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Jurisdictional Conflicts Between Tribes and States: Disputes Over Land Set Aside Pursuant to the Indian Reorganization Act and Reservation Boundary Disputes

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I. Introduction

The United States holds over 60 million acres of land and associated resources in trust or restricted fee for tribes and their individual members. As a result, the Supreme Court has long held that the United States has both a governmental and a proprietary interest in protecting these real property interests. Since the founding of the Environment and Natural Resources Division (ENRD) in 1909, the role of protecting these lands and resources in the courts has been assigned to ENRD. The Indian Resources Section of ENRD litigates to protect lands held in trust for tribes and individual Indian lands, as well as the rights and resources associated with those lands. The section also defends challenges to decisions made by the Secretary of the Department of the Interior (DOI) on behalf of tribes. This litigation often involves complex and challenging historical disputes, some of which date back to the early days of our nation. The broad docket of the Indian Resources Section encompasses issues of regional and national importance, and implicates important principles of tribal sovereignty and communal identity.

Absent a controlling congressional statute, states generally lack jurisdiction over Indian Country. This principle was first judicially recognized by the Supreme Court in *Worcester v. Georgia*, 31 U.S. 515 (1832), in which the Court held that the state of Georgia had no authority to imprison two non-Indian men who were residing within Cherokee tribal territory with the permission of tribal and federal authorities. The *Worcester* decision was based on two principles. First, the Indian Commerce Clause of the Constitution provided Congress with broad authority over Indian affairs. Second, the treaties between the Cherokee Nation and the United States generally reserved to the Cherokee Nation all governmental authorities not expressly surrendered, free of interference from the state. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.01 (2012). The authorities retained by tribes exclude those authorities that conflict with what the Supreme Court has characterized as the "dependent" status of tribes. *United States v. Wheeler*, 435 U.S. 313, 323, 326 (1978). As a result, for example, tribes generally lack the authority to conduct foreign relations independently of the United States.

The tribal lands involved in *Worcester* were aboriginal Cherokee lands reserved by the tribe in treaties, but tribal lands frequently have been established by other means. Many tribes exchanged their aboriginal lands for other lands further west, tribes purchased lands, and the Federal Government unilaterally established Indian reservations by statute, executive order, and purchase. The lands set aside for use by Indians and tribes, and under the supervision of the United States, are generally referred to as "Indian country," a term which Congress in 1948 codified at 18 U.S.C. § 1151. *See* 18 U.S.C. § 1151 (2014). While § 1151 specifically defines "Indian country" for purposes of the federal criminal code, the definition is also applicable to the scope of tribal civil jurisdiction. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). The principle of non-interference by states, which the Court identified in *Worcester*, generally applies to trust and restricted lands and the activities of tribes and their members on lands identified as Indian Country.

Since the early conflicts between the State of Georgia and the Cherokee Nation, states and tribes have continued to wrestle with jurisdictional conflicts. These conflicts repeatedly arise in a number of contexts, including taxation, civil and criminal jurisdiction, and disputes over territorial boundaries. This article discusses two contexts in which the conflict between state and tribal jurisdiction has arisen recently and details the Federal Government's role in related litigation.

II. The Indian Reorganization Act

As discussed above, Congress has plenary authority over Indian affairs. In the exercise of that authority, in 1934 Congress passed the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461–479, also known as the Wheeler-Howard Act. Congress enacted the IRA to encourage tribes "to revitalize their self-government," to take control of their "business and economic affairs," and to assure a solid territorial base by "put[ting] a halt to the loss of tribal lands through allotment." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973). This "sweeping" legislation, *Morton v. Mancari*, 417 U.S. 535, 542 (1974), manifested a sharp change of direction in federal policy towards tribes. It replaced the assimilationist policy of the General Allotment Act, which had been designed to "put an end to tribal organization" and to "dealings with Indians . . . as tribes." *United States v. Celestine*, 215 U.S. 278, 290 (1909). The earlier policy had led to the loss of millions of acres of tribal lands and indirectly resulted in deplorable health and socio-economic conditions. *See* INST. FOR GOV'T RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION 3–8, 430–60 (1928). The IRA repudiated these land policies. *See, e.g.*, 25 U.S.C. §§ 461 (prohibiting further allotment of land), 462 (extending indefinitely the periods of trust or restrictions on alienation of Indian lands), 464 (prohibiting any transfer of Indian lands except exchanges authorized by the Secretary of the Interior) (2014).

The "overriding purpose" of the IRA, however, was broader and more prospective than remedying the negative effects of the General Allotment Act. *Morton*, 417 U.S. at 542. Congress sought to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Id.* Congress thus authorized Indian tribes to adopt their own constitutions and bylaws, 25 U.S.C. § 476 (2014), and to charter corporations, *id.* § 477. Congress also authorized or required the Secretary of the Interior to take specified steps to improve the economic and social conditions of Indians, including:

- Regulations for forestry and livestock grazing, *id.* § 466
- Creation of federal Indian-Chartered Corporations, *id.* § 477
- Authority to make loans to Indian Chartered Corporations, *id.* § 470, and
- Preferences to Indians for employment in positions relating to Indian affairs, *id.* § 472.

Of particular relevance here, Section 5 of the IRA, 25 U.S.C. § 465, provides in pertinent part, that

> [t]he Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
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> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Id. § 465.

Pursuant to authority expressly delegated to the Secretary to prescribe regulations "carrying into effect the various provisions of any act relating to Indian affairs," *id.* § 9; *see* 5 U.S.C. § 301 (2014); 25 U.S.C. § 2 (2014), the Secretary has issued regulations governing the implementation of her authority under § 465 to take land into trust. DOI Land Acquisitions Rules, 25 C.F.R. §§ 151.1–.15 (2014). These regulations provide that the Secretary may acquire land into trust "[w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." *Id.* § 151.3(a)(3). The regulations require the Secretary to notify the state and local governments having regulatory jurisdiction over the land to be acquired so that they can provide written comments on the potential impacts on jurisdiction, taxes, and assessments. *Id.* §§ 151.10, 151.11. The provision also obligates the Secretary to consider factors such as the need of the tribe for the land, the purposes for which the land will be used, the impact on the state and its political subdivisions resulting from the removal of the land from its tax rolls, jurisdictional problems and potential conflicts of land use, whether the Bureau of Indian Affairs is equipped to discharge any additional responsibilities resulting from the trust status, and compliance with the National Environmental Policy Act. *See id.* § 151.10(b), (c), (e)–(h). As part of its consideration of the application, the DOI must consider the impact on the state and its political subdivisions resulting from the removal of the land from the tax rolls and any jurisdictional problems and potential conflicts of land use that may arise. *Id.* §§ 151.10, 151.11.

By taking land into trust, DOI removes that land from a state's jurisdiction, generally insulating it from state laws, including environmental laws, land use regulations, property and other taxes, and with some exceptions, criminal and civil laws, and the land becomes Indian Country. If DOI approves a tribe's application for land to be taken into trust, interested parties are provided with the opportunity to challenge that decision through an administrative appeal process or in federal district court under the Administrative Procedure Act (APA). *See* DOI Land Acquisitions Rule, 25 C.F.R. § 151.12 (2014); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2208 (2012). Therefore, any challenge to the Secretary's decision to acquire land into trust is subject to the APA's six-year statute of limitations. *See* 28 U.S.C. § 2401(a) (2014).

Over the past 20 years, state and local governments have increasingly begun to challenge these acquisitions of trust land in federal court. *See, e.g.*, *Dep't of the Interior v. South Dakota*, 519 U.S. 919, 920 (1996); *County of Charles Mix v. Dep't of the Interior*, 674 F.3d 898, 900–01 (8th Cir. 2012); *Butte County v. Hogen*, 613 F.3d 190, 191–92 (D.C. Cir. 2010). One recent successful challenge by the State of Rhode Island, described more in Part III, led to a re-interpretation of the Secretary's authority under the IRA, and has potentially wide-ranging impacts on the status of lands acquired into trust.

III. *Carcieri v. Salazar*

In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Governor of Rhode Island and local governmental entities challenged the Secretary's decision to acquire a 31-acre parcel of land located in

Charlestown, Rhode Island, in trust under § 465 of the IRA, in order for the Narragansett Tribe to construct low-income housing. One of the arguments that the state parties made was that that the IRA does not authorize the Secretary to take land into trust for the benefit of a tribe, such as the Narragansett, that did not receive federal recognition until after the enactment of the IRA in 1934. Congress previously settled the Narragansett Tribe's land claims against Rhode Island in 1978, and the Secretary subsequently took 1,800 acres of land into trust after formally recognizing the Narragansetts in 1983 under the DOI's federal acknowledgment regulations, 25 C.F.R. § 83. *See* Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701–1712 (2014). In 1993, the Narragansett applied to the Secretary to have the 31-acre parcel that was the subject of *Carcieri* taken into trust.

As noted above, § 465 of the IRA authorizes the Secretary to acquire lands for "Indians." 25 U.S.C. § 465 (2014). Section 19 of the IRA defines those who are eligible for the IRA's benefits and defines "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and "all other persons of one-half or more Indian blood." *Id.* § 479. The issue before the Court in *Carcieri* was whether the term "now" in the IRA's first definition of "Indian" plainly meant "as of 1934" or was ambiguous and could reasonably be construed to mean "at the present" or at the time the Secretary acted to take land into trust. *Carcieri*, 555 U.S. at 388. In the 30 years prior to the *Carcieri* decision, DOI had interpreted its authority under § 465 to extend to all federally recognized tribes, which were understood by definition to be "now under federal jurisdiction," by virtue of being federally recognized at the time of the acquisition. The Court rejected this interpretation of the IRA and held that the phrase "now under Federal jurisdiction" in the first definition of "Indian" in § 479 of the IRA referred only to tribes that were under federal jurisdiction in 1934, when the IRA was enacted. *Id.* at 395. As a result, the Court concluded that the Secretary did not have authority under the IRA to take land into trust for the Narragansett Tribe. Otherwise, the Court did not define "under Federal jurisdiction."

In a concurring opinion, Justice Breyer suggested indicia that might be used to determine whether a tribe was "under Federal jurisdiction" and opined that federal "recognition" and "under Federal jurisdiction" are not synonymous. *Id.* at 397–99. The Interior Solicitor recently issued an opinion setting forth her interpretation of the term. *See* Memorandum from the Dep't of the Interior Solicitor General to the Dep't of the Interior Secretary, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act (M-37029) (Mar. 12, 2014) (the M-Opinion), *available at* http://www.doi.gov/solicitor/opinions.html. The M-Opinion, drawing on Justice Breyer's concurrence, states

> some contend that *Carcieri* stands for the proposition that a tribe must have been both federally recognized as well as under federal jurisdiction in 1934 to fall within the first definition of "Indian" in the IRA, and thus, to be eligible to have land taken into trust on its behalf. That contention is legally incorrect.

Id. at 24. While the IRA includes a temporal limitation on a tribe being "under Federal jurisdiction," the Act provides no such limitation on federal recognition, meaning that federal recognition could occur after 1934. As a result, DOI interprets a tribe as being under federal jurisdiction in 1934 as distinct from federal recognition. "[T]he IRA does not require that the agency determine whether a tribe was a 'recognized Indian tribe' in 1934; a tribe need only be 'recognized' at the time the statute is applied (e.g., at the time the Secretary decides to take land into trust)." *Id.* at 25.

IV. Collateral challenges to land-into-trust decisions

In the context of challenges to DOI decisions to acquire land in trust for tribes, ENRD is currently litigating a number of *Carcieri*-type challenges. In addition to timely lawsuits concerning proposed acquisitions filed pursuant to the APA, the United States has begun to encounter collateral challenges to the status of land held in trust for tribes on the theory that the trust acquisition was invalid pursuant to

Carcieri and, therefore, that DOI acted *ultra vires* in acquiring the land in trust. Two such recent actions by states have sought to upset prior acquisitions under § 465 of the IRA.

In *Big Lagoon Rancheria v. California*, 741 F.3d 1032 (9th Cir. 2014), California argued that an 11-acre parcel of land acquired into trust in 1994 for the benefit of Big Lagoon was not Indian land under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701–2721, because the Secretary lacked authority to acquire the parcel into trust in 1994, based on *Carcieri*. *Big Lagoon Rancheria*, 741 F.3d at 1042–45. Despite acknowledging that "[t]hese questions are thorny indeed, and perhaps beyond our competence to answer," *id.* at 1044, and in the absence of an administrative record or the views of the DOI regarding whether the Big Lagoon Rancheria was under federal jurisdiction in 1934, the Ninth Circuit held that, based on *Carcieri*, the Secretary had no authority to take the land into trust in 1994. *Id.* at 1045. Consequently, the state did not have to negotiate a tribal-state compact with the Big Lagoon Rancheria. However, on June 11, 2014, the Ninth Circuit granted the tribe's request for rehearing en banc. *Big Lagoon Rancheria v. California*, No. 4:09-cv-01471-CW (9th Cir. filed June 11, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/06/11/1017803ebo.pdf. While the United States was not a party to the case and did not file a brief in the district court or the court of appeals, ENRD filed an amicus brief in support of Big Lagoon's petition for rehearing and rehearing en banc.

Similarly, in *Alabama v. PCI Gaming Authority*, No. 2:13-CV-178-WKW [WO], 2014 U.S. Dist. LEXIS 49606, at *2–3 (M.D. Ala. Apr. 10, 2014), the State of Alabama, citing *Carcieri*, argued that because the Poarch Band of Creek Indians was not recognized until 1984, lands taken into trust subsequent to the tribe's recognition did not qualify as Indian lands under IGRA because the Secretary had no authority to acquire those lands for a tribe recognized after 1934. The lands at issue were acquired in trust in 1984, 1992, and 1995. The state argued, therefore, that the Poarch Band could not lawfully operate a gaming facility under state or federal law. Recognizing that *Carcieri* involved a timely direct challenge to a land-into-trust decision under the APA in which the Secretary was a defendant, the district court rejected the state's collateral attack on the Secretary's decision because "the State does not challenge the United States' land-into-trust decisions under the APA's framework; the Secretary is not a defendant; and the attack on the validity of the land-into-trust decisions comes decades after the expiration of the APA's six-year statute of limitations, see 28 U.S.C. § 2401(a)." *Id.* at *51–52. Notably, the district court declined to follow the Ninth Circuit's reasoning in *Big Lagoon* because

> [f]irst, *Big Lagoon*'s majority essentially undid a federal agency's final decision and divested that agency's title to land (if not directly, then indirectly), seemingly without concern that the federal agency was not a party to the action. Second and relatedly, the panel admitted that some of the issues relevant to whether the tribe was under federal jurisdiction in 1934 were "perhaps beyond [its] competence to answer," yet at the same time it failed to obtain input (as it could have under the APA) from the federal agency that had the specific expertise that the court lacked. Third, *Big Lagoon* majority's opinion did not acknowledge or apply the Secretary's two-part standard for analyzing "under federal jurisdiction" in the post-*Carcieri* world. Fourth, the *Big Lagoon* panel essentially conducted a de novo review of the Indian-lands status, notwithstanding that a court that reviews a final agency decision "is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." Fifth, it cannot be ignored that *Big Lagoon* is the subject of a pending petition for rehearing.

Id. at *60–61 (internal citations omitted). ENRD filed an amicus brief in support of the Poarch Band's motion to dismiss in the district court. The state has appealed the decision.

Additionally, while *Carcieri* only addressed land-into-trust, we also face the prospect of similar collateral challenges regarding other provisions of the IRA. Ancillary attacks may come from criminal

defendants seeking to avoid federal or tribal jurisdiction. In addition to states, counties, and local governments, private citizens could also assert arguments based on *Carcieri*.

V. Reservation boundary disputes

Litigating in Indian Country involves jurisdictional complexities, even where reservation boundaries are well established and undisputed. These complexities are often exacerbated by disagreement about the location of a reservation border and claims that Congress diminished or disestablished a historic reservation. The remainder of this article describes the legal contexts in which reservation boundary disputes arise, the factors prescribed by the Supreme Court to determine whether a reservation has been diminished or disestablished, and recent litigation regarding the reservation boundaries of the Omaha Tribe of Nebraska.

Because the location of an event or activity often determines whether federal, state, and/or tribal jurisdiction applies, reservation boundary disputes arise in many legal contexts, both criminal and civil. The common diminishment argument is that some time after the establishment of a reservation, a subsequent congressional act removed a portion of lands from the reservation and re-drew reservation boundaries to exclude such lands from the definition of "Indian country" in 18 U.S.C. § 1151. In the late 19th and early 20th centuries, Congress often did not clearly distinguish between lands held in trust for tribes and individual Indians and the external boundaries of an Indian reservation, which may encompass both trust and fee lands. As explained above, pursuant to § 1151, reservations constitute Indian Country regardless of the mix of trust and fee land within that boundary. Disagreements regarding reservation boundaries, therefore, may have far-reaching impacts on the scope of federal, state, and tribal jurisdiction.

In the criminal context, reservation boundary litigation is often triggered by defendants alleging that their criminal conduct occurred within Indian Country and, thus, beyond the reach of state jurisdiction, or that the activity actually occurred outside Indian Country and is beyond the purview of the Federal Government. Fact patterns from Supreme Court caselaw are illustrative:

- In *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962), a tribal member charged with burglary and sentenced in state court filed for a writ of habeas corpus in federal court, arguing that his crime occurred on the Colville Reservation in Washington and alleging that the 1906 Congressional Act opening that portion of the reservation for allotment and settlement preserved the reservation's legal status and did not diminish it. The Court ultimately held that the reservation boundary remained intact. *Id.* at 359.
- In *Solem v. Bartlett*, 465 U.S. 463 (1984), a tribal member charged with attempted rape and sentenced in state court filed for a writ of habeas corpus in federal court arguing that his crime occurred on the Cheyenne River Sioux Reservation in South Dakota because a 1908 Congressional Act opening that portion of the reservation to non-Indian settlement maintained the reservation's legal status and did not diminish it. The Court agreed with the petitioner, holding that the reservation remained undiminished. *Id.* at 481.
- In *Hagen v. Utah*, 510 U.S. 399 (1994), a tribal member charged in state court with distributing a controlled substance argued on appeal that the state lacked jurisdiction because the crime occurred within the original boundaries of the Uintah Reservation in Utah, which he alleged retained reservation status after it was opened to non-Indian settlement at the turn of the century. The Court in this case held that the reservation had been diminished by Congress. *Id.* at 422.

Reservation boundary disputes also arise in civil and regulatory contexts. For example, in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), a tribe challenged a proposed landfill that had received a solid waste permit from the state and which, as a result of state regulations, was not required to install a synthetic composite liner. The tribe asserted that the proposed landfill site remained within the exterior boundaries of the tribe's reservation, that an 1894 Act had not diminished the reservation's

boundaries, and that federal EPA regulations (which required a composite liner) applied. The Court held that the operative language of the Act and the circumstances surrounding its passage evidenced an intention to diminish the reservation. *Id.* at 345.

In *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994), an energy company operating oil and gas wells pursuant to leases from non-Indian landowners on a reservation, sued to enjoin the tribe from enforcing certain tribal taxes and an employment ordinance against the company. The energy company relied primarily on a diminishment argument, alleging that a 1910 congressional act opening a portion of the reservation for homesteading diminished the reservation and, thus, the company's oil and gas wells were located outside the exterior boundaries of the reservation and not subject to tribal taxes or regulation. The court disagreed, stressing that the legislative language merely authorized the Secretary to survey, sell, and dispose of surplus unallotted and unreserved lands. *Id.* at 1297.

VI. Factors to determine whether a reservation has been diminished or disestablished

Once reservation boundaries are established, only Congress can diminish or alter them. *Solem*, 465 U.S. at 470 ("Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."). In determining whether Congress intended to diminish a reservation, the Supreme Court has established "a fairly clean analytical structure" consisting of a three-part inquiry. *Id.*

The first and most important factor is whether the statute explicitly evidences a clear intent by Congress to diminish the reservation boundaries: "Congress [must] clearly evince an 'intent to change boundaries' before diminishment will be found." *Id.* (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977)); *Hagen*, 510 U.S. at 399 ("[T]he statutory language must establis[h] an express congressional purpose to diminish[.]"). The Supreme Court has decided seven diminishment cases applying this factor, construing surplus land statutes along a spectrum of statutory language. "At one extreme," *Solem*, 465 U.S. at 469 n.10, is statutory language that explicitly cedes and relinquishes all tribal interests and provides in exchange for the cession an unconditional "fixed-sum payment," *Yankton*, 522 U.S. at 344, from the United States, creating an almost insurmountable presumption of diminishment. *Id.*; *Solem*, 465 U.S. at 470–71. "At the other extreme," are statutes that merely authorize the Secretary of the Interior to sell and dispose of unallotted lands within a reservation. *Solem*, 465 U.S. at 469 n.10. Such statutes do not demonstrate Congressional intent to diminish the reservation. *Yankton*, 522 U.S. at 345 ("Acts declaring surplus land 'subject to settlement, entry, and purchase,' without more, did not evince congressional intent to diminish the reservations."); *Solem*, 465 U.S. at 469 n.10.

Second, the Court may resort to legislative history and circumstances surrounding the passage of the relevant statute. However, absent explicit statutory language, the Court may find diminishment only "[w]hen events surrounding the passage of [the statute] unequivocally reveal a widely-held, contemporaneous understanding" of Congress's intent to diminish the reservation. *Solem*, 465 U.S. at 471; *see also Yankton*, 522 U.S. at 351 (Absent clear congressional purpose in the statutory text, "unequivocal evidence" from surrounding circumstances may support diminishment.).

Third and finally, the Court looks, "[t]o a lesser extent," at events that occurred after the passage of a surplus land act. *Yankton*, 522 U.S. at 330. However, subsequent history has been described as "less illuminating," *Hagen*, 510 U.S. at 420, and exclusive reliance on subsequent events to support a diminishment finding is inappropriate. *Solem*, 465 U.S. at 472 ("When both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, [the Court is] bound . . . to rule that diminishment did not take place and that the old reservation boundaries survived the opening."); *Duncan Energy*, 27 F.3d at 1298 ("We find this exclusive reliance on the third *Solem* factor to create a quasi-diminishment totally inappropriate.").

Inconsistencies in the subsequent treatment of reservation lands opened for settlement weigh against finding clear congressional intent to diminish a reservation. *Solem*, 465 U.S. at 478 (holding that diminishment did not occur where "[t]he subsequent treatment of the [reservation] by Congress, courts, and the Executive is so rife with contradictions and inconsistencies as to be of no help to either side"); *City of New Town v. United States*, 454 F.2d 121, 125–26 (8th Cir. 1972) (inconsistent subsequent events do not impute congressional intent to diminish and "[w]e do not deem it necessary to examine these later acts in detail"). The Court must also "resolve any ambiguities in favor of the Indians." *Hagen*, 510 U.S. at 411. The general rule that "legal ambiguities are resolved to the benefit of the Indians" is given "the broadest possible scope" in diminishment cases. *DeCoteau v. District County Court*, 420 U.S. at 447.

VII. The Omaha Reservation boundary litigation

The Omaha Reservation was established pursuant to treaties in 1854 and 1865. *See* Treaty With the Omaha, 1854, U.S.-Omaha, Mar. 16, 1854, 10 Stat. 1043, 1854 WL 9493; Treaty With the Omaha, 1865, U.S.-Omaha, Mar. 6, 1865, 14 Stat. 667, 1865 WL 17460. A subsequent Congressional Act of August 7, 1882, 22 Stat. 341, provides in pertinent part that "the Secretary of the Interior [is] authorized to cause to be surveyed, if necessary, and sold, all that portion of [the Omaha] reservation in the State of Nebraska lying west of the [railroad] right of way" with the "proceeds of such sale . . . placed to the credit of said Indians in the Treasury of the United States." § 2, 22 Stat. 341, 341 (1882).

For over 100 years following the 1882 Act, the western boundary of the Omaha Reservation was the subject of federal and state legislation, agency opinions, environmental permitting decisions, revenue rulings, and written contracts, almost all of which generally recognized the continued existence of the original Omaha Reservation boundaries, undiminished by the 1882 Act. But there were exceptions and temporary inconsistencies in the treatment of the Reservation by both the United States and the State of Nebraska, which fueled claims that the 1882 Act diminished the Omaha Reservation such that the 50,000 acres of land west of the railroad right-of-way were no longer within the Reservation.

The most recent iteration of those challenges dealt specifically with an alcoholic beverage control ordinance that the tribe adopted, *see* Amendment (Title 8 of the Tribal Code) to Omaha Tribe's Beverage Control Ordinance, 71 Fed. Reg. 10056 (Feb. 28, 2006), and attempted to enforce against liquor retailers on the Reservation pursuant to 18 U.S.C. § 1161, which delegates to states and tribes shared concurrent authority to regulate on-reservation liquor transactions. *See City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 558 (8th Cir. 1993).

The Village of Pender, Nebraska, and Pender business owners that sell alcoholic beverages sued tribal officials in federal court to enjoin the tribe from enforcing the tribal liquor ordinance in Pender. *Smith v. Parker*, No. 4:07-CV-3101, 2014 WL 558965, at *1 (D. Neb. Feb. 13, 2014) (on appeal). The plaintiffs claimed that the 1882 Act authorizing the sale and settlement of land west of the railroad right-of-way (where Pender is now located) diminished the tribe's Reservation, and that Pender lies outside the Reservation. The plaintiffs secured an order temporarily restraining the tribe from enforcing its liquor ordinance, but the district court held that plaintiffs had to exhaust their remedies in Omaha Tribal Court. *Village of Pender v. Parker*, No. 4:07CV3101, 2007 WL 2914871, at *2 (D. Neb. Oct. 4, 2007). After five years of extensive litigation in tribal court (which included an amicus curiae brief by ENRD in support of the tribe), the Omaha Tribal Court held that the 1882 Act did not result in diminishment.

Following the tribal court ruling, the district court ordered the parties to file cross motions for summary judgment. The State of Nebraska intervened in the case seeking to enjoin all tribal jurisdictions throughout the disputed portion of the Reservation, including Pender, as well as areas beyond Pender's municipal boundaries. The United States intervened to defend the treaty boundaries of the Reservation. On February 13, 2014, the Court granted summary judgment in favor of both the United States and the Omaha Tribe, holding that the 1882 Act did not diminish the boundaries of the Omaha Reservation. After a detailed analysis, the Court concluded that neither the statutory language—the legislative history and

circumstances surrounding the passage of the Act—nor the demographic history of the disputed area, demonstrated the requisite clear congressional intent to diminish the boundaries of the Reservation. *Smith*, 2014 WL 558965, at *18–19.

VIII. Conclusion

Conflicts between states and tribes, including jurisdictional disputes pertaining to land-into-trust and reservation boundaries, involve complex legal issues. What initially may appear to be a routine matter about a tribe acquiring land for member housing, a disagreement about the application of a liquor ordinance, or a question about a solid waste permit, may ultimately turn on centuries-old treaties, 19th century congressional acts, caselaw, and historical documents. ENRD has a long history of representing the United States in these matters and works closely with the relevant client agencies, particularly the Interior Solicitor's Office and the Bureau of Indian Affairs, as well as with the tribes. Prosecutors are encouraged to engage ENRD early in the process should any of these issues arise in your cases, as collaborative work will best assure the Department of Justice's consistency in litigating these issues. ❖

ABOUT THE AUTHORS

❑ **Gina Allery** serves as Senior Counsel for Indian Affairs in the ENRD, where she helps oversee the Division's affirmative Indian Country initiatives and provides counsel to the Assistant Attorney General. Prior to that, Ms. Allery was a trial attorney in the Indian Resources Section of the Division for over eight years. She litigated some of the Indian Resources Section's most complex cases while defending the Secretary of the Interior's program to acquire land into trust for tribes, including *MichGO v. Salazar*, *Patchak v. Salazar*, and *Grand Ronde v. Salazar*. She has also lectured frequently at the National Advocacy Center. Prior to joining the Department of Justice, Ms. Allery practiced Indian law, energy law, and administrative law at Dorsey & Whitney. ✠

❑ **Daron T. Carreiro** is a trial attorney in the Indian Resources Section of the ENRD, where he litigates to protect lands held in trust for American Indian tribes, as well as the rights and resources associated with those lands. He frequently litigates cases involving water rights, tribal boundaries and jurisdiction, and agency actions affecting tribal interests. Prior to joining the Department of Justice, Mr. Carreiro was an attorney at Pillsbury Winthrop Shaw Pittman, where he litigated cases involving commercial contract disputes, construction and real estate projects, employment disputes, environmental law, and Indian law issues. He is an enrolled member of the Chickasaw Nation. ✠

Protecting the Civil Rights of American Indians and Alaska Natives: The Civil Rights Division's Indian Working Group

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The Indian Working Group is central to the Civil Rights Division's (Division) work on behalf of Native Americans. Its mission is to assist the Division in meeting its law enforcement responsibilities in Indian Country and to Native American people. It works to coordinate and enhance enforcement, outreach, and awareness of Native American issues within the Division, within the Department of Justice (DOJ), and throughout the country. Through outreach and community engagement, the Indian Working Group also promotes the full inclusion of Native Americans in the Division's work force.

The Indian Working Group is chaired by two non-manager line attorneys. Members are drawn from each subject-matter section in the Division, as well as the Division's front office. Representatives from the Office of Tribal Justice, the Executive Office for United States Attorneys, the DOJ's Community Relations Service, the National Advocacy Center, the Office of Justice Programs, and several U.S. Attorneys' offices (USAOs) also attend meetings periodically. The working group often coordinates with Assistant U.S. Attorneys to tackle local issues affecting Native Americans and to connect with tribal leaders.

It also works to raise awareness of the Division's efforts on behalf of Native communities by maintaining a Web site at http://www.justice.gov/crt/iwg/, a blog on the DOJ Web site, and a publicly-available email address, indianrights.workinggroup@usdoj.gov. The working group distributes a plain-language brochure for distribution in native communities and reaches out to tribal leaders and Native American community organizations.

Members of the Indian Working Group also represent the Division in DOJ-wide and Government-wide working groups on Native American issues. The Indian Working Group helps the Division develop Indian Country-related policy, coordinates Government-wide policies, provides expert advice within the Division, and helps enhance the Division's access to community feedback.

I. Indian Working Group activities

A. Indian child welfare rights

The Indian Working Group is developing long-term strategies to enhance enforcement of the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963, and federal civil rights laws that can help Native American families and tribes in danger of losing children in child custody proceedings. Native American communities, advocacy groups, and organizations have often come to the Division with complaints that state social services systems are taking Indian children away from their homes and placing them with non-Indian families, in violation of ICWA's requirements. These representatives have explained how painful it is for the Native American community when Native American children are removed from their homes and placed outside their communities in the foster care system. They have also noted that Native American families are too often excluded from the placement process, causing children to lose their tribal identity and heritage. Recently, to raise awareness of the issues and the Division's efforts, the working group's co-chair and ICWA coordinator discussed the policies at the Bureau of Indian Affairs' ICWA "Summit" in Rapid City, South Dakota.

B. Navajo Nation Human Rights Commission Memorandum of Understanding

On July 15, 2013, the Indian Working Group signed a memorandum of understanding with the Navajo Nation Human Rights Commission. The memorandum sets up points of contact, regular meetings, and reporting procedures to assist the Division in receiving timely complaints about potential civil rights violations in the Navajo Nation.

The Navajo Nation Human Rights Commission is a branch of tribal government working to ensure that Navajo citizens are free from discrimination and able to enjoy basic human rights and fundamental freedoms. The commission identifies and investigates reports of discriminatory and racially motivated acts perpetrated against citizens of the Navajo Nation and refers the incidents to the proper authorities.

The memorandum of understanding will help promote enforcement of federal civil rights laws by streamlining communication between the Division and tribal governments, thereby helping the two entities to more effectively share information about civil rights issues affecting citizens of the Navajo Nation. The memorandum furthers the mission of the Civil Rights Division and the Indian Working Group to "[d]evelop and maintain relationships between the Division and the Native American Community." INDIAN WORKING GROUP MISSION STATEMENT, http://www.justice.gov/crt/iwg/about.php.

II. Civil Rights Division enforcement in Indian County: authority and activities by section

The Civil Rights Division enforces the federal laws prohibiting discrimination on the basis of race, color, national origin, sex, disability, religion, and familial status, in a wide variety of contexts. Native Americans who are subjected to discrimination on any of these bases may file complaints with the Division's enforcement sections.

A. The Voting Section

Native Americans are protected from discrimination on the basis of race and membership in a language minority group, as well as from intimidation, when they vote or when they want to run for federal, state, and local elected offices. *See* Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973q (2014) (Act). Federal laws prohibit voting systems or practices (such as having at-large elections instead of creating electoral districts) when they improperly dilute the votes of Native Americans. This law gives Native Americans the right to a fair opportunity to elect candidates of choice to state legislatures, county

commissions, school boards, or other elected bodies. In some cases, jurisdictions must provide voting materials in Native languages.

The Voting Rights Section enforces these and other protections. As part of its mission, the Section coordinates poll monitoring around the country each year. Election monitors may go to polling places in certain jurisdictions to make sure voters are allowed to vote without discrimination or intimidation. The Section has filed Statement of Interest briefs in *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 3, 2014), and *Wandering Medicine v. McCulloch*, No. 1:12-CV-135 (D. Mont. Nov. 6, 2012), two cases brought by Alaska Native and American Indian private plaintiffs under the Act. *Toyukak* involves a challenge under the language minority provisions of § 203, regarding the translation of election information into the Alaska Native languages in the Dillingham, Wade Hampton, and Yukon-Koyokuk Census Areas in Alaska. The *Wandering Medicine* plaintiffs allege that the lack of early voting and late registration opportunities for Native American voters in Big Horn, Blaine, and Rosebud Counties in Montana is a violation of § 2 of the Act. For more information, visit http://www.justice.gov/crt/about/vot/.

B. The Special Litigation Section

The Special Litigation Section protects the rights of people confined in facilities run by state or local governments, including jails, prisons, and juvenile corrections institutions, from mistreatment based on race, color, national origin, sex, disability, and religion. Unsafe or inhumane conditions at these facilities, if severe enough, can violate civil rights laws. *See* 42 U.S.C. §§ 1997–1997j (2014).

The Section also protects inmates' right to practice their religions without unnecessary restriction. *See* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2014). These laws are particularly important to Native Americans, whose religious traditions are often unfamiliar to prison officials. The Section may sue to help enforce the law, but it can also participate in actions brought by private plaintiffs. Many inmates have no legal representation and face difficulties in vindicating their rights. The Indian Working Group helps identify cases where it is appropriate for the Section to file amicus briefs or statements of interest. The Section has participated in cases protecting Native American inmates' rights to wear long hair and to use ceremonial tobacco in religious services, such as pipe ceremonies.

The Special Litigation Section also enforces laws protecting citizens from police misconduct, including excessive force; unlawful stops, searches, or arrests; and discriminatory policing. The Section investigates misconduct based on race, color, national origin, sex, and sexual orientation under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141; the Omnibus Crime Control and Safe Streets Act, 42 U.S.C. § 3789d; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Title VI); and other laws. It can also intervene where police improperly punish people for observing officers, recording them, or objecting to their actions. Recently, the Section settled an investigation of the Seattle Police Department that began after the shooting of a Native American woodcarver. For more information, visit http://www.justice.gov/crt/about/spl/.

C. The Policy and Strategy Section

The Policy and Strategy Section supports and coordinates the policy work of the Division, providing a focal point for proactive policy development and legislative proposals. These include the development and analysis of policy matters relating to the Division's enforcement authority, the pursuit of legislative and regulatory priorities, the coordination with other federal agencies on human rights matters, and the development of sustained relationships with USAOs and other federal agencies. The Section also reports on the policy and enforcement initiatives of the Division by convening roundtables and conferences and preparing ongoing analyses and assessments in reports and strategy documents.

D. The Housing and Civil Enforcement Section

The Housing and Civil Enforcement Section protects against discrimination in housing, land use, public accommodations, and lending. Actionable discrimination can include lending decisions based on race, color, national origin, sex, and residence on a reservation. In the past, the Section has investigated lenders who may have discriminated against American Indian borrowers because they lived on Indian reservations.

The Section enforces the Fair Housing Act, 42 U.S.C. §§ 3601–3619, which bars discrimination in providing housing based on a person's race, color, national origin, sex, disability, religion, and familial status. It also enforces the land use provisions of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5, which protects the rights of religious congregations. The law restricts how local governments can use zoning rules or other land use regulations, if they harm religious practices or discriminate based on religion.

Certain businesses, such as hotels, restaurants, and theaters or other places of entertainment (called "public accommodations"), also fall within the Section's jurisdiction. Under Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000a-6, these establishments may not discriminate because of race, color, national origin, or religion. The Section also enforces laws that protect servicemembers from certain civil actions during a deployment, such as foreclosures and repossessions. *See* Servicemembers Civil Relief Act, 50 U.S.C. app. 501–593 (2014). For more information, visit http://www.justice.gov/crt/about/hce/.

E. The Federal Coordination and Compliance Section

The Federal Coordination and Compliance Section leads Government-wide efforts to enforce Title VI and other statutory nondiscrimination provisions that similarly prohibit discrimination on the basis of race, color, national origin, sex, disability, and religion in federally assisted programs. The Section also advises other agencies on policies, coordination, and implementation of federal civil rights laws covering federally assisted programs. Recently, the Section's Courts Language Access Initiative (in partnership with USAOs) has worked in more than a dozen states to solve language access problems and ensure that people are not denied access to court proceedings because of limited English skills. For more information, visit http://www.justice.gov/crt/about/cor/.

F. The Employment Litigation Section and the Office of Special Counsel for Immigration-Related Unfair Employment Practices

Federal law prohibits employers from discriminating based on a person's race, color, national origin, sex, disability, and religion. *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2014) (Title VII). The law also prohibits an employer from retaliating against someone for protesting discrimination, helping with an investigation, or filing a complaint. One of the ways in which the Employment Litigation Section helps enforce Title VII is by bringing pattern-or-practice cases.

In addition, the Section enforces laws that protect servicemembers from discrimination because of their military service and loss of employment while deployed. *See* Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301–4304 (2014); Servicemembers Civil Relief Act, Pub. L. No. 108-189, § 1, 117 Stat. 2835 (1940).

The Office of Special Counsel for Immigration-Related Unfair Employment Practices enforces laws to prevent discrimination based on citizenship status, including the Immigration and Nationality Act. An employer may be liable under the act for refusing to accept an American Indian tribal document or other acceptable documents to show citizenship and work eligibility. For more information, visit http://www.justice.gov/crt/about/emp/ and http://www.justice.gov/crt/about/osc/.

G. The Educational Opportunities Section

Native American children have the right to the same educational opportunities that are offered to all other children attending public schools. Federal law prohibits public elementary schools, secondary schools, and colleges and universities, as well as all schools that receive federal monies, from denying students equal educational opportunities because of their race, color, national origin, sex, disability, and religion. *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000c to 2000c-9 (2014) (Title IV); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2014) (Title IX); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2014). The Division helps enforce Title VI and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), by conducting investigations and compliance reviews of entities that receive federal financial assistance from DOJ. The Educational Opportunities Section also shares enforcement authority for Title VI and Section 504 with the U.S. Department of Education.

Public schools must also offer appropriate services to English language learner (ELL) students to help them overcome language barriers so that they can meaningfully participate in school. *See* Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701–1702 (2014). The Section recently reached a settlement with the Ganado School District in Arizona to ensure its Navajo students and parents who are English language learners have equal access to school programs. The school will work to identify English language learners, provide language access instruction and materials, train teachers, inform students and parents about ELL programs and other essential information in accessible language, and monitor its success.

The Section also works to stop harassment and bullying in the public schools on the basis of race, color, national origin, sex, disability, and religion. For more information, visit http://www.justice.gov/crt/about/edu/.

H. The Disability Rights Section

The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213, prohibits discrimination based on disability in employment or in state and local government programs and services. It also bars discrimination by hotels, restaurants, stores, theaters, medical offices, hospitals, and other places of public accommodation. In addition, Section 504 of the Rehabilitation Act prohibits programs that receive federal financial assistance from discriminating on the basis of disability. This is important in Indian Country, as Native Americans have disproportionately high rates of disability.

The Disability Rights Section investigates, negotiates, and litigates cases under the ADA involving discrimination on the basis of all kinds of disabilities and has been very active on behalf of people with diabetes, cancer, vision disabilities, hearing impairments, depression, and mobility disabilities. The Section also coordinates the enforcement of Section 504 across federal agencies and helps enforce Section 504 by conducting investigations and compliance reviews of entities that receive federal financial assistance from DOJ. For more information, visit http://www.justice.gov/crt/about/drs/ and http://www.ada.gov/.

I. The Criminal Section

The Civil Rights Division's Criminal Section enforces federal law prohibiting acts of violence motivated by race, color, national origin, sex, gender identity, sexual orientation, disability, and religion. In the first application of the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249, the Division's Criminal Section and the U.S. Attorney's Office for the District of New Mexico won a conviction vindicating the rights of a 22-year-old disabled Navajo man with a developmental disability. *See United States v. Beebe*, 807 F. Supp. 2d 1045, 1047 (D.N.M. 2011), *aff'd*, 722 F.3d 1193, 1195 (10th Cir. 2013). The perpetrators taunted the man for his heritage, shaved a

swastika symbol into his head, and branded a swastika into his skin with a hot wire.

The Criminal Section also protects Native Americans who are victims of police brutality, human trafficking, forced labor, and forced commercial sex. *See* 18 U.S.C. § 242 (2014); 18 U.S.C. §§ 1589–1597 (2014); Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. §§ 7101–7113 (2014). For more information, visit http://www.justice.gov/crt/about/crm/.

J. The Appellate Section

The Appellate Section represents the Division in the courts of appeals. In addition to handling appeals in the Division's own cases, the Appellate Section files amicus briefs in support of private plaintiffs seeking to enforce the civil rights laws under the Division's jurisdiction, including the rights of Native Americans. In *Knight* v. *Thompson*, 723 F.3d 1275, 1280 (11th Cir. 2013), for example, the Section argued that Native American prison inmates in Alabama should be permitted to wear long hair in accordance with their religious beliefs. In *Native American Council of Tribes v. Weber*, Nos. 13-1401, 13-2745, 2014 WL 1644130, at *2–4 (8th Cir. Apr. 25, 2014), the Section supported Native American plaintiffs' request to use a dilute tobacco mixture (no more than one percent tobacco) in their congregational ceremonies at a South Dakota prison. In *Wandering Medicine v. McCulloch*, 906 F. Supp. 2d 1083, 1085 (D. Mont. 2012), the Appellate Section supported Native American voters from three Montana reservations who sought to establish satellite voting locations for reservation residents who must travel great distances to vote. The Appellate Section filed an amicus brief on behalf of the Plaintiffs-Appellants and participated in oral argument in *Wandering Medicine v. McCulloch*, No.12-35926, 544 F. App'x. 699 (9th Cir 2013). For more information, visit http://www.justice.gov/crt/about/app/.

III. Conclusion

The Indian Working Group has coordinated with Tribal Liaisons from USAOs located near Indian Country and welcomes queries and comments related to potential civil rights issues. ❖

ABOUT THE AUTHORS

❑ **Verlin Deerinwater** is a senior trial attorney with the Civil Rights Division and co-chair of the Division's Indian Working Group. Mr. Deerinwater joined the Civil Rights Division in 1986. The majority of his career with the Civil Rights Division has been focused on health care reform with an emphasis on protecting the civil rights of residents of publicly-owned nursing homes, including veterans' homes in Alabama, Tennessee, and Puerto Rico. Recently, he has been coordinating the Division's efforts in exploring ways to enhance compliance with the Indian Child Welfare Act. He is a member of the Cherokee Nation of Oklahoma. ✠

❑ **Susana Lorenzo-Giguere**, an attorney with the disability rights section of the Civil Rights Division at the Department of Justice, and co-chair of the Division's Indian Working Group, has been a career attorney in the Civil Rights and Criminal Divisions of the Department of Justice since 1991. She spoke for the Civil Rights Division on Native American disability rights at the Department of Education's Indian Civil Rights conference in Albuquerque, in 2010, and has brought voting rights cases on behalf of Navajo and Pueblo voters in New Mexico. Her recent publications include an article in The Legal Intelligencer, titled, "DOJ Settles its First ADA Hepatitis B Bias Claim." Susana Lorenzo-Giguere, *DOJ Settles its First ADA Hepatitis B Bias Claim*, THE LEGAL INTELLIGENCER (June 11, 2013), http://www.thelegalintelligencer.com/id=1202603775602/DOJ-Settles-Its-First-ADA-Hepatitis-B-Bias-Claim-?slreturn=20140506124137. ✠

Reentry Programming in Indian Country: Building the Third Leg of the Stool

Timothy Q. Purdon
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District of North Dakota

I. Introduction

As a young lawyer, long before I became U.S. Attorney for the District of North Dakota, I served as a member of the North Dakota federal court's Criminal Justice Act panel and provided indigent defense services to American Indian defendants charged with committing federal crimes on the reservations in North Dakota. One of those clients was a man named Gary from the Standing Rock Sioux Tribe. Gary was charged with a federal firearm crime, pled guilty, and received a substantial prison sentence. Some years later, I encountered Gary again while visiting another client who was being held pretrial at the North Dakota Department of Corrections, Centre, Inc., the residential reentry facility in Bismarck, North Dakota. Gary was on his way out of the Bureau of Prisons system, in the process of serving the last six months of his sentence on inmate status at Centre.

Gary recognized me and was happy to see me. In the course of catching up, he told me he was doing well at Centre. He had a job in Bismarck, and he had found an Alcoholics Anonymous (A.A.) group he was happy with and a sobriety sponsor he liked and trusted. He indicated that he had made mistakes in the past but was committed to moving forward and turning his life around. I felt good when I left Centre that day. I thought that maybe Gary would have a chance to become a person who contributed to his community as a father, a husband, and a worker. About five months later, I received a call from the U.S. Magistrate's clerk. A petition had been filed seeking to revoke Gary's supervised release and to send him back to prison. Would I accept the appointment to represent him in the revocation proceeding?

I said yes, of course. When I met with Gary, this time at the local county jail, I asked him what happened, sharing that the last time we talked he seemed to be headed in the right direction. Gary replied that when he completed his inmate time at Centre, a relative picked him up in Bismarck and drove him home to the Standing Rock Reservation. As Gary put it, "when I got there, no job, no A.A. group, no sponsor." He had quickly fallen back into his old habits with old cronies and was now headed back to federal prison.

These events occurred in the mid-1990s. Twenty years later, in most of Indian Country, reentry efforts remain the same. Residential reentry facilities are located far from reservations, and when an individual returns to the reservation, there is a dearth of support services to assist with reentry to the community. I have, in the last four years as North Dakota's U.S. Attorney, seen the frustration grow in the attorneys in my office who prosecute violent crime in Indian Country, as we see Gary's story repeated over and over.

- Halfway house in Bismarck: Employment. Services. Sobriety. Hope.
- Home on the reservation: No job. No services. Trouble. Reoffend.

This frustration reaches a boiling point when, as too often occurs in an isolated reservation community, the "trouble" involving the reentering offender produces yet another victim of domestic

violence or sexual abuse. Reentry in Indian Country, like everywhere else, is not just a matter of trying to "help" reentering offenders. It is also a matter of public safety. Unfortunately, the singular challenges to reentry in Indian County—combined with inadequate reentry resources—leads to higher recidivism rates, more crime, and more victims.

I have told Gary's story often as I have struggled to lead the U.S. Attorney's Office for the District of North Dakota (DND) forward on reentry. Several years of study and thought on this issue have revealed no silver bullet approach for us here in North Dakota, but it has led us to the point where we must take action. This article will place reentry in its proper context as a key part of a "three-legged stool" approach to public safety in Indian Country. It will describe the special challenges of reentry in reservation communities and will explain how DND intends to move forward toward a better reentry program.

II. Anti-violence strategies in Indian Country: reentry as part of the three-legged stool

On June 15, 2011, DND implemented an Anti-Violence Strategy (AVS) for the reservations of North Dakota. *See* U.S. ATTORNEY'S OFFICE, DISTRICT OF NORTH DAKOTA, ANTI-VIOLENCE STRATEGY FOR TRIBAL COMMUNITIES IN N.D. (2011), *available at* http://www.justice.gov/usao/nd/ic/Anti-Violence%20Strategy.pdf. The AVS was DND's response both to the Tribal Law and Order Act of 2010 and to the January 11, 2010 memorandum from then-Deputy Attorney General David W. Ogden. Ogden's memorandum required that all U.S. Attorneys whose districts include Indian Country "engage annually, in coordination with our law enforcement partners, in consultation with the tribes in that district" and "develop an operational plan addressing public safety in Indian Country." Memorandum from David W. Ogden, Deputy Attorney General, Dep't of Justice, to U.S. Attorneys (Jan. 11, 2010), *available at* http://www.justice.gov/dag/dag-memo-indian-country.html.

Our AVS represents the culmination of consultations among DND, the tribes in North Dakota, and federal, state, local, and tribal law enforcement partners. The AVS begins with an overview of the District of North Dakota and the tribal communities within the district. It then describes a new framework for DND's efforts to reduce violence in Indian Country. It sets forth a three-pronged approach toward violence prevention that calls for: (1) vigorous enforcement of federal criminal laws on the reservations, (2) support for viable crime-prevention programs, and (3) the creation of support structures for working with offenders who have been released from federal prison as they reenter tribal communities.

The AVS recognizes that the central mission of DND's prosecutors who work in Indian Country is the enforcement of federal criminal statutes on the reservations. The AVS rededicates DND to that core function and makes it the cornerstone of the strategy. It commits DND to vigorously enforcing laws that punish sexual assaults, domestic violence, other violent crimes, gun offenses, gang activity, and drug-related crimes, and to removing the most violent offenders from tribal communities. These efforts form the foundation of the AVS, buttressed by the DND's parallel education and prevention strategies for longer-term crime reduction.

Although essential as a short-term approach, the aggressive enforcement of federal criminal statutes in tribal communities will not solve the violent crime problems on the reservations in the long-term. Rather, a strategy that simultaneously pursues the prevention of violent crime on the front end and enforcement of criminal laws on the back end is required to address the long-standing, high rates of serious violent crime in Indian Country. As the second leg of the stool, the AVS commits DND to reinforce viable, community-based crime-prevention efforts by providing support to organizations working to empower these communities to reduce or eliminate the forces, influences, catalysts, and causes that feed violent behavior.

Finally, offender reentry to tribal communities has a significant impact on violence prevention. The AVS increases DND's focus on reentry efforts so that individuals on supervised release following a period of incarceration can become productive citizens once they are back in the community. For example, DND is committed to the support—where consistent with Department of Justice policies—of reentry courts and other reentry initiatives in the District of North Dakota.

Although focused more narrowly on DND's responsibility for public safety in Indian Country, the AVS coalesces with the Department of Justice's strategies for reducing violent crime across the United States. At the Project Safe Neighborhoods Conference in New Orleans in July 2010, Attorney General Eric Holder articulated this strategy:

> [W]e've reached an important point for updating our goals, for modernizing and refocusing our strategies, and for compiling the latest and best thinking we have on the most effective, and most economically viable, ways to reduce violent crime and to build safe, vibrant and productive communities. . . . [F]inding the solutions we need begins by updating the Justice Department's violent crime strategy—a critical initiative that's well underway. The development of this strategy is being led by our outstanding network of U.S. Attorneys. *It is focused on three key areas: enforcement, prevention, and reentry.*

Eric Holder, Attorney General, Address at the Project Safe Neighborhoods Annual Conference (July 13, 2010) (emphasis added), *available at* http://www.justice.gov/ag/speeches/2010/ag-speech-100713.html.

In response to this call for action, the Attorney General's Advisory Committee (AGAC) accepted the Attorney General's challenge of leadership in the area of violent crime reduction and prevention. The AGAC developed a memorandum that sets forth the Department of Justice's Anti-Violence Strategy. Memorandum from Attorney General's Advisory Committee, Anti-Violence Strategy to U.S. Attorneys (Nov. 16, 2010), *available at* http://usanetsp.usa.doj.gov/staffs/olvp/olvp%20Documents/attorney%20general%27s%20anti-violence%20strategy%20-%20november%202010.pdf. This strategy, with its focus on enforcement, prevention, and reentry, has direct application to tribal communities in North Dakota. DND's AVS for Indian Country integrates materials from this memorandum.

III. Working to gain an understanding of the challenge of reentry in Indian Country: the Federal Interagency Reentry Council's Indian Country Working Group

The desire to address reentry challenges in Indian Country is part of a larger context of enhanced efforts on reentry issues generally. The Federal Government's efforts in this area are coordinated by the Federal Interagency Reentry Council (FIRC). Established by Attorney General Holder in January 2011, the FIRC brings together 20 federal agencies to work toward making communities safer. The FIRC focuses on reducing recidivism and victimization, assisting those who return from prison and jail in becoming productive citizens, and saving taxpayer dollars by lowering the direct and collateral costs of incarceration. As described by The Council of State Governments:

> The Reentry Council . . . represents a significant executive branch commitment to coordinating reentry efforts and advancing effective reentry policies. It is premised on the recognition that many federal agencies have a major stake in prisoner reentry. The reentry population is one we are already working with—not only in our prisons, jails, and juvenile facilities, but in our emergency rooms, homeless shelters, unemployment lines, child support offices, veterans' hospitals, and elsewhere. When we extend out to the children and families of returning prisoners, the intersection is even greater.
>
> A chief focus of the Reentry Council is to remove federal barriers to successful reentry, so that motivated individuals—who have served their time and paid their debts—

> are able to compete for a job, attain stable housing, support their children and their families, and contribute to their communities. Reentry Council agencies are taking concrete steps towards these ends, to not only reduce recidivism and high correctional costs but also to improve public health, child welfare, employment, education, housing and other key reintegration outcomes.

THE COUNCIL OF STATE GOVERNMENTS, JUSTICE CTR., FED. INTERAGENCY REENTRY COUNCIL, *available at* http://csgjusticecenter.org/nrrc/projects/firc/.

For the past 18 months, I have co-chaired the FIRC's Indian Country Reentry Working Group. Our group has worked with multiple federal agencies to identify specific, unique challenges facing reentering offenders in Indian Country. A "Snapshot" produced by the FIRC summarizes our findings to date:

> There exist serious public safety challenges in reservation communities in the United States. American Indian people are incarcerated at higher rates than the general population: at midyear 2009, tribal, federal, and state authorities incarcerated American Indian or Alaska Native individuals at a rate 25 percent higher than the overall national incarceration rate. Due to federal criminal jurisdiction on many reservations, juveniles detained in federal facilities are predominantly American Indian males, generally between 17 to 20 years of age, with an extensive history of drug and/or alcohol use/abuse and violent behavior and who have often been sentenced for sex-related offenses.
>
> Of further concern is the rate of violent crime that exists in some reservation communities and the fact that this violence is often directed at the most vulnerable members of the community at rates that far exceed the rates off the reservations. For instance, it is a grim fact that an American Indian female has a one-in-three chance of being sexually assaulted in her lifetime. American Indian women also experience homicide at rates almost 50 percent greater than Caucasian women.
>
> Finally, violence in the form of sexual assault and domestic violence against American Indian women also occurs at heightened rates. The response to the heightened violent crime rates in reservation communities must be multi-pronged and culturally appropriate. Certainly, vigorous enforcement of criminal laws by federal law enforcement and federal support for viable crime prevention programs are key. But the public safety challenges faced by reservation communities are exacerbated by the unique challenges that an American Indian who is returning to his or her home community faces after serving a federal prison sentence for a crime of violence. Indian Country unemployment rates reportedly average 49 percent, even in better economic times. High unemployment compounded with a lack of affordable and adequate housing, magnifies challenges for returning individuals.
>
> Further, community confinement housing facilities actually located in a reservation community are uncommon, which may be for cultural as well as economic reasons. This too often results in an American Indian spending his or her final months of incarceration in a halfway house facility that is located a great distance from the reservation community to which the individual will eventually return. In addition, their home communities are far from health and employment services that are critical to successful reentry.

FED. INTERAGENCY REENTRY COUNCIL, RESERVATION COMMUNITIES 1 (2013), *available at* http://csgjusticecenter.org/wp-content/uploads/2013/06/SnapShot_Reservation.pdf.

Our working group also recommended action in specific areas moving forward:

- **Expand data collection:** Much appears to be unknown about the "flow" of American Indians through the federal criminal system. Data needs to be gathered as to the number of American Indians by: the reservations where they committed their federal crimes, the Bureau of Prisons facilities in which they serve their sentences, and the reservations to which they return and serve their supervision under U.S. Probation and Pretrial Services.
- **Increase coordination:** Because the Department of Justice and the Department of the Interior's Bureau of Indian Affairs often have primary criminal jurisdiction over certain serious crimes committed on reservations, they have a broad and deep expertise on the public safety challenges that these communities face. The Reentry Council has expertise in the implementation of successful reentry programs in non-reservation communities. Finally, U.S. Probation and Pretrial Services has expertise in the day-to-day supervision of offenders reentering reservation communities. Increased coordination among these centers of varied expertise is essential to understanding, and then positively impacting, the issue of reentry in Indian Country.
- **Explore transition assistance:** Currently, too many American Indians who are transitioning out of federal prisons to community confinement settings are doing so in non-reservation communities many miles from the reservation communities to which they will be returning. Enhanced understanding of resource availability and need is required to address this issue.
- **Focus on employment, education, health, and housing opportunities:** American Indians reentering reservation communities can face employment, education, health, and housing challenges that are unique, given the high unemployment rates and isolation of some reservation communities. These challenges need to be further considered by the Reentry Council agencies and efforts redoubled to find creative and effective methods to address these challenges. FED. INTERAGENCY REENTRY COUNCIL, RESERVATION COMMUNITIES 1 (2013), *available at* http://cs gjusticecenter.org/wp-content/uploads/2013/06/SnapShot_Reservation.pdf.

In addition to the U.S. Attorney community, two other Department of Justice entities have stepped forward as important partners in supporting Indian Country reentry efforts. The Executive Office for U.S. Attorneys worked with the FIRC Indian Country Reentry Working Group to add an Indian Country section to the U.S. Attorney Reentry Toolkit. *See* DEP'T OF JUSTICE, REENTRY TOOLKIT FOR U.S. ATTORNEYS' OFFICES 15 (2014), *available at* http://usanetsp.usa.doj.gov/Reentry/Documents/Reentry%20Toolkit%202014.pdf. The Department of Justice's Bureau of Justice Assistance has been a key member of the FIRC Indian Country Working Group and has finalized a "menu" of technical assistance programs that U.S. Attorneys' offices interested in building Indian Country reentry pilot programs can access. BUREAU OF JUSTICE ASSISTANCE, DEP'T OF JUSTICE, BJA STRATEGIES TO SUPPORT TRIBAL REENTRY (2014), *available at* https://www.bja.gov/Publications/TribalReentryFS.pdf.

With the recognized need for reentry programming as a key part of the three-pronged approach to safer reservation communities and with full knowledge of the challenges awaiting us in establishing such programming, DND has now begun our journey toward the creation of viable reentry programming for federal offenders returning to reservation communities in North Dakota.

IV. Getting started by taking action

Due to our mission as prosecutors, it is very difficult for a U.S. Attorney's office to run an Indian Country reentry program. We lack the tools and the resources, in most situations, to do so. Nevertheless, with the resolve to do more and with support for reentry efforts at the highest levels of the Department of

Justice, DND redoubled our efforts to find partners to work with us toward the goal of improving reentry in Indian Country in North Dakota. Our interest in this area has been met with strong support from the federal judiciary, U.S. Probation and Pretrial Services, and the Federal Public Defender. In April 2014, we held a meeting with these federal partners, along with representatives from the North Dakota Department of Corrections, Centre, Inc. (the primary provider of residential reentry services for federal inmates in North Dakota), and the Standing Rock Sioux Tribe.

The participants committed to establish a reentry program loosely based upon the evidence-based Boston (Massachusetts) Reentry Initiative. The program will initially consist of intervention with Standing Rock Sioux tribal members returning to North Dakota from federal prison. The program will include direct discussions with the reentering offenders about the consequences of reoffending. Over time, we hope to be able to make referrals to available service providers on specific issues.

Other U.S. Attorneys' offices have indicated an interest in starting new pilot programs to support offenders reentering reservation communities in their districts as well. The AGAC's Native American Issues Subcommittee (NAIS) is bringing together interested U.S. Attorneys' offices to compare ideas, coordinate training opportunities with the Bureau of Justice Assistance, and plan reentry efforts in their districts. If your district is interested in exploring a pilot program, please let NAIS know, and we will add your district to this effort.

V. Conclusion

DND's Anti-Violence Strategy for Tribal Communities starts with this quote from Attorney General Eric Holder: "Federal prosecutors should see themselves as neighborhood problem solvers, not case processors." U.S. ATTORNEY'S OFFICE, DISTRICT OF NORTH DAKOTA, ANTI-VIOLENCE STRATEGY FOR TRIBAL COMMUNITIES IN N.D. 5 (2011), *available at* http://www.justice.gov/usao/nd/ic/Anti-Violence%20Strategy.pdf. It is the philosophy that, as prosecutors, we are part of the communities we serve and that we must therefore participate in all facets that contribute to the public safety of that community, not just in the enforcement of laws. This broad responsibility inspires our effort to add the missing third prong of strong reentry programming to our ongoing efforts to improve public safety in Indian Country.

As any attorney who has ever prosecuted cases arising in Indian Country will tell you, making a reservation community safer is not easy. And, given the isolation, poverty, and lack of support services on many reservations, reentry may be the hardest part of this difficult challenge. But, we are committed to advancing reentry efforts, in combination with crime prevention and enforcement, to strive to improve the safety and health of the Indian Country communities we serve. ❖

ABOUT THE AUTHOR

❑ **Timothy Q. Purdon** has served as North Dakota's U.S. Attorney since 2010. In 2014, Mr. Purdon was appointed by Attorney General Eric Holder to a seat on the AGAC. Since 2013, he has served as the chair of the AGAC's Native America Issues Subcommittee, which is responsible for making policy recommendations to the Attorney General of the United States regarding public safety and legal issues that impact tribal communities. He also serves as a member of the Department's American Indian and Alaska Native Children Exposed to Violence Task Force and has served as co-chair of the Federal Interagency Reentry Council's Indian Country Working Group. Prior to becoming U.S. Attorney, Tim practiced law at the Vogel Law Firm in Bismarck, North Dakota, prior to which he clerked for the Honorable Bruce M. Van Sickle, U.S. District Court for the District of North Dakota. ✠

Native Children Exposed to Violence: Defending Childhood in Indian Country and Alaska Native Communities

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> *Today's Tribal youth carry wounds of their ancestors, compounded by generations of atrocities committed against this nation's Indigenous people, including historical traumatic campaigns of eradication, reservation assignment, boarding school[s], and relocation. Although they carry these wounds, these contemporary youth will be the first generation with an opportunity to heal from historical trauma.*

Ivy Wright-Bryan, National Director of Native American Mentoring, Big Brothers Big Sisters of America, in written testimony, Defending Childhood Initiative, Public Hearing 2, Attorney General's Task Force, Children's Exposure to Violence in Rural and Tribal Communities 31 (Jan. 30–Feb. 1, 2012), *available at* http://www.justice.gov/defendingchildhood/abq-hearing-binder-for-webposting.pdf.

My first real exposure to life on an Indian Reservation was when I worked as the Tribal Court Clerk for the Confederated Tribes of the Grand Ronde Community of Oregon (CTGR) from 1993 to 1995. I was a law student at the time, and was drawn to Indian law both academically and from a social justice perspective. The CTGR had been terminated in 1954 and restored in 1983. In the years following restoration, the Tribe established essential governing departments, enabling it to begin economic expansion, which was primarily based on timber sales. When I started in 1993, many tribal members who lived on or around the checkerboard reservation experienced poverty, substance abuse, and unemployment. The "Tribal Court" was a room in a modular building the court shared with Tribal Council. Nearly every case that I heard in that courtroom during the two years I served as clerk involved child abuse and neglect. Tribal Child Protective Service (CPS) workers and community members worked tirelessly to ensure that children were safe, while also working to empower families to be resources for tribal children when parents failed. There were many failures. I saw kids victimized by intimate partner violence, sexual abuse, physical abuse, extreme neglect, exposure to severe substance abuse, and yes, I saw kids die. I also witnessed first-hand a tribe's fierce commitment to its children and the love, strength, and security that tribes are uniquely able to give their people.

Today, the CTGR has used gaming profits as a catalyst for creating diverse economic opportunities in the surrounding community. Since 1997, through their charitable giving fund, CTGR has contributed almost $60 million to other tribes and non-profits. Close to 85 percent of that money has gone to support education, health services, and public safety. CTGR's Tribal Court and Tribal Counsel no longer have to share space in a cramped modular. Instead, they are housed in an impressive Tribal Governance Building, located across a parking lot from a modern Tribal Health and Wellness Center and Social Services Department, which provides employment support, services to families and children, emergency assistance, and youth prevention programs. CTGR has also developed a professional and well-staffed tribal police force.

However, for most American Indian/Alaska Native (AI/AN) children in the United States, the statistics paint a grim picture. These children, 64 percent of whom live outside Indian Country and 36 percent live within Indian Country:

- Are twice as likely to live in poverty, compared with the general population.
- Graduate from high school at a rate 17 percent less than the national average.
- Have the highest rates of drug use, binge drinking, and cigarette use of any other racial or ethnic group.
- Are twice as likely as their non-native peers to die before the age of 24.
- Are 2.5 times more likely to experience trauma.
- Have the highest per capita rate of violent victimization.
- Experience abuse and neglect at twice the rate of Caucasian children.
- Are more likely to be placed in foster care and to stay longer then non-native children.
- Are 2.5 times more likely to commit suicide.
- Have rates of Post-Traumatic Stress Disorder (PTSD) that exceed the prevalence of PTSD for military personnel who served in the latest wars in Afghanistan, Iraq, and the Persian Gulf.
- Are disproportionately represented in both the state and federal juvenile justice systems, where they also receive the most severe dispositions.

INDIAN LAW & ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICA SAFER, REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES 175 (2013), *available at* http://www.aisc.ucla.edu/iloc/report/index.html (Commission Report).

Additionally, because AI/AN women experience the highest rates of sexual assault and domestic violence in the nation, AI/AN children are being impacted by exposure to violence against women at a disproportionate rate.

These individual factors are compounded exponentially because these children are exposed to repeated losses and traumas as a result of the elevated rate of early, unexpected, and traumatic deaths among AI/AN people caused by accidents, suicide, homicide, and firearms. These contributing causes are found in the Native population at twice the rate of the population at large, and when alcoholism is determined to be a contributing factor to death, the rate among AI/AN people exceeds that of the general public by seven times. Michelle Sarche & Paul Spicer, *Poverty and Health Disparities for American Indian and Alaska Native Children: Current Knowledge and Future Prospects*, 1136 ANN. N. Y. ACAD. SCI. 126 (2008), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2567901/.

We know exposure to violence causes major disruptions of basic cognitive, emotional, and neurological function that are essential for optimal development. Children exposed to violence suffer lasting physical, mental, and emotional harm. They endure difficulties forming healthy attachments, engage in aggressive and regressive behaviors, and experience anxiety and depression. They are more susceptible to intimate partner violence, delinquency, repeated victimization, and involvement with the juvenile justice system. Finally, exposure to violence can impair a child's ability to form and maintain safe and healthy relationships as an adult, contributing to the continuance of the cycle. David Finkelhor, Heather Turner, Richard Ormrod, Sherry Hamby & Kristen Kracke, *Children's Exposure to Violence: A Comprehensive National Survey*, JUV. JUST. BULL. 1, 3 (2009), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/227744.pdf.

Since Attorney General Eric Holder launched the Defending Childhood Initiative in 2010, the Department of Justice (DOJ) has been working with subject-matter experts and reviewing research to take

an in-depth look at the epidemic of children exposed to violence in America. One aspect of the Defending Childhood Initiative was the Attorney General's Task Force on Children Exposed to Violence, convened in October 2011. The Task Force was comprised of 13 leading experts, including child welfare and juvenile justice practitioners, child and family advocates, academic experts, and licensed clinicians. The Task Force conducted four public hearings in Albuquerque, Baltimore, Detroit, and Miami, and provided a final report to the Attorney General in late 2012. The report includes the Task Force's findings and comprehensive policy recommendations. It outlines strategies to prevent children from being exposed to violence and for healing the deleterious effects experienced by children who are exposed to violence in this country.

What the Task Force found is that more than 60 percent of children in the United States have suffered exposure to violence. The particular exposure may include witnessing or being the victim of intimate partner violence, child abuse, homicide, suicide, sexual abuse, and community violence. Ten percent of children in the United States have endured some form of abuse or neglect. One in sixteen has been the victim of sexual abuse. This exposure to violence has a significant harmful impact on the mental and emotional development of our youth. ROBERT L. LISTENBEE JR. ET AL., REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 27–34 (2012), *available at* http://www.justice.gov/defendingchildhood/.

Tribal youth experience more violence than youth in other communities. In addition, on many reservations, the majority of the population is under the age of 25. The focus of the Defending Childhood Initiative on AI/AN children is part of DOJ's larger law enforcement initiative in Indian Country. ***Id.*** at 35. The 2012 Task Force Report concluded that AI/AN children experience "extreme levels of violence" and are in desperate need of supportive services. The Task Force also recognized that the issues of Native children exposed to violence were so unique, complex, and significant, that they could not be adequately addressed by the broader inquiry that was their focus. Therefore, the second of the Task Force's 10 recommendations requested the appointment of a new federal task force to examine the particular needs of AI/AN children exposed to violence. ***Id.*** at 38. The recommendation also included priorities to be addressed by the new task force, namely:

1. Improving the identification and appropriate treatment of AI/AN children who have been exposed to violence
2. Helping AI/AN communities and tribes rise out of violence, and involving AI/AN youth in solutions
3. Examining and addressing the needs of AI/AN children living outside reservations, in urban or rural settings off AI/AN lands
4. Involving a consultation process consistent with the government-to-government relationship between the Federal Government and tribal governments, and
5. Paying special attention to the incarceration of AI/AN children who are convicted and sentenced in the federal judicial system.

Id.

At the 2013 White House Tribal Nations Conference, Attorney General Eric Holder announced the creation of the Attorney General's Task Force on AI/AN Children Exposed to Violence. This task force is anchored by a federal working group that includes U.S. Attorneys and officials from the Departments of the Interior (DOI) and Justice, as well as an advisory committee of experts appointed to examine the scope and impact of violence facing AI/AN children. The aim of the task force is to make policy recommendations to Attorney General Holder on ways to address these issues.

Like the first task force on Children Exposed to Violence, the task force created in 2013 is comprised of leading experts, including practitioners, child and family advocates, academic experts, and

licensed clinicians. Senator Byron Dorgan, Board of Advisors, Center for Native American Youth, former U.S. Senator, and chair of the Senate Committee on Indian Affairs; and Joanne Shenandoah, Iroquois, composer and musical artist, serve as the co-chairs of the Advisory Committee. The Tribal Law and Policy Institute is providing technical assistance support for the task force, including assisting the advisory committee in conducting public hearings and listening sessions, and providing primary technical writing services for the final report.

The federal working group includes officials from key agencies involved in issues related to AI/AN Children Exposed to Violence. Agency representation includes the following: DOJ (including U.S. Attorneys Tim Purdon, North Dakota; Brendan Johnson, South Dakota; and Barry Grissom, Kansas), DOI, and the Department of Health and Human Services. I co-chair the working group along with Tracy Toulou, Director of DOJ's Office of Tribal Justice (OTJ). As DOJ supports this new task force focused on Native children exposed to violence, this working group is in an ideal position to take immediate steps and make meaningful, lasting improvements for AI/AN children.

Because juvenile systems and services to children have been the subject of so much study, the working group was able to assist the subcommittee by reviewing and analyzing past efforts, beginning with federal endeavors, to glean relevant findings and apply them to efforts to meet our current goals. This review has been completed and includes a list of pertinent publications about the number and status of AI/AN children in the health, justice, and welfare systems. This compilation will serve as a reference tool as efforts of the working group continue. To date, the working group has met 11 times since its first meeting on June 27, 2013. The working group has already completed the following tasks:

1. Office of Justice Programs (OJP) has developed a list of the agencies (federal, state, tribal, other) and resources generally responsible for, or involved in, health, safety, and welfare matters affecting AI/AN children. The White House Council on Indian Affairs has undertaken an inventory initiative. The results of that larger, executive branch-wide inventory will serve the purpose of this goal from a broader perspective. The results of that inventory will be available to all executive branch agencies.
2. As of August 2013, the working group has partnered with the Bureau of Indian Affairs (BIA) and the Bureau of Indian Education (BIE) to ensure that educational services for juveniles are being provided in two of the three BIA facilities. The third detention facility is currently closed for renovation. BIA and BIE have agreed that as of the 2014–2015 school year, and going forward, BIE will take over the responsibility for educational services in all BIA facilities. A Memorandum of Agreement between BIA and BIE is being drafted. BIE will obtain progress reports from the current contractor to track educational services in BIA facilities.
3. The working group is focusing on ensuring that trauma-informed counseling services are available in BIA facilities. A subgroup that includes DOJ, DOI, Indian Health Services (IHS), and Substance Abuse and Mental Health Services Administration (SAMHSA) representatives has been formed to focus on this issue.
4. An initial assessment has been completed to identify the availability of existing services to Native children exposed to violence and, specifically, victims of crime, from the time they are identified through the conclusion of any criminal prosecution. As a next step, members of the working group are conducting a gap analysis to determine the effectiveness of existing services and identify unmet needs for all child victims who interface with the federal justice system.
5. Working group members from OTJ and the Executive Office of U.S. Attorneys have reviewed the existing IHS/BIA Handbook on Child Protection in Indian Country and identified outdated information. A subgroup led by BIA and SAMHSA are working to update

the information and finalize a usable current handbook, which will be made available through BIA social services.

6. Bureau of Prisons (BOP) has completed a survey of all contract facilities to determine whether they provide culturally appropriate services to tribal youth in detention. The results have been summarized and sent out to the working group for review. Based on the results of this survey, the working group is partnering with the BOP and Office of Juvenile Justice and Delinquency Prevention to generate best practices guidance and to begin working with providers to ensure consistency with these best practices. A subgroup including BOP, OTJ, and OJP, is conducting an analysis of best practices and looking into the possibility of contracting with BIA or tribal facilities to incarcerate tribal youth.
7. In order to institute focused and culturally relevant training for federal, state, and tribal criminal justice and social service personnel on Trauma Informed Care, Forensic Interviewing of Child and Adolescent Victims and Witnesses, and Mandatory Reporting Obligations under Federal Law, we have completed an inventory of training opportunities that has been disseminated to the working group. DOJ's National Indian Country Training Initiative, in coordination with OJP and OJS, is currently developing a training calendar that includes focused training on each of these issues.
8. As a corollary to number 7 above, the National Indian Country Training Initiative within DOJ's Office of Legal Education has produced a video on mandatory reporter training to be used in all relevant DOJ components, and it may be easily adapted for use by other federal agencies.
9. The working group has coordinated with the FBI to conduct a system review on background checks for providers in Indian Country and to identify opportunities for enhanced efficiency and reliability. OJP will continue to work with constituents to determine if there are additional background check-related issues to address.
10. While researching training opportunities to expand judicial exposure to, and understanding of, the Indian Child Welfare Act (ICWA), working group members learned that the National Resource Center on Legal and Judicial Issues, in partnership with the National Resource Center for Tribes and Casey Family Programs, is currently developing a National Model Judicial ICWA Curriculum containing seven modules that cover ICWA. The content is nearing completion. A subgroup, including OTJ, the U.S. Attorney's Office for the District of Oregon, and other working group members, are reviewing the draft curriculum to provide input.
11. The Office of Juvenile Justice and Delinquency Prevention has initiated a public awareness campaign in the area of AI/AN children exposed to violence as part of the Defending Childhood Initiative.

The AI/AN Task Force hearings were held on December 9, 2013, in Bismarck, North Dakota; on February 11, 2014, in Phoenix, Arizona; on April 16–17, 2014, in Fort Lauderdale, Florida; and on June 11–12, 2014, in Anchorage, Alaska. The hearings were open to the public and offered an opportunity for public comment. The topics addressed at the hearings included:

- AI/AN children exposed to domestic violence and sexual and physical abuse
- Response by multi-disciplinary teams (MDTs) to children exposed to violence
- Healing through trauma-informed interventions
- Native youth in federal, state, and tribal juvenile justice systems
- Promising approaches in juvenile justice

- The Indian Child Welfare Act
- Gangs and sex trafficking
- Violence in tribal schools, and
- Meeting the challenges associated with addressing violence in Alaska Native villages.

Based on the testimony at these public hearings, comprehensive research, and extensive input from experts, advocates, impacted families, the federal working group, and communities nationwide, the Advisory Committee will issue a final report to the Attorney General this fall. The report will present the committee's findings and comprehensive policy recommendations. It will serve as an outline of strategies to prevent and remedy AI/AN children's exposure to violence.

There are 46 U.S. Attorneys' offices (USAOs) with Indian Country responsibility. Each office has engaged in government-to-government consultations with tribal leaders and law enforcement partners and has created Indian Country Operational Plans. Children's exposure to violence is a recurring theme at many tribal consultations. Operational Plans include USAO participation in, and support of, MDTs comprised of federal and tribal prosecutors, law enforcement, CPS workers, and medical professionals. MDTs and USAOs shall have a child-centered focus concentrated on creating a coordinated system-of-care response that eases the damage to children who have suffered abuse and/or neglect. Additionally, some USAOs, including my office in Oregon, have worked with tribes and IHS to open Child Abuse Assessment Centers to serve Native children on the reservation in a culturally appropriate and trauma-informed manner.

Around the country, USAOs have partnered with sovereign tribal governments in their districts to create a host of innovative solutions that support and empower tribal courts, law enforcement, CPS, and other tribal stakeholders to take care of their children. We still have plenty of work ahead. When I visit the Warm Spring Reservation, a community that experiences the highest crime rate in Oregon, I am continually struck by the fact that the life expectancy of tribal members on that reservation is about 55 years of age. A local IHS doctor recently put a positive spin on that dismal piece of data by reminding me that 55 is an improvement over the life expectancy 10 years ago. We can do better.

There is plenty of bad news about the disproportionate rates of Native children exposed to violence. There is also good news about the inspiring work of federal prosecutors, law enforcement, and tribes working in partnership to combat that violence. We have a long road ahead. U.S. Attorneys across the country will continue bringing people together to address children's exposure to violence by developing localized initiatives. Through summits, meetings, and training sessions, we are learning what works and what doesn't work in our tribal communities, and are advocating for solutions to prevent and reduce violence. We are only just beginning to comprehend the effect that exposure to violence has on children generally, and on AI/AN children, specifically. If we are to change the outcomes for kids in Indian Country, we must focus our combined efforts on AI/AN children who are exposed to violence. If we do, those efforts will help create a different narrative for these children, families, and communities in the future. If we don't seize this opportunity to build on what we now know, we will miss our chance to build a world where all children have the opportunity to grow up with dignity, well-being, and peace.

"Let us put our minds together and see what life we will make for our children." Tatanka Lotanka-Sitting Bull, PARTICULATE MATTERS (Sept. 14, 2012), *available at* http://kosmicdebris.blogspot.com/2012/09/let-us-put-our-minds-together-and-see.html. ❖

ABOUT THE AUTHOR

❑ **Amanda Marshall** was appointed U.S. Attorney for the District of Oregon in September 2011. She serves as the Vice Chair of the Attorney General's Native American Issues Subcommittee and is the co-chair of the Federal Working Group on Native American/Alaska Native Children Exposed to Violence. Ms. Marshall also serves on the Attorney General's Child Exploitation and Obscenity Working Group. Prior to her appointment as U.S. Attorney, she worked for the Oregon Department of Justice for 10 years as an Assistant Attorney General and Attorney in Charge of the Child Advocacy Section, representing the Department of Human Services/Child Welfare. She also served five years as a Deputy District Attorney, prosecuting a variety of cases—from property crimes to murder—and overseeing the Domestic Violence Prosecution Unit. ✠

Investigating and Prosecuting the Non-Fatal Strangulation Case

Leslie A. Hagen
National Indian Country Training Coordinator

I. Introduction

In the early morning hours of August 19, 2013, Zackeria Crawford strangled his girlfriend until she lost consciousness and became incontinent. The assault occurred within the exterior boundaries of the Blackfeet Indian Reservation in Montana. The defendant is an enrolled member of the tribe.

The victim told FBI Special Agent Mark Zahaczewsky that she was asleep in the home that she shared with defendant Crawford, her boyfriend of three years. Crawford woke her up, began to threaten her, and accused her of cheating. The defendant then forced the victim into the crawlspace located in a closet leading under the residence. While in the crawlspace, Crawford beat the victim with his hands and feet. He then placed his hands on the victim's throat and began strangling her. The victim told law enforcement that he said words to the effect of, "I really hate to do this to you, but I'm going to kill you."

The victim told investigators that she twice lost consciousness and lost control of her bladder. The victim said the assault lasted for approximately twenty minutes. When the defendant went to another room in the house, the victim escaped the crawl space and ran out of the house to her car and attempted to drive away. The defendant jumped on to the hood of the vehicle and hung on for several blocks. Crawford eventually rolled off of the vehicle, and the victim drove directly to the Browning Correctional Center and reported the assault.

Law enforcement obtained photographs of the injuries, and the victim obtained medical treatment. The treating physician documented that there was a substantial risk of death. The defendant confessed to the FBI and, ultimately, pled guilty to one count of assault by strangulation under 18 U.S.C. § 113(a)(8). The case was prosecuted by Assistant U.S. Attorney (AUSA) Ryan Weldon, and it represents one of the first in the country prosecuted under the new federal strangulation and suffocation statute. The defendant was sentenced to 30 months' imprisonment and 3 years of supervised release at his March 2014

sentencing hearing. (A copy of the sentencing press release can be found online at http://www.justice.gov/usao/mt/pressreleases/20140605140846.html.)

II. The scope and severity of the problem

Police and prosecutors are only recently learning what survivors of non-fatal strangulation have known for years: "Many domestic violence offenders and rapists do not strangle their partners to kill them; they strangle them to let them know they can kill them—any time they wish." Casey Gwinn, *Strangulation and the Law*, THE INVESTIGATION AND PROSECUTION OF STRANGULATION CASES 5 (The Training Inst. on Strangulation Prevention & the Cal. Dist. Attorneys Ass'n eds., 2013) (Gwinn). There are clear reasons why strangulation assaults—particularly in an intimate partner relationship—should be a separate felony offense and taken seriously at sentencing.

- "Strangulation is more common than professionals have realized. Recent studies have now shown that 34 percent of abused pregnant women reported being 'choked;' 47 percent of female domestic violence victims reported being 'choked.' " Press Release, Office of Public Affairs, Department of Justice, Justice Department Holds First National Indian Country Training on Investigation and Prosecution of Non-Fatal Suffocation Offenses (Feb. 4, 2013), *available at* http://www.justice.gov/opa/pr/2013/February/13-opa-148.html.
- "Victims of multiple [non-fatal strangulation] 'who had experienced more than one strangulation attack, on separate occasions, by the same abuser, reported neck and throat injuries, neurologic disorders and psychological disorders with increased frequency.' " *Id.* (citing Donald J. Smith, Jr. et al., *Frequency and Relationship of Reported Symptomology in Victims of Intimate Partner Violence: The Effect of Multiple Strangulation Attacks*, 21 J. EMERGENCY MED. 3, 323, 325–26 (2001)).
- "Almost half of all domestic violence homicide victims had experienced at least one episode of non-fatal strangulation prior to a lethal [or near-lethal] violent incident. [Victims of one episode of strangulation are 700 percent more likely to be a victim of attempted homicide by the same partner.] Victims of prior non-fatal strangulation are 800 percent more likely of later becoming a homicide victim [at the hands of the same partner]." *Id.* (internal citations omitted) (citing Nancy Glass et al., *Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women*, 35 J. EMERGENCY MED. 329, 329 (2008)).
- Even given the lethal and predictive nature of these assaults, the largest non-fatal strangulation case study ever conducted to date (the San Diego Study) found that most cases lacked physical evidence or visible injury of strangulation. Gael B. Strack, George E. McClane & Dean Hawley, *A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues*, 21 J. EMERGENCY MED. 3, 303, 305–06 (2001). Only 15 percent of the victims had a photograph of sufficient quality to be used in court as physical evidence of strangulation, and no symptoms were documented or reported in 67 percent of the cases. *Id.* The San Diego Study found major signs and symptoms of strangulation that corroborated the assaults, but little visible injury. *Id.*
- "Strangulation is more serious than professionals have realized. Loss of consciousness can occur within 5 to 10 seconds . . . and death within 4 to 5 minutes. The seriousness of the internal injuries [even with no external injuries] may take a few hours to be appreciated and delayed death can occur days later." Press Release, Office of Public Affairs, Department of Justice, Justice Department Holds First National Indian Country Training on Investigation and Prosecution of Non-Fatal Suffocation Offenses (Feb. 4,

2013), *available at* http://www.justice.gov/opa/pr/2013/February/13-opa-148.html (internal citations omitted) (citing Gwinn and DEAN A. HAWLEY, FORENSIC MEDICAL FINDINGS IN FATAL AND NON-FATAL INTIMATE PARTNER STRANGULATION ASSAULTS 6 (2012) (Hawley), *available at* http://www.strangulationtraininginstitute.com/index.php/library/viewcategory/843-scholarly-works-and-reports.html2013).

- "Because most strangulation victims do not have visible [external] injuries, strangulation cases may be minimized or trivialized by law enforcement, medical and mental health professionals [and even courts]." *Id.*
- Even in fatal strangulation cases, there is often no evident external injury (confirming the findings regarding the seriousness of non-fatal, no-visible-injury strangulation assaults). *Id*.
- Non-fatal strangulation assaults may not fit the elements of other serious assaults due to the lack of visible injury. Studies are confirming that an offender can strangle someone nearly to death with no visible injury, resulting in professionals viewing such an offense as a minor misdemeanor or no provable crime at all. *Id.*
- Experts across the medical profession now agree that manual or ligature strangulation is "lethal force" and is one of the best predictors of a future homicide in domestic violence cases. *Id.* (citing Nancy Glass et al., *Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women*, 35 J. EMERGENCY MED. 329, 329 (2008)).

Ten percent of violent deaths in the United States are from strangulation, with six female victims to every male victim. Allison Turkel, *"And Then He Choked Me": Understanding, Investigating, and Prosecuting Strangulation Cases*, 2 THE VOICE 1, 1 (2008), *available at* http://www.ndaa.org/pdf/the_voice_vol_2_no_1_08.pdf. However, the percentage of women that survive strangulation is far greater. Numerous studies show that 23 to 68 percent of women who are victims of intimate partner violence have experienced strangulation assault by a male partner in their lifetime. Another study conducted at a battered women's shelter found that on average each woman with a history of strangulation had been strangled 5.3 times in her intimate relationships. Lee Wilbur et al., *Survey results of women who have been strangled while in an abusive relationship*, 21 J. EMERGENCY MED. 297, 297–302 (2001). Furthermore, a strong correlation exists between strangulation and other types of domestic abuse. In a study of 300 strangulation cases, a history of domestic violence existed in 89 percent of the cases, and children were present during at least 50 percent of the incidents. GAEL B. STRACK & GEORGE MCCLANE, HOW TO IMPROVE YOUR INVESTIGATION AND PROSECUTION OF STRANGULATION CASES 2 (David C. James ed., 1998) (updated January 2003, September 2007).

This correlation is disturbing, especially in the context of Indian Country, where violent crime rates can far exceed those of other American communities. Some tribes have experienced rates of violent crime over 10 times the national average. RONET BACHMAN, HEATHER ZAYKOWSKI, RACHEL KALLMYER, MARGARITA POTEYEVA & CHRISTINA LANIER, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 5 (2008). Reservation-based and clinical research show very high rates of intimate partner violence against American Indians and Alaska Native women.

Police, prosecutors, and medical providers across the country have begun to appreciate the inherent lethality risks for strangulation and suffocation crimes. Approximately 30 states have enacted strangulation-specific laws that range from misdemeanor offenses to felonies. Because domestic violence and sexual assault remains primarily a matter of state, local, and tribal jurisdiction, the Federal Government historically lacked jurisdiction over some intimate partner violence crimes. The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) changed that by providing the Federal Government with additional statutory tools to prosecute intimate partner violence. With the passage of

VAWA 2013, Congress recognized the gravity of strangulation and suffocation crimes and, accordingly, amended the federal assault statute, 18 U.S.C. § 113, to include a specific charge of assault or attempted assault by strangulation or suffocation. This change in the law was effective March 7, 2013.

This article addresses how to improve the investigation and prosecution of perpetrators in strangulation cases under 18 U.S.C. § 113. It concisely summarizes what strangulation is and why it is so difficult to investigate and prosecute. It also offers guidance on how to approach these types of cases.

III. The Violence Against Women Reauthorization Act of 2013: 18 U.S.C. § 113

Under § 113, it is now possible to prosecute perpetrators in Indian County for the specific offenses of strangulation and suffocation. Section 113(a) provides that:

> whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of . . . an assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, [shall be punished] by a fine under this title, imprisonment for not more than 10 years, or both.

18 U.S.C. § 113(a)(8) (2014).

In this section, the term "strangling" means "intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim[.]" The definitions of spouse, intimate partner, and dating partner are found in 18 U.S.C. § 2266. *Id.* § 133(b)(3).

Prior to the passing of VAWA 2013, strangulation cases were typically prosecuted as an Assault Resulting in Serious Bodily Injury (ARSBI), pursuant to 18 U.S.C. § 113(a)(6). ARSBI is punishable by a fine, imprisonment for not more than 10 years, or both. Serious bodily injury is defined in 18 U.S.C. § 1365 as:

> (a) a substantial risk of death;
>
> (b) extreme physical pain;
>
> (c) protracted and obvious disfigurement; or
>
> (d) protracted loss or impairment of the function of a bodily member, organ, or mental faculty[.]

18 U.S.C. § 1365(h)(3) (2014).

Most federal prosecutors charging a defendant with ARSBI following an allegation of strangulation argue that the crime presented a "substantial risk of death" to the victim. AUSAs may need to enlist expert medical testimony to explain just how easy it is to strangle someone to death and yet leave no visible external injuries. Only 11 pounds of pressure placed on the carotid arteries (arteries that supply oxygenated blood to the head and neck) for 10 seconds is necessary to cause unconsciousness. J.L. Luke et al., *Correlation of Circumstances with Pathological Findings in Asphyxial Deaths by Hanging: A Prospective Study of 61 Cases from Seattle, WA*, 30 J. FORENSIC SCI. 1140, 1140–47 (1985). Brain death will occur in four to five minutes if strangulation continues.

The crime of ARSBI was infrequently used to charge strangulation cases occurring in the context of intimate partner violence. And, if other assaults occurred during the violent episode, charges were more likely to address those violent acts as opposed to the strangling. *See, e.g.*, *United States v. Mitchell*, 420 F. App'x 920, 921–22 (11th Cir. 2011) (defendant strangled the victim and was charged with one count of assault with intent to commit murder and one count of assault resulting in serious bodily injury); *but see,*

e.g., *United States v. Martin*, 528 F.3d 746, 748–49 (10th Cir. 2008); *United States v. Juvenile Male N.R.*, 24 F. App'x 638, 639–40 (8th Cir. 2001).

Because this new statute became effective in March 2013, prosecutors are just beginning to charge defendants. It is important to note that § 113(a)(8) only addresses situations where the victim is the spouse, intimate partner, or dating partner of the defendant. Consequently, a defendant who committed a strangulation offense outside this context will not be charged in federal court as a violation of § 113(a)(8). The prosecutor will instead need to look to the crimes of ARSBI, attempted murder, or murder, depending on the facts. To date, there are no pending cases on appeal where the new strangulation/suffocation statute itself is being challenged.

IV. Understanding strangulation

While most people think that they understand strangulation and that it would be easy to recognize when someone has been strangled, identifying strangulation is much more nuanced. It is a serious, violent act that has historically been treated as a minor incident in the criminal justice system. Such treatment resulted for a variety of reasons, some of which stem from misconceptions about the act itself and its potentially fatal consequences.

A. Identifying strangulation

The terminology used to describe the act displays a misunderstanding of what strangulation is. Choking and suffocation are the typical misnomers used by victims, law enforcement agents, and even legal professionals, to describe strangulation incidents. While all three lead to asphyxia, a lack of oxygen to the brain, the mechanics are different. Choking is the internal blockage of the airway preventing the victim from breathing. Suffocation is the obstruction of the airway at the nose or mouth. Strangulation is the external compression of the neck that can either directly block the airway, preventing breathing, or can impede the flow of blood to and from the brain by closing off arteries and jugular veins. There are three forms of strangulation: manual (hands, forearm, kneeling on victim's throat), ligature (use of a cord-like object), or by hanging.

B. Identifying injuries

Another common misconception is that strangulation causes bruises or other visible marks on the victim. Strangulation is a form of intimate partner violence often committed without witnesses. Therefore, when police arrive to investigate, they are faced with a "he said/she said" dilemma. A lack of visible injuries may be mistakenly viewed as a lack of harm to the victim, thereby allowing responding police officers, the abuser, and even the victim herself to minimize the assault. If the alleged victim appears unharmed, little to no evidence is collected for later use in prosecuting the abuser.

Absence of bruising should not be mistaken for denial of the act. In a study of 300 police reports on strangulation, victims in only 50 percent of the cases displayed visible injuries. GAEL B. STRACK & GEORGE MCCLANE, HOW TO IMPROVE YOUR INVESTIGATION AND PROSECUTION OF STRANGULATION CASES 2 (David C. James ed., 1998) (updated January 2003, September 2007). Of the 50 percent, 35 percent of the injuries were too minor to photograph. *Id.* Bruises sometimes take a few days to show the force of the injury, and internal swelling of the throat could develop and restrict breathing hours after the strangling.

Importantly, the statutory definition for strangling under § 113(a)(8) states that the crime can be proven even in the absence of any visible injury. Besides bruising and swelling around the neck, other signs of strangulation may include:

- Scratches, abrasions, and discoloration to the neck, face, chest, shoulders

- Swelling of the tongue
- Appearance of red dots, called petechiae, from ruptured capillaries in the eyes, under the eyelids, on the face, or on the neck
- Voice changes (hoarse, raspy, or no voice)
- Trouble or pain when swallowing
- Breathing changes (difficulty breathing, hyperventilation, wheezing)
- Behavioral changes (restlessness or combativeness, problems concentrating, amnesia, agitation, Post-Traumatic Stress Disorder, hallucinations)
- Involuntary urination or defecation
- Coughing and/or vomiting
- Loss of consciousness/fainting
- Blue fingernails
- Dizziness/headaches
- Miscarriage

In extreme cases, swelling could be an early indication of internal injuries, such as a fractured larynx (voice box) or hyoid bone, seizures, or pulmonary edema (lungs filled with fluid). If medical treatment is not sought, these symptoms can lead to death.

V. Prosecuting cases under § 113(a)(8)

To overcome the misconceptions of strangulation, it is important to bring awareness to the issue and to educate both the public at large and the professionals dealing with the legal or medical consequences of strangulation. Training efforts like those of the Department of Justice's National Indian Country Training Initiative and the Training Institute on Strangulation Prevention (TISP) provide training and technical assistance to family violence professionals, while local women's shelters provide immediate assistance to survivors of domestic abuse and strangulation for medical, psychological, and protective care. (More information on TISP can be found at http://strangulationtraininginstitute.com/index.php.)

The Maricopa County Attorney's Office in Arizona took up the fight against domestic violence strangulation. In 2012, a partnership initiative between the local healthcare system, the local law enforcement, and the County Attorney's office created a program to establish more reliable methods of obtaining the necessary evidence to effectively prosecute strangulation incidents. Law enforcement officers received special training on how to recognize and respond to strangulation incidents, which includes transporting domestic violence victims to either a medical care facility or to a family advocacy center. There, forensic nurses are available 24 hours a day to perform specialized medical-forensic examinations and to collect evidence, including photographs of any visible injuries. These forensic nurses then provide testimony as expert witnesses in court. Their testimonies allow certain cases to proceed, even if the victim is unavailable or unwilling to testify. News Release, Maricopa County Attorney, New Strategies Unveiled to Fight Against Domestic Violence Strangulations (June 8, 2011) News Release *available at* http://www.maricopacountyattorney.org/pdfs/news-releases/2012-06-08-New-Strategies-in-Fight-Against-Domestic-Violence-Strangulations.pdf. Since launching the program, Maricopa County was awarded the National Association of Counties Award in the category of Criminal Justice and Public Safety, and more than 38 percent of reported strangulation allegations have resulted in convictions. News Release, Maricopa County Attorney, Strangulation Program Honored with NACo Award (June 13, 2013), *available at* http://www.maricopacountyattorney.org/pdfs/news-releases/2013-06-13-Strangulation-Program-Honored-with-NACo-Award.pdf.

The Maricopa County program is effective because it addresses three obstacles that hinder the prosecution of domestic violence: the inability of first responders to recognize strangulation, the reluctance of victims to testify, and the loss or lack of evidence.

A. Training first responders

Law enforcement officers in every jurisdiction—federal, state, and tribal—must be trained on the severity of strangulation, and the common misconceptions that officers may hold need to be corrected. Officers should be aware that strangulation is a potentially lethal form of intimate partner violence and that it should not be associated with other abuse, like a slap in the face. Without that training, police will not be able to effectively identify signs of strangulation. The signs of strangulation are easy to overlook because visible injuries are not always evident when police officers or medics first arrive at the scene of a domestic dispute. Police officers need to be trained on how to detect the initial symptoms and signs of strangulation.

When law enforcement arrives at a domestic violence scene, officers should assess the situation. They should make note of the surroundings, the demeanor of the victim, and the demeanor of the alleged abuser, if still present. If the abuser has apparent injuries, those should be noted and photographed along with any visible injuries to the victim. If an officer suspects that strangulation has occurred, he or she must call for paramedics or at least strongly encourage the victim to seek medical attention because, as mentioned earlier, swelling or other undetected injuries of the throat can be life threatening.

Ironically, medical personnel, who should be the most qualified to recognize symptoms of strangulation, often under-evaluate reports of strangulation and attribute the signs of strangulation to other causes. For example, a victim's hoarseness may be reported as resulting from screaming during an argument, not from strangulation, and broken blood vessels in the victim's eye may be reported as resulting from pink eye or a substance abuse problem. Gael B. Strack, George E. McClane & Dean Hawley, *A Review of 300 Attempted Strangulation Cases Part II: Clinical Evaluation of the Surviving Victim*, 21 J. EMERGENCY MED. 311, 312 (2001). Medical personnel should not minimize these signs, but should note in the medical record that the victim is displaying signs consistent with strangulation. Having the record state that the symptoms are consistent with strangulation is helpful when it comes to gathering evidence for the prosecution.

When interviewing the victim, it is important for police officers or investigators to quote the victim's own words ("He choked me.") when she is describing the event, but should otherwise use the word "strangulation" in the official report. Any symptoms that the victim is experiencing should be noted on the report along with any apparent injuries. The more details the officer includes in his report, the more useful it will be in prosecuting the case later.

It is important to ask the victim to demonstrate how she was strangled and to ask questions that will elicit specific information about the signs and symptoms of strangulation. Below is a list of questions police and prosecutors should consider asking when interviewing strangulation victims. (A two-page interview form is attached to the end of this article for additional guidance.)

1. Ask the victim to describe and demonstrate how she was strangled. Take photographs.
2. Document whether the victim was strangled with one or two hands, forearm, and/or objects.
3. If an object was used to strangle the victim, locate, photograph, and impound the object.
4. Determine if the suspect was wearing any jewelry, such as rings or watches. Look for pattern evidence.

5. If an object was used, how did it get there? Determine if the suspect brought the object with him to the crime scene. This information may be used to show premeditation.
6. What did the suspect say when he was strangling the victim? Use quotes.
7. Describe the suspect's demeanor and facial expression.
8. Was the victim shaken simultaneously while being strangled?
9. Was the victim thrown against the wall, floor, or ground? Describe surface.
10. How long did the suspect strangle the victim?
11. How many times and how many different methods were used to strangle the victim?
12. How much pressure or how hard was the grip?
13. Did the victim have difficulty breathing or hyperventilate?
14. Any complaint of pain to the throat?
15. Any trouble swallowing?
16. Any voice changes? Complaint of a hoarse or raspy voice?
17. Any coughing?
18. Did the victim feel dizzy, faint, or lose consciousness?
19. What did the victim think was going to happen? (For example, did she think she was going to die?)
20. Did the victim urinate or defecate as a result of being strangled?
21. Was the victim pregnant at the time?
22. Did the victim feel nauseated or vomit?
23. Any visible injury, however minor? If so, take photograph and follow-up photos.
24. Any prior incidents of strangulation?
25. Any pre-existing injuries?
26. Were the injuries shown to anyone? Were any subsequent photos taken?
27. Did the victim attempt to protect herself or himself? Describe.
28. Was any medical treatment recommended or obtained? If so, obtain medical release.
29. Were there any witnesses?

GAEL B. STRACK & GEORGE MCCLANE, HOW TO IMPROVE YOUR INVESTIGATION AND PROSECUTION OF STRANGULATION CASES 2 (David C. James ed., 1998) (updated January 2003, September 2007), *available at* http://www.ncdsv.org/images/strangulation_article.pdf.

B. Victim testimony

Another obstacle in these cases is the reluctance of domestic abuse victims to get involved in the criminal justice system and to testify. Even though these women have suffered pain and feared for their and their children's lives at the hands of their abusers, myriad emotions exist that prevent victims from removing themselves from the abusive relationship. As opposed to other violent crimes, domestic violence and frequent sexual assault occur in the privacy of homes between people with intimate

relationships. While they fear their partner, they also love them and rely on them not only emotionally, but often times financially, as well. If their abuser is prosecuted and sentenced to jail or prison, that affects the family's income and leads to financial hardship. Also, imprisonment only offers temporary relief to the victim. The abuser will eventually be released, and victims fear the retribution that will follow. Retribution is also a concern if the prosecution is unsuccessful.

Because of that fear, studies show that 80 to 85 percent of abused women will deny allegations of abuse after the incident and will refuse to testify. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 768 (2005). As a result, prosecutors are placed in the difficult position of having to explain to the court and the jury why a victim is unavailable to testify, calling into question the legitimacy of the claims in the jury's and court's eyes.

As a way to introduce evidence from the victim despite their reluctance or inability to testify, prosecutors can attempt to use exceptions to the hearsay rule. However, in *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that, where the Government offers at trial hearsay evidence that is "testimonial" in nature, the Confrontation Clause of the Sixth Amendment requires actual confrontation, that is, cross examination, regardless of how reliable the hearsay statement may be. *Id.* at 59. Consequently, testimonial statements to police or emergency personnel may be excluded if the victim does not testify, but non-testimonial statements, which include statements given by the witness to police or 911 responders to help them resolve an ongoing emergency, may be admitted. *See Davis v. Washington*, 547 U.S. 813, 828 (2006). And, because medical attention should be sought for all survivors of strangulation, it may be the case that a physician, a Sexual Assault Nurse Examiner, or another medical provider, can testify to what the victim told them about the assault pursuant to Federal Rule of Evidence 803(4), the medical hearsay exception. Moreover, if the victim is unavailable to testify because of the defendant's actions, the prosecutor should explore using the forfeiture by wrongdoing exception under Federal Rule of Evidence 804(b)(6). This exception allows a victim's statements to come into evidence if the victim stays away from the court because of actions by the defendant that were purposefully done to keep the witness from testifying. *See Giles v. California*, 554 U.S. 353, 367 (2008).

C. Evidence

To overcome any skepticism that the judge or the jury develops due to a lack of participation by the victim in the criminal proceedings, it is helpful to have physical and demonstrative evidence of the crime. Evidence that is useful during prosecution includes photographs of the victim's injuries and of the scene of the abuse, physical evidence, medical evaluation forms, expert testimony, and if possible, a recording of the 911 call. Brigitte P. Volochinsky, *Obtaining Justice for Victims of Strangulation in Domestic Violence: Evidence Based Prosecution and Strangulation-Specific Training*, 4 STUDENT PULSE 1, 3 (2012).

Photographs: Photographs should always be taken. They are important to a judge and jury because they humanize the victim and make the assault personal. Photographs of the victim's injuries, if any are evident, should be taken soon after law enforcement arrives. Officers and investigators should continue to monitor the victim to ensure her safety and to capture any emerging bruises or injuries that can become visible hours after the assault took place. Full-shot photographs should be taken along with close-ups of injuries. The full-shots help the jury place the injuries in perspective to the victim's body and the close-ups show the details of the injuries that can be lost in distance shots.

Besides the victim, photographs of the scene should be included in the evidence. If a domestic fight occurred, furniture could be displaced and objects strewn about the room and broken. Also, because strangulation can cause urination, defecation, or vomiting, it is important to photograph any bodily fluids at the scene. These photographs will help portray the struggle a victim went through and will help set the scene for the strangulation.

Physical evidence: There may not be a lot of physical evidence, but it is important to present what is available during trial. Persuasive evidence can include the clothes of either the victim or the assailant if they are torn or ripped, and if they have any blood on them. Also, if the assailant used a ligature to strangle the victim, having the ligature and demonstrating how it was used on the victim is powerful evidence of the crime.

Medical forms: Studies show that victims sought medical attention in only three percent of strangulation cases. GAEL B. STRACK & GEORGE MCCLANE, HOW TO IMPROVE YOUR INVESTIGATION AND PROSECUTION OF STRANGULATION CASES 2 (David C. James ed., 1998) (updated January 2003, September 2007). The records from those visits may be crucial to the prosecution. If no visible injuries are present, the documentation of internal injuries, if present, may be the only medical evidence that the victim was strangled. Also, the victim's description of her injuries to the medical personnel can also be introduced as evidence, if it is documented in the medical record.

Expert testimony: A couple of different types of expert testimony may be used in a strangulation trial. First, expert testimony on strangulation may be introduced. This can be important because it provides the opportunity to educate the court and the jury about the physical mechanics of strangulation and also its inherent lethality. Medical personnel frequently provide this type of testimony; however, a law enforcement officer or investigator trained in strangulation may also serve as an expert witness. The prosecutor may also want to call an expert on the nature and dynamics of domestic violence and the effects it has on victims, particularly if the victim recants or is a hostile witness. Many jurors may be unable to understand why a victim will remain with her assailant and/or be reluctant to testify against him at trial. An expert witness can make these seemingly counterintuitive behaviors understandable to the judge and jury.

911 recording: If the victim dialed 911 after the incident, this can be extremely useful evidence. It will likely be the first time that the victim explains what happened. The stress and fear in the victim's voice will have a strong effect on the jury. More importantly, the recording may show that the victim's voice was hoarse, that she was coughing, or that she was unable to catch her breath. All three are indicators of strangulation.

If the victim calls 911 when the abuser is still present or when the victim feels like she is still in danger, the recording may qualify as an exception to the hearsay rule and be admitted into evidence.

VI. Amendments to the Sentencing Guidelines

Once an AUSA secures a conviction for a violation of § 113(a)(8), it becomes necessary to properly calculate an appropriate sentencing guidelines range. On April 30, 2014, the U.S. Sentencing Commission (U.S.S.C.) published amendments to the Sentencing Guidelines. After reviewing the legislative history, public comment, hearing testimony, and relevant data of VAWA 2013, "the Commission determined that strangulation and suffocation of a spouse, intimate partner, or dating partner represents [sic] a significant harm not addressed by the existing guidelines and specific offense characteristics." U.S. SENTENCING COMMISSION, AMENDMENTS TO THE SENTENCING GUIDELINES 9 (2014), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments.pdf.

Accordingly, the U.S.S.C. issued the following amendments to the Sentencing Guidelines:

> the amendment amends Appendix A to reference section 113(a)(8) to § 2A2.2 (Aggravated Assault) and amends the Commentary to § 2A2.2 to provide that the term "aggravated assault" includes an assault involving strangulation, suffocation, or an attempt to strangle or suffocate. The amendment amends § 2A2.2 to provide a 3-level enhancement at § 2A2.2(b)(4) for strangling, suffocating, or attempting to strangle or

suffocate a spouse, intimate partner, or dating partner. The amendment also provides that the cumulative impact of the enhancement for use of a weapon at § 2A2.2(b)(2), bodily injury at § 2A2.2(b)(3), and strangulation or suffocation at § 2A2.2(b)(4) is capped at 12 levels. The Commission determined that the cap would assure that these three specific offense characteristics, which data suggests co-occur frequently, will enhance the ultimate sentence without leading to an excessively severe result.

Although the amendment refers section 113(a)(8) offenses to § 2A2.2, it also amends § 2A6.2 (Stalking or Domestic Violence) to address cases involving strangulation, suffocation, or attempting to strangle or suffocate, as a conforming change. The amendment adds strangulation and suffocation as a new aggravating factor at § 2A6.2(b)(1), which results in a 2-level enhancement, or in a 4-level enhancement if it applies in conjunction with another aggravating factor such as bodily injury or the use of a weapon.

These amendments become effective November 1, 2014. Official text of the amendments can be found at www.ussc.gov.

VII. Conclusion

Strangulation is a serious crime that affects too many women in vulnerable positions. A strangulation survivor from Illinois provided written testimony to the U.S. Sentencing Commission in February 2014 as the Commission contemplated appropriate sentencing guidelines for the amended federal assault statute. She succinctly and profoundly described the devastating fear and effects of the crime of strangulation:

> *After two years of marriage filled with verbal abuse, shoving, and other physical abuse, one night my husband threw me down on the bed and began strangling me. Unlike any other way that he had attacked me in the past, this horror instantly sent me to a level of terror and trauma I had never known in my whole life. I knew I was seconds away from dying. This was a fear unlike anything I had ever known. Everything was suddenly different in my whole consciousness. I was going to die. The unthinking rage in his eyes made that clear.*
>
> *He had even pulled a gun on me once, slapped me black and blue, but nothing felt as scary as this. There was that first part of the attack that so utterly terrified me as I anticipated my imminent death, panicking with what I could do. The fighting for freedom, the pain of his hands around my neck. Then as I began to suffocate, I could feel myself dying. Gasping for breath, desperate for air. Feeling myself slipping away, so fully conscious and hyper aware. And watching him - how personal the rage was. How he was using his bare hands to kill me - it was so intimate, he was so close to me. His skin on my skin. Like drowning, trapped in the water beneath the ice, the panic, the desperation to breathe, yet not being able to.*
>
> *He felt me going limp and thankfully let go. I coughed myself back to life. What I learned in the days and the weeks after was the on-going and constant re-traumatization of the aftermath of the strangulation. For weeks, every time I moved my head, I was grabbed with pain. I couldn't sleep, I couldn't eat or drink well. Every move was a painful reminder. I had to take time off work without pay to cover up the worst of it, then I had to lie to deal with answering questions about the bruises, etc., at my teaching job. The aftermath was a constant reminder of what had happened. [Twenty] years later it is as vivid to me as any moment of my life.*

The neck is so easy to grab, so vulnerable, so vital to all life, connecting breathing and heart to mind. The viciousness and harm of this terroristic act is far different than mere broken bone or a physical injury. I have suffered the range of these injuries and nothing comes close to strangulation and suffocation in sheer terror.

Jennifer Bishop-Jenkins, Written Testimony to the U.S. Sentencing Commission (2014), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140213/Testimony_VAG.pdf.

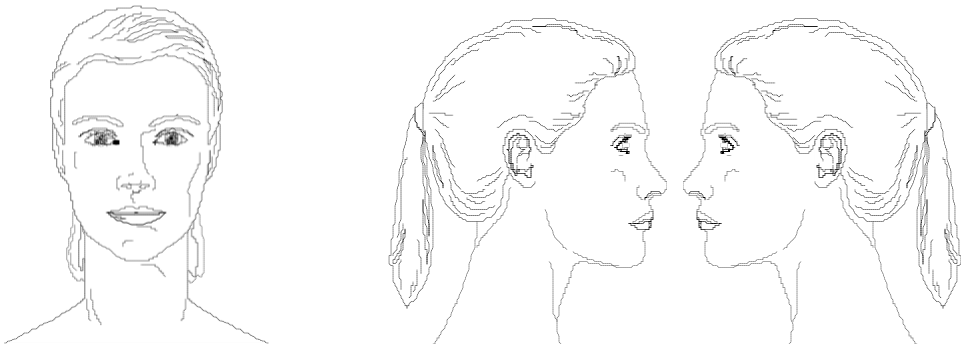
Hopefully, with the new provisions in § 113(a)(8), more victims of intimate partner violence in Indian Country will find protection under the law from their abusers, but the enactment of strangulation laws is not enough. Law enforcement, medical care providers, and criminal justice personnel must be able to identify when strangulation has occurred and must be willing to take the necessary steps to help victims who may not be willing to or are unable to help themselves. By training first responders in detection of strangulation and effective evidence gathering techniques, the prosecution of abusers will be more successful.

Documentation Chart for Strangulation Cases

Symptoms and/or Internal Injury:

Breathing Changes	**Voice Changes**	**Swallowing Changes**	**Behavioral Changes**	**OTHER**
□ Difficulty □ Breathing □ Hyperventilation □ Unable to breathe Other:	□ Raspy voice □ Hoarse voice □ Coughing □ Unable to speak	□ Trouble swallowing □ Painful to swallow □ Neck Pain □ Nausea or Vomiting □ Drooling	□ Agitation □ Amnesia □ PTSD □ Hallucinations □ Combativeness	□ Dizzy □ Headaches □ Fainted □ Urination □ Defecation

Use face & neck diagrams to mark visible injuries:



Face	**Eyes & Eyelids**	**Nose**	**Ear**	**Mouth**
□ Red or flushed □ Pinpoint red spots (petechiae) □ Scratch marks	□ Petechiae to **R** and/or **L** eyeball (circle one) □ Petechiae to **R** and/or **L** eyelid (circle one) □ Bloody red eyeball(s)	□ Bloody nose □ Broken nose (ancillary finding) □ Petechiae	□ Petechiae (external and/or ear canal) □ Bleeding from ear canal	□ Bruising □ Swollen tongue □ Swollen lips □ Cuts/abrasions (ancillary finding)

Under Chin	Chest	Shoulders	Neck	Head
□ Redness □ Scratch marks □ Bruise(s) □ Abrasions	□ Redness □ Scratch marks □ Bruise(s) □ Abrasions	□ Redness □ Scratch marks □ Bruise(s) □ Abrasions	□ Redness □ Scratch marks □Finger nail Impressions □ Bruise(s) □ Swelling □ Ligature mark	□ Petechiae (on scalp) **Ancillary findings:** □ Hair pulled □ Bump □ Skull fracture □ Concussion

Questions to ASK: Method and/or Manner:

How and where was the victim strangled?

□ One Hand (R or L) □ Two hands □ Forearm (R or L) □ Knee/Foot

□ Ligature (Describe):_____

□ How long? _____ seconds _____ minutes □ Also smothered?

□ From 1 to 10, how hard was the suspect's grip? (Low): 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 (high)

□ From 1 to 10, how painful was it? (Low): 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 (high)

□ Multiple attempts:_____ □ Multiple methods:_____

Is the suspect **RIGHT** or **LEFT** handed? (Circle one)

What did the suspect say while he was strangling the victim, before and/or after?

Was she shaken simultaneously while being strangled? Straddled? Held against wall?

Was her head being pounded against wall, floor or ground?

What did the victim think was going to happen?

How or why did the suspect stop strangling her?

What was the suspect's demeanor?

Describe what suspect's face look like during strangulation?

Describe Prior incidents of strangulation? Prior domestic violence? Prior threats?

MEDICAL RELEASE

To All Health Care Providers: Having been advised of my right to refuse, I hereby consent to the release of my medical/dental records related to this incident to law enforcement, the District Attorney's Office and/or the City Attorney's Office.

Signature:_____ Date:_____

TRAINING INSTITUTE ON STRANGULATION PREVENTION, DOCUMENT CHART AND QUESTIONS TO ASK, *available at* http://strangulationtraininginstitute.com/index.php/library/finish/837-documentation-forms/3634-documentation-chart-for-non-fatal-strangulation-cases.html (reprinted with permission from the Training Institute on Strangulation Prevention).❖

ABOUT THE AUTHOR

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Native American Graves Protection and Repatriation Act (NAGPRA): The Law Is Not an Authorization for Disinterment

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I. Introduction

"For decades, the skeletal remains of American Indians were removed from their burial sites, studied, cataloged, and relegated to the bins of museums and science. This legislation [NAGPRA] is about respecting the rights of the dead, the right to an undisturbed resting place." 136 Cong. Rec. E3484 (1990) (speech of Rep. Udall).

Since 1906, the United States has exercised management authority over the cultural and scientific resources under its jurisdiction. The 1906 Antiquities Act (16 U.S.C. §§ 431–433) and the Archaeological Resources Protection Act of 1979 (ARPA) (16 U.S.C. §§ 470aa–mm) established a permitting regime for

scientific data recovery on federal and Indian lands. The items excavated and removed from the ground—mainly Native American human remains and burial objects—were to remain under government control, and most came to be stored in government and university repositories. Meanwhile, attempts by Indian tribes to reclaim the remains of their ancestors and their tribally-owned property were unsuccessful. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L. J. 35 (1992). For example, when the Onondaga Nation sought to retrieve the Wampum Belts held by the New York State Museum, they found that the court would not acknowledge that the Nation had enforceable property rights. *Onondaga Nation v. Thacher*, 61 N.Y.S. 1027, 1030 (N.Y. App. Div. 1899).

At the end of the twentieth century, the American public and the U.S. Government began to recognize the need to protect Native American cultural heritage on a formalized basis for the benefit of Native Americans. Consequently, in 1986, the board of the New York State Museum voted to return the Onondaga Wampum Belts to the Onondaga Nation. In 1978, Congress passed the American Indian Religious Freedom Act (42 U.S.C. § 1996), and in 1996, the President issued the Sacred Sites Executive Order in support of the right of Native Americans to practice their traditional ceremonies. *See* Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996). In 1992, Congress amended the National Historic Preservation Act (16 U.S.C. §§ 470a to 470h-5) to list traditional cultural places on the National Register of Historic Places and establish the Tribal Historic Preservation Officers program to replace state authority on tribal lands.

In 1990, Congress passed specific legislation to address the cultural property rights of Native Americans—the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. §§ 3001–3013). Instituting language that had been reached by the archaeological, museum, and tribal communities on the scope of the proposed law, the NAGPRA legislation received unanimous support in Congress. NAGPRA is a law with four attributes. It is property law, Indian law, human rights law, and administrative process.

II. NAGPRA as property law

NAGPRA enfranchises Indian tribes (tribes) and Native Hawaiian organizations (NHOs) to assert rights in certain defined cultural items, consistent with the common law of property and the Fifth Amendment of the U.S. Constitution. Where "unassociated funerary objects," "sacred objects," and objects of "cultural patrimony," 25 U.S.C. § 3001(3) (2014), are in a collection in the possession or control of any institution that receives federal funds (that is, a "museum" under 25 U.S.C. § 3001(8) or a federal agency), the museum or agency must afford tribes and NHOs the opportunity to determine their interest in the cultural items. *See* 25 U.S.C. § 3005(a)(2), (c) (2014). Unless the museum or agency can show a "right of possession," as defined in 25 U.S.C. § 3001(13), to the cultural item, a tribe or NHO that is culturally affiliated with the item, upon request, must have the item returned to it. *See id.* (NAGPRA does not permit a taking of property in violation of the Fifth Amendment.)

NAGPRA also recognizes the right of Native Americans to direct the disposition (including reburial) of Native American human remains and "associated funerary objects," defined in 25 U.S.C. § 3001(3), according to an established priority order of right. *See id.* § 3005(a)(1); 43 C.F.R. § 10.11(c) (2014). In an effort to seek repose for Native American human remains, cultural affiliation is a priority consideration, but in contrast to determining the disposition of "unassociated funerary objects," "sacred objects," and objects of "cultural patrimony," it is not dispositive.

Congress charged the NAGPRA Review Committee with the responsibility to recommend "specific actions for developing a process for the disposition of [culturally unidentifiable human] remains." *Id*. § 3006(c)(5). That process became final in 2010, in regulation 43 C.F.R. § 10.11, which addresses culturally unidentifiable Native American human remains from tribal and aboriginal lands. In

addition to the disposition of these culturally unidentifiable human remains, the disposition of unprovenanced human remains also may be resolved under NAGPRA. *See* 43 C.F.R. § 10.16 (2014).

In determining the ownership or control responsibility for the resolution of human remains and cultural items, NAGPRA distinguishes between cultural items removed from "Federal lands" or "tribal land" after November 16, 1990, *see* 25 U.S.C. § 3002 (2014), and cultural items in collections or holdings in the possession or control of "Federal agencies and museums," *see id.* § 3005. No such distinction exists, though, where a lineal descendant of a deceased individual is ascertainable. Consistent with the rights afforded in the United States to non-Native Americans, a lineal descendant's right to receive the decedent's human remains and associated funerary objects is accorded priority regardless of whether those human remains are in a collection or are newly discovered on federal or Indian land. *See id.* §§ 3003, 3005.

As a process for resolving property rights, NAGPRA underscores the principle that permits to excavate, remove, or study cultural items (under the Antiquities Act or ARPA, for example) do not convey ownership or control in the human remains or cultural items. Consequently, determining ownership or control of Native American human remains and cultural items does not involve a balancing of the rights of lineal descendants, tribes, and NHOs against the interests of scientific study and possessors that do not have the right of possession.

III. NAGPRA as Indian law

NAGPRA acknowledges the unique relationship between the Federal Government and tribes and NHOs. *See* 25 U.S.C. § 3010 (2014). It resolves issues arising from past land management authority which did not account for the property interests of Native Americans, and it is a statute enacted for the benefit of Indians. Codified in Title 25 of the U.S. Code, the law is subject to those general tenets of Indian law. NAGPRA decision-making requires consultation with tribes. In deference to tribal sovereignty, new finds on tribal lands, absent an identified lineal descendant, are controlled by the tribe.

IV. NAGPRA as human rights law

NAGPRA does not provide Native Americans with any greater rights than would otherwise be afforded to those seeking to make claims recognized under common law, or allow them to obtain relief from a "taking" under the Fifth Amendment of the Constitution. As such, NAGPRA may be seen as "equal protection" law. Enfranchising Native Americans with property rights due, but not historically respected, is the essence of human rights law. Under NAGPRA, Native Americans and NHOs are afforded standing to assert cultural property rights through a process in which the museums and federal agencies are required to comply.

V. NAGPRA as an administrative process

The NAGPRA compliance process follows two tracks. One governs "repatriation" of Native American human remains and other cultural items in holdings or collections in the possession or under the control of museums and federal agencies, for which the museum or federal agency cannot show a "right of possession." 25 U.S.C. § 3005 (2014). The other determines "ownership or control" of such human remains and cultural items upon their excavation or removal from federal or tribal lands after November 16, 1990, the effective date of the law. *Id.* § 3002. In establishing this two-track process, NAGPRA seeks both to rectify past actions that did not acknowledge the property rights of Native Americans, as well as to alter prospective behavior through an initial acknowledgement of the rights of ownership or control of cultural items when they are newly discovered and removed from federal and tribal lands.

A. Repatriation

Federal agencies, as well as institutions or state or local government agencies that receive federal funds and have possession of or control over Native American cultural items in holdings or collections, must summarize their Native American and Native Hawaiian collections, give disclosure to possibly interested tribes and NHOs, and, when requested, enter into consultations with tribes and NHOs. Through the process of consultation, tribes and NHOs will determine whether they wish to make claims for repatriation of items. The NAGPRA summary is not a statement of cultural affiliation or a determination that an item in the collection is a NAGPRA protected item; no such obligation exists under NAGPRA. Resolution of items in a collection and a NAGPRA summary are claim-dependent. In a claim, the claimant tribe or NHO presents a prima facie case showing that: (1) it has standing to make a claim for (2) items that are protected under NAGPRA, namely funerary objects, sacred objects, objects of cultural patrimony, or objects that are both sacred and cultural patrimony, with which (3) the claimant is culturally affiliated and to which (4) the museum or federal agency does not have the right of possession. *See id.* § 3005(c). When a museum or federal agency receives a claim, it should advise the claimant of any shortcomings in the claim or respond that the claim is complete, but that it elects to assert the right of possession in order to overcome the claim. If the claim is complete, the museum or federal agency has 90 days to publish a notice of inventory completion and repatriate the item.

As to human remains and associated funerary objects, consultation is required to inform museum and federal agency decisions as part of inventory completion. The decisions on cultural affiliation enable lineal descendants, tribes, and NHOs to request the repatriation of the remains and objects. There are actually two NAGPRA inventories compiled by museums and federal agencies having possession of or control over Native American human remains. After consultation and review of the information in the possession of the museum or federal agency, cultural affiliation determinations are listed in a culturally affiliated inventory. Those human remains and associated funerary objects that cannot reasonably be culturally affiliated with any tribe or NHO are listed in a culturally unidentifiable inventory. *See id.* § 3003(d)(2)(C).

Inventories and summaries are sent to the Department of the Interior, National NAGPRA Program, which is housed in the National Park Service. Summaries are sent directly to all potentially culturally affiliated tribes and NHOs as an invitation to consult. The National NAGPRA Program maintains databases of all NAGPRA compliance documents, as well as reports to support NAGPRA consultation and other compliance. The databases may be accessed at http://www.nps.gov/nagpra/onlinedb/index.htm.

There is an affirmative obligation on museums and federal agencies to move the entries in the NAGPRA inventories into Notices of Inventory Completion, which are published in the Federal Register. The inventories are decision documents, and the notices serve to enfranchise the tribes and NHOs listed in the notices to receive the human remains and associated funerary objects. *See* 43 C.F.R. § 10.9 (2014). All Native American human remains listed in inventories that either are culturally affiliated or are culturally unidentifiable, but originate from the tribal land of a tribe or NHO or the aboriginal land of a tribe, must be in notices.

When a tribe or NHO reaches agreement with a museum or federal agency as to the repatriation of cultural items in the summary, the museum or federal agency prepares a Notice of Intent to Repatriate. Notices are sent to the National NAGPRA Program for publication in the Federal Register. Multiple tribes or NHOs may jointly claim items in a summary.

If no competing claims are made within 30 days of publication of either type of notice, repatriation can occur on the 31st day following the publication. As a practical matter, the claimant group and the museum or federal agency begin consultation on the manner of transfer once they have come to an initial agreement. A letter indicating transfer of control, separate from a receipt of possession, is recommended, but not required.

NAGPRA does not require that science be undertaken to make a cultural affiliation determination, but it does not prohibit science undertaken in consultation with the interested tribes or NHOs. A provision in the law allows a museum or federal agency holding NAGPRA protected items in a collection, with permission from the Secretary of the Interior, to retain cultural items until the end of a study that is of major benefit to the United States. 25 U.S.C. § 3005(b) (2014). This provision has never been utilized.

Requests to facilitate the resolution of disputes over issues of fact may be referred to the Native American Graves Protection and Repatriation Review Committee. The Review Committee may also be asked to make findings of fact related to the identity or cultural affiliation of cultural items, or the return of such items. These findings may avoid disputes and aid in the resolution of claims. *See id.* § 3006(c)(3), (4). While not a predicate to court action, Review Committee input provides a means to have the facts examined by an expert, neutral panel. Disputes can arise when tribes or NHOs make competing claims for cultural items and subsequently question the decision of the land manager or museum as to which tribe or NHO has the preponderance of evidence in its favor as the most appropriate claimant. A dispute can also arise between a tribe or NHO and a museum or federal agency if the requesting party disagrees with a decision concerning cultural affiliation or repatriation. All findings of fact made by the Review Committee are advisory.

Decision-making under NAGPRA follows the standards of proof that apply in civil law. The initial decision of a museum or federal agency as to cultural affiliation of human remains is made using a reasonable belief standard, based on a totality of the circumstances. *Id.* §§ 3001(2), 3003. A tribe or NHO that feels the decision is in error may present evidence to overcome the decision by a preponderance of the evidence. *Id.* § 3005(a)(4). A scientific or beyond-a-reasonable-doubt standard for decision-making does not exist in the law. Also, the age of human remains is not dispositive for determining whether they are Native American and subject to NAGPRA. Instead, cultural affiliation is determined on a case-by-case basis, using geographical, kinship, biological, archeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion. *See id.* § 3005(a)(4). Present-day tribes and NHOs have standing to request the repatriation of individuals belonging to an earlier group of people. *Id.* § 3001(9).

B. Ownership

NAGPRA requires consultation with tribes and NHOs immediately upon a new discovery of human remains or cultural objects on federal or tribal land, including Hawaiian Homes Commission land, and prior to excavation and removal. When there is an agreement in place for a Plan of Action prior to the discovery of a NAGPRA-protected item, the event is called an "intentional excavation." The disposition of newly discovered items follows the agreement. When no agreement is in place, the event is called an "inadvertent discovery," and all work must cease for 30 days while consultation on the potential removal of the items and their disposition occurs. Federal agencies are encouraged to be proactive and to consult with tribes and NHOs to reach contingency Plans of Action that are triggered in the event of otherwise unanticipated or unauthorized ground disturbance. Advance planning is better than stopping a project to do remedial decision-making. Federal agencies are also encouraged to consider NAGPRA disposition and Plans of Action as a postscript to consultation with tribes in the course of consultation under the National Environmental Policy Act and § 106 of the National Historic Preservation Act.

Disposition of Native American human remains and funerary objects removed from federal or tribal land after November 16, 1990, follows a different process than it does for collections because there is perfect information regarding their place of discovery. Absent an ascertainable lineal descendant for human remains and associated funerary objects, when the removal is from *tribal* land, the tribal land owner has jurisdiction to receive all new finds and determine their disposition. On *federal* land, absent an ascertainable lineal descendant for human remains and associated funerary objects, disposition of all new finds is to the tribe or NHO with the closest cultural affiliation with the cultural items and which, upon

notice, states a claim for them. If the cultural affiliation of the items cannot be reasonably ascertained, then disposition is to the tribe that is recognized by a final judgment of the Indian Claims Commission or the U.S. Court of Claims as aboriginally occupying the area where the items were found if, upon notice, such tribe states a claim for them, unless a different tribe can show by a preponderance of the evidence that it has some cultural relationship to the items which, although less than cultural affiliation is, nonetheless, more than only geographical. Decisions of federal agencies regarding the disposition of such cultural items are published twice in newspapers. There is a 30-day period for competing claims to come forward prior to a disposition. Native American human remains and associated funerary objects that are not claimed, or for whom claimants cannot be determined, remain in federal control pending future regulations on their disposition. *See* 43 C.F.R. § 10.7 (2014).

VI. Illegal trafficking in Native American human remains and cultural items

The NAGPRA statute includes a criminal enforcement section. Codified at 18 U.S.C. § 1170, the law contains two subsections. One subsection criminalizes the knowing sale, purchase, use for profit, or transportation for sale or profit of the human remains of a Native American without the "right of possession." 18 U.S.C. § 1170(a) (2014). The other subsection criminalizes the knowing sale, purchase, use for profit, or transportation for sale or profit of any cultural item obtained in violation of NAGPRA. *Id.* § 1170(b). The meaning of the phrase "obtained in violation of NAGPRA" is not provided in the law. NAGPRA criminal sanctions apply to the removal of Native American human remains and cultural items from federal or tribal land after 1990, and might apply to the sale of items from museum and federal agency collections otherwise subject to the NAGPRA process. Regardless of value or loss, a first violation is a misdemeanor and a second or subsequent violation is a felony. Illegal trafficking in Native American human remains and other cultural items is a general intent crime.

VII. NAGPRA and disinterment in the courts

NAGPRA provides, among other things, for the legal and physical repose of Native American human remains and associated funerary objects by establishing control of the disposition of the remains and objects according to a priority order. *See* Part II. To be subject to this priority order, the human remains and funerary objects in question must either have been "excavated or removed" from federal lands or tribal land after November 16, 1990, *see* 25 U.S.C. § 3002(d)(2) (2014), or be part of "holdings or collections" in the possession or under the control of a museum or federal agency. *See id.* § 3003(a).

The U.S. district courts have judicial jurisdiction over any action brought by any person alleging a violation of NAGPRA, as well as the authority to enforce the requirements of this Act. *Id.* § 3013. Since 1998, the U.S. district courts have produced several opinions in cases where Native American human remains were interred variously on federal land, municipal land, and tribal land. The issue, in effect, was whether the disinterment of the interred remains was governed by NAGPRA. The approaches to this issue taken by the courts have varied. Some of the opinions indicate that the courts confused the separate provisions of the law dealing with collections (25 U.S.C. §§ 3003–3005) with excavation and removal from federal or tribal lands (25 U.S.C. § 3002), and also confused standing, disposition, and jurisdiction under NAGPRA. A summary and discussion of these cases is presented below.

A. Disinterment on federal lands

***Idrogo v. U.S. Army*, 18 F. Supp. 2d 25 (D.D.C. 1998):** Plaintiffs Michael Idrogo and the Americans for Repatriation of Geronimo brought suit against the U.S. Army and the President to "repatriate" the human remains of Geronimo, the legendary Chiricahua Apache warrior who lived the last 23 years of his life as a prisoner of war under the custody of the U.S. Army. Geronimo is buried on federal land somewhere in Fort Sill, Oklahoma. The court found that plaintiffs lacked standing to prosecute their NAGPRA claims and dismissed the case with prejudice. The court held that only direct

descendants of Native American human remains and affiliated tribal organizations stood to be injured by violations of the Act, and that NAGPRA did not vest any rights in Idrogo or the Americans for Repatriation of Geronimo to receive the remains of Geronimo. Further, the court found that, even if it were proven that the U.S. Army somehow was violating NAGPRA by harboring Geronimo's remains at Fort Sill, plaintiffs still could not claim any injury in fact. *Id.* at 27; *but see Bonnichsen v. United States*, 367 F.3d 864, 873–74 (9th Cir. 2004) (Non-Native American plaintiffs were afforded standing to challenge federal agency compliance with NAGPRA.). The opinion does not indicate whether the court determined, in the first instance, whether NAGPRA provided a waiver of the United States' sovereign immunity from suit. ("[T]he court has broad power to decide its own right to hear a case." *Sisseton v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1077 (D.S.D. 2009) (quoting *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990)).) Moreover, "[b]ecause jurisdiction is a threshold question, judicial economy demands that the issue be decided at the onset." *Sisseton*, 659 F. Supp. 2d at 1077 (quoting *Osborn*, 918 F.2d at 729).

The court's reasoning regarding the plaintiffs' standing was premised, incorrectly, on the NAGPRA provision governing collections and holdings (25 U.S.C. § 3005), rather than the provision governing excavation or removal from federal land (25 U.S.C. § 3002). Even if the court were to conclude that it did have jurisdiction (*but see Geronimo v. Obama*, below, where the court held that NAGPRA does not provide a waiver of immunity, and that the Administrative Procedure Act governs the jurisdiction of the court over a challenge to a federal agency's compliance with NAGPRA), had it looked at the applicable provision of the statute, it easily could have dismissed the case for failure to state a claim because control of the disposition of Native American human remains still buried on federal land does not fall within the scope of NAGPRA unless and until the human remains are excavated or removed. Moreover, nothing in § 3002 requires the excavation or removal of a burial.

***Geronimo v. Obama*, 725 F. Supp. 2d 182 (D.D.C. 2010):** Plaintiffs, a group of 20 purported lineal descendants of the legendary Apache warrior Geronimo, sued, under NAGPRA, the President, other federal officials, Yale University, and the Order of Skull and Bones (an organization of Yale University students whose premises are on the Yale campus). Among other things, the plaintiffs sought an order under 25 U.S.C. § 3002 requiring defendants to return Geronimo's remains buried on federal land in Fort Sill, Oklahoma. According to the complaint, in 1918 or 1919, a group of Yale University students who were members of the Order of the Skull and Bones opened the burial of Geronimo and removed his skull, other bones, and items that were buried with him, and transported them to the Order's premises. The federal defendants moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim. The motion was granted, and the court dismissed the complaint as to all defendants. With respect to the federal defendants, the court held that, while NAGPRA allows for enforcement actions under 25 U.S.C. § 3013, the law does not provide a waiver of sovereign immunity. *Id.* at 185 (citing *Rosales v. United States*, No. 07-624, 2007 WL 4233060, at *3 (S.D. Cal. Nov. 28, 2007) (citing *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 886 (D. Ariz. 2003)); *Monet v. United States*, 114 F.3d 1195 (9th Cir. 1997)). Instead, the applicable waiver of sovereign immunity is found in the Administrative Procedure Act (APA), at 5 U.S.C. § 702. Finding that the complaint cited no agency action, inaction, or involvement at all, the court held that the agency action needed for the APA's waiver of sovereign immunity to apply was not pleaded as a cure to the defect in subject matter jurisdiction. *Id.* at 186. In addition, even if the complaint were to be read to allege a claim under the APA, the complaint failed to state a claim for two reasons. First, the complaint alleged no excavation or removal of Geronimo's remains after November 16, 1990, which are the only discoveries to which 25 U.S.C. § 3002 applies. Second, to the extent that the plaintiffs sought to require the federal defendants to excavate Geronimo's possible burial sites, they did not cite to any provision of NAGPRA that requires a federal agency to engage in an excavation of possible burial sites. *Id.* at 187 n.4. As to the non-federal, non-moving defendants, the court dismissed the complaint for failure to allege facts to support a cause of action. *Id.* at 186–87.

In support of their complaint, plaintiffs referred to the NAGPRA provision in 25 U.S.C. § 3003, which requires "museums" to create inventories of Native American human remains and associated funerary objects in "holdings or collections" in their possession or under their control. *Id.* at 187 n.4. The court must have inferred that any remains of Geronimo, and any funerary objects associated with his remains, that might possibly be at Yale University and/or the premises of the Order of Skull and Bones, remained buried prior to November 16, 1990, and were not in a "holding or collection," because the court's dismissal for failure to state a claim was premised on plaintiffs' failure to point to any authority interpreting § 3003 or any other section of NAGPRA *as requiring an intentional excavation*.

B. Disinterment on tribal land

***Hawk v. Danforth*, No. 06-C-223, 2006 WL 6928114, at *1 (E.D. Wis. Aug. 17, 2006):** Plaintiff Daniel Hawk filed an action against the Oneida Tribe of Indians of Wisconsin, asserting that the tribe violated NAGPRA because it failed to provide for the reburial of the human remains of Native American individuals, including those of his ancestors, currently interred underneath a parking lot on tribal land. The court did not decide the question of whether the tribe was immune from suit, even though it was raised. (*See Timothy White v. University of California*, No. C-12-01978-RS, slip op. at 9 (N.D. Cal. Oct. 9, 2012) (order granting Kumeyaay Cultural Repatriation Committee's (KCRC's) motion to dismiss and granting Regents' of the University of California motion to dismiss). "Congress does not appear to have waived the tribes' right to sovereign immunity against claims brought under NAGPRA. While the law does contain an enforcement provision, § 3013, it does not expressly waive tribal immunity." *Id.* slip op. at 10. "KCRC is entitled to immunity as an 'arm' of the Kumeyaay tribes." *Id.* slip op. at 12.) Instead, the court dismissed the case for failure to state a claim. *Hawk*, 2006 WL 6928114, at *2. The court's reasoning was twofold. First, the court reasoned that NAGPRA applies to museums and federal agencies and that the tribe is neither. As authority for that proposition, the court incorrectly cited to the NAGPRA provisions governing collections and holdings, §§ 3003–3005, despite having correctly understood that "[i]n the plaintiff's view, the tribe should excavate under the parking lot to *find* the remains he asserts are there," which, in turn, would implicate § 3002 of NAGPRA regarding excavation or removal from tribal land. *Id.* (As an aside, using its own reasoning, the court never did explain why an Indian tribe could not be a "museum.")

Second, the court held that, to the extent that the provision governing removals from tribal land could apply without respect to whether a museum or federal agency is involved, NAGPRA does not apply to human remains that may still be buried. The court went on to state that no provision in the Act requires a tribe or anyone else to excavate an area in order to find remains or other artifacts. Assuming that the tribe was not immune from suit and that the court had jurisdiction in the first instance, the second reason for dismissal of the case should have been the sole one stated by the court.

***Kickapoo Traditional Tribe v. Chacon*, 46 F. Supp. 2d 644 (W.D. Tex. 1999):** In a motion for emergency relief, defendants—the state of Texas and Martha Chacon, a justice of the peace—asked the court to dissolve a temporary restraining order entered by a Texas state court preventing exhumation for an autopsy of a Native American woman whose remains had been removed and buried on tribal land. Plaintiffs, Kickapoo Traditional Tribe of Texas, contended that an exhumation and autopsy violated NAGPRA. Chacon had ordered an autopsy of a Native American woman who died unexpectedly and whose mother claimed she had been killed. The Tribe objected to the autopsy on religious grounds and quickly buried the body on tribal land. Chacon then issued an order for the disinterment and autopsy of the body, whereupon the tribe filed a declaratory judgment action in state court, naming both the state of Texas and Chacon as defendants. In its petition, the Tribe asserted in one of its two claims that Chacon's disinterment and autopsy order was invalid and void, as the procedural requirements set out in NAGPRA for intentional excavation of cultural items on tribal land, which include obtaining the consent of the tribe and a permit prior to the intentional excavation under 25 U.S.C. § 3002(c), had not been met. The Tribe

obtained *ex parte* an order temporarily restraining enforcement of Chacon's order. In response, the state defendant removed the action to federal court and filed a motion for emergency relief, seeking an order vacating the state court's temporary restraining order. Jurisdiction was premised on the existence of a federal question under NAGPRA.

The court granted judgment on the merits for defendants and vacated the temporary restraining order, finding that the tribe had failed to state a claim under NAGPRA. *Id.* at 651. The court held that Chacon's exhumation order was not invalid or void under NAGPRA because NAGPRA did not apply to a recently buried corpse that state authorities sought to exhume in order to determine the cause of death for an inquest. According to the court, NAGPRA did not apply for two principal reasons. First, and despite the fact that the term "human remains" is not defined in NAGPRA (probably because Congress could not find any ambiguity in the term), the court found that " 'human remains' was intended to mean ancient human remains or those with some sort of cultural or archaeological interest." *Id.* at 650. Therefore, "NAGPRA was not meant to apply to a recently buried corpse which is of no particular cultural or anthropological interest, but which is sought by state authorities for the purposes of conducting an inquest." *Id. But see Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 83 F. Supp. 2d 1047, 1056 (D.S.D. 2000) ("The Act must . . . be interpreted to apply to all human remains within the meaning of [the definition of "human remains" contained in the regulations implementing NAGPRA at] 43 C.F.R. § 10.2(d)(1), and not merely human remains of prehistoric origin.").

The court's second principal reason as to why NAGPRA did not apply seems more sound. Citing to a savings clause in § 3009(5) of NAGPRA, which states that the Act does not "limit the application of any State or Federal law pertaining to theft or stolen property," and to a Texas criminal law concerning body-tampering, the court held that Congress intended "that NAGPRA's protections not supersede the legitimate efforts of state and Federal law authorities to enforce applicable criminal laws," such as the Texas body-tampering statute. *Kickapoo Traditional Tribe*, 46 F. Supp. 2d at 651. This case demonstrates that, not only does NAGPRA *not* authorize exhumations, but pursuant to its savings clauses, in some cases, NAGPRA will not govern the intentional excavation of Native American human remains buried on tribal land.

C. Disinterment on non-federal and non-tribal lands

***Thorpe v. Borough of Jim Thorpe,* No. 3:CV-10-1317, 2013 WL 1703572 (M.D. Pa. Apr. 19, 2013):** The court granted the motion for summary judgment of plaintiffs Richard Thorpe and William Thorpe, surviving sons of Jim Thorpe, and the Sac and Fox Nation of Oklahoma. The motion declared that 25 U.S.C. §§ 3003 and 3005 (the provisions of NAGPRA governing inventories and repatriation of Native American human remains and associated funerary objects in holdings or collections that are in the possession or under the control of a museum) were applicable to the remains of Jim Thorpe that are presently interred on municipal land in the Borough of Jim Thorpe, Pennsylvania. Earlier, the same court had denied the motion of defendants Borough of Jim Thorpe, its former and then-current mayor, and its council members, to dismiss the complaint for failure to state a claim under NAGPRA. *Thorpe v. Borough of Thorpe*, No. 3:10-CV-1317, 2011 U.S. Dist. LEXIS 147587, at *46 (M.D. Pa. Feb. 4, 2011). The court found instead that the complaint stated a claim upon which relief can be granted under NAGPRA. *Id.*

Legendary athlete Jim Thorpe, a Native American, was an enrolled member of the Sac and Fox Nation. He died intestate in March 1953. At the time of his death, he was a California resident. Thorpe was survived by his spouse, Patricia Thorpe, and eight children. His estate was assigned to Patricia Thorpe under California law. Subsequently, in May 1954, Patricia Thorpe entered into an agreement with the Boroughs of Mauch Chunk and East Mauch Chunk, Pennsylvania that set forth the terms and conditions for the renaming of the municipalities and the interment of Jim Thorpe. As part of the agreement, Mauch Chunk and East Mauch Chunk were consolidated into a single Borough under the

name "Jim Thorpe." Also pursuant to the agreement, Jim Thorpe's remains were interred within the Borough, and the remains continue to be interred on Borough-owned land in a mausoleum maintained by the Borough.

The court's holding that the inventory and repatriation requirements of 25 U.S.C. §§ 3003 and 3005 apply to interred human remains risks creating an absurd result. (In interpreting statutes, absurd results are to be avoided. *See McNeill v. United States*, 131 S. Ct. 2218, 2223 (2011) (quoting *United States v. Wilson*, 503 U.S. 329, 334 (1992)).) According to the court's interpretation of NAGPRA, interred human remains are deemed to be in "holdings or collections" and, therefore, the statute authorizes—even *requires*—that where human remains are interred in graves controlled by an institution or by a state or local government agency that receives federal funds, the human remains must be disinterred and transferred to a lineal descendant or culturally affiliated Indian tribe when requested. *Thorpe*, 2013 WL 1703572, at *8, *18. Thus, according to the court, Native American graves "protection" occurs through disinterment or, in other words, we need to destroy these graves in order to protect them. More importantly, the court's holding that NAGPRA applies in this case is contrary to a savings provision of NAGPRA, which states that "[n]othing in this [Act] shall be construed to . . . limit any procedural or substantive right which may otherwise be secured to *individuals* or Indian tribes or Native Hawaiian organizations." 25 U.S.C. § 3009(4) (2014) (emphasis added).

At the time of his death, California law provided that the priority of right to control the disposition of the remains of Jim Thorpe and the duty of interment devolved upon his surviving spouse, Patricia Thorpe. CAL. HEALTH & SAFETY CODE § 7100 (Deering 1956). (If, prior to his death, Jim Thorpe had directed a different preparation for, or type or place of interment of his remains, then his surviving spouse would have been required to faithfully carry out those directions. ***Id.*** No such direction was ever alleged to have occurred and, in any case, the matter would not be a federal question.) Consequently, to apply NAGPRA to the buried remains of Jim Thorpe would limit the right of his surviving spouse, Patricia Thorpe, to control the disposition of his remains under California law and would be inconsistent with § 3009(4).

This court's holding also risks placing NAGPRA in tension with the Tenth Amendment, which states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The power to determine the priority of right of custody of a corpse for the purpose of the disposition of the corpse (including burial) has traditionally been reserved to the states. Similarly, the states traditionally have exercised authority over the disinterment of human remains that are buried on non-federal and non-tribal lands. The plaintiffs may ask that Jim Thorpe's remains be transferred to them, but they should be doing so before a Pennsylvania state court, and not a federal one.

Pursuant to NAGPRA's savings provision, NAGPRA did *not* apply here, and the court lacked subject matter jurisdiction over the case. *See* 21 PA. L. ENCYCLOPEDIA § 104 (Matthew Bender 2013) (regarding disinterment and removal of human remains under Pennsylvania law); *see also Zale v. Koons*, 38 Pa. D. & C.2d 583, 587 (1965) (Daughter of a decedent was not entitled to have body removed from a cemetery to another cemetery in a different locality, where decedent's widow participated in arrangements for his burial and acquiesced in burial during her lifetime, where burial accorded with his wishes, and especially where owner of land in which body was buried does not consent to its removal); *Puckey v. Blake*, 306 Pa. 374, 375–76 (1932) (It is not an abuse of discretion to refuse to permit a removal after a period of years, even on the petition of the surviving spouse).

VIII. Conclusion

NAGPRA has not caused all Native American cultural items to be stripped from the collections of museums. Rather, the institutional knowledge about Native American culture has been enriched through the process of consultation with tribes and NHOs. Post-NAGPRA collections protocols typically

require respectful treatment of the dead. Native Americans are being regarded as necessary participants in the consultation and determination of rights to items in collections, as well as potential ownership or control of human remains and cultural items excavated or removed from federal lands since the passage of NAGPRA. The process is ongoing, and the progress has been profound. Over 2,300 NAGPRA notices have been published pertaining to collections, accounting for approximately 48,000 Native American individuals, 1.2 million funeral objects associated with those individuals, 200,000 unassociated funerary objects, 5,000 sacred objects, 8,000 objects of cultural patrimony, and 1,800 objects that are either both sacred and cultural patrimony or have not been categorized. *See* U.S. DEPARTMENT OF THE INTERIOR, FY 2013 FINAL REPORT 13 (2013), *available at* http://www.nps.gov/nagpra/DOCUMENTS/Reports/FY13FinalReport.pdf.

While tribes and NHOs, museums, and federal agencies have become well-versed in the NAGPRA process, courts have approached NAGPRA cases as matters of first impression. Regardless of whether a case emanates from a collection or a new discovery on federal or tribal land, rulings on cases involving lineal descendants, tribes, and NHOs should fall into the well-trod rubric of the common law, affording due process to all. In providing, among other things, for the legal and physical repose of the human remains of Native American individuals and the objects placed with or near them as part of a death rite or ceremony, NAGPRA is the antithesis of a law that disrupts repose by authorizing the disinterment of Native American burials. ❖

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The views expressed in this article are those of the authors, and do not necessarily reflect the views or opinions of the Department of the Interior.

The Investigation and Federal Prosecution of the Native Mob—Responding to a Statewide Gang Threat Through the Use of the Racketeering Statute

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I. Introduction

A. An attempted murder on the Leech Lake Indian Reservation

On March 4, 2010, Amos Laduke walked his six-year-old daughter down the street of a small town on the Leech Lake Indian Reservation in northern Minnesota. Holding his daughter's hand, Laduke noticed a dark sedan slowly drive by him as the front-seat passenger gave Laduke what he would later describe as a "hard look." Laduke kept his eye on the dust-covered Buick as it continued slowly up the street, turned around, then circled back before stopping a short distance away. Laduke then watched a man armed with a handgun emerge from the back of the vehicle and move in Laduke's direction. Recognizing danger, Laduke immediately grabbed his daughter up into his arms and fled. The assailant chased both father and daughter, then opened fire with a semi-automatic handgun, hitting Amos Laduke three times in the back and causing him to stumble to the ground. Laduke's daughter fell from his arms onto the street, remaining near her father as the shooter continuously fired .40 rounds, several striking within inches of the victims.

At this moment, a retired tribal police officer drove by and upon seeing the chaos, made the split-second decision to drive his pick-up between the advancing gunman and his victims—an act that likely saved the lives of both Amos Laduke and his child. With the truck in the way, the shooter fled into the nearby woods, allowing the retired officer to load the victims into his truck and rush them to a nearby hospital, while also calling 911. Amos Laduke would eventually recover from his gunshot wounds. Miraculously, Laduke's daughter was not hit by the gunfire, but the left shoulder strap of her backpack had been pierced by one of the .40 rounds.

The investigation that followed revealed the identities of two of the men involved in the attack and their motive. The shooter was identified as Native Mob member William Morris and the front-seat passenger was found to be Native Mob member Anthony Cree, a/k/a Punisher. Their motive was retaliation by the Native Mob for Laduke's cooperation against the gang in an ongoing investigation into the gang's activities.

B. A murder in South Minneapolis

On a sub-zero night in February 2011, 28-year-old Jeremee Kraskey was found dead in a South Minneapolis backyard. He was the victim of an execution-style murder. Kraskey, a member of the Native Mob street gang, had been shot once in the back of the head and twice in the abdomen. Though residents in the neighborhood heard shots and called 911, no one witnessed the killing, and little from the scene was found to assist police in their investigation.

One week before Kraskey was killed, task force officers investigating the Native Mob had executed a document warrant at the Cass Lake home of Wakinyon McArthur, a/k/a Kon, a/k/a Killa, the leader or "chief." The night before his murder, Kraskey—also a Cass Lake resident—had been summoned to Minneapolis by the Native Mob leadership. An unhappy Kraskey left his daughter's middle school open house that night to make the 200-mile trip to Minneapolis, only to be found dead within hours of his arrival. Without witnesses or physical evidence from the crime scene, the story behind Kraskey's murder would be unknown until approximately one month later.

On March 3, 2011, an informant working with a task force investigating the Native Mob conducted a routine controlled buy of cocaine from a target of the investigation, the "co-chief," Shaun Martinez. As the recorded transaction ended, Martinez spontaneously confessed his role in the murder of Jeremee Kraskey to the informant. In hushed tones, Martinez confided that Kraskey was viewed by the gang as a "snitch" and that the gang's leader, Wakinyon McArthur, had asked him to commit the murder. Martinez described the middle-of-the-night execution, but urged the informant not to mourn Kraskey's death because, as Martinez emphasized, Kraskey "was bogus." The victim's family would inform law enforcement that Kraskey was in the process of leaving the gang at the time of his death. Officers confirmed that Kraskey had not worked as an informant for law enforcement looking into Native Mob activities.

The ruthless acts of violence described above are representative of the lengths to which this gang would go to protect its interests. The Native Mob was an organization that prided itself on loyalty and discipline and, as evidenced by Kraskey's murder, an organization that would kill its own in an effort to remain intact and in control. By 2012, the Native Mob had become a statewide public-safety threat, committing a wide variety of crimes in cities, towns, and Indian reservations across Minnesota.

II. The Native Mob: The rise of a criminal enterprise

A. Origins of the Native Mob

The origins of the Native Mob go back to the early 1990s, when gang activity in Minneapolis and elsewhere in Minnesota was on a precipitous upward trend. Following the 1991 execution-style murder of a Minneapolis police officer by members of the Vice Lords, law enforcement's ensuing crack-down on gang activity in the Twin Cities put tremendous pressure on the gang. In response to its dwindling numbers, the Vice Lords began to successfully recruit new gang members from the Native American youth living in South Minneapolis, an arrangement that worked well until the mid-1990s, when a rift developed between the Native American members of the Vice Lords and its African-American members. This tension ultimately resulted in a split between the groups and the creation of a separate and distinct gang, the "Native Mob Vice Lords." The gang would later rebrand and become what is now known as the "Native Mob."

B. The early years

With increased numbers of active members, a cultural identity, and a degree of loyalty not seen in other street gangs, the Native Mob grew in size and reputation. By the mid- to late-1990s, "tit-for-tat" murders and drive-by shootings were commonplace as the Native Mob and their rivals (primarily the

Native Gangster Disciples and the Project Boyz) battled for dominance in Minneapolis and Indian communities throughout the state. This rise in criminal activity naturally resulted in the prosecution and incarceration of numerous Native Mob members. Once established in the state prison system, the gang honed a leadership structure and further expanded recruiting efforts. The resulting surge of Native Mob members inside the state prison system seeded the next iteration of the gang and expanded the gang's reach geographically as members relocated from prison to Indian and non-Indian communities throughout Minnesota.

Some years later, however, there would be two blows to the leadership of the Native Mob. In 2005, founding member and then leader of the Native Mob, Wambli McArthur (a/k/a "Bli"), was convicted in a gang-related homicide in South Minneapolis for which he received a mandatory 30-year prison term. The leadership vacuum left behind was filled by long-time Native Mob member Gordon Reese (a/k/a "G-Money"), who led the gang until 2007, when he was arrested in northern Minnesota on assault, drug distribution, and firearms charges. Reese was tried and convicted in federal court and, due to his lengthy and violent criminal history, received a 30-year federal sentence. Following the incarceration of Reese, the Native Mob saw a disintegration of its leadership and a relative lack of unity spreading among the rank-and-file members.

C. Resurgence under Wakinyon McArthur

Not long after Gordon Reese was sentenced on federal charges, Wakinyon McArthur was paroled from state prison, having served time for a 1995 homicide. The younger brother of founding member Wambli McArthur, Wakinyon was determined to take over the reins and, in his own words, "resurrect the body" of the Native Mob. Upon release from prison, Wakinyon relocated from South Minneapolis, where he grew up, to the Leech Lake Indian Reservation town of Cass Lake, Minnesota, where he was more readily able to generate income from the distribution of cocaine, marijuana, and other illegal drugs. Simultaneously, McArthur stepped up recruiting efforts, sought to expand the gang's territory, and demanded new levels of discipline and accountability from the gang's membership. Not coincidentally, Minnesota then began to see a spike in Indian gang violence and an increased domination of the drug trade by the Native Mob in the Indian communities.

As part of Wakinyon's vision for the gang, a renewed emphasis was placed on the hierarchical structure of the Native Mob, both on the streets and in prison. At the top of the organization was the position of "chief," whose responsibilities included delegating and encouraging the commission of criminal acts, maintaining discipline, managing personnel, and facilitating council meetings. Following the chief was co-chief, civil chief, war chief, treasurer, and finally, "Reps." Reps were elected members responsible for the various geographic branches of the gang throughout Minnesota and were primarily responsible for the discipline and the criminal activities of members within his own geographic region, as well as recruiting new members from his region. Below the Reps came soldiers and finally, those members on "probation"—typically new recruits who were not yet fully trusted by the organization.

In addition to the structure and rules in place for Native Mob membership on the street, a similar structure and hierarchy was in place for incarcerated members of the gang. Each individual prison had its own "chief" responsible for holding meetings, recruiting new members, and enforcing Native Mob rules. While not directly accountable to the chief on the streets, the prison leadership kept the street leadership informed on issues affecting the gang, and vice versa. This arrangement served to bridge the gap between members in prison and the members on the street who, because of the nature of the gang's constant cycle of criminal activity/incarceration/release, were often trading places. Furthermore, communication between members in prison and members on the street was essential to keep tabs on who was a *bona fide* member of the gang, and who was not. As the Native Mob had experienced significant growth in numbers, it was imperative that those in the gang knew who were legitimate members and presumably trustworthy. Trust in a fellow gang member is valued when the daily business of the organization carried the potential for a lengthy prison sentence. Thus, claiming membership in the Native Mob when one was

not an actual member (called "false-flagging") carried a severe consequence, such as an assault at the hands of actual Native Mob members.

Loyalty and discipline in the Native Mob were important to Wakinyon, in part due to his belief that the rank-and-file of the Native Mob had failed to adequately aid his older brother, Wambli, when he was facing the homicide charge in 2005. Despite the Native Mob's documented efforts to tamper with witnesses testifying against Wambli, the jury in Minneapolis convicted him—an outcome deemed unacceptable to Wakinyon. As part of his response to this breakdown in the gang, Wakinyon began holding monthly statewide council meetings, he reinvigorated the practice of "violating" members who broke Native Mob rules, and, importantly, he placed a renewed emphasis on the silence of his gang members when questioned about Native Mob activities by law enforcement or anyone outside of the gang.

To drive home this point, Wakinyon insisted on and encouraged retaliation against *any* individual suspected of having cooperated in the investigation of a Native Mob member, be it a fellow gang member, a rival gang member, or an innocent citizen-victim. To ferret out informants and cooperators, members, when formally charged with a crime, copied and shared the police reports with the gang's leadership. Once the Native Mob could confirm on paper (referred to as having "black and white") a person's cooperation against the gang, leadership would make the decision of when and how to retaliate. An example of this arose in a surreptitiously recorded council meeting attended by dozens of gang members in 2010. Wakinyon can be heard on tape advising Derrick Williams, Jr., the Mille Lacs Reservation Rep for the Native Mob, to wait until his attempted murder case in state court was complete before retaliating against the cooperating victim because, as McArthur advised, the penalties for witness tampering were less serious after the underlying case was concluded.

In addition to reinforcing rules and structure on the street, McArthur encouraged members to "put in work," an expression used to describe the commission of crimes on behalf of the Native Mob. "Putting in work" (shooting a rival gang member, finding a new source for drugs, committing a robbery) had the effect of increasing both the individual member's stature within the group, as well as benefitting the name of the Native Mob as an organization. A promotion within the Native Mob was most often the result of the member's commission of one or more significant criminal acts on behalf of, or in furtherance of, the gang. Committing crimes for the gang was also rewarded with money, as the Native Mob put money on the "books" of inmates who were serving time in state prison for gang-related crimes.

By the middle of 2010, monthly statewide gang meetings were commonplace, membership continued to grow, and the Native Mob maintained active branches in Indian Country, in the city of Minneapolis, and in virtually every prison in Minnesota. Not surprisingly, drug trafficking and violence attributable to the Native Mob was also peaking. More than ever, the Native Mob presented a statewide criminal threat.

III. The investigation of the Native Mob

Law enforcement and the U.S. Attorney's Office for the District of Minnesota concluded that an effective way to disrupt and dismantle the Native Mob was through a coordinated, statewide response from the federal criminal justice system. Among the unique challenges presented by this organization were the geographically widespread nature of the gang, the variety of crimes committed by the gang, and the lack of informants and witnesses willing and able to provide reliable information about its activities. These obstacles would eventually be overcome in some instances by sheer effort, sometimes by pure luck, but most often by a combination of both.

Due to the statewide nature of the organization, it was apparent to the police and prosecutors that no single agency or county authority could alone be successful in responding to this gang. To adequately address this problem, a formalized group of federal, state, and local officers who, with the support of their

agencies, would commit vast amounts of time to work a long-term conspiracy case against the gang. The entities committing to the project included the Minnesota Department of Corrections; the Minnesota Bureau of Criminal Apprehension; the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATFE); the Drug Enforcement Administration; the U.S. Marshals Service; the FBI; the Paul Bunyan Drug Task Force; the Headwaters Safe Trails Task Force; the Mille Lacs Tribal Police Department; the Carleton County Sheriff's Office; the Minneapolis Police Department; the Duluth Police Department; and the United States Attorney's Office for the District of Minnesota. Though its contours and some of the personnel would change over time, this group of officers and prosecutors undertook the arduous process of collecting and analyzing historical information on the Native Mob, while at the same time proactively investigating the gang—all with an eye towards the arrest and conviction of the most dangerous of the gang's members.

IV. Building the case

The components of the case investigation are numerous and varied, but several categories of the most persuasive evidence against the gang merits discussion. Prison calls and letters, individual crimes committed by gang members, information obtained through informants, and forensic linking of a multitude of shootings, all provided evidentiary support for what would become a persuasive conspiracy case.

A. "This phone call is recorded and may be monitored"

In 2001, the sitting U.S. Attorney for the District of Minnesota, Tom Heffelfinger, secured Project Safe Neighborhood (PSN) funding as part of a broader effort to provide federal resources to communities battling Indian gang issues in both urban and rural settings. Heffelfinger, a former state prosecutor in Minneapolis and a recognized expert on Indian Country issues, had long recognized the threat posed by gangs in general and by the Native Mob in particular. A portion of this PSN funding was set aside to pay for a correctional investigator whose primary function would be the collection of intelligence and evidence on the Indian gangs flourishing in Minnesota's prison system.

By 2003, the PSN-funded correctional investigator, Jerry Wilhelmy, began to document the stream of information flowing between Native Mob members in prison and their counterparts on the street. With the exception of conversations between an inmate and their attorney, all prison calls are recorded and prefaced with a caution to the participants that the call may be monitored. Despite this admonition, members of the Native Mob often spoke about the structure of the gang, its membership, drug deals, the transfer of weapons, and a host of other topics germane to the functioning of the gang. Over the ensuing years, this investigator's efforts resulted in the compilation of a significant body of evidence that would prove useful to both state prosecutors working individual gang cases and to the Native Mob task force developing a historical conspiracy case for federal prosecution.

B. From the case files

A second source of evidence for the case would be found in the open and closed files of local police departments investigating crimes committed by members of the Native Mob. After securing the cooperation of dozens of departments, the ATFE spear-headed a process of retrieval, copying, researching, culling, and analyzing hundreds of incidents involving the gang. Spanning over 15 years' worth of criminal conduct, this task consumed vast amounts of agent and prosecutor time, but the effort resulted in uncovering evidence that would later help shape a variety of federal charges. Individual crimes—some a decade old—were often re-investigated and then viewed through the lens of an ever-increasing cache of intelligence. This allowed police and prosecutors to make connections between crimes and gang members that were previously not apparent.

C. Cooperating individuals and recorded gang meetings

Marshaling the past criminal conduct of an organization like the Native Mob, however valuable, would not alone suffice to prove the gang's full scope to a jury. Informants who could describe the inner-workings of the organization would be a necessary component of the case, but in the traditionally tight-knit Native American communities, it has been difficult for law enforcement to recruit them. In the unusually secret and violent world of the Native Mob, this reality was an even more significant obstacle to the success of this case. For years, officers working the investigation lacked a Native Mob member who met the criteria of being in good standing with the gang, not in prison or jail, yet willing to work proactively against them. In 2010, however, investigators would get a needed break.

As a result of excellent police work by the Minneapolis and Duluth Police Departments, two separate Native Mob members within six months of each other agreed to assist law enforcement in exchange for leniency in pending criminal matters. Each department then promptly made the informants available to task force officers working the Native Mob case. This critical turn of events was the result of an information-sharing mindset fostered by the law enforcement community in Minnesota that had been struggling with the Native Mob problem for years. The ability to promptly use these informants became essential to the success of those informants and, not coincidentally, to the subsequent prosecution of the Native Mob.

The cooperation of these informants (which included a third gang member in 2011) led to the collection of vast amounts of evidence against the Native Mob, the most potent of which were the surreptitious audio recordings of five statewide Native Mob council meetings held between July 2010 and June 2011. These recordings would confirm what officers and prosecutors had been hearing anecdotally for years, and they would become the cornerstone of the Government's racketeering case against the gang.

The taped gang meetings peeled back the secrecy long surrounding the Native Mob council and were instrumental in revealing the nature and extent of the criminal agreements entered into by Native Mob members. The recordings confirmed the hierarchical nature of the gang, including the authority wielded by Native Mob leadership over the rank-and-file gang members. The meetings, run by Wakinyon, began with a roll call, at which time each member identified himself by name and the geographic branch of the gang to which he belonged. Wakinyon then generated a discussion of "issues" facing the organization. These issues ran the spectrum from the mundane, like the adoption of a new gang logo, to the sinister, such as ordering the murder of a rival gang leader. Other topics discussed at these meetings included drug trafficking, punishment for members accused of breaking Native Mob rules, recruiting efforts, the number and location of the gang's firearms, and the identification of individuals believed to be cooperating against the Native Mob. The recordings were further littered with statements by leadership addressing the necessity for structure and unity within the organization—key evidence in the eventual racketeering prosecution. Ironically, Wakinyon's means for building a structured, loyal, cohesive criminal organization would ultimately serve to provide the most damning evidence against him and his enterprise.

D. Use of NIBIN and forensic firearms examination

Like many street gangs, the Native Mob used firearms as the tools of their trade. The ability of the Government to link shootings and violent incidents over time and from across the state, however, was significantly enhanced through the use of forensic firearms examination. The investigation bore out that Native Mob leadership actively encouraged members to use the guns provided to them and to share the guns with the other members when needed. An expectation of Native Mob membership was knowing that one could obtain a firearm when needed and, conversely, members were expected to share firearms with other members when asked. Proof of this agreement came not only from informants and their recordings,

but from the expert analysis of firearms and discharged casings recovered by police agencies responding to gang shootings across the state.

Over the years, the task force worked diligently to ensure that physical evidence collected from suspected Native Mob-related shootings was compared with the evidence from other known or suspected Native Mob shootings from around the state. Officers on the task force submitted the physical evidence for National Integrated Ballistic Information Network (NIBIN) review as part of an effort to search for potential links to other cases and incidents. Once linked by the NIBIN system, an expert forensic firearms examiner could independently review the evidence and, in many cases, confirm that the casing, bullets, and/or guns, were indeed connected to the Native Mob. By the time investigators and prosecutors indicted the case, there were no fewer than 8 firearms linked to 16 shootings involving more than a dozen Native Mob members, but because firearms that were "dirty" (used in the commission of a serious crime) were often discarded by gang members, not all firearms known to be used by the Native Mob were recovered or made part of the evidence in the case. This forensic evidence had the added benefit of corroborating information being provided by cooperating gang members. Having forensic links between guns, gang members, and crimes, in addition to cooperating gang member testimony, allowed the Government to present a significant number of shootings as "overt acts" in furtherance of both the racketeering conspiracy and a conspiracy to use and possess firearms in furtherance of a crime of violence in violation of 18 U.S.C. § 924(o).

V. Use of the RICO statute against the Native Mob

A. Development of a prosecutive strategy

The Native Mob had geographic reach throughout Minnesota unlike any gang in the state's history. The gang had established itself on both tribal and non-tribal lands, in the urban center of South Minneapolis, and in nearly every state prison facility in Minnesota. The criminal activity taking place was coordinated by centralized leadership and was diversified in nature, ranging from witness tampering to drug-trafficking to murder. Native Mob members were mobile, living in South Minneapolis housing projects one month and moving to remote reservation lands the next, and they were in frequent contact with each other via cell phones, prison calls, letters, and attendance at monthly statewide council meetings.

The goal of the investigation had always been the disruption and dismantling of the Native Mob to the greatest extent possible. The prosecution of the gang as a traditional drug-trafficking organization, however, was a strategy that brought insufficient potential penalties to bear and failed to capture both the personnel of the organization and the breadth of their criminal conduct. After analyzing historical evidence, reviewing hundreds of prison phone calls and letters, studying transcripts of recorded council meetings, and debriefing cooperating individuals, investigators and prosecutors agreed that use of the federal racketeering statute in pursuit of the Native Mob was legally appropriate and would be beneficial in meeting the goals of the investigation. The fact that the gang committed a vast array of crimes in a coordinated fashion in locations throughout the state made the use of the racketeering statute's broad reach not only plausible, but likely the best way to respond to this very unique threat.

With the evidence obtained from an investigation that began approximately 8 years earlier, federal prosecutors obtained arrest warrants for 24 Native Mob gang members. The 2012 indictment charged two dozen defendants with a variety of federal violations, including allegations that members of the Native Mob violated federal racketeering laws.

B. The RICO statute

The RICO (Racketeer Influenced and Corrupt Organization) statute was enacted to combat organized crime by bringing the diversified acts of a criminal organization under a single umbrella for

prosecution. In *United States v. Turkette*, 452 U.S. 576 (1981), the Supreme Court wrote that the RICO statute should be construed broadly and that its application was intended to reach not only legitimate businesses but also criminal enterprises having no legitimate dimension. *Id.* at 590–92. The illegal diversified acts of a criminal organization are referred to as "racketeering activity" and are listed in 18 U.S.C. § 1961(1). This list is expansive, but includes the "bread and butter" crimes of the Native Mob, that is, robbery, witness tampering, obstruction of justice, drug trafficking, attempted murder, and murder. The particular portion of the RICO statute used in the prosecution of the Native Mob was 18 U.S.C. § 1962(d), making it unlawful for any person to "conspire to participate, directly or indirectly, in the affairs of an enterprise through a pattern of racketeering activity." *See* 18 U.S.C. § 1962(d) (2014).

C. The Native Mob indictments

The indictment handed up by the federal grand jury in Minnesota identified 24 gang members by name, contained a detailed description of the enterprise itself, the manner and means by which the conspiracy operated, and a chronological list of "overt acts" committed by gang members in furtherance of the racketeering conspiracy. The majority of overt acts identified in the indictment were gang-related crimes committed by one or more of the Native Mob members (for example, the murder of Jeremee Kraskey in 2011 and the attempted murder of Amos Laduke in 2010). Some were conduct as simple as one gang member calling another to discuss Native Mob business. The overt acts identified in the indictment spanned nearly nine years, beginning in 2003 and ending in 2012. The evidence presented at trial, however, would span even further: from a gang-related murder in 1996 to witness tampering committed on the eve of the trial in 2013, when Wakinyon was caught attempting to instruct a fellow gang member how to testify on his behalf.

D. Take-down on the streets and in the prisons

Armed with federal arrest warrants, a statewide take-down took place in January 2012, when agencies from across Minnesota located and arrested all of the indicted Native Mob defendants. During the take-down, the Minnesota Department of Corrections took the unusual step of shutting down the entire state prison system for 24 hours. During this time, confirmed Native Mob inmates were separated from each other and their cells were searched. This response resulted in the recovery of significant amounts of contraband and gang evidence, which later proved useful at trial.

E. The trial

Approximately one year after the arrests, 22 of 25 gang members ultimately indicted had pled guilty to racketeering or racketeering-related charges. Three defendants, however, would proceed to a jury trial. The chief of the Native Mob, Wakinyon McArthur, and two of his soldiers, Anthony Cree and William Morris, were jointly tried before the Honorable Judge John R. Tunheim in federal district court in Minneapolis from January to March 2013. The U.S. Marshals Service took the lead in providing security during the trial, which included increasing the number of deputy marshals present in court and during the transport of witnesses and defendants, as well as the shackling of the three gang members when present in the courtroom. The Government presented the testimony of approximately 180 witnesses and offered over 1000 exhibits into evidence. After nearly seven weeks of trial, the jury returned guilty verdicts against all three of the remaining Native Mob members.

VI. Impact of the case

A. The numbers

Including cooperating defendants and gang members charged and convicted prior to the 2012 take-down, a total of 30 Native Mob members were successfully prosecuted federally as a result of this

investigation. The investigation also resulted in solving the 2011 murder of Jeremee Kraskey, which culminated in the guilty plea and 43-year sentence for Native Mob co-chief Shaun Martinez. Wakinyon McArthur, Anthony Cree, and William Morris are, as of this writing, pending sentencing and face penalties of 30 years' to life imprisonment. Furthermore, the cooperating gang members and witnesses assisted in the successful state prosecutions of four separate gang-related homicides committed in 1996, 2005, 2010, and 2012.

B. Reports from the field

Reporting from law enforcement throughout the state suggests that in the communities where the Native Mob once thrived, violent crime and gang-related violence has been significantly reduced, and the conspicuous presence of the Native Mob has been noticeably curtailed. Also, victims of Native Mob violence are coming forward and cooperating with law enforcement with greater frequency. This is likely the result of the long-standing fears of retaliation being diminished by the imprisonment of the gang's worst actors and a new confidence that reporting crime committed by a gang can have tangible, positive results. It has also been reported that recruiting for the Native Mob has slowed dramatically following this investigative effort as existing members are distrustful of any new and unfamiliar face, fearing yet another informant working on behalf of law enforcement has infiltrated their ranks.

VII. Conclusion

The investigation and prosecution of the Native Mob was a long-term investigation targeting one of the most organized and violent gangs in Minnesota history. Capitalizing on an unprecedented level of multi-agency cooperation, patience, hard work, and luck, a successful racketeering conspiracy case was brought in federal court against the gang's most dangerous and loyal members, including the gang's leadership. The impact of this investigation and prosecution has been a significant reduction in gang violence and drug-trafficking activities in Indian Country and in many other communities throughout Minnesota where the Native Mob once thrived. ❖

ABOUT THE AUTHOR

❑ **Andrew R. Winter** joined the U.S. Attorney's Office for the District of Minnesota in 2002 after serving 10 years as an assistant Hennepin County Attorney in Minneapolis, Minnesota. Mr. Winter is currently an Assistant U.S. Attorney assigned to the Terrorism and National Security Section. Prior to this, he spent the previous nine years prosecuting cases arising out of OCDETF investigations. He taught a class on the Native Mob investigation and prosecution at the National Advocacy Center in January and March 2014, and instructed on the case at the Minnesota Criminal Justice Institute in August 2013. Mr. Winter has also presented instruction on racketeering and VICAR prosecution on several occasions to federal and state law enforcement and probation personnel in Minnesota. ✠