



The Resurgence of Tribal Courts: A Tribal Judge's Perspective

Transcript

Tribal Court Judge David Voluck
November 18, 2013

Transcript of podcast prepared by Melissa S. Green, UAA Justice Center.

Opening

Summary

0:00:01

Barbara Armstrong, UAA Justice Center

This is a University of Alaska Anchorage Justice Center podcast. Judge David Voluck is an attorney in Sitka, Alaska, and in 2008 was appointed chief judge of the Sitka Tribal Court. He also serves as magistrate judge for the Central Council of the Tlingit and Haida Indian Tribes and is presiding judge pro tem for the Aleut Community of St. Paul Island tribal government. He is introduced here by Dr. Ryan Fortson of the UAA Justice Center. In this podcast Judge Voluck presents a context for tribal courts and Native law, outlines the development of Indian law in the United States, and discusses tribal sovereignty and the role of tribal courts in Alaska. This presentation was recorded on Monday, November 18th, 2013 at the University of Alaska Anchorage/Alaska Pacific University Consortium Library on the UAA campus.

Welcome and Introduction

0:00:56

Ryan Fortson, Assistant Professor, UAA Justice Center

Hello, and welcome. I am Professor Ryan Fortson, assistant professor with the Justice Center here at UAA. And it's my pleasure tonight to introduce tribal court Judge David Voluck. As with most of these talks, I have a few thank yous before we get started. First of all, I'd like to thank the UAA Pre-Law Society for helping to co-sponsor this event and to help with set up. I'd like to thank the Justice Center for providing the refreshments, Barbara Armstrong, our intrepid editor of the Alaska Justice Forum, for her assistance and reserving the room, and setting up this event. And also I'd like to acknowledge that tonight we have three judges from the Kenaitze Tribal Court. So thank you for coming to this event.

Tribal courts in Alaska are an underappreciated, underutilized, and often not well-understood aspect of the Alaska justice system. I'm not sure how many of you saw the headline in the Anchorage Daily News last Thursday regarding the federal panel part of the Indian Law and Order Commission that issued a report, one chapter of which was devoted to Alaska, and it was a very critical report of Alaska and the treatment by tribal courts — treatment OF tribal courts — by the

state of Alaska. In fact, the report concluded that Alaska's approach creates and reinforces discriminatory attitudes about Alaska Natives and the governing capacities of Alaska Native tribes. And one of the suggestions of the report — in fact, the key suggestion of the report — was to try to shift a lot of cases, or at least increase the number of cases that are heard by tribal courts in Alaska, including potentially criminal cases. So it's very appropriate that we have our topic here tonight titled "The Resurgence of Tribal Courts: A Tribal Court Judge's Perspective."

And again, we are honored here to have tonight Judge David Voluck. Judge Voluck earned his law degree from Northwestern School of Law and Lewis and Clark. Upon graduation he came up to Alaska, to Sitka, initially to work with the Indian Land and Trust Resources Department with the Sitka Tribe of Alaska. In 1998 he moved to Anchorage to join the firm of Landye, Bennett, and Blumstein where he worked with David Case specializing in Indian law, traveling to a variety of rural villages, and assisting in municipal and tribal matters. He also became one of the co-authors of the treatise *Alaska Natives and American Laws*, which just last year entered its third edition. In 2008 — well, I should say after leaving the practice of law for a couple of years to engage in rabbinical studies, Judge Voluck returned to Sitka. In 2008 he was appointed Chief Judge of the Sitka Tribal Council. He was also hired as an adjunct professor of Indian law for the Lewis and Clark Law School's summer Indian law program. In 2010 he was appointed as a magistrate and judge for the Central Council of Tlingit and Haida Indian Tribes and then in 2012, he was appointed as presiding judge pro tem for the Aleut Community of St. Paul Island tribal government.

So with those many accomplishments, again, I'm pleased to introduce Judge David Volluck.

[Applause].

0:05:07

Judge David Voluck

That's just silly to be at your own funeral, you know, listen to the.... Anyway, first, thank you for having me and sorry for making you crazy by being late, just got lost in the parking lot. You guys know how that is. First thing I want to say is, if my voice sounds especially sexy tonight, you have my son to thank for that. He came home farshnotzik {sp?}, which is a Yiddish word, and I don't think I need to translate it for you. And I said dude don't do it, and my son of course has to give you wet kisses. So I'm just recovering now.

The other thing I'd like to do, beyond thanking the university and all of you for being here and spending your precious time with me, is to thank the people that lived here, before we built all these girders, stone, and lovely fluorescent lights. The people that raised me up taught me to be mannerful. I'm a stranger in a strange land, as you can tell by my garb, and so whenever I visit I want to thank the people from this place for allowing us to be here. The other thing I want to do, of course, is to give a shout-out to the Kenaitze judges that are here. They're good friends, and it's actually a very empowering to have them here, and they'll let me know at break if I'm off kilter.

The last thing I want to do is apologize to you. And that is before I start speaking, I can sometimes get worked up, a little bit frothy at the mouth about this topic. And if I do, I get excited and sometimes I can say things that are offensive, and if I do — I got your attention now — if I do I want you to accept my apology in advance. It's surely not my intention. Okay. All right.

So we have some time together not sure how to spend it most wisely. So what I'm going to do is tell you a little bit how I ended up here. I have a bunch of law stuff that I don't mind sharing. but if you find it really boring we can just jump into question and answer and topics that people find interesting. Okay? And I did want to save time for your questions and answers.

So the first thing I do is a parlor trick. I'm not sure if I've done this with the Kenaitze yet. So if this is a repeat, I apologize. I learned how to read minds in rabbinical school. So what I'm going to do now is I want everyone to quiet their mind and have a thought and I'm going to try to figure out what it is, okay? Can we do that for a second? Okay. [Short silence.] "What is a Hasidic Jew doing up here talking to us about tribal courts?" [Laughter.]

0:08:18

I just — are you ready for me? Okay, great. My AV people are awesome.

So what happened was a funny thing happened on the way to the store, right? So I ended up, through all kinds of bizarre things that I cannot tell you now — meet you at the pub later — ended up on Baranof Island working with the Tlingit people in Sitka. And being the young hippie wannabe. I was throwing myself into the culture there, which was amazingly rich, if you know anything about any of the Native people all over the world. And Tlingit people, much like Jewish people, their mothers like to have either doctors or lawyers as sons [laughter], and so me being a lawyer, I became attractive to a number of suitors and they were circling me like sharks about adopting me culturally into their tribe.

And one very special woman who is extremely spiritual felt that I was a reincarnation of her son David, and she had lost him to a drowning accident, and she asked me if I would become her ceremonial son, and I was honored and of course said yes. And a few weeks before the adoption ceremony, she was visited in a dream, and her grandmother came to her and said, "Nu [sp?], who's this?" She said, "This is David. He's an attorney with our tribe and I want to adopt him," and the grandmother says, "That's good. Did you pick out a name for him?" And she said, "Yes," and she gave this ten-gallon name that I cannot pronounce, and it was the name of a deceased chieftain of their line. It was much like Jewish people — the Tlingit people want to carry names on in living people. And the grandmother grew stern with her and said, "You cannot give him that name, he comes from his own tribe." Jesse wakes up, she comes to me, she says, "What tribe are you from? My grandmother says you're from a tribe."

I was bar mitzvahed in the suburbs of Philadelphia...[laughter]...and so began a whole process. — Oh, hey you, I didn't see you back there! I think I recognize somebody there, I could be wrong. I sometimes do. —

Anyway, so began a process of reawakening of who I was, and I have the Tlingit people and the Native people of Alaska for accepting me for — okay, hopefully there's nothing embarrassing here. Anyway, I'm going to finish my spiel and then we'll deal with the computer because you know, what a trap that is.

And so began the process of both of us, and the thing that hit me between the eyes was there was an elder named Mark Jacobs. Mark's awesome. He's walked on, as they say — classic dude. I would love to tell you story. Well, I will because whatever, you know, it's our time together, right? So

Mark was one of these classic elders that had two hearing aids, and when he didn't want to hear what you were saying, they weren't working so good. But nothing passed Mark, right. So he came over to our house for a dinner party an hour and a half early. So as you can tell by me strolling in 10 minutes late, I'm not one of those dinner party preparers that has all the napkins folded an hour before the party. My kitchen is flying. I am freaking out. I did not take a shower yet, and in knocks Mark and his family drops him off and drives off and I've got this 90-year-old man, double hearing aids, sitting on my couch, and I don't know what to do.

So, at that time we had two cats, and there's — cats are either one of two main phylums. They're either super sweet and nice or you can never talk to them, right? And so the two cats I had were the kind that jump on you and start rubbing their tails on your face and gnawing on you and covering you in fur, right? And I'm watching them crawl on the head of this Tlingit elder and shove their tails in his face and do the whole nine yards, and I'm like, oh God. So I screamed from the kitchen making small talk. "So Mark, do you like cats?" [Audience laughter.] Right? Nothing. So I'm like, okay, so I'm back to short order cooking. Ten minutes later, I guess, out from the living room comes — I'm gonna try to do this and he has a very raspy voice, okay, so I'm going to channel Mark for you right now: "On the sixth day the Creator finished all the works of creation. I gave man dominion over all the animals. Except for cats." [Audience laughter.] That was Mark Jacobs.

But the thing that he said, that's more than just humorous, is that every day, he would stare me in the eyes and he would say, "David. Our people, our culture, our language, our children: so important. You must help us."

Day in and day out. After a while when the elder walks into your office and you're doing a thousand things, you know, you not giving them the attention maybe they deserve — Mark would do it again. And there's a famous metaphor of a drop of water can eventually carve a canyon, and finally Mark's drops started to — [coughing] excuse me — penetrate this thick cranium. So I took a sabbatical from law, got back in touch with where I come from, and then decided to come back, and if I have time, I'll tell you the story why. Not sure — I'm worried about burning all of your time and stealing your questions and things of that nature, but I think I can speed up a little bit.

0:14:57

Let me just find this PowerPoint. I made my first PowerPoint. I'm so proud. [Audience laughter.] And it's completely irrelevant to my talk, but I don't care. I want you to see it. Let's see how it's got that great little. PowerPoint icon, right? Okay, so this is where I need someone to help me. I think I go to view. Oh, well, okay. Well, except the recommended settings I guess. Don't don't don't! Damn, you guys scared me there. Okay, so somehow there's like a slideshow way to look at it, I think. We'll just go with ask me later. Okay? Oh, perfect.

[Several seconds silence.]

[Audience laughter.]

[Technical issues with Powerpoint]

0:16:02

Ryan Fortson

It's a little bit difficult when you're trying to look at the screen there. That's a little better.

David Voluck

Oh my God. Hello, Ryan. [Audience laughter.]

Ryan Fortson

All done.

David Voluck

Okay, so then how do you make it? Yeah, you must know.

Barbara Armstrong

Where, where is this selection?

David Voluck

One more right there.

[Audience laughter.]

Ryan Fortson

Okay from the beginning. How about that?

David Voluck

Okay, and how do I — oh I can just move it here. Perfect. Alright, well super, so, uh. Hello. Okay, and it gives you a preview I guess. All right, yikes! is all I got to say to that, you know, I'll probably make this available to you in writing. You can follow up on some of the latest research. Come, come. Okay. So this is the story I want to tell you real quick. How we doing on time, Ryan? Alright super, you with me? Okay.

Main presentation by David Voluck

[**Note:** This portion of the transcript takes its subtitles from those used in Judge Voluck's accompanying Powerpoint slide presentation, "The Sapphire Skylight: A Renaissance for Native Sovereignty in Alaska."]

Why is any of this important?

0:17:10

David Voluck

So this is one of the weird things that happened to me while I was working in this field, and I want to share it with you because I think one of the questions I tried ask myself and encourage other people to is, "Why is this important?" All of us know, we've lost loved ones, we see how quickly children grow, we get up in the morning and go, wooh, yikes. That's great, right? So we know none of us are here forever. We have a certain amount of time allotted to us. And why are you going to spend your time farting around? Pardon me. That's a term of art, you know, we can have a good time. Believe me. I'm a former sports on television addict. I'm doing much better now. I'm in recovery. But we try to do important things with our lives and with our time.

So I want to tell you a story, and the story exists across the globe amongst, I'm betting, almost all the peoples, and it's a story of a flood. Is that weird? It's one of those things where people just go, "Is that weird?" then they're like, "Can I have another?" You know, it's like no, that is strange. There is a story of a grand flood all over the Earth.

So the version I can tell you is the only one that I really know, and it's in Hebrew, and I'm telling you that because there's some weird words in it that are not normal, and they're there to catch your attention. Okay?

So, you know the story: there's going to be a big rainstorm. And this voice comes out of the sky and tells a righteous man named Noach or Noah, "Build for yourself" and in Hebrew it's a *teva*, and there's no good translation for a *teva*. So they feed you in the King James Version an "ark." You all know the picture, right? And my judges here have heard this before — the plush toy at Toys R Us with the giraffe's head sticking out right, isn't it cute? But this is a serious story. What is a *teva* is my first question for you. And next, Noach is told to build "a *tzohar* shall you make" — what the heck is a *tzohar*? Anybody? Come on, Bueller. No? Nobody knows. So you're in the majority of not knowing what a *tzohar* is. And then the last commandment is you and your family shall go into this *teva*.

Now the Old Testament is highly detailed on the architecture of this thing. And if you look at it, it's actually a large box, it's not a boat at all. And a *tzohar*, nobody's sure what it is. Some people say it was a window, other rabbis say it was a skylight. And then there's another opinion that says it was a large opalescent light-giving stone. A little weird now, isn't it, people? A large box with a magical stone that gives off its own light — not normal. Because, if you follow the text, the sun and the moon cease shining during the flood. So what do you need a window for? What are you looking at? How about a skylight? Darkness. So that opinion says this *tzohar* gave off its own light.

Cultural trauma is a lot like a flood. *Mayim rabim*, is it in Hebrew — a great torrent of waters. And if you don't build a *teva* you could drown, God forbid. My friends, my cousins, the Alaska Native

people, indigenous people all over the world, are experiencing a flood right now. It's not relegated to the history books like the Washington Redskins would like you to believe. It's happening right now. And Noach and Umma [sp?] were charged with taking all of the seeds of life — animal and plant — and putting them in this bizarre huge magic opalescent box, for when the floodwaters recede, they open the door and we're ready to replant and regenerate life.

So, too, indigenous people are in the process of building a *teva* to withstand the *mayim rabim*, the torrents of waters, that are going on in their villages, their neighborhoods, their countries. Why is this important? Well, we like to believe all humans have an **inherent right to self-determination**. Sounds good. We signed a Declaration of Human Rights to that effect. You get to decide who you are. I don't tell you what to look like, what to wear, what to talk, or how to worship, or what to eat, or — and the list goes on.

Well, if that's not good for you, if that's feeling too oovy-groovy, let's move down the list. **Health, safety, and welfare of the Native people**. My cousin and great Indian law scholar Felix Cohen wrote a handbook, and the front of the handbook says, "Like the miner's canary, Native people mark the shift between fresh air and poisonous gas in our society.

[Exact quote: "Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith." — Felix Cohen, *Handbook of Federal Indian Law* (1941)]

Does anybody know what a miner's canary is? Tell me.

Audience member

[Inaudible.]

David Voluck

Right. When it stops singing in its little cage you knew things weren't well. The report that Professor Fortson talked about I highly commend you to. It's the Indian Law and Order Commission, and guess which state got its own chapter — the only one of fifty states — our beloved Alaska, the great north. And every statistic is mind-bogglingly horrid. From physical violence to sexual violence to children in the protection system, the juvenile system, incarcerated Natives, every kind of social category we'd rather not mention. Natives are beyond overrepresented in Juneau where I work. Native children make up 80 percent of the welfare docket. They're only eleven percent of the population. If I'm getting worked up, it's because the miner's canary is not seen. And it's not me making this stuff up. It's not even close.

Like when I hear solutions to the problem, what, what, we just, we'll put more police out there, or let's sign an agreement, we'll, we'll start working together. Great! If you can improve things 25 percent, one quarter, that is immense results! And now they're only 60 percent of the population. It's not even close to fixing right now. The miner's canary is not singing and you know, what if you want to be University of Chicago Mister Economist and it doesn't bring tears to your eyes, it's costing billions of dollars. So if you want to play to the right or to the left, I don't care. Either way, it's a nightmare.

But if that's not working for you, the last thing I want to talk to you about is the **library of collective experience**. Each one of us, with these brains we were given, is a book. And our families, our traditions, our ancestors have handed down some information to us on how to survive what to do, how to be married, how to raise children. How to have education, how to live healthy lives. If you're going to burn — we're in a library right now, right? Think of Nuremberg. If we're going to burn whole wings of our library because everybody's got to eat a Big Mac, we are setting ourselves up for some issues, is all I'm going to say, because, as we know, every successful species — I'm doing biology on you now — has multiple approaches to stressors. And if we don't have the Native people and Indigenous people sharing with us, like, oh hey, yeah, this is how you might tackle that problem — we've burnt a part of our library. And the funny part is, as my colleagues know, guess who's coming calling?

The Anglo-American adversarial system of justice is floundering. Our dockets are full. Nobody feels justice is being served. And the only one getting rich is us lawyers — naw, I'm just kidding. It's no good talk without a lawyer joke, right? Seriously. There's some very good lawyers that I know. Anyway, but the justice system is not serving us, right? And so courts from New York all the way over are now going. Wow, we need to figure out another way to solve problems and to, you know, broach disagreements. Let's look at the Native American model, right? And so all the mediation and therapeutic courts are now trying to study the Native American traditional justice system. But what happens if you're burning the library? Anyway, questions to think about, okay?

How's time, Professor, still doing okay? All right. Um, we are going to fast forward a little bit — ha! — but I want to give you a little bit of background before we talk tribal courts, okay?

Divine Rights

0:28:34

David Voluck

So, why did I get into Indian law? Well, you can tell because a lot of it has to do with God. It's so fascinating when you go back to the roots of federal Indian law. You go back to the 1400s and it's all about "divine rights" and things of that nature.

What I did want to point out to you is there was a very lovely debate going on in Spain back in those days when they were trying to figure out what they were going to do with the lands they were colonizing and the people that they met there, which was highly inconvenient. Oh, what are you doing here? So there was a debate between a philosopher named **Sepulveda** and then against him was **Las Casas** and then the middle guy was **De Vitoria**, who they eventually went with. And Sepulveda argued that Native people were accursed and were less than human and their destiny was to be slaves.

Las Casas was the first hippie, before there were any hippies — an amazing story, I don't have time to tell you the whole story about him. Suffice to say he was a very wealthy upper middle class well-educated young man who had vast land holdings in Hispaniola and was making a mint. And one day he had what Samuel Jackson entitled in "Pulp Fiction," if you've ever seen it, what alcoholics call "a moment of clarity." Do you remember that? What a movie! Anyway, he saw a brutal massacre and said what in God's name are we doing and he became an ardent debater and advocate of Native

rights back when, in the 1490s, and he was an amazing orator, and got all the way up to the Pope. And his way actually won, but it was impossible to administer thousands of miles away. Because the conquistadores don't give a crap about your decree about the Natives and their rights, okay?

So eventually they went with De Vitoria. Yes Natives are human [light clapping] but there are all kinds of footnotes about how and why we can dispossess them of their land and fight what are called "just wars" against them. Okay, so that was the Middle Road position which allowed, all the way up to our beautiful nation where we sit now, and just for history's sake will buzz through this.

Foundations of United States Indian Law

0:31:11

David Voluck

But you should know that everything west of the Appalachian Trail in the early days was known as **Indian Country**. The king's laws did not apply there. The Native peoples' laws applied there, and if you decided to cross the line, good luck. And this concept is still in play on this debate over jurisdiction, and you'll hear that term and that term's from the 15–1600s. Okay? So that's the interesting piece about what you read in the *Anchorage Daily [News]* today. It's an old story that's winding its way through time.

Okay, with our fine **Declaration of Independence** and overthrowing the British government, the United States of America became the new king or sovereign. And if you look in the word sovereign, you'll see the Latin word for king. So whenever we discuss sovereignty we're going all the way back to the "divine right" monarchs being able to talk to each other, okay?

Our constitution is incredibly terse when it comes to Native Americans. There's one clause which says Congress has this power to regulate commerce with foreign nations and Indian tribes.

[**U.S. Constitution, Article I, Section 8, Clause 3 'Indian Commerce Clause':** U.S. Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes]

And so you start to see that Indian tribes, as we will find out in a moment, are inherently sovereign. Okay? No one gave them this power. If I could swallow all the vomit I've had at cocktail parties where people start telling me what we gave the Natives.... — hopefully everyone in this room understands that — nope! They were sovereign before anyone put a pinky on this land. But as you will find if you start studying this for real, that's highly inconvenient.

And so if you read our legislative history through time, you'll see that many congressmen, senators, presidents will discuss what's called — and they don't mince words — the "Indian problem." So eventually...the chief judge had to decide — this is on Walter Echo-Hawk's *10 Worst Indian Law Decisions Ever* — a book I commend to people, I need to read it myself actually but it looks fascinating — he takes the 10 worst Indian law decisions ever decided and guess writes chapters about it.

[full title: *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* by Walter R. Echo-Hawk (2010)]

Fundamentals of the Marshall Trilogy

References: 'The Marshall Trilogy':

- [*Johnson v. McIntosh*, 21 U.S. 543 \(1823\)](#)
- [*Cherokee Nation v. Georgia*, 30 U.S. 1 \(1831\)](#)
- [*Worcester v. Georgia*, 31 U.S. 515 \(1832\)](#)

0:34:06

David Voluck

So they decided that Congress has plenary power over Indian nations. This means when all else fails, watch out for Mr. Big. But it needs to be tempered by a **trust doctrine**. This is a **fiduciary responsibility**. That means if you are a trustee for a child, you need to take care of their money. You cannot run off to Vegas with it. Okay. Sorry for all those parents have been collecting Permanent Fund dividends for your kids. You need to take care of it. You need to use it in their best interest. So, too, Congress has great power, needs to be used as if it was a trustee.

And we have these special things, that have fallen into disfavor lately in our United States Supreme Court, called the **canons of federal Indian law**. For the most part the canons mean, if there's confusion, if there is an ambiguity in a law, if you're not sure quite what to do, you are to decide it in favor of Native rights, not against Native rights, and our beloved United States Supreme Court has decided that's inconvenient. Here we have an "Indian problem" again, and so they're going the other way. And the last 30, I think, Indian law decisions that been in front of the United States Supreme Court, tribes have lost 27. Yikes. All right.

All right, so some of that's land stuff. We're not going to get into all that. Let's get to tribal courts, right? That's why we're all here. — Are we moving? There we go. —

Oh, there's so much fun history to discuss about Alaska suffice to say, none of the early stuff dealt with the Natives. So again, if you hear at a cocktail party someone tell you that Russia sold Alaska to America, try to choke it back, okay, because that's not true. Russia never had control over Alaska. It was what we like to call in the law a quitclaim deed. I'm selling you whatever I have even if it's nothing. All right.

Aboriginal rights in Alaska

References:

- 1867 Treat of Cession; Alaska Organic Act of 1884
- [*Tlingit & Haida Indians of Alaska v. United States*, 177 F. Supp. 452 \(U.S. Court of Claims 1959\)](#)
- Alaska Native Claims Settlement Act (ANCSA), 1971

0:36:20

David Voluck

Well, it is important that we realize that eventually there was a very big Native problem in Alaska. Does anybody know what that might be? That's right: **aboriginal rights over land**. And what in particular sure got people burning? Oil, that's right, and they needed to build a pipeline from Prudhoe Bay to an ice-free port in Valdez, and aboriginal claims sat all over the right of way. And so Congress got a-moving and they passed an absolutely revolutionary law — there's none like it in our country — called the **Alaska Native Claims**

Settlement Act, sometimes called ANCSA. You'll hear people bandy that around. And it was designed to extinguish this aboriginal title. There was a cash settlement and 45 million acres.

But here's the kicker: it was given in fee simple to for-profit Native corporations. No other settlement ever is with corporations, it's always with the sovereign. Remember what we were talking about? — King to king, queen to queen, sovereign to sovereign. Somehow they tried a new thing, and if you look at the legislative history, they will tell you quite unabashedly. It was a social experiment designed to assimilate Alaska Natives. That's exactly what they wanted to do. It's not me being a liberal freak over here. Look in the record! They'll tell you that's what they wanted to do, just like in the old days. It was the Bible and farming — now it was capitalism.

And the magic words was they wanted to avoid any permanent racially defined institutions or prolonged trusteeship. These magic words would create confusion for the next — yeah, we're going on 40-some years and it's still happening today. What do I mean? Let's go. Boo.

Post-ANCSA Tribal Sovereignty in Alaska

References:

- [Ada Deer's List and Preamble, 58 Fed. Reg. 54364, 54368 \(October 21, 1993\)](#)
- [Tribal List Act, 25 USC. 471a, 471a-1](#)
- [Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 \(9th Cir. 1991\)](#)

0:38:41

David Voluck

Okay, are there tribes in Alaska? Many people will tell you no, thank you to ANCSA, there are no tribes anymore, if there ever was in Alaska. And our lovely Department of Interior contributed to that confusion by putting corporations on the list of Native entities. So there was no difference between a Native corporation and an Indian tribe. Finally, in '93, **Ada Deer [head of the Bureau of Indian Affairs 1993–1997] published a list** that said, Oops! we've been mistaken — every tribe on this list is indeed a federally recognized inherently sovereign Indian tribe with all the rights and privileges of tribes down in the Lower 48. Well, you can imagine some people popped a sprocket, and there was a whole bunch of litigation lawsuits about that. Luckily, Congress ratified Ada Deer's list the next year, and finally the Ninth Circuit, and believe it or not there was a case this year that is still dealing with this. So all three branches of the federal government have said, guess what, there are 229 or 230 tribes in Alaska.

Post-ANCSA 'Indian Country' in Alaska

0:40:09

David Voluck

Okay, so now we're getting back to that question of Indian Country. So, the definition is, Indian reservations, Indian allotments, or dependent Indian communities. The Native Village of Venetie reselected their reservation, but it was now in fee simple because it was ANCSA land, okay. They did a little switcheroo, then they quitclaimed it right back to their tribe, and then they charged a tax on the State of Alaska. A quick moment about a bizarre love triangle: The federal government is the primary sovereign dealing with Indian tribes. States have very little voice whatsoever. States do not like competing sovereigns. It's no. And so states — you'll notice one special magic word in every lawsuit dealing with sovereignty, and that is the State of Alaska. And they fought — you can imagine what happened when Venetie taxed Alaska — they went all the way up to the [U.S.]

Supreme Court, and I told you how our stats were doing up, there didn't I? And so the question was dependent Indian communities, and the Supremes said ANCSA land lacks the requisite level of federal superintendence to qualify as a dependent Indian community. Therefore ANCSA land is not Indian country. And the famous term is, there are tribes in Alaska, but they're sovereigns without territorial reach. [[Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 \(1998\)](#)]

Well, that makes life very confusing, and then it got even weirder the next year.

State of Alaska's Historical Hostility Toward Tribal Sovereignty

0:42:00

David Voluck

Come. — Oh, so just so you know, this is what the Petri dish of Native law looked like for the longest time in this state:

- Public Law 280 divested tribes of jurisdiction.
[[Native Village of Nenana v. Dept. of Health and Social Services, 722 P. 2d 219 \(Alaska 1986\)](#)]
- "There are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law."
[Originally in [Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P. 2d 901 \(Alaska 1961\)](#)]; cited in [Native Village of Stevens v. Alaska Mgmt. Planning, 757 P.2d 32 \(Alaska 1988\)](#)]

This is our Supreme Court, Alaska Supreme Court.

- "ANCSA...abolishes all claims to tribal status and sovereignty...."
[[Nenana Fuel Co. v. Native Village of Venetie, 834 P. 2d 1229 \(Alaska 1992\)](#), Justice Moore concurrence]

That was the prevailing belief, the legal precedent.

- Non-reservation Native villages — that means everyone but Metlakatla — lack any authority of sovereign government.
[[In the Matter of F.P., 843 P.2d 1214 \(Alaska 1992\)](#)]

That was the state of the law, in Alaska.

We're getting there. I promise you.

Renaissance for Tribal Sovereignty in Alaska

0:43:08

David Voluck

And then came a sea change. Our [Alaska] Supreme Court pulled up the emergency brake and went into a spin and then hit it into reverse. In an amazing decision, the [Alaska] Supreme Court said yes, there are inherently sovereign Indian tribes in Alaska [[John v. Baker, 982 P.2d 738 \(Alaska 1999\)](#)]. I know we've been playing I'm pretending you're not there for the last 30 years, but it's time to take the glasses off. And guess what? They can adjudicate core tribal matters: sovereignty is tied to their political citizenship — not land — and state courts are to provide respect through a legal term called comity for tribal court judgments.

What I want you to understand — and it can get funky, I will admit — **Indian law is based on sovereignty, not race**, and a lot of people fundamentally misunderstand what this whole body of law and tribal courts and Indian tribal governments are all about. They are the sovereigns from inherently always since time immemorial. It's a political relationship between the United States, as the new king, and the tribal government as the king to negotiate with. It's called government-to-government. You will see that in federal executive orders. It is not racial.

Now, the weird part is tribes are great extended families. And so they use family trees often, or for many years the Bureau [of Indian Affairs] wanted them to have blood quantum. But really it is, are you a citizen or not? And the tribe decides that. You could have one drop of blood. Technically, you really don't need a drop of blood, or you could have a ton of blood. Doesn't matter. It's up to the tribe.

And that's what's so disturbing. If you pick up baby girl Veronica — this was a case, a harrowing Indian Child Welfare Act case that just rattled through our United States Supreme Court, that the Dr. Phil Show, CNN, Oprah, the whole nine [yards] — it was a nightmare, it was like watching a train crash in slow motion for this child. South Carolina, Oklahoma. But you read the first line of the Supreme Court's opinion, the first line [[Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 \(2013\)](#)]. Hello, typewriter, I'm sitting down to write an opinion that's going to be read by tens of thousands of people. "This is about a girl who's only three-365ths Cherokee." From that sentence on I couldn't see, because if you understand Indian law, that is the most irrelevant thing in the world, and it shows those judges don't get it or they're playing the race card. Sorry, that was my soapbox for me.

So then Alaska gets beat in the Ninth Circuit, and the Ninth Circuit said, listen, Alaska, you need to give full faith and credit to tribal court adoption decrees. [[Kaltag Tribal Council v. Jackson, 344 Fed. Appx. 324 \(9th Cir. 2009\), cert. denied, 131 S. Ct. 66 \(October 2010\)](#)].

The Tide Continues

0:46:38

David Voluck

Well, I told you we're getting to tribal courts, didn't I? Indian country is not required. And then the ball kept rolling, okay, and all these — if you start noticing the dates here, we are very much alive, and it keeps going. Indian law is morphing at an incredible rate in this state. So, if you're interested in, this so am I. Native Village of Tanana: tribes retain their inherent sovereign jurisdiction concurrent with the state — that means the state and tribes have co-equal parallel civil sovereignty over their people. [[State of Alaska v. Native Village of Tanana, 249 P.3d 734 \(Alaska 2011\)](#)].

And they went further. They took a whole bunch of stinky sock decisions that they had on their books that these people who are fighting sovereignty keeps citing to — "Oh, but you said *In the Matter of F.P.*, and what about *Nenana* and *Nenana* you, what do you —?" and, you know, and the Alaska Supreme Court said we were wrong, overturned — and that's not normal, okay? As you know from *stare decisis* and precedent, courts do not overturn themselves lightly, and our [Alaska] Supreme Court has just completely moved in another direction.

And I want to tell you it's not because they drank the Kool-Aid. If you read these decisions, they are sound, brilliant Indian law decisions. I wish our United States Supreme Court would read these cases, because they are solid, based on the foundations of sovereignty and Indian law.

The Tide Continues

0:48:38

David Voluck

And like I told you, just a couple years ago, somebody was arguing that they're still not federally recognized tribes in Alaska. And they were arguing, "By the way, you made a mistake in *John v. Baker*, and you should overturn *John v. Baker*," and our Alaska Supreme Court said, thanks, but no, thanks [[*McCrary v. Ivanof Bay Village*, 265 P.3d 337 \(Alaska 2011\)](#)].

And then this, my alma mater right now. We just won summary judgment in Juneau saying that we have the inherent sovereignty to handle child support and paternity. [[*Central Council of Tlingit & Haida Indian Tribes v. Alaska*, 1JU-10-376 \(Order Summary Judgment, October 25, 2011\)](#)]. But of course, why wouldn't a tribe? *John v. Baker* already told you they could handle custody and visitation. But our lovely sister sovereign is arguing tooth and nail every inch.

Turn About Continues

0:49:51

David Voluck

Alright, so this case just came out very powerful, as you can see at the date, 2013. Again the Alaska Supreme Court overturning multiple precedents, saying that they've been getting the Indian Child Welfare act all wrong. And making it much stronger. [[*Native Village of Tununak v. State*, 303 P. 3d 431 \(Alaska 2013\)](#)].

Except for In Alaska

0:50:13

David Voluck

All right, and then we'll hopefully we have a minute to start getting into tribal courts. Okay. Sorry, so come on, Mr. PowerPoint. There we go. We still have a problem that's going on, as my friends know, and I call it "**except for in Alaska**" — still this pervasive, I don't know what it is, that somehow Alaska is different, and that Indian law should not apply up here. And it's been successful to have Alaska exempted or pulled out of major, major national tribal court empowerment legislation. By our own legislators, exactly.

First one: we need to fix the nightmare in Indian Country. What I told you is going on in Alaska is going on throughout the country. Indian country is a vacuum of law enforcement because of all these jurisdictional issues, and guess who likes to go there? — drug dealers, pedophiles, and rapists. Lovely, right? It's like it's like Disneyland for people who are sociopaths because of the law enforcement and tribal court jurisdiction problems. I think there's a famous TV show, right? I saw it once, it freaked me out. What's the one about the the science teacher that starts cooking meth or selling meth — "Breaking Bad," right? This is in national entertainment. Where do they go to cook the meth? — the Indian reservation. I wish it was a joke, it's not.

And so they passed this law to strengthen tribal courts — except for Alaska. [**Tribal Law and Order Act of 2010: Section 205 (Alaska Disclaimer)**]. Ah, but it gets better, doesn't it, my friends? Just recently they reauthorize the **Violence Against Women Act**, and because of this vacuum of justice, Native women are raped and brutalized orders of magnitude higher than any other ethnic. population of women.

0:52:30

Yes, go ahead.

Audience member

We just talked about it. It needs to be clarified that Native women are raped and pillaged not by Native men.

David Voluck

Right. So that's the other piece of it. I just finished a book called *The Round House*. I don't know if you've ever read that, it's a by a woman from Minnesota [Louise Erdrich]. It's a fascinating book, but at the — in the appendix, 80 percent of the offenders are non-Native. So what they did again was they needed to empower tribal courts because of jurisdictional holes, rapists and domestic batterers were flocking the Indian country — non-Natives — because the word was out if you wanted to get you know, your jollies —. Uh, oh wake up. Are we running out of power here? Yeah, looks like maybe we're running out of power.... Yeah. Okay. — So, where do you go? — you go to Indian Country?

So they reauthorize the **Violence Against Women Act** to empower tribal courts to handle offenders, tribal or non-tribal, and — except for Alaska. [Violence Against Women Act (VAWA) Reauthorization 2013: Sections 905, 910 (Alaska Exception) — disparately excepting Alaska's tribal courts from the jurisdictional clarifications and improvements in the Ac)].

Questions & Answers

0:53:49

David Voluck: Anyway, let's talk about tribal courts. Shall we I'll open to questions and answers, I think is the best way to go. I've yapped at you for like an hour and I appreciate everyone's attention, but I wanted to share whatever I might know and I will defer to my colleagues early and often. Yes.

Contrasts between tribal courts and Alaska state courts

0:54:25

Questioner

What would you recommend as reading material, just to give a laydown of the basics of the comparison and contrast between how tribal courts run versus how the Alaska Court System runs... [garbled].

David Voluck

That's a great question. That is a great question. You know, there's 230 tribes and each tribal court, it will be very different. And so that's a toughie, you know, the best would be to get on a, you know, on a bush plane and go around spend a couple months in each village. You probably don't have time for that. One thing that I saw that was pretty powerful, and then I'll defer to my colleagues if they've seen anything, is by a woman named Ada Pecos, P-E-C-O-S, and she wrote a little article on the fundamental differences between traditional indigenous justice systems, in the big macro and Anglo-American Justice systems, kind of a side-by-side comparison. [*Indigenous Justice Systems and Tribal Society* by Ada Pecos Melton (2005)]. And she's a great writer and I thought she did an amazing job of something that's not easy to capture.

The one thing I can tell you about, I guess, you know, practically speaking. I don't sit — when I sit on the bench, I am not higher than my parties. We sit down with there in a roundtable situation, and I'm not there to be on a bully pulpit and start wagging my finger, banging my gavel. I really want, if anything, I view myself — if I can pull out whatever it is that's going on so that the people can decide for themselves, because they know, much better than I do, what's good for their families. I always say that. You got — you know, when a child's at issue. "You guys know this child, you love them. Let me be a facilitator. I'll give you that, but I'm not here to start push back [growled words, unclear]", and that's kind of what goes on unfortunately in Superior Court — someone that does not know your family from Adam will give you, sometimes. I had one emergency expedited custody hearing, there were knives being thrown at these children and the judge gave us a half an hour. Now, maybe it was because of the stack of files on his desk. Maybe, I don't know what. But I was like, I need respiration, that someone was going to give these children 30 minutes and then go "ruh-ruh-ruh."

And so, that's I know how our tribal court is different. It's meant to be a welcoming environment. We have ah-oo [sp?], which is like ceremonial artwork, everywhere, and the lighting is brought down. We've built a little playroom — we're very lucky, we have an antechamber that nobody really uses, and so we've made it so that kids like to go in there and, like, hang out, because we welcome kids in our court. So it's just freaking different. Kenaitze, please, help me out here.

0:58:03

Kenaitze tribal judge 1

One of the things that [unclear] peacemaking court [unclear] like Judge Voluck says, is that every court is different, if that might help. For me to explain it, it's very similar to — the way we adjudicate, it's like civil

mediation, except you wouldn't be in two different rooms. In some civil mediations that are done, and they're done inaccurately or incorrectly, would be the two parties are in two different rooms. We bring them together. And the other thing, the other difference is — I love it. We don't care if you bring your lawyer in, and bring as many as you want, but I don't wanna heard about it, I don't want to hear from them. I want to hear from the parties. I want it from their mouths, and if [unclear] attorney thinks that maybe they forgot to tell you something, then maybe. But no offense to some of us who've taken law. From Justice — and I can quote Justice Thorn [sp?] from the Lower 48: Our lawyers are much of the problem, actually... [unclear]. Sorry.

Kenaitze tribal judge 2

[Unclear] more nonconfrontational. [Unclear.] Basically if something's happened, we're there to fix it, not to find a winner and a loser. It's more to get things worked out so everybody [crosstalk, unclear.]

ANCSA corporations as Native entities

0:59:39

David Voluck

Mr. Moon.

Questioner

The question that I have goes back to earlier in your presentation, where the federal government listed the corporations on the same list as federally recognized tribes. Is there any additional clarification on that, or, in the law, are they still one and the same?

David Voluck

No, I'm glad you asked that. Well, obviously, you know, I couldn't do my federal Indian law 101. I tried my best. But I hope you understand, based on this conversation about the political and the sovereignty issue, that's the only way you can have Indian law. Otherwise is racial discrimination, which is illegal in our constitution, 'kay? So it's a government-to-government relationship. So you can understand how distressing it was when for-profit, state-chartered companies — and I wish them all well so that they benefit their shareholders and their descendants and all that. They should be well and do well.

But Doyon is not a tribe. Okay. It's a company with accountants and lawyers and they have to file with the state and the whole nine yards. CIRI is not a tribe. Sealaska is not a tribe. I know I'm probably going to be attacked in the parking lot. But you know, yeah, yeah. Okay good. So that's distressing when also they end up on that list and creating that confusion because that's big confusion. It's not a small matter.

So they've been since taken off the list, but they're not done. Because there's incredible bargaining power in certain areas that a tribe has, that other people do not, because of this government-to-government relationship, and certain corporations have lobbied dangerously close to be called tribes to have those benefits, those sovereign benefits. And so sovereignty watchdogs, you know, flip out every time that this happens, and it happens, like, once every few Congressional sessions somebody starts sneaking up the fish passageway to try to start saying, "We're tribe." "No, you're not."

Questioner

So at this point they're not —

David Voluck

They're not recognized.

Questioner

Thank you.

David Voluck

Now hold on. We have some qualifications. Go ahead.

Questioner 2

Well, CIRI, Cook Inlet Region [Inc.], has actually gotten on the list for money purposes, for the purposes of funding for different areas, and so for example if there's a pot of money for tribal courts or justice programs, CIRI can compete for that money, but if a tribe says no we want to take that money, then we get precedence. So oftentimes what's happening is our corporate entities or the corporate — the tribal organizations will go after the funding and compete directly with the tribes. And if they, if the tribes don't know they're competing for it, then they get it —

David Voluck

Huh.

Questioner

— over us.

David Voluck

Right. So the confusion still is out there because certain statutes, in particular the Self-Determination Act, in the definition section, where it defines 'tribe', still includes corporations and nonprofit organizations like Maniilaq and Bristol Bay Native Association. So there's many an immense array of Native organizations, but at least the Department of Interior list of federally recognized tribes has remained pristine. I think. Yes, go ahead.

Tribal land acknowledgement

1:03:11

Questioner

First, I'd like to thank you for acknowledging the local peoples here, the Denai'inas. You're one of the first that I've heard do that so, on the best said, thank you very much.

David Voluck

My pleasure to be here.

“Integration” under ANCSA; land into trust

1:03:24

Questioner

Secondly, my question is on ANCSA in particular, like, what would you do and what do you think should be done about this in order to make it something that's more — that's less towards assimilation and more towards integration.

David Voluck

Hmmm. Damn that's a good question, right? That's a great question. I have not read all the way, I have to admit, I just breezed through it because I get a snowdrift of information per day, but they make some recommendations in this Indian Law and Order Commission report that I was telling you about, and I haven't had a ch— I was too busy looking at like the, oh my God, that, like blistering I think is the word that a lot of people — blistering criticism of why Alaska is the plaintiff in all of those cases and what's going on out in the villages is a nightmare. So I was doing the wow factor, but they actually make some recommendations.

One of the ones I think I would throw out there is that, to date, the Department of Interior has refused to take land back into trust. So there is a process for Indian tribes, and some of the more wealthy ones are actually going out and rebuying back their territory. They lost it through all kinds of shenanigans, now they're doing better and they're just buying neighborhood after neighborhood and they're rebuilding the reservation with their own in the free market. And so they have the ability then go to the Department of the Interior and say, "We would like this land converted back into trust."

Now it really starts to look like Indian Country again. And to date the Department of the Interior — that was one of my "except for Alaska" things before my trusty computer took a nap — has refused to do that. They were just body-slammed in the district court in Washington, DC for discriminating against Alaska tribes, they had no basis for the — it's just this weird "except for in Alaska" thing. Right? And so that was just overturned. [[Akiachak Native Community v. Salazar, 935 F. Supp. 2d 195 \(Dist. Court, Dist. of Columbia 2013\)](#)] —“Alaska Exception” in 25 CFR 151.1 Dept. of Interior ‘Land-Into-Trust’ Regulations [Alaska Exception] overturned as improper and discriminatory toward Alaska tribes].

So it seems to me that — that's what Venetie tried to do. They had ANCSA forced on them. They weren't interested in it. They're a more traditional people. They're hunting, they have subsistence customary traditional way of life. They had their language. They didn't want to be a corporation. "Well, you have to be." "But we don't want to be." "You have to be." "Fine. Give it to me. Are we done yet?" And then they gave it right back to their tribal government. They have 1.4 million acres owned by their tribal government. They tried to recreate the reservation. But the Supremes said, no, it's fee simple, like, so this weird property concept — they now no longer have governmental jurisdiction over their 1.4 million acres that they own. They want to regulate fish and wildlife, they want to tell you who can poop in the stream and who can't, they want to make sure that what's going on on their land. That's what governments do through zoning and taxation and property development regulations, but they're not allowed to do that. So what's the solution? To go back to Department of the interior and say, "We want to put it in trust," and if that happens, it's Indian Country, done. They just over — they just circumvented Venetie and now they have what they need to do for self-determination. That's all I can hope for.

Let me say one other thing while I'm yapping at you. Sorry. One of the great things that I have found about Alaska Native people is their ingenuity, right? They are — there's this great — there was an old elder silver carver in Sitka, and people would come in off the cruise ship boats to watch him carve. Right? And so one wisenheimer saw him with like an electric drill, right and this guy's got, he's got Coke bottle glasses and then

he's got magnifying glasses on top of his Coke bottle glasses, right? So his eyes looked whack, right? And so this wisenheimer off the cruise ship goes. "I bet you're grandfather didn't use that kind of tool," right? And he looks up, he goes, "If my grandfather could have got hold of this tool, he would have used it." [Audience laughter.]

So ANCSA and the corporations, and the capitalistic drive of that world, has usefulness somehow, and Native people are figuring, and will figure, and have figured how to use that tool. So I'm not one of these people that says, you know, "Blow torch it all," you know, and — but integration is a brilliant word.

“Why haven’t I heard of tribal court in Alaska before?”

1:08:30

David Voluck

Go ahead. What were you going to say before I yapped?

Questioner

Uh, well, you brought up a very interesting point that I — I don't, I don't really want to get rid of ANCSA myself. I recognize, uh, fiat currency here in this kind of, um, that deprives power in this Western society, one that that we didn't, the Natives of the south didn't really get to enjoy, so they got mistreated a lot more than we did, from what I hear. The other thing that I wanted to know is, why haven't I heard of tribal court in Alaska before?

David Voluck

Ah. Well, part of that — sorry. He's coming to get me! Part of that's by design. There's a famous saying, "You don't know you have a head until you have a headache," right? So tribal courts, as we were saying — I think you were on this phone call with me the other day where I was spouting off as usual — but tribal courts are a sister sovereign and has been mostly silent and invisible, and that means she's doing her job, because I think, Chief Justice [Dana] Fabe [of the Alaska Supreme Court] is starting to recognize that there's this other court system underneath the Alaska Court System shouldering a huge amount of the burden of cases that would otherwise fill the dockets, they couldn't handle it. And so tribal courts are handling all these cases, nicely, non-confrontationally. People walk away and they actually — I don't know if they're laughing or smiling, but they're not screaming, you know, so you don't really hear about a court until you have a headache, and thank God, thank God that it's been going great. There's been some cases some of us would wish would, you know, go away, but for the most part it's been going well, and that's why you haven't heard about them.

The one case that is getting noise right now, that my cohort brought up, is a case out of the Tanana Chiefs region where they refuse to let attorneys speak [[Simmonds v. Parks, 329 P.3d 995 \(Alaska 2014\)](#)]. Much like Kenaitze: "Hey, if you want to pay that that monkey in a suit to be here, by all means, enjoy, but he doesn't get to open his mouth," and this person's arguing that that is a violation of their fundamental due process. And so I want to throw that out to you guys because this is a case of new impression. I don't think there's a case all over the United States that has this issue. Do you have a right to have your attorney speak for you?

Questioner

Well, is it sovereign, or isn't it? If it is sovereign, then is it another country, is it another country's laws, and therefore do you have a right to due process in that country?

David Voluck

Mmm. Mmm-hmm. Okay, let's hold that. Great answer. Give me something from over this side of the room. Yeah.

Do tribal courts write opinions?

1:11:51

Questioner

Do tribal courts write opinions, or when you make a decision, what happens with that? And also, how do you become a tribal court judge?

David Voluck

That's both good questions. To your first answer: for the most part, yes, I write opinions. But you know, I'm also a word freak, um, that you can, you can rule from the bench orally and it's on record. Its — most tribes record their proceedings either in log notes or actual with, with equipment. So you don't have to write an opinion. But I usually do because our court has a right of appeal, and I like to cover my *tuchus* and also put out there how I made this decision, and I tell people, "You can, and if you think you should, appeal me." You know, I put on my pants the same way you do in the morning. I could get this wrong. And so yes, I write, I want to say, 95 percent of all my decisions.

I became a judge because the people that I worked for are highly competitive, and they have inter-clan disputes that go back longer than any of us could ever remember, and so it was an easy pick to have the guy without the bone in the fight to help with their court. And also they were wanting to grow it. And the hard part about the comity *John v. Baker* decision is, well, they are holding tribal courts, you know, the sovereignty thing goes so far, but you remember that I wrote *plenary* power, right. So eventually there is a wall where they start wagging their finger, and if that worse comes to worse, the U.S. Marshals and National Guard can come in, you know, if you make a decision that's "Outer Limits." it could get ugly. And so one of the things they are holding tribal courts to is due process. Now the question is, what does that mean? So the Black's Law Dictionary is notice. We shouldn't make decisions without telling, that's not fair, and a right to be heard.

What does that right to be heard include, attorneys? This side of the room. Give me an opinion. Yes, in the back.

The Major Crimes Act

1:14:15

Questioner

I have a question, actually. The Major Crimes Act — what's your opinion of that, and how do [unintelligible].

David Voluck

Yeah. Oh man. This is a tough crowd, right? Okay, so you're lucky I just read this book *The Round House* because it freshened me up. Basically there was a case. Oh my God, help me. What's the name of the the two Indians that got into a fight? Thank you. *Ex parte Crow Dog* [109 U.S. 556 (1883)]. So what happened was there was a conflict on the reservation between a leader, a chief, that was put into power by the Bureau of Indian Affairs and the traditional chief, and somehow push came to shove and the traditional chief killed the BIA plant. And this is a no-no in everyone's culture, including — I believe it was in the Dakotas? Help me. Yeah. Yeah. Yeah. So the way — it went to tribal court and the way it was resolved was traditionally, Crow

Dog — was Crow Dog the murderer or the one who was murdered? Thank you so much. So Crow Dog shot Spotted Tail. So Crow Dog was responsible now for the subsistence and the financial and economic welfare now of Spotted Tail's family. And there was horses exchanged, blankets exchanged. It was a repair of the tear in the community, the way that they always had done. Well, that was disturbing to the non-Native population that felt like justice wasn't served, and they wanted to hang Crow Dog. And out of this. I believe the Supreme Court said no no no no. They are sovereign, they are their own nation. And this is how they decided. And Congress quickly freaked out and passed the Major Crimes Act [1885]. And so the United States has taken upon itself jurisdiction over major crimes, like rape, murder, most serious felonies, and it's not working.

So I'm not sure, you know, you hit me with this question, so I'll just talk out my rear end for a second. I think that jurisdiction should be given back to the tribes, but they need the resources to be able to deal with it. That's the hard part that we run into every day as tribal courts are growing by leaps and bounds, and the State of Alaska relies on us and has started shoving cases our way — the ones that they don't want, the very high needs, expensive cases, Child in Need of Aid cases. Now they're like, "Oh, we love your sovereignty, here you go," you know, as they throw file after file off of their desk onto our desk. Problem is, there's not a penny attached, and so we are holding our courts together with duct tape and blue tarps, you know, the Alaska way, and it's just ridiculous. So if tribes were to start taking on felonies, they would need to be given the resources to deal with it because the criminal justice system is expensive.

Questioner

Can the tribal courts do a better job of it?

David Voluck

I would hope so I would hope so, but I do not know.

Circle justice, restorative justice

1:17:49

Questioner

The political climate is swinging towards — because the courts across the United States for years, if you look at the number of incarcerated persons and the cost of that as opposed to the cost of education, where are we putting our money, and it's ass backwards. And so even the judiciary is realizing that what we're doing isn't working. There's an example of Leech Lake, Minnesota, where the superior court judge had a revolving door for the Leech Lake Indian Reservation people that were DWIs, domestic violence, you name it. So that was one visionary non-Native that went to the reservation and said, "What I'm doing is not working. I need your help. What can I do?" And so he actually takes his court onto the reservation, and they use traditional Indian law to adjudicate the cases and even for penalties, and so we're seeing now whether circle justice going on and that's becoming — [audience member sneezes] —

David Voluck

God bless you.

Questioner

— used in the judiciary is finding out that Natives really know what's best for the people and they're — the chances are, that's not a good word, of rehabilitation are much much higher than throwing it into the clink. It's not working. So, so I think when we say it, when I say, yeah, we can do a better job, it's because most Native groups know their people better than a judge that sits upon a bench above and doesn't get down in

cases of equal, and look at it as, "What's the problem? And what do you think is the solution to that problem, and how we going to make it happen?"

David Voluck

What I can tell you also is we have a program in Sitka where we get the Minor Consuming offenders, so we're not talking felonies here, but the the crazy part about Minor Consuming Alcohol is that it is, it is the gateway to the prison system. For some weird reason, if you get a Minor Consuming, are you going to prison? No. But if you're in prison, did you get a Minor Consuming? Yes, that's what they're finding. So for whatever reason this Minor Consuming is, is a crossroads for young people. And so we've been fortunate, we worked out an agreement with the City and Borough of Sitka, where WE get them. And it's a much more rehabilitoryprocess. We attach them — we have one guy who is an awesome carver. So guess who gets to do an internship with Tommy Joseph, a national, nationally renowned carver. If he went to the state court he'd get whacked, he'd get his fine, he'd have to sweep the YMCA, and he's done. With me he's going and he's carving a totem pole. Where I had one Philippine — Filipino young lady interview her great-grandparents of how they met and got married. They were like, she had her great-grandparents, they were like a hundred and six, and just, I was like, wow, during the hearing, I was like, that's amazing. I'm like, "Did you ever ask them how they met?" She's like, "No." I'm like, "Boo! guess who's sitting down with Grandmama tonight with tea." And she wrote me a whole essay about it. You know what I mean? So we're trying to engage, to light a fire in somebody's life, as opposed to, "Next," you know, poppy mill justice. Some more love, you know what I'm saying?

Intergenerational trauma

1:22:04

Questioner

So many of our people don't realize what has happened on, when you look, you know, academicians call it generational trauma, and things — when we talk about ANCSA, most of us didn't know that the tribes — not all the tribes in Alaska sanctioned that, at all. It wasn't ratified. And then, when you — when we who are maybe pro-ANCSA or pro what, what was the other alternative go to look at it, the federal government in that negotiation of ANCSA knew that in order for tribes to thrive and be healthy, needed at least 80 million acres of land. Now. Do you know how much land that the ANCSA tribes were given? Huh?

David Voluck

44.

Questioner

43, I think it is.

David Voluck

Yeah.

Questioner

43 or 44 [million acres]. So they gave us enough to make us think that we got the good end of the deal. But yet in order for people to thrive and be who we are and continue to take care of our needs and our people we weren't given the full measure of what we needed to do that. Or control.

David Voluck

Yeah what but in one cause for optimism that I'm kind of getting into lately was that I went to a conference and they started talking about this concept of epigenetics. I don't know if anybody's heard about it, but it's basically, they're going back to Lamarck. Darwin had one and now we're going back to Lamarck, and the truth is somewhere in the middle. So it was nature versus nurture. Right? And so we — the prevailing genetic scientific theory is that your DNA is given to you and, you know, what happens to you in life, of course has an impact on you, but it cannot impact your genetic material. Well, guess what? They're finding out differently — that actually profound experiences in our lives can have modification effects on our DNA, which then means when we have children we pass on that epigenetic morph from that powerful experience. And so what happens to you in life is being handed down not only by the way you teach your kids, but also your DNA. Now that can — that door swings both directions.

So my colleague brings up something called intergenerational trauma. And that is the flood that I was talking about earlier. That's not nice. Whole villages were lost to disease, starvation, horrible things happened and so, families were taken apart and sent to boarding schools. We could go over — it's unbelievable the horror, the history which I encourage you to learn. We don't have time to go over at all, but traumatic, traumatic impacts, and so we lost a generation of parents because they were sent to boarding schools. They sometimes were abused by their teachers and then sent back home, have kids, have fun, but they didn't get to watch their parents, how they got to raise kids. They were stuck in a boarding school. So how do you be a parent? So we lost a generation of parents and the epigenetic morph of that trauma. And so now is the time to heal.

So the door swing was the hard way, but also the good way, if we can create profound experiences for our young people that are positive. Not only are we plastering a smile across somebody's face, making somebody's day, we could be altering the genetic future of our population with goodness, which is what I think why we got into the business. Now how you get there is a bizarre road. Each of us has our bizarre story to tell you — how do you end up being a tribal judge? There's no tribal judge track at UAA that I'm aware of yet. Maybe Professor Fortson's working on it. You know, it will happen one way or another but you get into the business to do it differently and to heal, I think, is why we got into it. Anyway. Yeah, go ahead. Mr. Moon.

Tribal jurisdiction and overlapping jurisdictions

1:26:11

Questioner

Can you talk a little bit about jurisdiction with respect to tribal courts, um. Earlier you said that tribal courts were about sovereignty, not about race, and then the sovereign determines the membership. So what's the relationship between but like an example when you've got two tribes that are very close and have geographic overlay. I'm not sure I'm expressing my question.

David Voluck

I got it though. It's a great question. Okay. So, before any tribal judge renders a decision, although I did this maybe not so great the other day, you should announce at the beginning of your opinion why you have jurisdiction. Jurisdiction is a fancy Latin word for meaning you have the right to talk, you know *diction*, *juris* law, you can talk the law. Otherwise, you have no business making the decision, right?

So there's two pieces, personal and subject matter. Do you have a right to talk about this person and do you have a right to talk about this subject matter? And so the citizenship is the linchpin, a major piece of the jurisdiction that gives you personal jurisdiction, and the law's pretty settled right now: tribal courts are

allowed to talk about their own citizens. Now, where the mush comes from, and a particular area of subject matter jurisdiction to help you understand that is families, because what is a tribe? A big family, a collection of families. So when it comes down to family law and something that's happening to a kid, does a tribe have subject matter jurisdiction to talk about children? Of course they do. Does the tribe have jurisdiction to talk about, uh, Fin— you know, something that's going on in Finland? Probably not. Maybe, but probably not, right?

So the first piece, is who are we talking about? And if they are a tribal citizen you're on safe ground, and if you're talking about a topic that's near and dear to the tribe's heart, you're on safe ground.

Now where the mush comes from — and you knew there was mush coming — is, what happens when one of the parties is not a member of the tribe. Not a citizen. Do you have jurisdiction over them? State of Alaska says no. My position — because he spiked my tea — is, it depends if that person, I don't care if you're a black white yellow purple, whatever, if you come to the village and you voluntarily avail yourself of the privileges and benefits of being connected to that tribe, you have subjected yourself to personal jurisdiction.

Case in point. I rent a car in Seattle. I drive across the Columbia River. I am now in Oregon — it's so beautiful — bam! I wasn't paying attention, I was texting, right? The Oregon state trooper comes over and gives me a ticket. "No, you don't have jurisdiction over me, I'm from Washington!" "Well, buddy, you came to Oregon. We'll see you in court." Okay? So, too, if someone enters into a relationship with the Kenaitze and then decides to misbehave, God forbid, hit a Kenaitze woman. From where I'm coming from, it's as old as snot, they have jurisdiction over you.

This is something that's going to have to be litigated. It's coming up right here. And now, in this Parks case [[Simmonds v. Parks, 329 P.3d 995 \(Alaska 2014\)](#)], where whether you have an attorney — no one ever answered the question except for this gentleman over here. Do you have a fundamental right to have your attorney speak? But in that case it is a Native person from village not far away, but he is not a citizen in Minto, which is the one that terminated his parental rights. The child is Minto. The mom is Minto. Dad is from somewhere else, but Alaska Native, and saying, "You don't have jurisdiction over me." Well, my position, and I think this will eventually be clarified, is, "No, you entered into relationship with Minto, you are now subject to their jurisdiction." But it's not a hundred percent clear yet. It will be the next 10 years.

Questioner

Well, if you have...it seems to me like if that person were part of another tribe, then it would be an intertribal court.

David Voluck

It could be, it could be. That's a great point, but it started in Minto and, just kind of the way that courts work, usually where it starts is where it should be. But, but an intertribal conference would not have been a bad idea, and maybe his tribe would have said, we hereby delegate jurisdiction over homie to you because this gentleman beat this woman within an inch of her life, he is now in jail for fif— forty, fifty-some years for she's unrecognizable. Right? So we're not talking about a little parking ticket here. So maybe an intertribal conference where this tribe said, you know what, he came over there and did that. By all means we think you have jurisdiction, but just in case there's any doubters out there, we're delegating jurisdiction to you. And then it's lock, stock to smoking barrels. I think. Yes. Yeah.

Kenaitze tribal judge

[unintelligible]... other tribes and given three options they, if, they — because we are the third largest — the Kenai Peninsula is the third largest growing Native population from outlying villages. We have several people petitioning our courts, don't want to get involved in state court, especially in regards to custody or CINA cases, and it's free to come to our court. It's not — if you don't have to pay any filing fees. So we have them contact their tribe, especially if it's just a custody case. The tribe will either grant us jurisdiction. They have the option to sit concurrent, which means they call in with the judge, we make the decisions jointly. Or they can say, "It's all yours," Kenaitze handle it. So we do those three options. Right now on our docket we only have probably seven or eight cases that are actually connecting in with tribal members. The rest are all resolutions from other tribes. [Unintelligible]. They have a rotation. And we have a concurrent position with Tanana Chiefs at this time.

David Voluck

Cool. Here's another piece I wanted to tell you. I get a lot of non-Natives in my court down in Juneau. And I always say, "Here's my position: jurisdiction follows the child is my position." Okay. I don't give a hoot about the parents. Obviously one of the parent needs to be a tribal member, but really I'm talking about the kid. And I say that to them: "I believe jurisdiction follows your child, but we have a practice of inviting you in as a welcome guest to this court. Are you comfortable consenting to jurisdiction?" 99.9 say, "Heck, yeah," they'd much rather be in my court than up the hill with Johnny Black Robe up on his pedestal costing god-knows-what with a bazillion rules. You know, they feel comfortable getting it done in our court. And so I've only had one non-Native placed squarely with me. I knew this person. Anyway, he was always looking for an angle, you know, and he was like, oh, you know, we had a child support case. He's like, "Oh you might not have jurisdiction over me. No, I don't consent." I'm like, "Okay, I'm sending you to the state. And by the way, they charge interest. You know, bye-bye." And so we eventually, you know, fine, you want that you got it, but ninety-nine out of a hundred say. "I want to stay right here." So really the worry is more of a boogeyman than reality. I think non-Natives are very, I don't know. Do you guys have non-Natives in your court? They are so happy and pleased to be in a tribal court.

Kenaitze tribal judge

If the Parks case actually goes through the way it is, the way they want it to, and we only have jurisdiction over our members, then we can't hear any of our CINA cases, because I can't think of even one case where it is two Kenaitze Indian tribal members with a Kenaitze child. There isn't one. So.

David Voluck

Yeah.

Ryan Fortson

So if we can have one more question, then we can wrap it up.

David Voluck

Okay.

Lawyers in tribal courts

1:35:06

Questioner

Yes, because you keep mentioning about, if someone hired a lawyer, how would that lawyer, even though he does not, is not allowed to speak in court, what law is he, would he be following, because you know when it comes to jurisdiction is, you would be in the village and trying, you know, yeah, it would be — just to answer your question, I don't think a lawyer would be very effective.

David Voluck

And the truth is you're right. They're not effective in tribal court at all. In fact, they're anti-effective because we're problem-solving, you know, we're not trying to win. I've had some lawyers come to my court. We make them join our bar, you know, take a little skin off the *tuchus* there. We accept credit cards. No, I'm just kidding. So, you know, we have them join our bar, and our codes are available. They are written and they're online — not every tribe has to be like that — and they would follow tribal law. And in one case I had a very respectful attorney, who was just pleased as punch to sit back and let it ride, because I was driving and he knew where I was going. And then I had one attorney who did not think I was an attorney by trade, and tried to get up on top of me. You know, in the rutting season, if you catch what I'm saying, and you know, I had to just put him down, you know, he was ineffective assistance of counsel trying to bully me. And we have that problem right now in Sitka, there's a case where I'm not the primary judge on it. There's a lay judge on it, because you don't need to be an attorney to be a tribal court judge. What you need is some common sense and wisdom, God willing, and humility and all these other things that a judge should have, but a law degree is not one of them, and so we get these attorneys that start trying to do their little, their little dance, trying to make the attorney feel intimidated — I mean the tribal judge feel intimidated. That's why Kenaitze wisely says, "Zip it."

Questioner

That's what's wrong in the legal system in this country now. It's not a matter of what's right or what's wrong, who's trying to fix who with what, it's a matter of who wins, it's a winner and a loser, how much money you've got.

Closing the event

1:37:15

Ryan Fortson: So one thing I will say is you're interested in these issues, I do teach a Alaska Native law class. So I certainly invite you, we cover many of the cases that Judge Voluck addressed, and covering many contemporary issues. For instance this week we're reading the Simmonds versus Parks briefings.

David Voluck: All right.

Ryan Fortson: We do cover a lot of these issues. But can we please have a wonderful thanks for Judge Voluck... [Audience applause.]