



LAW OFFICES OF  
**O. YALE LEWIS III**

Law Offices, O. Yale Lewis III  
1511 Third Ave., Ste. 1001  
Seattle, WA 98101  
206 / 223-0840  
[yale@yalelewislaw.com](mailto:yale@yalelewislaw.com)

# The Indian Child Welfare Act

WHERE IT CAME FROM

WHAT IT IS

WHERE IT NEEDS TO GO

WHERE ICWA CAME FROM

# Two Centuries of Federal Indian Policy

- Constitution (1789)
- Removal / Treaty-Making (1789 – 1871)
- Allotment / Assimilation (1871 – 1928)
- Reorganization (1928 – 1945)
- Termination (1945 – 1961)
- Self-Determination (1961 – present)

# Indians and the Constitution

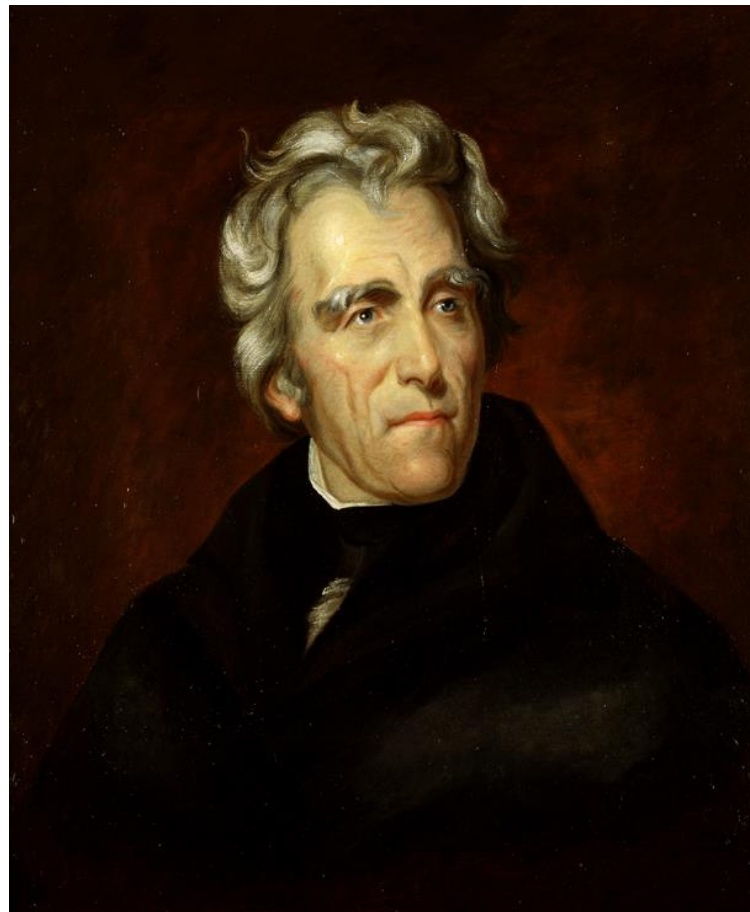


# Three References

- Apportionment, U.S. House – Art. 1, § 2  
“excluding Indians not taxed”
- Indian Com. Cl. – Art. 1 § 8  
“to regulate commerce ... with the Indian tribes”
- Apportionment, U.S. House. Amend. XIV, § 2  
“excluding Indians not taxed”

REMOVAL

# Old Hickory



# Trail of Tears

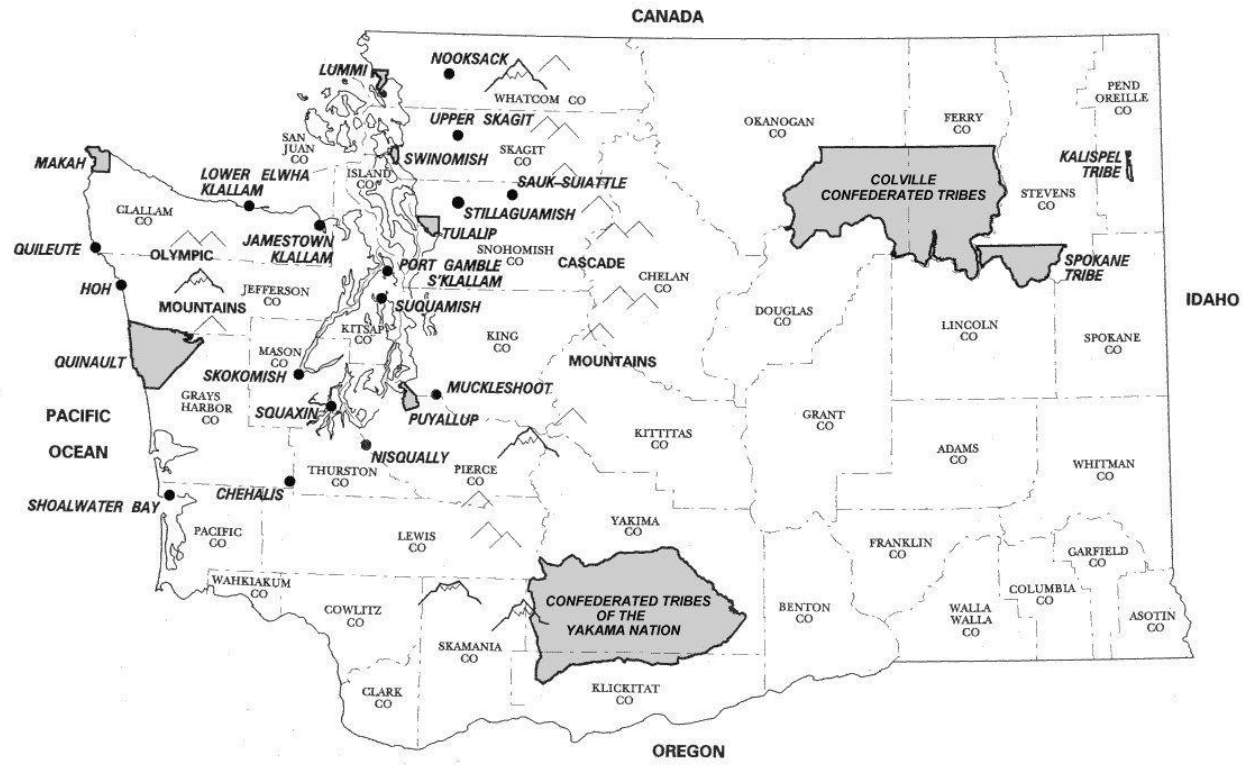


# Dawes Act

- Allotted Reservation lands to tribal members
- Established membership rolls
- Allotments Held in trust by United States for 25 years, then fee simple title delivered to tribal member
- Tribal member became citizen, subject to state law, including real estate taxes



# Indian Country in Washington



# Citizenship

## 14<sup>th</sup> Amend. Not Apply to Indians

---

- ❑ 3/5ths compromise deleted, but not “Indians not taxed”
- ❑ Citizenship for members of individual tribes if good behavior

## Citizenship Act, 1924

---

Automatic citizenship to person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe

# Tulalip Boarding School



# Indian Reorganization Act

- Ended allotment era
- Restricted alienation of land
- Established revolving fund from BIA
- Established tribal governments

# Commissioner of Indian Affairs & Blackfoot Tribe



# House Concurrent Resolution. # 108

All Indians should :

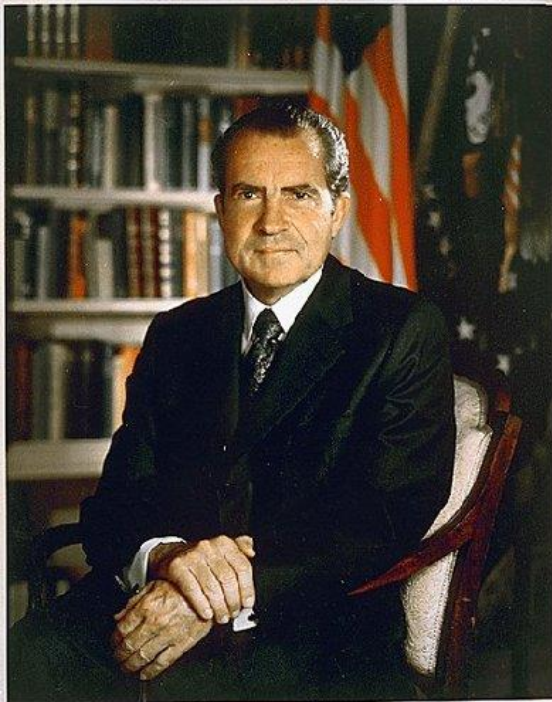
- be freed from Federal supervision and control;
- Enjoy all rights and prerogatives pertaining to American citizenship; and
- Assume full responsibilities as American citizens.

# Individual Bills

- ▣ 109 tribes / bands terminated
- ▣ 1.3 M acres alienated
- ▣ Federal programs discontinued
- ▣ State jurisdiction imposed
- ▣ Tribal sovereignty effectively ended

# Self Determination

## Message from the President



- Indian future shall be determined by Indian acts and Indian decisions
- Federal funding, but tribal planning and implementation



# Indian Child Welfare Act

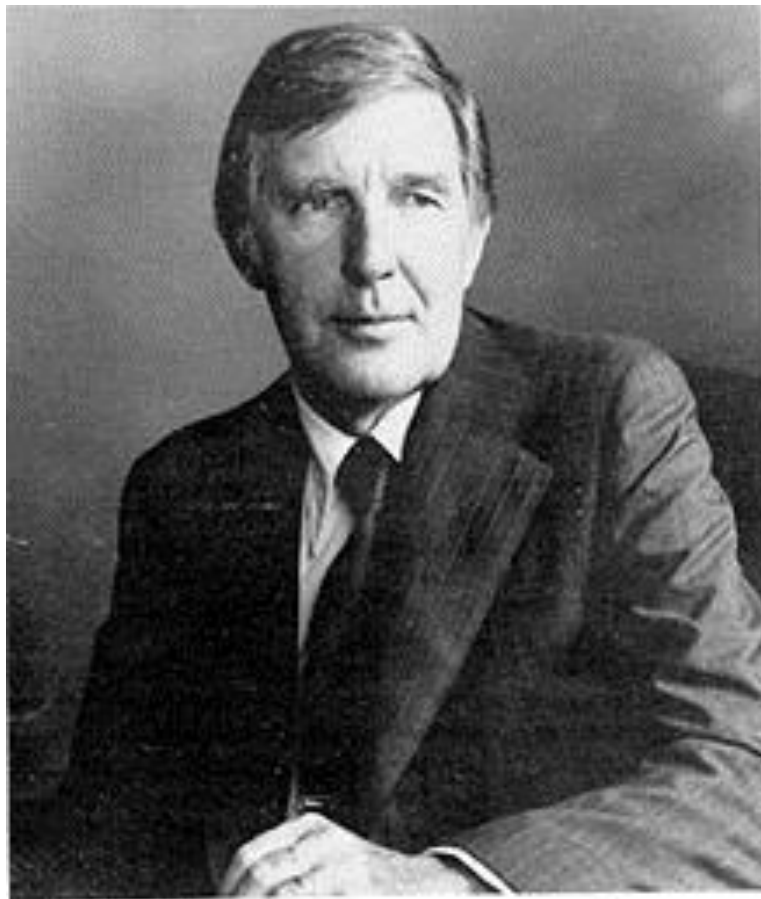
## National

- ▣ 25 – 35% all Indian children in foster care
- ▣ 1 in 4 Indian children adopted

## Washington

- ▣ Adoption rate of Indian children 19 times higher than non-Indian
- ▣ Foster care rate 10 times higher

# Morris Udall



# Findings

- Congress:
  - has plenary power over Indian affairs
  - Trust relationship
- Children are vital to Tribe's existence and integrity
- "Alarming high" rate of break-up of Indian family
- States fail to recognize essential tribal relations

# Policy

Promote:

- ▣ Best interest of Indian children
- ▣ Stability / security of Indian Tribes

By:

Establishing minimum Federal standards for removal and placement of Indian children

# Definitions: Child Custody Proceeding

## Applies

- ▣ Foster care placement
- ▣ Termination of parental rights
- ▣ Pre-adoptive placement
- ▣ Adoptive placement

## Doesn't Apply

- ▣ Criminal proceedings
- ▣ Parent v. parent custody proceedings

# More Definitions

- Indian custodian: Indian person w/legal custody under tribal law/custom, state law, or temp. custody from parent
- Indian tribe: Federally recognized
- Extended Family:
  - Defined by tribal law and custom; or
  - Blood relations or stepparent

# Existing Indian Family (Wash former.)

ICWA not apply in an adoption if:

- No removal from Indian cultural setting
- Natural parents have no substantive ties to specific tribe
- No residence on Reservation

*Adoption of Crewes, 118 Wash. 2d 561 (1992)*

# Existing Indian Family (Washington Current)

- If the child is “Indian” as defined by ICWA, the provisions of the act shall apply.

RCW 26.33.040(1)(a) [2004]

- “Washington no longer recognizes the “existing Indian family exception.”

*Parenting and Support of Beach*, 246 P.3d 845 (Div. III, 2011)



# Jurisdiction

## Tribe (Exclusive)

---

- ▣ Domiciled on the Reservation
- ▣ Ward of tribal court

## State & Tribe (Concurrent)

---

- ▣ Outside the Reservation
- ▣ But
- ▣ Presumptive transfer to tribal court
- ▣ Unless
- ▣ Objection by either parent, or
- ▣ Good cause to the contrary

# Exclusive Tribal Jurisdiction



# Transfer to Tribal Court

Transfer presumed

Exception: good cause to the contrary

- ▣ Foster care placement
- ▣ Termination of parental rights

Presumption Not Apply

- ▣ Preadoptive Placement
- ▣ Adoptive Placement

# Good Cause to the Contrary

- ❑ No tribal court
- ❑ Proceeding is at an advanced stage
- ❑ Indian child is over the age of 12 and objects to transfer
- ❑ Forum *non-conveniens*
- ❑ Child over 5 years old & Parents not available
- ❑ Little or no contact with Tribe or tribal members

# Good Cause May Not Include

- ❑ Socio-economic conditions
- ❑ Adequacy of tribal or BIA social services
- ❑ Adequacy of tribal judicial system
- ❑ Burden of proof on party asserting good cause

# Intervention and Notice

Tribe and / or Indian custodian has right to:

- ▣ Notice of state court foster care or termination of parental rights proceedings
- ▣ Intervene at any time

# State Court Involuntary Proceedings

## Due Process & Services

---

- ▣ Notice
- ▣ Right to counsel
- ▣ Examination of reports
- ▣ Remedial services / rehabilitative programs

## Evidence

---

- ▣ Beyond a reasonable doubt
- ▣ Testimony of qualified expert witness
- ▣ Continued custody by Indian likely to result in serious emotional or physical damage to child

# State Court Voluntary Proceedings

- Consent must be certified by a judge
- Consent to foster care may be withdrawn at any time
- Consent to termination of parental rights and adoption may be withdrawn at any time prior to entry of final orders
- Adoption may be vacated up to two years post entry if fraud or duress



# Placement

## Adoption

---

- ▣ Extended family
- ▣ Other tribal members
- ▣ Other Indian families

## Foster Care

---

- ▣ Extended family
- ▣ Foster home specified by Tribe
- ▣ Indian foster home licensed by State
- ▣ Institution approved by Tribe

# Codify Existing Indian Family Exception

State Court shall have exclusive jurisdiction over child custody proceeding where:

- ▣ Parental rights terminated
- ▣ No significant contacts with Tribe, and
- ▣ Child has bonded with his / her caregiver