Domestic Nations in the Age of "Tribalism"

Hilary C. Tompkins*

INTRODUCTION

In today's world, we are bombarded daily with dueling, political narratives from the left and right of the political spectrum. In my view, the current culture clash is a product of young America's growing pains, where the painful, destructive origins of America's founding are catching up with the ethos of "America, the land of the free." Some Americans desperately want to hang onto the cultural myth that America is one-hundred percent "great" with no shortcomings, while others want to redefine it for the future with an acknowledgement of past mistakes.[1] Political commentators have described this divisiveness as a regression into "tribalism."[2] Yet ironically, this label of "tribalism" does not include the first domestic Indian nations of this country, nor is there an acknowledgement that the pejorative use of the term "tribalism" reduces tribes' stature in the American political system.

---

* Hilary C. Tompkins was the former Solicitor of the U.S. Department of the Interior (2009–2017) and currently is a partner at Hogan Lovells in Washington, D.C., where she practices Native American law. She is an enrolled member of the Navajo Nation. Hilary provides her personal viewpoint in this article based on her firsthand experiences and is not representing the views of Hogan Lovells or any former employer. This Article came from the Author's lecture at the Canby Lecture on October 24, 2019.

1. *See, e.g.*, AMY CHUA, POLITICAL TRIBES: GROUP INSTINCT AND THE FATE OF NATIONS 165–66 (2018).

2. *See, e.g.*, David Brooks, *The Retreat to Tribalism*, N.Y. TIMES (Jan. 1, 2018), https://www.nytimes.com/2018/01/01/opinion/the-retreat-to-tribalism.html [https://perma.cc/5Q9L-WJ35]; Jim Mattis, *Duty, Democracy, and the Threat of Tribalism*, WALL STREET J. (Aug. 28, 2019), https://www.wsj.com/articles/jim-mattis-duty-democracy-and-the-threat-of-tribalism-11566984601 [https://perma.cc/9DZ7-9ZBA]; Geoff Nunberg, *As Fissures Between Political Camps Grow, 'Tribalism' Emerges as the Word of 2017*, NPR: FRESH AIR (Dec. 6, 2017), https://www.npr.org/2017/12/06/568583263/as-fissures-between-political-camps-grow-tribalism-emerges-as-the-word-of-2017 [https://perma.cc/X6XE-VLY2]; George Packer, *A New Report Offers Insights into Tribalism in the Age of Trump*, NEW YORKER (Oct. 13, 2018), https://www.newyorker.com/news/daily-comment/a-new-report-offers-insights-into-tribalism-in-the-age-of-trump [https://perma.cc/68E9-EESQ].

I. AMERICA'S MYTHOLOGY OF NATIVE AMERICA

A. Native Tribalism Can Enrich America's Identity

Throughout my life, I have heard mainstream American cultural narratives that disparage Indians—we have all heard the phrases—don't be an Indian giver, stop acting like a bunch of wild Indians, you're totally "off the reservation"—to name a few. We recently heard this past October (2019) the divergent views on Columbus Day and whether it should be renamed Indigenous Peoples' Day, with little coverage of the myth behind the holiday—that Columbus Day was an effort to counteract discrimination against Italian immigrants, unfortunately at the expense of the truth about Columbus.[3] Nation-states have mythologies to support their existence and to soften the harsh lens of reality, and in America's case, I have found that true depictions of Native America clash with America's depiction of itself.

In point of fact, America's current political narrative has co-opted the term "tribalism," assigning it the negative connotation of an uncivilized, undesirable, primitive state of being. The predominant message is that "tribalism" is bad, ignoring the fact that there are 573 federally recognized tribes in the United States.[4]

Having lived in America my entire life, I am suffering fatigue from the dominant culture's treatment of anything indigenous as "other" or reduced to a tagline. From the Native perspective, the term tribalism is deep, complex, and meaningful. Protecting and preserving tribal knowledge and identity has been meaningful and enriching to America's history and identity, as evidenced by the decades-long and impressive work of the National Congress of American Indians, the Native American Rights Fund, and institutions of higher education that have devoted entire programs to tribal law, policy, and literature.[5] Tribalism is not singularly bad and can provide enrichment to the

---

3. Brent Staples, *How Italians Became 'White'*, N.Y. TIMES (Oct. 14, 2019), https://www.nytimes.com/interactive/2019/10/12/opinion/columbus-day-italian-american-racism.html [https://perma.cc/VE97-E2D7].

4. *See* Recognizing National Native American Heritage Month and Celebrating the Cultures and Contributions of Native Americans to the United States, H.R. Res. 682, 116th Cong. (2019); *Tribal Nations & the United States: An Introduction*, NAT'L CONGRESS OF AM. INDIANS, http://www.ncai.org/about-tribes [https://perma.cc/TSV2-QY3B].

5. NATIVE AM. RTS. FUND, https://www.narf.org [https://perma.cc/6AND-7APG]; *About NACI*, NAT'L CONGRESS OF AM. INDIANS, http://www.ncai.org/about-ncai [https://perma.cc/KGF7-RE3C]; *see, e.g.*, *Indian Law*, ASU SANDRA DAY O'CONNOR COLLEGE OF LAW, https://law.asu.edu/focus-areas/indian-law [https://perma.cc/3TT7-XU52]; *Program in Native American Studies*, DARTMOUTH, https://native-american.dartmouth.edu [https://perma.cc/3JH5-G5P9].

American experience—anyone who has witnessed the intertribal gathering of Apache crown dancers with Joe Tohonnie performing at the Navajo Nation Fair will see a living example as to why tribalism is good.[6]

Tribes have been a source of great knowledge in this country, from sharing governance models that are reflected in the U.S. Constitution,[7] to offering peacemaking dispute resolution methodologies for use in modern times.[8]

Contrary to the negative connotation of "tribalism" today, being tribal does not mean fighting against anything that is different. Tribes have extended their hand beyond Indian Country to benefit America, such as welcoming the first foreigners to our lands,[9] providing record levels of military service in defense of America,[10] and service in leadership positions in state and federal government.[11] Indeed, being "tribal" for Native Americans also means being proud to be an American.

B. The Duality of Tribalism

For Native Americans, it is a balancing act of life to maintain this dual existence as a tribal member and as an American; however, our experience could provide a cure to the current chasm in American politics. We are adept at being true to our core, cultural identity while also building bridges to our former foes on the battlefield. Sovereign tribal nations engage in this balancing act in the face of incredible odds and adversity, protecting their tribal sovereignty while being active, influential actors in the American body politic.

By extension, tribal members likewise must build those bridges and have built resiliency and adaptability to survive, often in the face of oppositional

---

6. Navajo Joe, *Joe Tohonnie Jr. Singing at Tuba City Fair Navajo Song and Dance*, YOUTUBE (Oct. 19, 2010), https://www.youtube.com/watch?v=hNCoN0ea4oU [https://perma.cc/LA4N-WM42].

7. H.R. Res. 682; *see also* OREN LYONS ET AL., EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION 45, 47, 71 (1st ed. 1992).

8. Basharatullah Sheenwary, *Institutionalizing Customary Dispute Resolution in Afghanistan: Lessons from the Navajo Approach to Harmonizing Traditional and Formal Justice*, 32 OHIO ST. J. ON DISP. RESOL. 245, 265 (2017).

9. COLIN G. CALLOWAY, NEW WORLDS FOR ALL: INDIANS, EUROPEANS, AND THE REMAKING OF EARLY AMERICA 156–57, 181–90 (2d ed. 2013).

10. *20th Century Warriors: Native American Participation in the United States Military*, NAVAL HIST. AND HERITAGE COMMAND (Sept. 14, 2017), https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/t/american-indians-us-military.html [https://perma.cc/7YPP-D79Z].

11. DAVID TREUER, THE HEARTBEAT OF WOUNDED KNEE: NATIVE AMERICA FROM 1890 TO THE PRESENT 441–42 (1st ed. 2019).

forces. My own personal experience is an example of this dual state of existence. I was born in Zuni, New Mexico and was adopted as an infant by white parents before the passage of the Indian Child Welfare Act[12] in 1978. As a young Navajo girl growing up in South Jersey, I always felt like a stranger in my own land. As early as first grade, I felt conflicted when doing the pledge of allegiance and being Navajo—the part about "one nation" and "for liberty and justice for all" did not seem to me to tell the whole story. At that young age, I knew about my Navajo identity and that I was a member of a tribe that existed far away in New Mexico. I was told that there was much suffering and poverty on the reservation and that was why I was removed from my tribe. Growing up, I struggled to overcome an internal conflict of being an Indian and an American—could I be both or did I have to give up being Indian to survive? Only once I became a teenager and attended Dartmouth College did I learn for the first time about the destructive doctrine of manifest destiny, the genocidal forces of colonization, and the federal policies of removal, assimilation, and termination. Gaining this new knowledge made me wonder why the Founding Fathers received such high marks in American history.

I also learned in my classes that tribes are sovereigns. Yes, the U.S. Supreme Court in *Cherokee Nation v. Georgia* had to qualify tribes as "domestic *dependent* nations," but I was encouraged to learn that despite all the forces against Native Americans, we were still here, and even better, we had sovereignty![13] My newfound knowledge also confirmed that my gut instincts as a first grader were not far off the mark—that I was a part of America but that being a tribal member gave me certain legal rights that were distinct from America.

Armed with an education, I began my journey to reconnect with my Tribe—one of the most impactful and profound experiences of my life. Building a reconnection with my Tribe made me whole, and after re-gaining my tribalism, I was a healthier and happier individual not only in my tribal community but also in America writ large. I returned to the reservation and became a tribal court advocate for the Navajo Nation Department of Justice, which led me to law school, and ultimately, to serve at the highest levels of government. For me, tribalism made me whole instead of broken. Through duality, we can find balance and peace.

12. 25 U.S.C. §§ 1901–1963 (2018).
13. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (emphasis added).

II. AMERICA'S UNEASE WITH BEING TRIBAL

So how is my story of growing up as a Native American adoptee in America and the current political climate relevant to legal practitioners, scholars, and advocates who work on tribal issues? Because sharing these experiences as Native Americans gives evidence that America's struggle with shaping its identity as America the Beautiful with the baggage of its tortured past can benefit from not demanding unitary allegiance to one national narrative. The division we are witnessing today revolves in large part between those who want to let bygones be bygones and others demanding a full accounting of past injustices, thereby defining America's future differently.

A. Is Tribalism Inconsistent with American Ideals?

This struggle in the current American discourse influences how non-native, government decision makers view tribes and Indian law issues. At best, most are ill-informed of tribes' legal status, and at worst, some view that status as inconsistent with American constitutional ideals. Having served in state and federal government and often being the only Native person in the room, I garnered deep insight into this struggle of the government official, many who believed it is important to right the wrongs of the past and embrace tribal self-governance, but some who have a hard time doing so when it appeared to threaten America's constitutional values.

We have been witnessing this dynamic for decades in the law. A touchstone example is the *Oliphant* decision in 1978. Untethered by congressional intent and driven by judicial fiat, Justice Rehnquist held that tribes impliedly gave up the right to prosecute non-citizens in their territories. Justice Rehnquist reasoned that tribes lost this power by subjecting themselves to the greater power of the United States, and that Congress had never affirmatively recognized tribes' inherent prosecutorial authority.[14] Justice Rehnquist also relied on a twisted analogy to *Ex parte Crow Dog*, a prior Supreme Court case where the Court had held that tribal government should be able to try tribal members free from outside interference. Justice

14. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) ("But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.'") (quoting H.R. REP. NO. 23-474, at 18 (1834)).

Rehnquist reasoned that a similar approach should apply in Oliphant's case, concluding that it would be unfair to subject Oliphant to tribal prosecution, which

> seeks to impose upon [non-Indians] the restraints of an external and unknown code . . . ; which judges them by a standard made by others and not for them . . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception. . . .[15]

Conveniently, Justice Rehnquist failed to note that *Ex Parte Crow Dog* stands for the recognition that tribal norms rightly exist inside tribal territory, and Oliphant was an individual who voluntarily entered the reservation, subjecting himself to that on-reservation, legal regime. Another, more basic oversight is Justice Rehnquist's failure to point to any specific congressional intent to divest tribes of their inherent authority. Undoubtedly, Justice Rehnquist's goal was to protect Mr. Oliphant from a "different race" of an inferior "social state."[16]

Thankfully, Congress has since proven Justice Rehnquist wrong by recognizing the inherent authority of tribes to prosecute non-members under the Violence Against Women's Act (VAWA).[17] But even in more modern times, there is hand-wringing in the American body politic, where the protection of indigenous women from domestic violence is conditioned on protecting the due process rights of non-Indian offenders. It was only when tribes agreed to adopt constitutional, westernized protections for defendants was it possible for VAWA to pass, ignoring the fact that many traditional Native legal principles provide the same, if not more, due process rights, and that offenders voluntarily enter tribal territory.[18]

B. Tribalism Beyond Tribes Not Welcomed by the Courts

I recently finished a stint serving as Solicitor of Interior for nearly seven years under the Obama administration. It was the law job of a lifetime, but also, a challenging one as a Native woman. As Solicitor, I witnessed many

---

15. *Id.* at 210–11 (quoting *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883)).

16. *Id.* at 211 (quoting *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883)).

17. Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 904, 127 Stat. 54, 120–24 (2013).

18. Shefali Singh, *Closing the Gap of Justice: Providing Protection for Native American Women Through the Special Domestic Violence Criminal Jurisdiction Provision of VAWA*, 28 COLUM. J. GENDER & L. 197, 222 (2014) (discussing concerns with constitutional protections of non-native offenders).

instances where the rights of non-Indians, many of whom voluntarily entered the reservation, took precedence over tribes. I witnessed concerns about gaming employees being exposed to tribal labor laws on trust land, that non-Indian businesses would have to resolve disputes in tribal court, and that the existence of historic reservation boundaries would disrupt the "settled expectations" of the non-native population.

We are seeing that dynamic play out presently in the *Carpenter v. Murphy* case involving the Muskogee Creek Reservation, where the Supreme Court has asked for supplemental briefing and re-argument this term on the issue of criminal jurisdiction inside the reservation boundaries—an area that includes Tulsa, Oklahoma.[19] The United States Solicitor General filed amicus briefs stating that the reservation had been disestablished and that Oklahoma state law could apply to prosecutions within the reservation boundaries.[20] The United States clearly is concerned about tribal authority over non-natives.

The National Labor Relations Board (NLRB) cases are also instructive, where multiple circuit courts have held that tribes are subject to NLRB enforcement authority.[21] The National Labor Relations Act (NLRA) expressly treats public and private employers differently, exempting state and federal governments from federal labor law requirements.[22] The NLRA is silent with regard to tribes, creating an ambiguity, but the courts allowed the NLRB to hide behind *Chevron* deference[23] to an unsupportable degree. The circuit courts gave little weight to important factors, such as the fact that the NLRB had previously ruled that it lacked enforcement authority against the tribes; that the NLRB definition of "state" includes territories, which the NLRB has concluded enjoy the exemption from enforcement; that the NLRB disregarded the self-governance purpose of the Indian Gaming Regulatory

19. Carpenter v. Murphy, 139 S. Ct. 626 (2018) (mem.).

20. Supplemental Reply Brief for the United States as Amicus Curiae Supporting Petitioner at 1–2, Carpenter v. Murphy, 139 S. Ct. 626 (2018) (No. 17-1107), 2019 WL 181598, at *1–2; *Sharp v. Murphy*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/sharp-v-murphy/ [https://perma.cc/FBA4-87BX].

21. Pauma v. Nat'l Labor Relations Bd., 888 F.3d 1066, 1085 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2614 (2019); Nat'l Labor Relations Bd. v. Little River Band of Ottawa Indians, 788 F.3d 537, 555–56 (6th Cir. 2015); Soaring Eagle Casino & Resort v. Nat'l Labor Relations Bd., 791 F.3d 648, 675 (6th Cir. 2015); San Manuel Indian Bingo & Casino v. Nat'l Labor Relations Bd., 475 F.3d 1306, 1318–19 (D.C. Cir. 2007); *cf.* Nat'l Labor Relations Bd. v. Pueblo of San Juan, 276 F.3d 1186, 1200 (10th Cir. 2002).

22. Labor Management Relations Act of 1947, 29 U.S.C. § 152(2) (2018); 29 C.F.R. § 102.7 (2020).

23. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (providing federal agencies with deference in their interpretation of statutes that are ambiguous).

Act[24]; and the questionable, arbitrary line drawing between tribal government functions versus tribal commercial activity involving non-Indians, which the NLRB did not similarly do for state-owned gaming enterprises. At the core in these cases was simple hand-wringing about exposing non-Indian employees to tribal authority. Indeed, a common theme coming from the courts is the embrace of implied divestitures of tribal authority to avoid impacts to non-tribal members, as the dominant culture is deeply troubled with exposure of Americans to foreign, tribal authority.

The Supreme Court Justices have also openly flagged concern about tribes having control over non-Indians, as shown during oral argument in the *Dollar General* case, where more than one Justice repeatedly raised the issue, per the following question: "Is it consistent with your concept of due process as a general matter to have a nonmember tried by a jury consisting solely of tribal members?"[25] This question, in my view, invites themes of "us" and "them," depiction of tribal courts as lawless enclaves, and lack of legitimacy in the eyes of the dominant authority—in this case originating from a Supreme Court Justice. The dual existence of tribal courts and the American legal system was abhorrent to this Justice when it meant exposure of non-natives to the tribal legal system. I was sitting in the courtroom when I heard this Justice raise this question to my current law partner, the esteemed Supreme Court jurist Neal Katyal, who was arguing on behalf of the Mississippi Band of Choctaw Indians at the time. It was one of those times when I felt tribes were being penalized for being tribal and not American enough.

One of the highlights of being Interior's Solicitor was going to the Supreme Court to hear oral argument. I enjoyed this part of my role, and it gave me a sense of pride as a Native woman to attend these arguments and feel like a legitimate member of the American legal system sitting in the highest court of the land. However, when I heard those words come out of the Justice's mouth, I had that feeling like I did when I was in first grade—that the power structure determined what was valid in America and it was superior to the tribes. I couldn't help but feel that tribes' unique legal status was being turned against us, with the underlying message being that you are not legitimate unless you assimilate to our norms.

---

24. 25 U.S.C. §§ 2701–2721 (2018).

25. Oral Argument at 53:35, Dollar General Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (No. 13-1496), https://www.oyez.org/cases/2015/13-1496 [https://perma.cc/MTA9-HWD7].

C. Embracing Duality in Governmental Decision-Making

As I was about to wrap up my tenure as Solicitor, one final matter that came across my desk that brought these dynamics to the fore was the Standing Rock Sioux Dakota Access pipeline dispute. The U.S. Army Corps of Engineers had authorized the construction of an oil pipeline half a mile north of the Standing Rock Sioux Reservation in North Dakota. The Tribe filed suit claiming violations of the National Historic Preservation Act and the National Environmental Policy Act (NEPA), among other claims.[26] We all witnessed the historic level of protests against the pipeline. Ultimately, the Obama administration made the decision to pause the project to provide for more NEPA review and assess potential impacts on tribal treaty and water rights.[27] The pause was short lived as the Trump administration reversed course, and the project remains the subject of litigation.

The Dakota Access experience from inside the government is an example where Native knowledge and input helped shape a more informed and legally defensible government position. Miraculously, the Obama team found a way to balance the United States' multiple responsibilities—trustee to the tribes and administrator of laws like the Clean Water Act and the Rivers and Harbors Act[28]—but reaching that state was only after many internal, challenging deliberations.

As a Native American federal official, I offered my perspective and explained that the level of protest wasn't just about the pipeline but came from a deeper reserve of pain caused by this country's legacy of mistreatment of Native Americans. I remember one night after a particularly tough day where I had felt pressure to conform to the majority view, when I thought to myself, "Being in this role under these circumstances is the reason I went to college and law school. I have been training for years for this moment. I need to speak the truth, informed by my training, however unpopular." Of course, lofty thoughts are one thing in the middle of a sleepless night. It is quite another thing to insert your minority views in the harsh reality of government decision-making. But I am often emboldened when I think of what generations of Native Americans before me have faced, which is beyond anything I can imagine in my comfortable life. So in the face of difficult, internal debates, in the heat of litigation and the increasing levels of tension at the protest site, I proceeded to voice the Native American view in our

26. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101, 111 (D.D.C. 2017).

27. *See* Memorandum from Jo-Ellen Darcy, Assistant Sec'y of Civil Works, Dep't of the Army, to Commander, U.S. Army Corps of Eng'rs (Dec. 4, 2016) (on file with Dep't of Defense).

28. 33 U.S.C. §§ 1251–1388 (2018); 33 U.S.C. §§ 401–467 (2018).

deliberations, armed with fundamental legal principles in Indian law involving treaty rights and water rights, and the Standing Rock Sioux's history of dispossession and disenfranchisement in the region.

I ultimately issued an M-Opinion,[29] which concluded that the Army Corps of Engineer's NEPA review suffered from deficiencies for failing to assess potential risks on the Tribe's treaty and water rights.[30] While the Department of Justice disavowed the opinion in its continued defense of the Army Corps of Engineers, saying it had no bearing on its decision to pause the authorization of the pipeline,[31] and the Trump administration also withdrew my opinion and reversed the Obama administration's pause,[32] the district court ultimately adopted its central premise—that the Army Corps of Engineers needed to conduct more robust NEPA analysis to evaluate impacts on the Tribe's hunting and fishing treaty rights and environmental justice implications.[33] The litigation remains active, with the Tribe's most recent motion for summary judgment on remand arguing the Army Corps' redo of its NEPA analysis was perfunctory at best, and its refusal to conduct a full Environmental Impact Statement analysis was arbitrary and capricious under the Administrative Procedures Act.[34]

The experience of serving as Solicitor during this grave controversy involving Native American protests at unprecedented levels and difficult legal wrangling gave me a front seat to how government officials perceive the Native American voice and its place in the federal government decision-making process. Indeed, there were underlying tensions of "us" and "them," accusations of bias, and moments where I am sure the non-native federal

---

29. The Solicitor of the Interior has the authority to issue M-Opinions, which are legal interpretations that are given weight by the courts and are binding on the Department of the Interior.

30. U.S. Dep't of the Interior, Office of the Solicitor, Opinion Letter on Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline to Sec'y (Dec. 4, 2016), *designated as* M-Opinion No. 37038 (*withdrawn*, July 7, 2017).

31. U.S. Army Corps of Eng'rs' Opposition to Standing Rock Sioux Tribe's Motion for Partial Summary Judgment and Cross Motion for Partial Summary Judgment at 32–33, Standing Rock Sioux Tribe v. Army Corps of Eng'rs, 255 F. Supp. 3d 101 (D.D.C. 2017) No. 1:16-cv-1534-JEB, 2017 WL 1090180.

32. Construction of the Dakota Access Pipeline, 82 Fed. Reg. 11,129, 11,129–30 (Feb. 17, 2017); Memorandum on Construction of the Dakota Access Pipeline, GOVINFO (Jan. 24, 2017), https://www.govinfo.gov/content/pkg/DCPD-201700067/pdf/DCPD-201700067.pdf [https://perma.cc/CD2C-ZNXC].

33. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101, 112 (D.D.C. 2017).

34. Memorandum in Support of Standing Rock Sioux Tribe's Motion for Summary Judgment on Remand at 9, 34, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101 (D.D.C. 2017) (No. 1:16-cv-1534-JEB, 16-cv-1796, 17-cv-267), 2019 WL 3933735.

officials felt they were witnessing "tribal" dynamics to a degree that made them uncomfortable. But I also witnessed how bringing the Native voice to the conversation showed the value of including a different perspective and brought to the fore important, well-established legal principles to the decision-making. Thus, there was value in the "tribal" view being a part of the solution, as opposed to being a negative. I also saw how it brought many of us federal officials together—native and non-native—to support a legal and policy position that blended various views in a sound manner. I also have no doubt that my voice would not have been heard but for the strong support of powerful, non-native leadership that embraced my legal analysis. Sadly, but perhaps not surprisingly, I have found during my time in federal service (and more generally as a Native American lawyer) that my Native voice is not always immediately embraced in our legal profession. I have especially learned that when delivering difficult messages that do not reflect the collective view, the identity of the messenger matters, and having a member of the majority support your message can make all the difference, which was my experience in the Dakota Access controversy.

III. TRIBALISM IS AN ADVANTAGE, NOT A DISADVANTAGE

Based on these experiences, I often think about how tribes are to navigate in today's challenging world, where segments of American society are open to embracing tribal self-governance as long as it only impacts tribal members and doesn't appear to be "un-American." Ironically in light of today's political discourse, I think an isolationist policy could be a wise approach for tribes—stay out of the fray and low on the radar. But at the same time, interaction with the American politic is necessary for tribes so that we remain relevant, influential, and heard.

In that regard, it was terrific that there was the first bi-partisan Presidential candidate forum focused on Native American issues.[35] After all, tribal members are dual citizens, entitled to enjoy the constitutional rights of all Americans, such as the right to vote. The Presidential candidate forum represented the inclusion of Native American views in the American political conversation without forcing us to repress our tribalism.

The recent efforts to address voter disenfranchisement in Indian Country give us an opportunity to tell tribal stories that resonate with other Americans

35. *Native Presidential Forum: Democrats Sanders, Castro, Williamson, Bullock, Delaney, and Independent Charles Confirmed Attendees as of July 25, 2019*, FOUR DIRECTIONS (July 25, 2019), http://www.fourdirectionsvote.com/news/native-presidential-forum-democrats-sanders-castro-williamson-bullock-delaney-and-independent-charles-confirmed-attendees-as-of-july-25-2019/ [https://perma.cc/N6EU-VDC9].

living in rural America—where P.O. boxes instead of street addresses are commonplace, or polling places are miles away. Like other Americans, tribal members have the right to assert our constitutional rights when we face disparate impacts from unlawful racial discrimination. These individual rights were recently affirmed by the Tenth Circuit, which ruled that San Juan County violated Navajo residents' right to equal protection (14th Amendment) for engaging in district packing, where out of three county districts, only one district was over 92% Native American, and the county commission had never had a Native American majority.[36] As a result of the ruling, for the first time, Navajos held a majority on the county commission. This change had real, tangible impacts, as seen by the County's reversal of its support for President Trump's revocation of the Bears Ears National Monument.[37]

Tribes also must deploy our unique political status to overcome challenges of racial discrimination filed against us, such as legal challenges to the Indian Child Welfare Act (ICWA). The Fifth Circuit's recent, favorable ruling in the *Brackeen* litigation was a momentous legal victory, which hopefully will withstand en banc review.[38] The majority opinion strongly reaffirmed *Morton v. Mancari* and the long standing principle that tribal membership is a political classification, not a racial one.[39] Under a rational basis test, the court easily found ICWA's federal minimum standards for placement of Native children did not violate the Equal Protection Clause or impose undue burdens on non-Indian families.[40] It was far from a foregone conclusion that the conservative Fifth Circuit would rule this way, let alone that the current administration would continue to litigate in support of ICWA.

The Fifth Circuit found there was a proper delegation from Congress to the Department of Interior to administer the Act, which "federalized" the program to survive state rights challenges.[41] Most interestingly, the court relied heavily on ICWA's foundational premise that tribes' children are directly tied to tribal self-governance, where cultural-astuteness is essential. The court noted Congress's finding in ICWA of states' failure to recognize "the essential tribal relations of Indian people and the cultural and social

36. Navajo Nation v. San Juan Cty., 929 F.3d 1270, 1276, 1282 (10th Cir. 2019).

37. Rachel Fixsen, *San Juan County Commission Changes Direction on Bears Ears*, MOAB SUN NEWS (Feb. 28, 2019), http://www.moabsunnews.com/news/article_8b130740-3b85-11e9-8d8d-c70f7d1ceb20.html [https://perma.cc/Y8F7-LWEJ].

38. Brackeen v. Bernhardt, 937 F.3d 406, 441 (5th Cir. 2019), *rehearing en banc granted*, 942 F.3d 287 (5th Cir. 2019).

39. *Id.* at 425–26.

40. *See id.* at 429–30.

41. *Id.* at 436–37.

standards prevailing in Indian communities and families."[42] Similarly, the court found ICWA's application to children off-reservation was permissible given that a majority of Native Americans live off-reservation, but matters of tribal membership and self-governance are wholly internal, tribal affairs that can reach outside the reservation.[43] This reasoning we have heard before—as long as internal matters of the tribe and unique tribal customs and culture apply to its membership, then outsiders need not interfere. For once, this trend of treating tribes as outliers in our legal system has worked in the tribes' favor.

The recent treaty rulings in the Supreme Court also have this tenor in the *Herrera v. Wyoming* and *Cougar Den* cases. Both cases involved tribal-member activity off-reservation, but the Court found the treaty provisions prevailed, perhaps because of the minimal, direct impact on non-natives.[44] In *Herrera v. Wyoming*, the tribe's off-reservation hunting rights were in an area of a National Forest that the Court concluded had not been shown to be occupied—an issue the Court remanded on.[45] In *Cougar Den*, the treaty right of the tribe was to travel on the highway to transport goods free of state taxation, but the Court noted that the preemptive impact of the treaty did not preclude the state from regulating such activity for conservation or health and safety matters or to collect sales or use taxes, as was the case for all of the state's citizens.[46] Thus, where minimal impacts to state authority or non-Indians exist, it appears the Court has less consternation with upholding tribal rights.

In light of these trends, I believe practitioners in Indian law need to understand the sensitive pressure points that influence good-intentioned government officials who will be swayed by many factors beyond whether black letter law supports the tribal position. To merely insist on the existence of tribal sovereignty as a take it or leave it proposition will not always win the day, and in fact, can foster fear and consternation in some who will view this approach as overly "tribal" and antithetical to American values. Factors of race, impacts to non-natives, and whether internal, tribal affairs are at play can be determinative.

---

42. *Id.* at 416; *see also id.* at 436–37.

43. *Id.* at 427–28, 436.

44. *See* Herrera v. Wyoming, 139 S. Ct. 1686, 1691–92 (2019); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1006 (2019).

45. *Herrera*, 139 S. Ct. at 1703.

46. *Cougar Den, Inc.*, 139 S. Ct. at 1014–15.

CONCLUSION

Much of how we perceive things as lawyers, policymakers, and citizens in this country are a culmination of our life experiences. My experience started as an adopted Navajo girl, feeling out of place in her own country without her tribe to help shape her identity and sense of self. I grew up in mainstream America, time and again witnessing America's cultural narrative disparage Native Americans through racially based sayings, minimizing tribal existence in our political system. I believe today's divisive political climate is the emergence of America's identity crises, which have been seething beneath the surface for centuries. But despite these challenging times, I see opportunities for tribes given that our experiences with "tribalism" can be used to build bridges instead of barriers.

We can craft positions separate from today's dueling narratives in a manner customized to the audience and our needs because as tribal entities, we have the sovereign authority to define our destiny and shape our identity in ways that protect our traditions while adapting to the mainstream's external pressures.

Tribes are domestic nations that are not beholden to a specific vantage point. We adapt to whatever is thrown at us and have flexibility to pursue diverse objectives. For Indian tribes, tribalism is fluid, not limiting. We are protectors of tradition but make decisions for future generations; we welcome outsiders to our homelands, but we are the first, original Americans; we regulate our territories, but we reject paternalism through federal overregulation; we suffer the scourge of racial discrimination, but we enjoy the legal protections of political status; we are conservationists, but we are also entrepreneurial developers of new economies; and we have perfected the art of being tribal while also being American.

Lastly, and most importantly, we are here to stay in our original homelands, no matter where the political winds may blow.