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Judge Murphy's Indian Law Legacy

Kirsten Matoy Carlson

In Memoriam

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INTRODUCTION

Federal Indian law profoundly shapes the daily lives of American Indians.[1] The United States has dealt legally with Indian nations or tribes by treating them as separate sovereign governments since its formation. Before the end of the treaty period in 1871, the United States entered into some 400 treaties with Indian tribes, acknowledging their preexisting and ongoing

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1. *See* Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1124 (1994) (noting "the unusually great impact of law on Native American group life"). Several scholars have documented how federal Indian law empowered the Bureau of Indian Affairs to encroach on the daily lives of American Indians. *See, e.g.*, Reid Peyton Chambers, *Reflections on the Changes in Indian Law, Federal Indian Policies and Conditions on Indian Reservations Since the Late 1960s*, 46 ARIZ. ST. L.J. 729, 734 (2014) (noting that the Bureau of Indian Affairs "controlled many, perhaps most, actions by tribes and reservation Indians"); Warren H. Cohen & Philip J. Mause, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1820 (1968) ("Although the normal expectation in American society is that a private individual or group may do anything unless it is specifically prohibited by the government, it might be said that the normal expectation on the reservation is that the Indians may not do anything unless it is specifically permitted by the government."); Donald L. Fixico, *Witness to Change: Fifty Years of Indian Activism and Tribal Politics*, *in* BEYOND RED POWER: AMERICAN INDIAN POLITICS AND ACTIVISM SINCE 1900, at 2, 8 (Daniel M. Cobb & Loretta Fowler eds., 2007) ("During the first fifty years of the twentieth century, Native people had limited influence. The Bureau of Indian Affairs controlled their lives. As we say, BIA stood for 'Boss Indians Around.'").

rights and governmental authority.[2] These treaty relationships (and subsequent agreements), along with federal legislation and Supreme Court decisions, form the basic legal framework governing the relationships among two distinct groups of people—Indians and non-Indians—in the United States today. The key elements of this framework include: federal recognition of the inherent governmental authority possessed by Indian tribes, which usually supplants state powers on Indian lands; a federal trust obligation toward and special federal powers over Indian tribes and their citizens; and federally protected lands designated for Indian tribes.[3]

The United States, however, has not always honored this government-to-government relationship or the treaties and agreements it made with Indian nations.[4] Federal Indian laws and policies have varied tremendously over time, including periods when the goal was to destroy tribal organizations and even Indians themselves.[5] Federal judges have faced the unenviable task of interpreting these laws and policies.[6] They have made countless decisions that have had monumental, and often irreversible, consequences for Indian nations and their people.[7]

Few federal judges try to understand federal Indian law even though it affects the daily lives of millions of people and the sovereign rights of 573 federally recognized American Indian and Alaska Native nations. Even fewer recognize and appreciate Indian nations as sovereign governments, attempt to comprehend their distinctive worldviews, and translate those realities into terms cognizable by a foreign Western legal system.

The summer after my first year in law school, I was preparing to apply for a federal judicial clerkship and looking for that rare federal judge with an expertise in federal Indian law. I asked Reid Peyton Chambers, one of the partners at the boutique

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2. CHARLES E. CLELAND ET AL., FAITH IN PAPER: THE ETHNOHISTORY AND LITIGATION OF UPPER GREAT LAKES INDIAN TREATIES 13 (2011).

3. Goldberg-Ambrose, *supra* note 1, at 1123–26.

4. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 560–62 (1903).

5. For a discussion of these policies, see DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 140–243 (6th ed. 2011).

6. *See* INDIAN LAW STORIES 1 (Carole Goldberg et al. eds., 2011) (discussing the complex nature of Indian law); *see also* MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 219–23 (2016) (discussing the canons of treaty construction that federal judges use to interpret Indian treaties).

7. *See* Goldberg-Ambrose, *supra* note 1, at 1126, 1228–29, 1135–36, 1143–44 (highlighting the real life impact that U.S. Supreme Court decisions have had on Indian peoples).

Indian law firm where I was clerking, if he knew any judges that would fit that description. He enthusiastically responded: Judge Diana Murphy of the U.S. Court of Appeals for the Eighth Circuit. I applied to Judge Murphy. I believe Judge Murphy was interested in me because of my interest in federal Indian law and her commitment to increasing diversity on the federal bench.[8] I was honored to serve as Judge Murphy's law clerk after I finished law school.[9]

Mr. Chambers's response indicates the high esteem with which Indian law practitioners, scholars, and tribal leaders regarded Judge Murphy and her contributions to Indian country—and that was in 2001. This respect for Judge Murphy has only grown over time. During her thirty-plus years on the federal bench, Judge Murphy heard nearly fifty cases and wrote almost two dozen opinions related to federal Indian law.[10] Her Indian law jurisprudence reflects her remarkable ability to tackle complicated factual and historical patterns, to read closely and identify the relevant facts in their historical context, to apply the law precisely to those facts, and to value and give voice to cultures and ways of life distinct from her own. These attributes, while particularly important to her expertise in federal Indian law, also distinguished her as a fair and thoughtful judge more generally.

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8. *See* Barbara L. Jones, *Attorneys of the Year: Judge Diana Murphy*, MINN. LAW. (Feb. 8, 2018), https://minnlawyer.com/2018/02/08/attorneys-of-the-year-judge-diana-murphy (noting Judge Murphy's commitment to promoting gender diversity in the law). Judge Murphy demonstrated her interest in promoting diversity while I clerked for her. My family is from the Cherokee Nation, but I am not enrolled. Throughout my clerkship, she talked with me about my experiences. In particular, I recall several conversations we had about my upcoming wedding because my fiancé and I were beading our regalia and making giveaway gifts for a traditional Anishinaabe ceremony, consistent with the traditions of his community. At her request, I brought the shawl I beaded to chambers to show her.

9. Ironically, although a mutual interest in federal Indian law drew Judge Murphy to my application, no significant Indian law cases came before her the year I clerked.

10. The author generated this number from data collected from LexisNexis. It includes all cases with reported opinions, but excludes cases that only reviewed the convictions or sentences of individuals convicted of crimes in Indian country (the author found sixty-five of these cases). The author used Lexis Advance to generate all the cases that Judge Murphy heard as a judge on the U.S. District Court for the District of Minnesota and the U.S. Court of Appeals for the Eighth Circuit. The author then searched within these results for any cases involving "Indians" or "tribes." She then went through every case to confirm that it dealt with Indians or tribes.

Part I of this Article highlights Judge Murphy's federal Indian law jurisprudence and its real world impact. To focus solely on Judge Murphy's opinions, however, would overlook the substantial contribution she made to Indian country as the Chair of the U.S. Sentencing Commission. Part II discusses the Judge's instrumental role in transforming the U.S. Sentencing Commission from a body largely unaware of Indian issues into one attempting to take its responsibilities to, and effects on, Indian nations and their citizens seriously.

I. FEDERAL INDIAN LAW JURISPRUDENCE AND ITS IMPACT

Judge Murphy significantly shaped modern federal Indian law through her insightful and well-crafted opinions.[11] Arising out of a unique body of law, Indian law cases often present lawyers and judges with special challenges. The 573 federally recognized American Indian and Alaska Native nations in the United States vary widely in terms of culture, size, region, and history. Indian tribes neither resemble, nor want to resemble other Americans or even necessarily each other. Unlike most groups in the United States, Indian nations often resist the inclusive tendencies of the democratic nation-state and seek recognition of their status as separate sovereigns.[12]

11. Judge Murphy participated in several of the most significant Indian law cases reviewed by the Supreme Court during her tenure as a federal judge. She wrote opinions in at least five cases later heard by the Supreme Court. Yankton Sioux Tribe v. Podhradsky, 577 F.3d 951 (8th Cir. 2009), *reh'g granted, withdrawn by* 606 F.3d 985 (8th Cir. 2010); Plains Commerce Bank v. Long Family Land & Cattle Co., 491 F.3d 878 (8th Cir. 2007), *rev'd*, 554 U.S. 316 (2008); Leech Lake Band of Chippewa Indians v. Cass Cty., 108 F.3d 820 (8th Cir. 1997), *rev'd in part*, 524 U.S. 103 (1998); Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist., 99 F.3d 1439 (8th Cir. 1996), *vacated*, 141 F.3d 798 (8th Cir. 1998); Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784 (D. Minn. 1994). She participated either as one of the judges on the panel or in en banc proceedings in at least two more cases. United States v. Lara, 324 F.3d 635 (8th Cir. 2003), *rev'd*, 541 U.S. 193 (2004); A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1996).

12. *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 27–40, 59–60, 65 (1995) (arguing that forcibly assimilating Indian tribes into American culture and society diminishes the tribes' ability to have the separate and distinct identities which they desire); *see also* GETCHES ET AL., *supra* note 5, at 26–28 (discussing the Indian resistance to forced assimilation into American society).

Federal Indian law further challenges judges because it has developed out of encounters between Europeans and Indian nations already residing in the Americas.[13] These interactions often lead to cultural misunderstandings, many of which persist in relationships among Indian nations, federal and state governments, and local communities. These misunderstandings often end up in the federal courts. They ask judges to comprehend distinctive, tribal worldviews and translate those realities into the terms of a foreign Western legal system.[14] Judges frequently struggle to understand tribal ways and to legally define the relationships among these distinct nations and the federal, state, and local governments with whom they must deal. Like the other two branches of the federal government, judges face a constant tension in federal Indian law between the inclination to treat all Indian nations (and land) alike, and the legal and historical distinctions that make each unique.

The variety and complexity of federal Indian law cases also frequently challenge judges. The disputes arising in federal Indian law cover almost every area of substantive law from contracts to torts to property to healthcare. They often also include legal issues specific to the federal-tribal relationship, such as fiduciary duties, sovereignty, treaties, and intergovernmental relations. Indian law cases often raise complicated and novel legal claims, include multiple parties, and sometimes involve a century or more of relevant history.

This specialized and complicated area of the law never fazed Judge Murphy. Her majority, concurring, and dissenting opinions covered a wide range of topics, including, *inter alia*, land

13. *See* GETCHES ET AL., *supra* note 5, at 43. *See generally* Taiawagi Helton & Lindsay G. Robertson, *The Foundations of Federal Indian Law and Its Application in the Twentieth Century*, *in* BEYOND RED POWER, *supra* note 1, at 33, 33–55 (discussing the evolution of Indian law since the founding of the United States).

14. Stacy L. Leeds, *The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10 KAN. J.L. & PUB. POL'Y 491, 492–96 (2001) (explaining how Cherokee views of property clash with Anglo-American concepts of property). *See generally* Matthew L.M. Fletcher, *Listen*, 3 MICH. J. RACE & L. 523 (1998) (describing the author's experience of being an American Indian in law school).

into trust,[15] taxation,[16] gaming,[17] tribal civil adjudicatory jurisdiction,[18] tribal sovereign immunity,[19] treaty rights,[20] reservation boundaries,[21] and criminal jurisdiction.[22] As a result, her opinions reached almost every area of federal Indian law and had important practical implications in the daily lives of American Indians.[23]

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15. Cty. of Charles Mix v. U.S. Dep't of Interior, 674 F.3d 898 (8th Cir. 2012); South Dakota v. U.S. Dep't of Interior, 69 F.3d 878 (8th Cir. 1995), *vacated*, 106 F.3d 247 (8th Cir. 1996).

16. Fond Du Lac Band of Lake Superior Chippewa v. Frans, 649 F.3d 849 (8th Cir. 2011); Campbell v. Comm'r, 164 F.3d 1140 (8th Cir. 1999); Leech Lake Band of Chippewa Indians v. Cass Cty., 108 F.3d 820 (8th Cir. 1997); United States *ex rel.* Cheyenne River Sioux Tribe v. South Dakota, 105 F.3d 1552 (8th Cir. 1997).

17. Bettor Racing, Inc. v. Nat'l Indian Gaming Comm'n, 812 F.3d 648 (8th Cir. 2016); Duluth v. Fond Du Lac Band of Lake Superior Chippewa, 785 F.3d 1207 (8th Cir. 2015); Duluth v. Fond Du Lac Band of Lake Superior Chippewa, 702 F.3d 1147 (8th Cir. 2013); United States *ex rel.* Bernard v. Casino Magic Corp., 384 F.3d 510 (8th Cir. 2004); United States v. Santee Sioux Tribe of Neb., 324 F.3d 607 (8th Cir. 2003); Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians, 317 F.3d 840 (8th Cir. 2003); United States *ex rel.* Bernard v. Casino Magic Corp., 293 F.3d 419 (8th Cir. 2002); United States v. Santee Sioux Tribe, 254 F.3d 728 (8th Cir. 2001); United States v. Santee Sioux Tribe, 135 F.3d 558 (8th Cir. 1998); United States *ex rel.* Steele v. Turn Key Gaming, Inc., 135 F.3d 1249 (8th Cir. 1998); Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536 (8th Cir. 1996).

18. DISH Network Serv. L.L.C. v. Laducer, 725 F.3d 877 (8th Cir. 2013); Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa, 609 F.3d 927 (8th Cir. 2010); Nord v. Kelly, 520 F.3d 848 (8th Cir. 2008); Plains Commerce Bank v. Long Family Land & Cattle Co., 491 F.3d 878 (8th Cir. 2007); Davis v. Mille Lacs Band of Chippewa Indians, 193 F.3d 990 (8th Cir. 1999); Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998); A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1996).

19. Alltel Commc'ns, L.L.C. v. DeJordy, 675 F.3d 1100 (8th Cir. 2012).

20. United States v. Brown, 777 F.3d 1025 (8th Cir. 2015); Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784 (D. Minn. 1994).

21. Yankton Sioux Tribe v. Podhradsky, 577 F.3d 951 (8th Cir. 2009); Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999); Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist., 99 F.3d 1439 (8th Cir. 1996).

22. United States v. Lara, 324 F.3d 635 (8th Cir. 2003), *rev'd*, 541 U.S. 193 (2004).

23. Judge Murphy authored several powerful concurrences and dissents. *See, e.g.*, Fond Du Lac Band of Lake Superior Chippewa v. Frans, 649 F.3d 849, 853–57 (8th Cir. 2011) (dissent); Nord v. Kelly, 520 F.3d 848, 857–59 (8th Cir. 2008) (concurrence); South Dakota v. U.S. Dep't of Interior, 69 F.3d 878, 885–91 (8th Cir. 1995) (dissent). For example, the Supreme Court vacated the opinion she dissented from in *South Dakota v. U.S. Department of Interior*, which held that the U.S. Secretary of the Interior did not have the authority to take land into trust for Indians under 25 U.S.C. § 465 (2012). U.S. Dep't of Interior v. South Dakota, 519 U.S. 919 (1996). Ultimately, the Court of Appeals for the

Two of Judge Murphy's most influential Indian law decisions are discussed here. They highlight Judge Murphy's contributions to federal Indian law as both a trial court and an appellate judge. These cases provide a window into the tremendous contribution that she made to Indian country. At their core, both cases are about Indian nations fighting to survive as distinct peoples with their own governments in a rapidly changing world. As these cases show, Judge Murphy played a key role in ensuring that survival.

A. TREATY RIGHTS: *MILLE LACS BAND OF CHIPPEWA INDIANS V. MINNESOTA*

Judge Murphy distinguished herself as an exceptional Indian law jurist in *Mille Lacs Band of Chippewa Indians v. Minnesota* by parsing a dense historical record to identify Chippewa voices and translate Chippewa experiences into terms cognizable under Western law. As the trial court judge that originally heard the case, she faithfully applied the canons of treaty construction to uphold the rights of Indians to hunt, fish, and gather off reservation.[24] Her opinion both reiterated the vitality of the canons of construction and demonstrated their intended application to Indian treaties to protect tribal rights. The Supreme Court heard the case on the merits and affirmed her findings in 1999.[25] The case remains one of the most important treaty rights cases decided in modern times.

For generations, the Potawatomi, the Odawa, and the Ojibwe (Chippewa), collectively known as the Anishinaabek or Three Fires Confederacy, have thrived in what is now known as the Great Lakes region of the United States and Canada.[26] They continue to live abundantly off the land, hunting, fishing, and harvesting wild berries, *manoomin* (wild rice), and maple

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Eighth Circuit rejected a similar challenge to the Secretary of the Interior's authority to take land into trust. South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 799–801 (8th Cir. 2005).

24. *See* Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F.Supp. 784, 830–33 (D. Minn. 1994).

25. *See generally* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (holding that the Chippewa Indians retained the usufructuary rights guaranteed to them by the 1837 treaty).

26. *See* EDWARD BENTON-BANAI, THE MISHOMIS BOOK: THE VOICE OF THE OJIBWAY 98–102 (1988) (explaining the origins of the Anishinaabek in the Great Lakes region).

sugar.[27] These natural resources have sustained the Anishinaabek both physically and spiritually for generations.[28]

Starting in the early nineteenth century, the United States sought to obtain Anishinaabek lands in the Great Lakes. In 1837, the United States negotiated a treaty to purchase lands in Wisconsin and Minnesota from several bands of Ojibwe, or Chippewa, Indians.[29] The 1837 Treaty with the Chippewa ceded lands in Wisconsin and Minnesota, but the Chippewa retained hunting, fishing, and gathering rights on the ceded lands.[30] The Chippewa continued hunting, fishing, and gathering on these lands even though the state attempted to regulate these activities.[31] They endured state prosecutions for hunting and fishing because they did not interpret subsequent treaties or actions by the federal government as altering the rights they retained under the 1837 Treaty and were determined to keep exercising their treaty rights.[32]

After attempting to negotiate with the Minnesota Department of Natural Resources (DNR) in the 1980s, the Mille Lacs Band of Chippewa Indians[33] and several of its citizens sued the State of Minnesota, the Minnesota DNR, and various state officials in 1990.[34] They sought a declaratory judgment that they

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27. *See id.* at 101. *See generally* EDWARD BENTON-BANAI, ANISHINAABE ALMANAC: LIVING THROUGH THE SEASONS (2008) [hereinafter ANISHINAABE ALMANAC] (describing seasonal Anishinaabek hunting and gathering practices). Anishinaabek prophecies predicted their migration to the Great Lakes, where they found *manoomin* or "the food that grows on the water." BENTON-BANAI, *supra* note 26, at 94–102 (recounting the Anishinaabek migration).

28. ANISHINAABE ALMANAC, *supra* note 27; Wenona Singel & Matthew Fletcher, *Indian Treaties and the Survival of the Great Lakes*, 2006 MICH. ST. L. REV. 1285, 1285–88 (2006) (advocating for the preservation of the Great Lakes as a resource for the Anishinaabek); Marc Slonim, Mille Lacs Band of Chippewa Indians et al. v. State of Minnesota et al., *in* CLELAND ET AL., *supra* note 2, at 134 (detailing the Indian interest in the region).

29. Treaty with the Chippewa 1837, July 29, 1837, 7 Stat. 537, *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 491–93 (Charles J. Kappler ed., 1904).

30. *Id.* at art. 5.

31. Kari Krogseng, Minnesota v. Mille Lacs Band of Chippewa Indians, 27 ECOLOGY L.Q. 771, 774–75 (2000).

32. Pat Doyle, *An Issue of Fishing Rites; Tribal Members Tell How Their Activities Both Sustain Them, Clash with the State*, STAR TRIB. (Minneapolis), June 24, 1994, at 1A.

33. When Judge Murphy decided *Mille Lacs* in 1994, the Band currently known as the Mille Lacs Band of Ojibwe was known as the Mille Lacs Band of Chippewa.

34. Judge Murphy bifurcated the case into two phases. Phase I would determine whether, and to what extent, the Mille Lacs Band retained its rights under the treaty. Phase II would determine the ability of the State to regulate

retained their hunting, fishing, and gathering rights under the 1837 Treaty and an injunction preventing the state from interfering with those rights. The United States intervened as a plaintiff and nine counties and six landowners intervened as defendants in the suit.[35]

This highly public and controversial case revealed a longstanding, serious conflict between state regulators and the Band. Like related treaty litigation in Wisconsin and Michigan,[36] the conflict generated tremendous hostility towards American Indians.[37] The slogan "Save a Walleye; Spear an Indian," adopted by opponents to tribal fishing rights, became ubiquitous throughout the Great Lakes.[38] The *Mille Lacs* case, like the fishing disputes in Wisconsin and Michigan, pitted state regulators and sports fisherman against the Anishinaabek and threatened to alter the status quo by calling into question the regulation of fishing activities on Mille Lacs Lake, one of the most popular and lucrative walleye fishing lakes in Minnesota.[39] The Mille Lacs Band asserted their governmental authority to regulate hunting, fishing, and gathering by their own peoples. This authority ensures their ability to protect and maintain their way of life, as fresh fish, game, *manoomin* (wild rice), and *ode'imin* (strawberries) have to be gathered for ceremonies. They also wanted to preserve traditional forms of fishing, including gill netting and spear fishing, which the state had outlawed.[40]

To avoid protracted litigation, the Minnesota DNR negotiated a settlement with the Band. Both sides compromised in reaching the agreement, but the Minnesota Legislature refused

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any retained rights. Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784 (D. Minn. 1994).

35. *Id.*

36. Wisconsin bands had previously sued the state of Wisconsin and prevailed on similar claims under the 1837 Treaty in Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir. 1983). *See also* United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979) (holding that the Ottawa and Chippewa Indians of Michigan maintained fishing rights in the waters of the Great Lakes).

37. CLELAND ET AL., *supra* note 2, at 7; *Protests*, GREAT LAKES INDIAN FISH & WILDLIFE COMMISSION, http://www.glifwc.org/TreatyRights/protest.html (last visited Oct. 15, 2018).

38. *Protests*, *supra* note 37. For a fuller discussion of these conflicts, see LARRY NESPER, THE WALLEYE WAR: THE STRUGGLE FOR OJIBWE SPEARFISHING AND TREATY RIGHTS (2002).

39. Pat Doyle, *Tribal Fishing on Mille Lacs: Who's in Control*, STAR TRIB. (Minneapolis), June 13, 1994, at 1B.

40. *See* CLELAND ET AL., *supra* note 2, at 134.

to approve it.[41] Some legislators feared that traditional Chippewa forms of gill netting and spear fishing would harm the environment and deter tourism.[42] Negotiations ended, and the litigation resumed.[43]

Judge Murphy's rulings during the three-week trial on the merits in the *Mille Lacs* case demonstrate her trial management skills, commitment to a fair judicial process, and exceptional ability to acknowledge the unique lived experiences of Indian peoples.[44] First, Judge Murphy ensured that members of the Mille Lacs Band—and not just its lawyers and experts—had an opportunity to be heard. Despite objections raised by the defendants, three members of the Mille Lacs Band testified.[45] They shared their personal knowledge about the significance of fishing, hunting, and gathering to the physical, spiritual, and cultural survival of the Anishinaabek and explained how state regulation threatened the continuation of their way of life.[46] In allowing this testimony and treating Mille Lacs Band members as experts, Judge Murphy recognized the importance of these rights to the lived experiences and cultural vibrancy of contemporary Chippewa. The rights retained in the 1837 Treaty were not relics of a romanticized past, but an integral part of modern Chippewa life. Second, she limited the trial to the relevant issues when she rejected the defendants' request for records on casino gaming by the Band.[47] She refused to let popular misconceptions about Indian gaming cloud the issue of whether the Chippewa retained rights under the 1837 Treaty.[48] In contrast to popular

41. *Id.* at 135.

42. *Minnesota Issues Resource Guides: American Indian Fishing and Hunting Rights*, MINN. LEGIS. REFERENCE LIBR., https://www.leg.state.mn.us/lrl/guides/guides?issue=indian (last visited Oct. 15, 2018); *see also* Catherine M. Ovsak, *Reaffirming the Guarantee: Indian Treaty Rights to Hunt and Fish Off-Reservation in Minnesota*, 20 WM. MITCHELL L. REV. 1177, 1178, 1201–04 (1994).

43. Ovsak, *supra* note 42, at 1202–03.

44. Prior to the trial, Judge Murphy decided several pretrial motions. Mille Lacs Band of Chippewa Indians v. Minnesota, 853 F. Supp. 1118, 1123, 1147 (D. Minn. 1994).

45. Doyle, *supra* note 32.

46. *Id.*

47. Pat Doyle, *Judge in Treaty Case Rejects Request for Indian Casino Data*, STAR TRIB. (Minneapolis), June 28, 1994, at 1A.

48. *Id.* Other federal judges have not shown similar acumen about what facts are relevant in Indian law cases. For example, the majority opinion in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2556 (2013), starts by noting the child's low percentage of Indian blood, a fact entirely irrelevant to whether the Indian Child Welfare Act applied to her adoption proceeding. *See id.* at 2560.

rhetoric suggesting that the Chippewa no longer needed their treaty rights because they had a casino,[49] her rulings in the case recognized that hunting, fishing, and gathering are more than economic activities to the Chippewa.

After trial, Judge Murphy faced the unenviable task of reviewing a historical record spanning over 150 years to determine whether the federal government had abrogated the Chippewa's hunting, fishing, and gathering rights. The canons of treaty construction make such inquiries no easy feat. The canons instruct judges to: (1) liberally interpret treaties in favor of the Indians or tribes in question; (2) construe Indian treaties as the Indians would have understood them; (3) resolve doubtful or ambiguous treaty terms in favor of the Indians; and (4) interpret treaty provisions that are not clear on their face by using surrounding circumstances or history.[50] Judges have to interpret a treaty from the parties' point of view, and yet Indian treaties were often drafted with a historical record only documenting the non-Indian point of view.[51]

On August 24, 1994, Judge Murphy handed down the historic ruling that the Chippewa retained the rights of hunting, fishing, and gathering in the territory ceded to the United States by the treaty of 1837.[52] She made several important and detailed

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Under the Indian Child Welfare Act, 25 U.S.C. §§ 1901–63 (2012), a child's eligibility for tribal enrollment determines the applicability of the Act, and it is well established federal law that tribes determine their own enrollment criteria. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978). Some tribes require a certain blood quantum while others do not. *See* KIRSTY GOVER, TRIBAL CONSTITUTIONALISM: STATES, TRIBES AND THE GOVERNANCE OF MEMBERSHIP 123–30 (2010).

49. Ovsak, *supra* note 42, at 1178 n.1.

50. FLETCHER, *supra* note 6, at 219–20.

51. CLELAND ET AL., *supra* note 2, at 5; David E. Wilkins, *Fish in the Lakes, Wild Rice, and Game in Abundance: Testimony on Behalf of Mille Lacs Ojibwe Hunting and Fishing Rights*, 24 AM. INDIAN Q. 645, 647 (2000) (book review). As Cleland points out, the reluctance of the U.S. Courts to accept oral testimony exacerbates this problem for American Indians. CLELAND ET AL., *supra* note 2, at 7. For a fuller discussion of the difficulties of Indian treaty interpretation, see Angela R. Hoeft, *Coming Full Circle: American Indian Treaty Litigation from an International Human Rights Perspective*, 14 LAW & INEQ. 203, 248–50 (1995).

52. Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 841 (D. Minn. 1994).

findings drawn from a lengthy record and live testimony to support this holding.[53] Her opinion demonstrates her astute awareness of the politics surrounding a case[54]—particularly a hotly contested one—and her commitment to respecting the parties by fairly applying legal precedents and evaluating the evidence.[55]

Few opinions illustrate how the facts matter as clearly and concisely as Judge Murphy's opinion in *Mille Lacs*. As a law professor, I repeatedly tell my students that the facts matter. I am not sure most of them believe it, and I wish I could make them all read *Mille Lacs* (but I have yet to figure out how to assign it in a first year civil procedure course). The opinion is remarkable because it identifies and properly considers relevant facts that are not in the record as well as ones that are in the record. Acknowledging that American treaty negotiators often left Indians out of the official narrative, Judge Murphy perceives what is missing from the record. She uses the broader historical record to contextualize the facts and accord them their proper weight as evidence. For example, her opinion emphasizes the fact that the Chippewa would not have given up the hunting, fishing, and gathering rights that they fought so hard to retain in 1837 without even discussing the matter in the 1855 treaty negotiations.[56]

Her perceptiveness here demonstrates another unique and important aspect of her opinion. Unlike most federal judges, Judge Murphy successfully gives voice to a people purposefully left out of the historical narrative. Her opinion reveals her exceptional ability to see and value cultures and ways of life distinct from her own and to use the law to respect a world foreign to it.

Another impressive aspect of Judge Murphy's opinion is that it never loses sight of the fact that it is interpreting historically contingent facts. The state argued that the Band's rights had been terminated by an 1850 Executive Order and an 1855 Treaty.[57] In evaluating the evidence, Judge Murphy placed these documents in their appropriate historical contexts. This is evident in her findings that neither the 1850 order nor the 1855

53. *Id.* at 840.

54. *Id.* at 789 (noting the "widespread interest" in the case and "fears about the possible impact of any court decision").

55. *Id.* ("The court is respectful of all those before it and of the varying interests in the outcome, but it must be guided in its task of decision by the legal precedents and a fair evaluation of the evidence developed in the record and at trial.").

56. *Id.* at 832.

57. *Id.* at 789–90.

treaty abrogated Chippewa fishing, hunting, and gathering rights under the 1837 treaty. Judge Murphy situated the 1850 order in the broader historical context of removal, which dominated federal Indian policy at the time.[58] This context facilitates an understanding of the order more consistent with what was happening at the time it was issued and prevents misinterpretation of the order by mistakenly viewing it through an ahistorical lens.

Perhaps, most important for American Indian peoples, who are often relegated to the distant past rather than understood as active agents strengthening their culture for future generations, Judge Murphy's opinion presents the Chippewa as vibrant, living people rather than being frozen in time. In her findings on the scope of the retained rights, she explained that the rights retained in the 1837 treaty were not just an incident of Indian title but were a treaty held right of use,[59] included harvesting resources for commercial purposes, and were "not limited to use of any particular techniques, methods, devices, or gear."[60] These findings both enable the Chippewa to continue traditional practices, such as spearfishing, and yet to adapt and change over time.

Judge Murphy's carefully constructed and sound opinion made affirmance by the Supreme Court possible,[61] perhaps even easy, at a time when the Court found against Indian interests in

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58. *Id.* at 824 ("Since the Chippewa living in the 1837 ceded territory had not consented to removal as required by Congress, President Taylor acted outside of his authority when he issued the 1850 executive order requiring their removal from that area.").

59. *Id.* at 832.

60. *Id.* at 838.

61. In her opinion on the merits, Judge Murphy denied the defendants' request for an interlocutory appeal. *Id.* at 839–40. The defendants immediately appealed, and the Eighth Circuit dismissed the appeal as premature. Mille Lacs Band of Chippewa Indians v. Minnesota, 48 F.3d 373, 375 (8th Cir. 1995). The Honorable Michael J. Davis presided over Phase II of the case as Judge Murphy had been appointed to the U.S. Court of Appeals for the Eighth Circuit. *See* Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 911 n.9 (8th Cir. 1997). Several Wisconsin Bands intervened in the case, and the defendants were allowed to assert new defenses. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 186 (1999). At the end of Phase II of the case, the defendants appealed rulings made in both Phase I and II of the case. *See Mille Lacs*, 124 F.3d at 907 (summarizing the procedural history of the case). The Eighth Circuit affirmed the district court's holding that the Chippewa retained their hunting, fishing, and harvesting rights under the 1837 Treaty. *See id.* at 934. Judge Murphy recused herself from the appeals of the case heard by the Eighth Circuit. *Id.* at 907.

over seventy-five percent of the Indian law cases it heard[62] and frequently ignored the canons of treaty construction.[63] The majority opinion clearly took note of her meticulous review of the historical record, careful weighing of the expert evidence, and application of the canons of treaty construction.[64] Reiterating the importance of the established canons of treaty interpretation, it adopted her findings that the 1850 order did not abrogate Chippewa hunting, fishing, and gathering rights because it was invalid and intended to secure removal,[65] that the 1855 treaty neither referenced the rights reserved in the 1837 treaty nor sought to abrogate them,[66] and that the lack of reference to the rights in the treaty negotiations strongly suggested that the parties did not intend to abrogate these rights.[67] The Court, thus, secured the rights of the Chippewa to hunt, fish, and gather on ceded lands in Wisconsin and Minnesota.[68] More broadly, the Court reaffirmed that the federal government cannot terminate Indian treaty rights by implication, and that "states lack inherent

62. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280 (2001) (finding that tribes lost eighty-two percent of the cases decided by the Supreme Court from 1991–2000); *see also* Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 943 (2009) (showing that the success rate of tribal litigants in the Supreme Court did not improve after 2001).

63. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[3], at 125–26 (Nell Jessup Newton ed., 2005) (discussing how canons of treaty construction have been utilized in Supreme Court cases involving Indian tribes).

64. The Band also relied heavily on Judge Murphy's development of the factual record in their arguments before the Supreme Court. *See* Slonim, *supra* note 28, at 138.

65. *See Mille Lacs*, 526 U.S. at 188–95.

66. *Id.* at 195 ("This sentence, however, does not mention the 1837 Treaty, and it does not mention hunting, fishing, and gathering rights. The entire 1855 Treaty, in fact, is devoid of any language expressly mentioning—much less abrogating—usufructuary rights. Similarly, the Treaty contains no language providing money for the abrogation of previously held rights. These omissions are telling because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights.").

67. *Id.* at 198 ("[T]he Treaty Journal, recording the course of the negotiations themselves, is silent with respect to usufructuary rights. The journal records no discussion of the 1837 Treaty, of hunting, fishing, and gathering rights, or of the abrogation of those rights . . . . This silence suggests that the Chippewa did not understand the proposed Treaty to abrogate their usufructuary rights as guaranteed by other treaties.").

68. Slonim, *supra* note 28, at 138 (noting that the decision conclusively determined these rights and secured earlier decisions upholding them).

power over Indian lands, rights, or resources absent express congressional consent. . . ."[69]

In addition to its tremendous legal significance, *Mille Lacs* has had profound practical implications for the lives of the Anishinaabek. It remains vitally important to the Mille Lacs Band and its members. Chief Executive Melanie Benjamin of the Mille Lacs Band of Ojibwe explains:

> At a moment in history when the rights of tribes were especially politically unpopular, the Band sought justice from the federal courts. Judge Murphy took on a complex, unpopular case and came to a difficult and unpopular decision. We knew our case was strong and hoped she would do the right thing—which she did. She faithfully followed the law. Even so, her decision took great courage and a deep strength of character. When I look at her career, and her impact on our people, today she stands like a giant.[70]

The decision had a tremendous impact on the ground. By recognizing the authority of the Mille Lacs Band, it substantially altered the regulation and management of fishing, hunting, and gathering on the 1837 ceded lands in Minnesota.[71] In response, individual Chippewa Bands, including the Mille Lacs Band, have developed the capacity and institutions to regulate their resources.[72] They have enacted conservation codes to regulate tribal hunting, fishing, and gathering in the twelve counties that constitute the 1837 ceded lands and along with the Minnesota DNR and Great Lakes Indian Fish and Wildlife Commission, they co-manage the walleye harvest.[73] The Bands have also appointed conservation enforcement officers and used tribal court

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69. Wilkins, *supra* note 51, at 646.

70. Personal correspondence with Exec. Office of the Mille Lacs Band (May 29, 2018) (on file with author). Judge Murphy's decision remains controversial today. *See* Joe Fellegy, *"Indian Understanding" Judge Murphy Was Wrong!*, PROPER ECON. RESOURCE MGMT. (PERM), https://www.perm.org/articles/a034.html (last visited Oct. 15, 2018).

71. The Mille Lacs Band's ability to regulate the fishery and engage in traditional practices remains controversial today. *See* PROPER ECON. RESOURCE MGMT. (PERM), https://www.perm.org (last visited Oct. 15, 2018).

72. *See Minnesota Issues*, *supra* note 42 (explaining how after the *Mille Lacs* decision the harvesting of walleye was to be regulated by agreement between the Minnesota Department of Natural Resources and the bands of Chippewa, which then became a five year management plan based on levels established in the 1837 Ceded Territories Fisheries Committee).

73. *Id.*; *DNR Names 17 to Mille Lacs Fisheries Advisory Committee*, MINN. DEP'T NAT. RESOURCES (Oct. 6, 2015), http://news.dnr.state.mn.us/2015/10/06/dnr-names-17-to-mille-lacs-fisheries-advisory-committee (noting the creation of the Mille Lacs Fisheries Advisory Committee in 2015 by the Minnesota Department of Natural Resources to advise the state agency on regulating fishing on Mille Lacs Lake). The Great Lakes Fish and Wildlife Commission monitors the

systems to enforce their conservation codes.[74] As a result, the decision has greatly increased the ability of the Mille Lacs Band to retain traditional practices. The Band has returned to gill netting, spearfishing, and *manoomin* harvesting on Mille Lacs Lake.[75] Its members have increasingly engaged in these traditional practices over time, ensuring that they will continue into the future.[76]

The impact of Judge Murphy's decision, however, has radiated beyond the Mille Lacs Band and other signatories of the 1837 Treaty. It has encouraged members of other Minnesota Chippewa Bands to pursue the recognition of similar rights to fish, hunt, and gather on ceded lands in northern Minnesota.[77] More importantly, the decision has contributed to broader revitalization efforts of traditional practices in the Great Lakes.[78] For example, in Michigan, several Anishinaabek bands are working to cultivate and rejuvenate wild rice beds within their traditional territories.[79] The cultural renewal that Judge Murphy's opinion in *Mille Lacs* contributed to has had a profound impact on my own life. The year after I clerked for her, I married a member of the Grand Traverse Band of Ottawa and Chippewa Indians. We have committed to raising our two children as Anishinaabek and participate in many traditional activities, including harvesting and processing *manoomin*. Without the Judge's decision in *Mille Lacs*, this may not have been possible.

B. TRIBAL ECONOMIC DEVELOPMENT: *GAMING CORP. OF AMERICA V. DORSEY & WHITNEY*

Gaming Corp. of America v. Dorsey & Whitney never captured the public's attention quite like *Mille Lacs* did. Unlike *Mille Lacs*, which developed out of centuries-old, serious, and direct conflicts among the Chippewa, state regulators, and sports

Band and also participates in conservation planning with the Minnesota DNR. Matthew Steffes, *Implications for the Mille Lacs Lake Fishery with Continued Enforcement of the 1837 Treaty of St. Peters*, 35 HAMLINE J. PUB. L. & POL'Y 367, 382 (2014).

74. CLELAND ET AL., *supra* note 2, at 338–39.

75. Dennis Anderson, *Mille Lacs Band Says It'll Exercise Spearing Rights*, STAR TRIB. (Minneapolis), Dec. 16, 1994, at 12A.

76. Steffes, *supra* note 73, at 386 ("Since 1997 tribal gillnets have increased from fewer than 500 in 1997 to more than 3,250 in 2011.").

77. *Minnesota Issues*, *supra* note 42.

78. Slonim, *supra* note 28, at 132.

79. *See, e.g.*, BARBARA J. BARTON, MANOOMIN: THE STORY OF WILD RICE IN MICHIGAN 129 (2018) (discussing how ricing is a part of ongoing cultural restoration).

fisherman, the dispute in *Gaming Corp.* arose from an important, modern form of tribal economic development—Indian gaming.[80]

Very few contemporary forces have transformed Indian country as much as Indian gaming.[81] In 1987 in *California v. Cabazon Band of Mission Indians,* the Supreme Court held that, in states that do not prohibit gaming, Indian nations could operate gaming establishments free of state regulation.[82] Congress enacted the Indian Gaming Regulatory Act (IGRA) a year later.[83] IGRA sought to clarify the standards and structure for the conduct of gaming on Indian lands.[84] To do so, it chose to balance the interests of three sovereigns—federal, state, and tribal governments.[85] It also clearly stated that its purpose was "to benefit

80. Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 539 (8th Cir. 1996).

81. *See generally* STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE (2005) (discussing the law, politics, and impact of Indian gaming); W. DALE MASON, INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS (2000) (analyzing policy and political conflicts involving Indian gaming in the United States); THE NEW POLITICS OF INDIAN GAMING: THE RISE OF RESERVATION INTEREST GROUPS (Kenneth N. Hansen & Tracy A. Skopek eds., 2011) (discussing the politics of Indian gaming across the United States); Randall K. Q. Akee et al., *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSP. 185 (2015) (providing a quantitative analysis of Indian gaming and discussing IGRA's effect on gaming); Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381 (1997) (discussing the growth of Indian gaming and how IGRA impacted its growth).

82. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 210–12 (1987).

83. 25 U.S.C. § 2701 (2012). Interestingly, Indian nations did not uniformly support the enactment of the Indian Gaming Regulatory Act. For a detailed history of the IGRA's enactment, see Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?*, 42 ARIZ. ST. L.J. 17, 17–19 (2010).

84. FLETCHER, *supra* note 6, at 443.

85. IGRA did this by creating a comprehensive scheme for regulating Indian gaming. It defined three classes of gaming activity subject to different jurisdictions and levels of regulation. Tribes have exclusive authority to regulate Class I gaming, which includes tribal traditional games. 25 U.S.C. §§ 2703(7)(A), 2710(a) (2012). The Act codified tribal regulation of Class II games or high stakes bingo as upheld by the Court in *Cabazon*, but required the approval of Class II gaming ordinances and issuance of tribal gaming licenses by an independent federal regulatory agency, the National Indian Gaming Commission. *Id.* §§ 2703(7)(A)–(B) (defining Class II gaming); *id.* § 2710(b)(2) (explaining the role of the National Indian Gaming Commission). All other non-traditional games, including casino-style gaming, were categorized as Class III gaming. *Id.* § 2703(8). Tribes could only conduct Class III gaming if the state

Indian tribes, not the states, and to expand tribal opportunities for self-determination, self-government, economic development, and political stability."[86]

With the uncertainty of the legality of gaming resolved, many Indian nations sought to open gaming operations after Congress enacted IGRA.[87] These efforts frequently generated conflicts between tribes and the management companies hired to help them finance, build, and manage casinos.[88] These disputes raised important questions about the impact of IGRA on state law.

Judge Murphy played a key role in the interpretation of IGRA by issuing the first federal appellate decision holding that IGRA completely preempts state laws that interfere with tribal regulation of gaming on Indian lands.[89] Her opinion for the U.S. Court of Appeals for the Eighth Circuit in *Gaming Corp.* was unanimous and never reviewed by the Supreme Court. It remains widely recognized as the leading case on IGRA's complete preemption of state law regulating Indian gaming.[90] Her decision maintained the delicate balance among state, federal, and tribal authority Congress reached in IGRA, reaffirmed the central tenant of federal Indian law prohibiting state authority without tribal consent, and protected tribal sovereignty from potential encroachments from state courts and private corporations.

Gaming Corp. emerged out of a dispute between the Ho-Chunk Nation and two management companies over the operation of a casino in Baraboo, Wisconsin.[91] After negotiating a gaming compact with the state of Wisconsin in 1992, the Ho-Chunk Nation, a federally recognized tribe then known as the Wisconsin

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did not prohibit all forms of these games and they entered into a compact with the state that decided basic issues about the tribal gaming operations. *Id.* § 2710(d).

86. FLETCHER, *supra* note 6, at 443.

87. *See* William V. Ackerman & Rick L. Bunch, *A Comparative Analysis of Indian Gaming in the United States*, 36 AM. INDIAN Q. 50, 51 (2012).

88. *See, e.g.*, CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM CASES AND MATERIALS 874–78 (6th ed. 2010).

89. Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 544 (8th Cir. 1996).

90. *See, e.g.*, Kurtis A. Kemper, Annotation, *Preemption of State Law by Indian Gaming Regulatory Act*, 27 A.L.R. Fed. 2d 93, 105–06, 107 (2008).

91. *Gaming Corp.*, 88 F.3d at 540.

Winnebago,[92] entered into a management agreement with Golden Nickel Casinos, Inc. (Golden Nickel), a Minnesota corporation involved in casino management.[93] Golden Nickel agreed to finance the construction of the Ho-Chunk Casino Baraboo and to maintain a valid license from the Winnebago Gaming Commission at all times.[94] In May 1993, the Winnebago Gaming Commission granted Golden Nickel a provisional license that would expire at the end of that year.[95] Golden Nickel had plans to merge with Gaming Corporation of America (Gaming Corp.), a casino management company partially owned by the same individuals, and the management agreement required Gaming Corp. to acquire a license if they merged.[96] Golden Nickel applied for a permanent gaming license in December 1993, and Gaming Corp. applied for one several months later. The Ho-Chunk Casino in Baraboo opened in 1993.[97]

The Ho-Chunk Nation hired Dorsey & Whitney, a Minneapolis-based law firm, to represent it during the process of developing the casino.[98] Dorsey had represented Gaming Corp. until April 1993 and advised both Golden Nickel and the Nation that the tribe's interests could be adverse to Golden Nickel's.[99] Golden Nickel consented to Dorsey's representation of the tribe.[100] Dorsey assisted the tribal gaming commission in evaluating the licensing applications and presented evidence at several commission hearings on them.[101] The tribal gaming commission denied the applications of both Golden Nickel and Gaming Corp., finding that the owners of the management companies had violated the terms of the provisional license.[102] The Nation subsequently terminated its management contract with Golden Nickel.[103]

The Ho-Chunk Nation settled with Golden Nickel and Gaming Corp. after the management companies appealed the gaming

92. The Wisconsin Winnebago changed their name to the Ho-Chunk Nation in 1994. *Id.* at 539.
93. *Id.* at 540.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 539.
99. *Id.*
100. *Id.*
101. *Id.* at 540.
102. *Id.*
103. *Id.*

commission's decision in tribal court.[104] The management companies sued Dorsey in Minnesota state court in September 1994, alleging common law violations related to the licensing process, breach of fiduciary duty, and violation of the Indian Civil Rights Act.[105] Dorsey removed the case to federal court, arguing that the claims raised federal questions under IGRA.[106] After finding that IGRA did not completely preempt state law, the district court dismissed some of the claims and remanded the rest to state court.[107]

On appeal, the management companies argued that the federal court lacked subject matter jurisdiction over their facially state law claims.[108] Dorsey countered that the district court abused its discretion in remanding the remaining claims to the state court because IGRA completely preempted state law and all of the remaining claims therefore arose under federal law.[109]

Judge Murphy reversed the district court in a unanimous opinion, holding that IGRA completely preempted state law regulation of Indian gaming unless a tribal-state compact provided otherwise.[110] In reaching this conclusion, Judge Murphy's opinion combined a close examination of the text and history of IGRA, its legislative history, and its jurisprudential framework with a broader understanding of the principles of federal Indian law and the congressional policy of tribal self-determination.

Judge Murphy's interpretation of IGRA and its legislative history reveals her deep understanding of the delicate regulatory balance Congress reached in IGRA. States have long been described as the tribes' deadliest enemies,[111] and Indian gaming has often inflamed the historic conflict between the two.[112] States and tribes fought over regulating gaming, and while the states lost in *Cabazon*, they regained in IGRA some of what they

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104. *Id.*
105. *Id.* at 540.
106. *Id.*
107. *Id.* at 541.
108. *Id.*
109. *Id.*
110. *Id.* at 544.
111. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 384 (1886) ("[Indian nations] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.").
112. *See, e.g.*, JEFF CORNTASSEL & RICHARD C. WITMER, FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD 4 (2008); MASON, *supra* note 81, at 45.

had lost in court.[113] Judge Murphy's opinion explains that allowing state courts to decide disputes related to tribal regulatory decisions could upset Congress's balance among state, federal, and tribal authority in IGRA by according more power to the states than the statute intended. IGRA limited state power over gaming unless a tribe specifically agreed to such authority in a tribal-state compact.[114] Rather than acknowledge state court authority, "[e]very reference to court action in IGRA specified federal court jurisdiction."[115] Further, IGRA restricted federal courts by balancing state, federal, and tribal regulatory interests instead of leaving such assessments to the federal courts.[116] In finding that IGRA preempts state regulation, her opinion adheres to IGRA's purposes, ensures that claims arising under IGRA that may affect a tribe's regulation of gaming activities are treated as federal questions, and conforms with the established federal Indian law principle requiring tribal consent before a state extends its jurisdiction over tribes.

More significantly, Judge Murphy's opinion acknowledges and gives voice to Indian interests by exposing how a dispute between two non-Indian entities can have profound effects on an Indian tribe and its ability to govern its own affairs.[117] Despite its emphasis on a modern form of tribal economic development, *Gaming Corp.* represents a distinctive and all too frequent historical trend in Indian law cases. Federal judges overseeing Western-style courts have frequently had to make decisions about Indians without any Indians actually present in the case. This factual scenario may seem strange, but federal courts have made decisions about Indians without their direct involvement in the litigation since Justice Marshall handed down *Johnson v. M'Intosh* in 1823.[118] Often federal judges fail to comprehend how these cases affect the non-party Indians, and the Indians have no voice. Judge Murphy does not make this mistake. Her opinion

113. For a detailed history of the IGRA's enactment, see Clinton, *supra* note 83, at 17.

114. *Gaming Corp.*, 88 F.3d at 545 ("The legislative history indicates that Congress did not intend to transfer any jurisdictional or regulatory power to the states by means of IGRA unless a tribe consented to such a transfer in a tribal-state compact.").

115. *Id.*

116. *Id.* at 544, 546–47.

117. Not all federal judges have demonstrated such an awareness. For example, the Supreme Court in *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997), overlooked how restricting the ability of the tribe to adjudicate accidents between non-members within its reservation may harm the tribe.

118. Johnson v. M'Intosh, 21 U.S. 543 (1823).

accurately perceives the management companies as attempting to use state law to challenge a decision validly made by a tribal government's internal processes—something IGRA intended to prohibit by creating a comprehensive structure for regulating Indian gaming that greatly limited state regulation.[119] Thus, while her opinion did not determine which state claims were preempted by IGRA, it did suggest a standard that considered the interests of both the tribes and states but preserved tribal authority over gaming. She proposed that "[t]hose causes of action which would interfere with the nation's ability to govern gaming should fall within the scope of IGRA's preemption of state law."[120] Her proposal protects the tribe's interests (despite its absence from the case) and furthers IGRA's goals of fostering tribal sovereignty and economic development by ensuring tribes' authority and ability to regulate gaming activities on their land.

Gaming Corp. illustrates one of Judge Murphy's greatest strengths—her ability (and desire) to build consensus through meticulous and thoughtful deliberation and writing. Her careful construction of the holding, built on detailed consideration of both Indian law and non-Indian law cases, created a solid foundation for the rare conclusion of complete preemption. She did not overreach. Always respectful of the role of the district courts, the opinion left the application of the principles underlying the holding to the district court on remand, after further development by the parties. The end result was an opinion that earned the unanimous support of her colleagues on the panel, which may have come as a surprise to some. Certainly not limited to her Indian law cases, Judge Murphy's commitment to collegiality and her skill in framing issues to build consensus should be touchstones for lawyers and judges in a world increasingly divided by ideology.

Gaming Corp. is widely recognized as the leading case on IGRA's complete preemption of state law regulating Indian gaming.[121] The Supreme Court never reviewed the case, and many courts have treated it as a foundational opinion in their analyses

119. *Gaming Corp.*, 88 F.3d at 549 ("Nothing in the structure created by IGRA or in the tribal-state compact here suggests that the management companies should have the right to use state law to challenge the outcome of an internal governmental decision by the nation.").

120. *Id.* at 550.

121. *See, e.g.*, Kemper, *supra* note 90, at 108.

of whether IGRA preempts state law.[122] As of this writing, the opinion has been cited 231 times by federal courts, 27 times by state courts, 171 times in court documents, and 26 times in law reviews.[123]

At its simplest and most straightforward, *Gaming Corp.*'s real world impact has been to ensure that disputes arising out of tribal regulatory actions are heard by federal (or tribal) not state courts.[124] Consistent with the principles of federal Indian law, it has protected tribal sovereignty by preventing management companies and state courts from undermining internal tribal court decisions.[125]

More broadly, *Gaming Corp.* both relied on and affirmed tribal sovereignty and the ability of tribes to develop economically by reinforcing the purposes of IGRA and reiterating the potential benefits of gaming for tribal economic development and survival. Gaming has not been a panacea for all tribes,[126] but it has turned out to be a game changer for some, including the Ho-Chunk Nation.[127] Like most gaming tribes, the Ho-Chunk Nation has used gaming revenue to ensure its survival and strengthen its tribal community.[128] Tribal unemployment has decreased while the number of college graduates and homeowners has increased.[129] Gaming revenues have enabled the Nation to build infrastructure, such as courts, administrative offices, and law enforcement services, create educational, health, and

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122. *See, e.g.*, Alabama v. PCI Gaming Auth., 15 F. Supp. 3d 1161, 1172 (M.D. Ala. 2014); Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah), 36 F. Supp. 3d 229, 237 (D. Mass. 2014); *see also* Kemper, *supra* note 90.

123. Lexis search on September 27, 2018.

124. *See, e.g.*, Kemper, *supra* note 90, at 107–09 (discussing how *Gaming Corp.* held that the IGRA completely preempts state law and how the court in *Gaming Corp.* analyzed that every mention of court in the IGRA was to federal rather than state court jurisdiction).

125. *See generally* Fisher v. Dist. Court, 424 U.S. 382 (1976) (discussing how exercising state court jurisdiction over a tribal adoption matter would be an interference with the tribe's autonomy); Williams v. Lee, 358 U.S. 217 (1959) (concluding that the state of Arizona did not have authority or jurisdiction on-reservation affairs).

126. Helen Oliff, *Indian Gaming: Not a Gold Rush*, WHISPER N THUNDER (2013), http://www.nativepartnership.org/site/DocServer/Indian_Gaming_Not_a_Gold_Rush_-_WnT__07.01.13.pdf?docID=4601. The benefits of gaming are also unevenly distributed in Indian country. *Id.*

127. Bill Lueders, *Gambling Has Given Ho-Chunk New Hope*, WISCONSIN-WATCH.ORG (Mar. 3, 2014), https://www.wisconsinwatch.org/2014/03/gambling-has-given-ho-chunk-new-hope.

128. *Id.*

129. *Id.*

other programs for its 7,400 members, and preserve its language and culture.[130]

II. U.S. SENTENCING COMMISSION

Judge Murphy profoundly affected the daily lives of American Indians through her jurisprudence but her legacy does not end there. Judge Murphy played an integral role in increasing awareness of the issues faced by Native Americans and tribes under the federal sentencing guidelines as chair of the U.S. Sentencing Commission from 1999 to 2004. The federal government has a special trust relationship with Indian tribes and exercises jurisdiction over felonies committed in Indian country.[131] As a result, Native Americans who commit serious crimes disproportionately face federal prosecution.[132] Yet the U.S. Sentencing Commission, which establishes sentencing policies and practices for federal courts, had not seriously considered the unique problems that the federal sentencing guidelines pose to Native Americans and tribes prior to Judge Murphy's tenure.[133]

Judge Murphy added Native American issues to the agenda of the U.S. Sentencing Commission and encouraged it to take its responsibilities to Indian tribes more seriously. In 1999, concerned members of the Native American community raised issues about the discriminatory impacts of the federal sentencing guidelines on Indians to the South Dakota Advisory Committee to the U.S. Civil Rights Commission.[134] The U.S. Sentencing Commission then held its own public hearing in South Dakota in 2001 to investigate these concerns.[135]

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130. *Id.*

131. *See, e.g.*, Major Crimes Act, 18 U.S.C. § 1153 (2012).

132. U.S. SENTENCING COMM'N, QUICK FACTS: NATIVE AMERICANS IN THE FEDERAL OFFENDER POPULATION 1 (2013), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Native_American_Offenders.pdf.

133. Created by the Sentencing Reform Act of 1984, the U.S. Sentencing Commission is an independent federal agency within the judicial branch. In addition to establishing sentencing policies and practices, it advises policymakers in the development of crime policy, and collects, analyzes, and distributes research on crime and sentencing issues to policymakers, practitioners, academics, and the public. *About*, U.S. SENT'G COMMISSION, https://www.ussc.gov/about (last visited Oct. 15, 2018).

134. AD HOC ADVISORY GRP. ON NATIVE AM. SENTENCING ISSUES, U.S. SENTENCING COMM'N, REPORT OF THE NATIVE AMERICAN ADVISORY GROUP 3, 10 (2003), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20031104_Native_American_Advisory_Group_Report.pdf.

135. *Id.* at 3.

Under Judge Murphy's leadership, the Sentencing Commission responded to the concerns expressed at these hearings and in a 2000 report of the South Dakota Advisory Committee by forming an Ad Hoc Advisory Group on Native American Sentencing Issues in 2002.[136] The Sentencing Commission had never before constituted an Advisory Group to study sentencing issues particular to tribes and tribal citizens.[137] The Advisory Group's charge was "to consider any viable methods to improve the operation of the federal sentencing guidelines in their application to Native Americans prosecuted under the Major Crimes Act."[138] It met several times over the next year. Its comparison of the sentences received by Native American defendants charged under the Major Crimes Act and sentenced under the federal sentencing guidelines with defendants sentenced in state courts for similar crimes revealed that the impact of the federal sentencing guidelines varied by offense and jurisdiction.[139] It made recommendations to the Commission specific to each of the three offense categories it studied.[140] More generally, it strongly encouraged the Sentencing Commission to formalize mechanisms to consult regularly with tribes both individually and nationally.[141]

Judge Murphy's creation of the Ad Hoc Advisory Group generated interest in and research on the impact of the guidelines on American Indians and federal courts even though none of its recommendations were enacted.[142] Scholars have produced several empirical studies on the sentencing of Native Americans in federal courts and tried to determine whether a disparity exists between the treatment of Native American defendants sentenced in federal court and non-Indians sentenced in state courts

136. *Id.* at 3, 10.

137. *Id.*

138. *Sentencing Commission Convenes Native American Ad Hoc Advisory Group*, U.S. SENT'G COMMISSION (May 1, 2002), https://www.ussc.gov/about/news/press-releases/may-1-2002.

139. AD HOC ADVISORY GRP., *supra* note 134, at i–iv.

140. *Id.* at ii.

141. *Id.* at iv, 38.

142. The recommendations made by the Ad Hoc Advisory Group were included among the Commission's policy priorities for the 2003–04 amendment cycle, *2003 Year-End Report*, SUP. CT. U.S. (Jan. 1, 2004), https://www.supremecourt.gov/publicinfo/year-end/2003year-endreport.aspx, but did not move forward. B.J. Jones & Christopher J. Ironroad, *Addressing Sentencing Disparities for Tribal Citizens in the Dakotas: A Tribal Sovereignty Approach*, 89 N.D. L. REV. 53, 68 (2013).

for similar crimes.[143] Scholars and advocates have also made multiple proposals for revising the guidelines to address issues related to Native Americans in tribal courts and federal courts.[144] The issues raised by the Native American Ad Hoc Advisory Group have not gone away and the attention paid to them has increased over time.[145]

The longstanding interest in the federal sentencing of American Indians stimulated by the Ad Hoc Advisory Group encouraged the U.S. Sentencing Commission to announce the formation of a second Tribal Issues Advisory Group (TIAG) in 2015.[146] The Sentencing Commission gave the TIAG a broad mandate to (1) assist the Commission in carrying out its statutory responsibilities; (2) provide its views on federal sentencing issues relating to American Indians; (3) study a range of issues related to the application of the guidelines in Indian country, including disparities in the sentencing of American Indians in federal courts as compared to sentencing in state and tribal courts; and (4) recom-

143. *See generally* Travis W. Franklin, *Sentencing Native Americans in US Federal Courts: An Examination of Disparity*, 30 JUST. Q. 310 (2013) (finding that Native Americans, and specifically young Native American males, tend to receive more punitive sentences than other groups); Jeffrey T. Ulmer & Mindy S. Bradley, *Punishment in Indian Country: Ironies of Federal Punishment of Native Americans*, 35 JUST. Q. 1 (2017) (analyzing sentencing disparities for Native Americans in federal courts).

144. *See, e.g.*, Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-*Booker, 91 MARQ. L. REV. 723, 725 (2008); Matthew L.M. Fletcher, *Sovereign Comity: Factors Recognizing Tribal Court Criminal Convictions in State and Federal Courts*, 45 CT. REV. 12, 16 (2009); Jones & Ironroad, *supra* note 142, at 53–54; Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 403–06 (2004); Gregory D. Smith, Comment, *Disparate Impact of the Federal Sentencing Guidelines on Indians in Indian Country: Why Congress Should Run the* Erie Railroad *into the Major Crimes Act*, 27 HAMLINE L. REV. 483, 488 (2004); Emily Tredeau, Comment, *Tribal Control in Federal Sentencing*, 99 CAL. L. REV. 1409, 1409 (2011).

145. *See, e.g.*, Celia M. Rumann & Jon M. Sands, *Lost In Incarceration: The Native American Advisory Group's Suggested Treatment For Sex Offenders*, 16 FED. SENT'G REP. 208, 208 (2004) (discussing how Indian offenses make up a significant portion of the violent crime prosecutions in federal courts, despite accounting for less than five percent of the overall federal case load); Washburn, *supra* note 144, at 403 (stating that Native Americans are likely affected more by the federal sentencing guidelines than any other group in the United States).

146. Dan Frosch, *Panel Reviews Native American Sentencing*, WALL ST. J., Apr. 22, 2015, at A3; *see also* Letter from Ralph R. Erickson, Chief Judge, Dist. of N.D., Chair, Tribal Issues Advisory Grp., to Tribal Leader (July 2, 2015), https://www.ussc.gov/sites/default/files/pdf/advisory-groups/tribal-issues-advisory-group/20150707_Consultation_Materials.pdf.

mend mechanisms by which the Commission could establish regular and meaningful consultation with tribes.[147] This mandate reflects the recommendations made by the 2003 Ad Hoc Advisory Group to the Sentencing Commission that it enhance its interactions with tribes. The Sentencing Commission directed the TIAG to conduct formal consultation and outreach to tribes consistent with the earlier recommendation.[148]

In a 2016 report, the TIAG forcefully reiterated recommendations about how the Sentencing Commission could strengthen its relationship with and better fulfil its commitment to Indian nations originally made by the 2003 Advisory Group.[149] The Sentencing Commission has taken steps to implement some of these recommendations, including the ones encouraging tribal outreach and consultation.[150]

As a result of the recommendations of the two tribal advisory groups, the Sentencing Commission has recognized its trust relationship with tribes and indicated its commitment to consulting with them through the creation of a permanent TIAG.[151] The TIAG has been tasked, *inter alia*, with providing the Commission with its views on federal sentencing issues relating to American Indian defendants and victims and to offenses committed in Indian country; engaging in meaningful consultation and outreach with tribes, tribal governments, and tribal organizations regarding federal sentencing issues that have tribal implications; and disseminating information regarding federal sentencing issues to tribes, tribal governments, and tribal organizations.[152] The formation of a permanent TIAG indicates that the Commission is committed to consulting and engaging

147. TRIBAL ISSUES ADVISORY GRP., U.S. SENTENCING COMM'N, REPORT OF THE TRIBAL ISSUES ADVISORY GROUP 3 (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/20160606_TIAG-Report.pdf.

148. *Id.* at 5.

149. *Id.* The TIAG also found insufficient data to determine whether American Indian defendants are treated differently under the federal sentencing guidelines than defendants sentenced for analogous crimes in state courts and made several recommendations about how federal agencies could generate the data necessary to determine whether sentencing disparities exist. *Id.* at 5–8.

150. Letter from Ralph R. Erickson, Chief Judge, Dist. of N.D., Chair, Tribal Issues Advisory Grp., to Tribal Leader (Aug. 28, 2017), https://www.tribaldatabase.org/wp-content/uploads/2017/09/TIAG-Consultation-materials.pdf.

151. *Id.*

152. *Advisory Groups*, U.S. SENT'G COMMISSION, https://www.ussc.gov/about/who-we-are/advisory-groups (last visited Oct. 15, 2018).

with Indian tribes to resolve the unique sentencing issues faced by Native Americans.

Without Judge Murphy, the U.S. Sentencing Commission may have continued to overlook Native American issues despite the federal trust relationship with Indian nations, the federal government's exercise of criminal jurisdiction in Indian country, and the numbers of Indians in the federal criminal system. Her efforts placed them on the agenda and inspired others to keep them there. As a result, the Commission is taking its responsibilities to Indian nation more seriously.

CONCLUSION

Most federal judges leave the bench with only a jurisprudential legacy. But Judge Murphy is not, and never has been, like most federal judges. She was the first woman appointed to the Court of Appeals for the Eighth Circuit, and she remained the only women on the court for decades.[153] Unlike many federal appellate judges, she served as a district court judge for over a decade before joining the Court of Appeals.[154] Judge Murphy brought this experience and perspective as well as her keen intellect and impeccable sense of fairness to all her endeavors. She was never afraid to raise pressing issues or voice dissent when necessary. It's not surprising that her legacy extends beyond the cases she decided. She positively affected the federal judiciary, the U.S. Sentencing Commission, and countless individual lives.

In particular, Judge Murphy profoundly influenced federal Indian law and the direction of federal Indian policy as a federal judge and as Chair of the U.S. Sentencing Commission. This specialized and complicated area of the law never fazed her. She recognized Indian nations and their people for what they are: sovereign governments with distinctive cultures and ways of life. Moreover, she saw their inherent value and found ways to protect them in a democratic legal system largely foreign to them. Judge Murphy's legacy will positively affect Indian country for many years to come.

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153. Jones, *supra* note 8.

154. *Diana Murphy '74, U.S. Court of Appeals Judge for the Eighth Circuit, Dies*, U. MINN. L. SCH. (May 17, 2018), https://www.law.umn.edu/news/2018-05-17-diana-murphy-74-us-court-appeals-judge-eighth-circuit-dies.