



Hon. Diana Murphy

Judge, Court of Appeals for the Eighth Circuit¹

by Kirsten Matoy Carlson



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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 expertise in federal Indian law. I asked Reid Peyton Chambers, one of the partners at the boutique 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.”

Mr. Chambers’ response indicates the high esteem with which Indian law practitioners, scholars, and tribal leaders regarded Judge Murphy and her contributions to Indian country. During her 30+ years on the federal bench, Judge Murphy heard nearly 50 cases and wrote almost two dozen opinions related to federal Indian law. 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.

From Studying History to Making It

Judge Murphy started her career as a historian, graduating from the University of Minnesota with a Bachelor of Arts, *magna cum laude*, in 1954. Little did she know that she would *make* history rather than study it. She continued to study history as a Fulbright scholar at the Johannes Gutenberg University in Mainz, Germany, and as a doctoral student at the University of Minnesota. She left her studies after she married and



decided to devote herself to raising her two sons.

After her boys had grown up, Judge Murphy attended law school at the University of Minnesota. She served as an editor of the *Minnesota Law Review*. In 1974, she graduated with her Juris Doctor, *magna cum laude*, and was nominated to the Order of the Coif. After law school, she spent two years practicing law at Linquist and Vennum before being appointed to the Hennepin County Municipal Court in 1976. Two years later, she was appointed to the Hennepin County District Court, where she served until 1980.

In 1980, President Carter appointed Judge Murphy as the first woman to serve as a judge on the U.S. District Court for Minnesota. She became the first woman to be the chief judge of a district court in the Eighth Circuit, serving as the chief judge of the U.S. District Court for Minnesota from 1992 to 1994.

Judge Murphy, as a distinguished jurist, was appointed by President Clinton as the first woman to serve on the U.S. Court of Appeals for the Eighth Circuit in 1994. She remained the only woman on the court for decades. As an appellate judge, Judge Murphy authored numerous opinions affecting minority and women’s rights. She raised issues of gender equality through her service on the Eighth Circuit Gender Fairness Taskforce. She also mentored count-

less clerks and was instrumental in the design of the U.S. courthouse in downtown Minneapolis.

Breaking barriers beyond the federal courts, Judge Murphy was appointed to be the first woman to chair the U.S. Sentencing Commission in 1999. As chair, she built consensus among a diverse group of commissioners, increased the work produced by the commission, and engaged in considerable public outreach by holding hearings outside the D.C. Beltway. She did all this while carrying a full case load as an appellate judge until 2004.

Judge Murphy's leadership extended beyond her formal appointments. She served as a board member of the Federal Judicial Center, president and founding member of the Federal Judges Association, board chair of the American Judicature Society, and chair of the American Bar Association Ethics and Responsibility advisory committee. She was also a member of the U.S. Judicial Conference Committee on Court Administration and Case Management, the American Law Institute, the National Association of Women Judges, and the American Bar Association and its standing committees on Federal Judicial Improvements and on Judicial Selection, Tenure, and Compensation.

An avid reader and lover of classical music and opera, she served on several boards, including the Minnesota Opera, the Science Museum of Minnesota, the University of Minnesota Foundation, St. John's University, St. Thomas University, and the United Way.

In recognition of her tremendous accomplishments, the U.S. courthouse in downtown Minneapolis was named after her in October 2019. It is only the second federal courthouse to be named after a woman.

Impact on Federal Indian Law

Judge Murphy significantly shaped modern federal Indian law through her insightful and well-crafted opinions.² Federal Indian law is the unique law that has developed over the past five centuries to govern the relationships among Indians and non-Indians in the United States. Treaties, federal legislation, and Supreme Court decisions form the basis of federal Indian law. Its key elements 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

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.⁴ Moreover, Indian law cases ask judges to comprehend distinctive tribal worldviews and translate those realities

into the terms of a foreign Western legal system. 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 friction 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. Finally, 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. As a trial court judge, she distinguished herself as an exceptional Indian law jurist in *Mille Lacs Band of Chippewa Indians v. Minnesota*.⁵ In that case, she parsed a dense historical record to identify Chippewa voices and translate Chippewa experiences into terms cognizable under Western law. Then she faithfully applied the canons of treaty construction to uphold the rights of Indians to hunt, fish, and gather off reservation. Her opinion both reiterated the vitality of the canons of construction and demonstrated their intended application to Indian treaties to protect tribal rights. At a time when the Supreme Court found against Indian interests in over 75 percent of the Indian law cases it heard,⁶ the Court heard the case on the merits and affirmed her findings in 1999.⁷ The case remains one of the most important treaty rights cases decided in modern times.

Judge Murphy's legacy, however, extends beyond *Mille Lacs*; her majority, concurring, and dissenting opinions covered a wide range of topics, including *inter alia*, land into trust,⁸ taxation,⁹ gaming,¹⁰ tribal civil adjudicatory jurisdiction,¹¹ tribal sovereign immunity,¹² treaty rights,¹³ reservation boundaries,¹⁴ and criminal jurisdiction.¹⁵ 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.¹⁶ In her opinions, 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.

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 sentenc-

ing 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.¹⁷ As a result, Native Americans who commit serious crimes disproportionately face federal prosecution.¹⁸ 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.¹⁹

Judge Murphy added Native American issues to the agenda of the U.S. Sentencing Commission and advocated for it to take its responsibilities to Indian tribes more seriously. Her leadership led to the first advisory group to study sentencing issues particular to tribes and tribal citizens²⁰ and encouraged the U.S. Sentencing Commission to recognize its trust relationship with tribes and commit to ongoing tribal consultation through the creation of a permanent Tribal Issues Advisory Group.²¹

Conclusion

Most federal judges leave the bench with only a jurisprudential legacy. But Judge Murphy never was like other federal judges. She was the first woman appointed to the U.S. District Court for Minnesota and the U.S. Court of Appeals for the Eighth Circuit. Unlike many federal appellate judges, she served as a district court judge for over a decade before joining the Court of Appeals.²² 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. ☉

Endnotes

¹A full version of this article originally appeared in the *Minnesota Law Review*, *Tribute: Judge Murphy's Indian Law Legacy*, 102 Minn. L. Rev. 37 (2018).

²Judge 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).

³Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1123-26 (1994).

⁴See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 27-40, 59-60, 65 (1995).

⁵See *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784 at 830-33.

⁶David 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 82 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).

⁷See generally *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

⁸*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).

⁹*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).

¹⁰*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).

¹¹*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).

¹²*Alltel Commc'ns, L.L.C. v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012).

¹³*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).

¹⁴*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).

¹⁵*United States v. Lara*, 324 F.3d 635 (8th Cir. 2003), *rev'd*, 541 U.S. 193 (2004).

¹⁶Judge Murphy has 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 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).

¹⁷*See, e.g., Major Crimes Act*, 18 U.S.C. § 1153 (2012).

¹⁸U.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.

¹⁹Created 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 Sept. 22, 2018).

²⁰*Id.*

²¹*Id.*

²²*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>.



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