreme Court, 2023: In this case, non-Indian plaintiffs trying to adopt Indian children—along with the State of Texas—asked the Court to declare the Indian Child Welfare Act (ICWA) unconstitutional. Plaintiffs' arguments ranged from Tenth Amendment arguments related to the division of state and federal power, as well as arguments that Congress's use of "Indian" to identify citizens of Tribal Nations violates the Equal Protection Clause of the Fourteenth Amendment (as incorporated through the Fifth). The Court rejected certain aspects of the plaintiffs' Tenth Amendment arguments, but did not reach the merits on all of the plaintiffs' claims. Thus, ICWA remains constitutional at this time, but it is likely that there will be subsequent cases brought to the Court where non-Indian parents and entities attempt to undermine or eliminate ICWA.