Native Servicemembers, Veterans, and the Indian Child Welfare Act

Kathryn E. Fort
Michigan State University College of Law

Peter S. Vicaire
VA Office of Tribal Government Relations
American Indians in the Armed Forces

- American Indians serve at a higher rate, per capita, than other ethnic/racial groups.

- As of 2012, there were 31,155 Active Duty American Indian/Alaska Native Servicemembers (AI/AN).

- AI/AN Servicemembers are more likely to be younger than other Servicemembers.

- AI/AN Servicemembers are 2.5 times less likely to be officers.

- 70% of AI/AN Servicemembers serve 5 years or less.
## American Indian Veterans

<table>
<thead>
<tr>
<th>Total Estimated American Indian/Alaska Native Veteran Population</th>
<th>154,305</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>137,335</td>
</tr>
<tr>
<td>Female</td>
<td>16,970</td>
</tr>
</tbody>
</table>
American Indian Children

- American Indian Children are over-represented in state care compared to their population (disproportionality)—2.4 times their rate in the population

<table>
<thead>
<tr>
<th>State</th>
<th>2012 Disproportionality Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minnesota</td>
<td>13.9</td>
</tr>
<tr>
<td>Washington</td>
<td>4.3</td>
</tr>
<tr>
<td>Oregon</td>
<td>3.5</td>
</tr>
<tr>
<td>Alaska</td>
<td>2.9</td>
</tr>
<tr>
<td>California</td>
<td>2</td>
</tr>
</tbody>
</table>
Indian Child Welfare Act

- ICWA, 25 U.S.C 1901 et al, a federal law applying in state courts.

- ICWA is a remedial statute, to make up for years of federal and state policy removing Indian children from their homes.

- Protects American Indian families from unnecessary removal of Indian children.

- Applies to both involuntary removals and termination of parental rights 19 U.S.C. 1903 (1) & 1913, and voluntary adoptions
Additional Provisions of ICWA

- **Definition of Indian child, 25 U.S.C. 1903(4)**
  - A child who is a tribal member, OR
  - A child who is eligible for enrollment in a tribe AND the biological child of a tribal member.

- **Jurisdictional Provisions**
  - 25 U.S.C. 1911 (a) & (b)
  - Tribe has exclusive jurisdiction over children on the reservation
  - Tribe and State have concurrent jurisdiction otherwise
ICWA: Active Efforts

- 19 U.S.C. 1912(d)

“Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break up of the Indian family . . .”
Adoptive Couple v. Baby Girl

- 133 S. Ct. 2552 (2013)
- Second time the Supreme Court has interpreted ICWA
- Biological Father, Cherokee Nation citizen, was deployed to Iraq just after receiving adoption papers.
- But the child remained with Adoptive Couple during that time and while the case was in the South Carolina Courts.
SCRA

- Servicemember’s Civil Relief Act amended in 2008 to include child custody proceedings.

- If the Servicemember applies for a stay and meets the requirements of the law, the state court “shall” stay an action for a period of not less than 90 days.

- Additional stays are at the discretion of the court
Adoptive Couple v. Baby Girl

Continued

- South Carolina Courts returned the child to her Biological Father.

- U.S. Supreme Court reversed, and characterized the Biological Father as absentee father who never had custody of the child, and therefore received no protections under ICWA.

- No mention of Father’s military service, his reliance on a JAG, on the Servicemember Civil Relief Act.
Potential Issues Facing Servicemembers and Veterans in Child Welfare Cases

- **Adoptions**
  - One parent voluntary, but servicemember is involuntary

- **Child Welfare Cases**
  - May occur while servicemember is abroad and child is with other parent
  - May occur to veterans suffering from the results of their deployment
Veteran Treatment Courts

- Adaptations of drug or mental health treatment courts and require a treatable psychiatric condition for admission

- They are not set up as separate court systems. They operate within a regular court or therapeutic court, but handle a separate docket dealing with specific cases.

- After eligible veterans are identified, assessed, and referred to the veterans treatment court, they are then linked with a program of services fashioned to meet their individual needs.

http://www.justiceforvets.org/
Veteran Justice Outreach (VJO) Specialists

- VJO Program – seeks to avoid unnecessary criminalization of mental illness and extended incarceration among Veterans by ensuring that eligible justice-involved Veterans have timely access to VHA services as clinically indicated.

- VJOs are responsible for direct outreach, assessment, and case management for justice-involved Veterans in local courts and jails, and liaison with local justice system partners.

- There is at least one VJO in every VA Medical Center

http://www.va.gov/HOMELESS/VJO.asp
Veterans with Minor Children

- Recent Survey of Treatment Court Veterans with Minor Children

- More likely to have served in Iraq and received fire in a combat zone than those without minor children.

- More likely to be diagnosed with PTSD than those without minor children.
Recommendations

- Kinship placement in contested adoptions put on hold due to deployment;
- Ensuring Memorandums of Understanding between military bases and states include reference to the Indian Child Welfare Act (ICWA);
- Identifying and educating attorneys—including Judge Advocates and tribal attorneys—on both ICWA and the Servicemembers Civil Relief Act;
- Training Veteran Treatment Court judges on issues specific to Native veterans;
- Modeling specialized state Indian Child Welfare Act dockets on Veteran Treatment Courts;
- Opening conversations between child welfare courts and veterans courts, and assigning one judge per family;
- Encouraging the development of tribal court veterans treatment dockets and engaging with the Veterans Administration (VA) through Veteran Justice Outreach Specialists (VJOs)