DENTONS

Native American
Law and Policy

INDIAN CHILD WELFARE ACT CONSTITUTIONAL CHALLENGE: *BRACKEEN V. HAALAND*

2022 Oregon Tribal/State ICWA Conference

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"Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child."

-- Hon. Calvin Isaac, Chief, Mississippi Band of Choctaw Indians, *Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs*, 95th Cong., 2d Sess., 191-192 (1978)

Background

1974 - 1978: Congressional Hearings

- Testimony from executive branch, state representatives, medical and psychiatric professionals, tribal leaders and tribal members, and child welfare groups.
- Native children removed at rates far greater than non-Native children.
- State child welfare systems unfettered by due process.
- Native families targeted for removal; cultural ignorance and drive to adopt children.
- Severe consequences for tribes, families, and their children.

Background

- 1978: ICWA Enacted
- Purposes (25 U.S.C. §§1901, 1902):
  - Prevent the breakup of Indian families
  - Protect the "best interests" of the Indian child
  - Tribal stability and security
  - "Minimum federal standards" for removal
  - Placement of children reflecting "unique values of Indian culture"

Background

- Most significant provisions in ICWA aimed at establishing minimum federal standards and procedural safeguards in state court proceedings.
- ICWA not intended to "oust the States of their traditional jurisdiction over Indian children falling within their geographic limits" (H.R. Rep. No. 95-1386 at 19).
- Many states have incorporated provisions of ICWA into state law.
- May states and tribes have entered into agreements to implement ICWA.

EARLY CHALLENGES TO ICWA

- Flashpoints in state court proceedings over Native identity and placement continuity (*see* Atwood, 2002).
- Resistance over transfers to tribal court (§ 1911(b)) and changes in placement (§ 1915).
- Sometimes challenges to notice (§ 1912(a)) to or intervention by child's tribe (§ 1911(c)).
- "Existing Indian Family" exception:
  - State court judges seek to avoid ICWA on the basis that the child or child's parents haven't maintained significant enough connections to tribe.
  - Most courts have now rejected the doctrine.
- Challenges to ICWA's <u>constitutionality</u> rare during first three decades of its existence (Examples: California, Iowa).

ICWA in State and Federal Courts

- Hundreds of state court of appeals decisions interpreting ICWA since 1978.
- "The federal courts have interpreted ICWA on rare occasions…" *Doe v. Mann*, 415 F. 3d 1038, 1051 (9th Cir. 2005).
- Two Supreme Court decisions addressing ICWA
  - *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (Mississippi Supreme Court).
  - *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (South Carolina Supreme Court).
- *Holyfield* – landmark ICWA case; helped shape state court ICWA cases for decades

ADOPTIVE COUPLE (AKA *"BABY VERONICA"*)

- Widespread media attention (and misinformation)
- Overwhelming *amicus curiae* participation by Indian tribes and tribal organizations.
- **2013:** Supreme Court decides *Adoptive Couple:*
  - 5-4 (Justice Alito): certain ICWA provisions inapplicable where biological father "abandoned the Indian child before birth and never had custody of the child." Suggests that ICWA might raise constitutional problems in certain situations.
  - Justice Thomas (concurring) - ICWA as applied to the case would be unconstitutional; questions plenary authority of Congress over Indian affairs.

AFTER *ADOPTIVE COUPLE* CASE

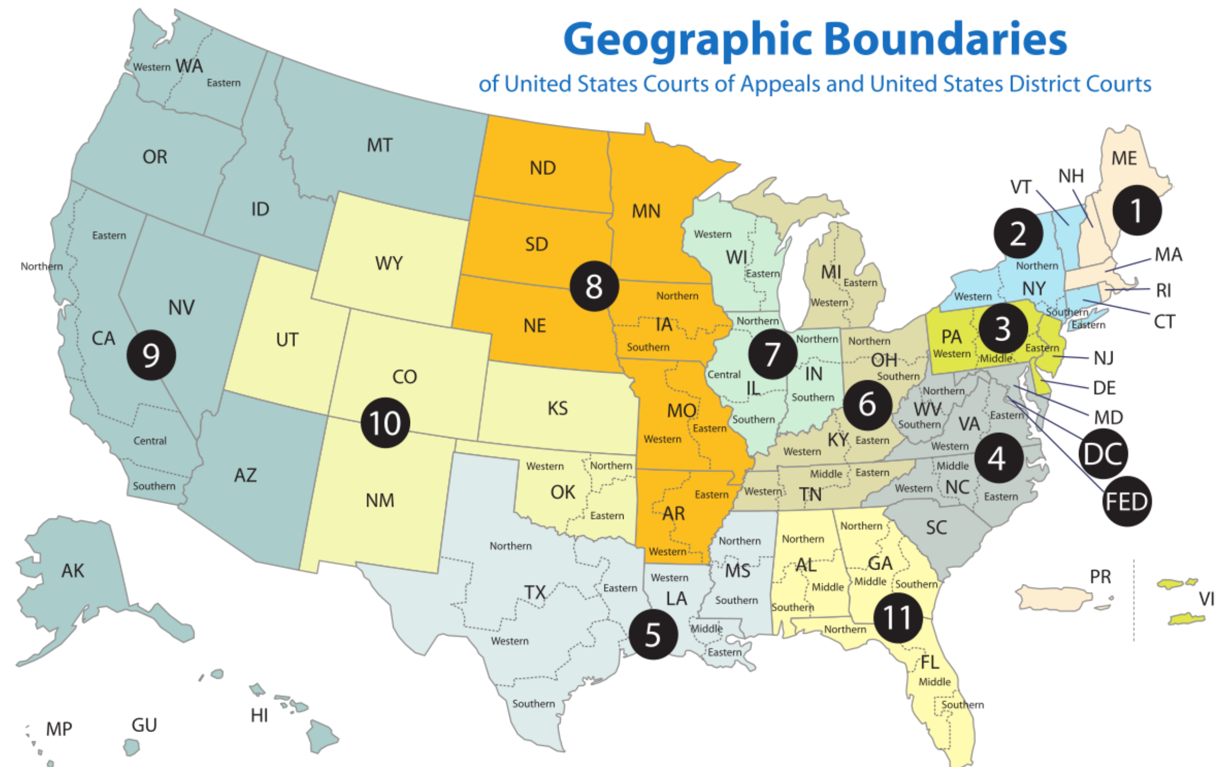
Department of the Interior:

- 2015: Updates ICWA Guidelines; significant overhaul is first since 1979 Guidelines, with focus on tribal participation and tribal family placements; rejects “existing Indian family” exception; like earlier Guidelines, remains non-binding.
- 2016: Publishes ICWA Regulations (*a.k.a.* the “Final Rule”): Drawing from thousands of comments from Tribes, States, and child welfare agencies, these legally binding regulations incorporate many of the protections recommended in the Guidelines.

AFTER *ADOPTIVE COUPLE*: COORDINATED LITIGATION

2015 - Present: New wave of litigation in federal courts

- Virginia
- Arizona
- Oklahoma
- Michigan
- Minnesota
- **<u>Texas</u>**



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Coordinated Litigation - Common Themes

- Non-Indian prospective adoptive placements (and more recently, states)
- Repeat players (law firms, conservative organizations).
- Challenges to legality of Guidelines and Regulations.
- Challenges to constitutionality of ICWA:
  - ICWA discriminates on the basis of race.
  - ICWA violates due process of prospective adoptive and foster care placements.
  - ICWA "commandeers" state courts and state officials.

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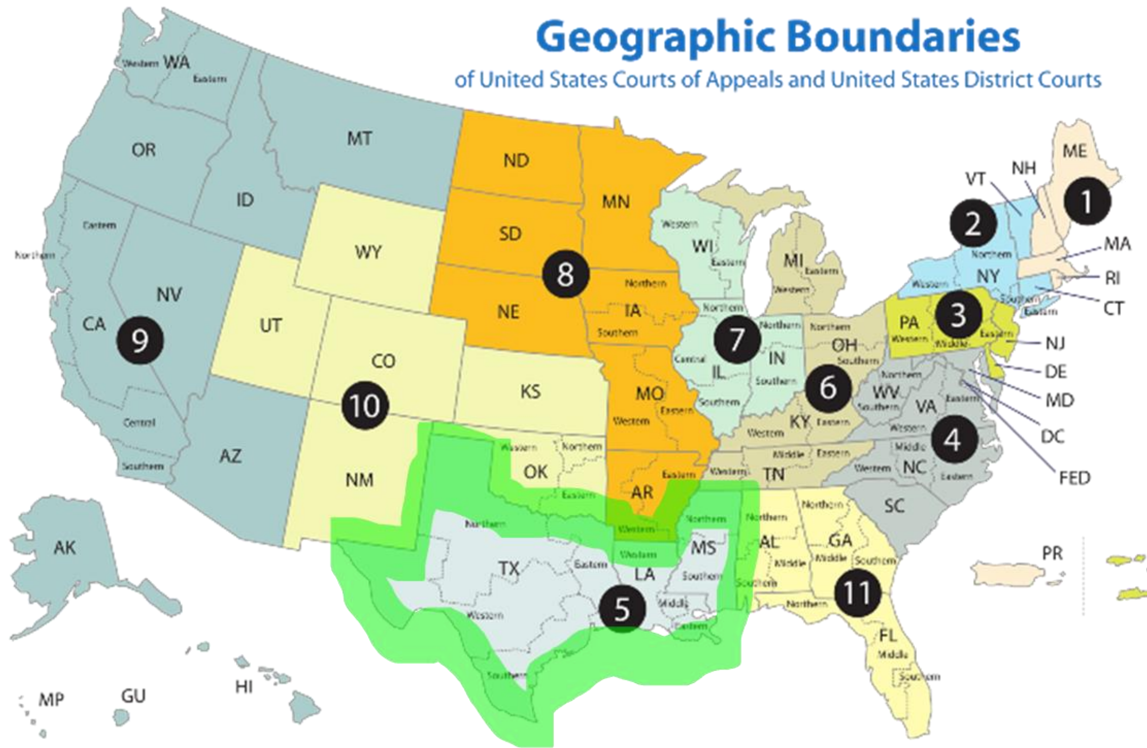
BRACKEEN V. HAALAND

The Litigation Path:

Northern District of Texas → 5th Circuit Court of Appeals → U.S. Supreme Court



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BRACKEEN DECISION (5TH CIRCUIT): KEY HOLDINGS

- Congress has the authority to enact ICWA.
- ICWA does not discriminate on the basis of race.
- Many provisions of ICWA upheld as constitutional (or were not challenged in the appeal).
- Court equally divided as to a number of other provisions.
- Narrow majority held three provisions unconstitutionally "commandeered" state agencies.
- ICWA regulations mostly upheld.

Brackeen Decision (5th Circuit): Details

➢ Upheld	➢ Equally Divided	➢ Unconstitutional
➢ Right to intervention (§ 1911(c))	➢ Right to notice of state child welfare proceedings involving Indian children (§ 1912(a))	➢ Active efforts requirement (§ 1912(d))
➢ Right to court-appointed counsel (§ 1912(b))	➢ Placement preferences (to the extent applicable to state agencies) (§ 1915(a)–(b))	➢ Qualified expert witness requirement (§1912(e) and (f))
➢ Right to examine reports and documents (§ 1912(c))	➢ Adoptive placement preference for "other Indian families" (§ 1915(a)(3))	➢ Requirement that states maintain records of placements of Indian children pursuant to the placement preferences (§ 1915(e))
➢ Right to informed written consent to foster care or adoptive placements, or to TPR, and to withdraw that consent (§ 1913(a), (b), and (c))	➢ Foster care placement preferences for a licensed "Indian foster home" (§ 1915(b)(iii))	
➢ Right to collaterally attack state court adoption decree or petition for its invalidation (§§ 1913(d) and 1914))	➢ Requirement that states must provide certain adoption records to the Department of the Interior (§ 1951(a))	
➢ Right to petition for return of custody (§ 1916(a))		
➢ Right of adult adoptees to obtain tribal affiliation information (§ 1917)		
➢ Placement preferences (§ 1915(a) and (b)) (to the extent applicable to state courts)		
➢ Heightened evidentiary standards in foster care and termination of parental rights proceedings (§1912(e) and (f)) (to the extent applicable to state courts)		

SUPREME COURT TAKES UP *BRACKEEN V. HAALAND*

- Supreme Court grants "certiorari" February 28, 2022.
- All challenged issues (equal protection, Tenth Amendment, congressional authority) on the table.
- Overwhelming support for ICWA from tribes, states, child welfare practitioners.
- **Oral argument will take place on November 9.**

time for oral argument is granted.

21-6022 IN RE ROBERT L. HEDRICK

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

CERTIORARI GRANTED

21-376) HAALAND, SEC. OF INTERIOR, ET AL. V. BRACKEEN, CHAD E., ET AL.
21-377) CHEROKEE NATION, ET AL. V. BRACKEEN, CHAD E., ET AL.
21-378) TEXAS V. HAALAND, SEC. OF INTERIOR, ET AL.
21-380) BRACKEEN, CHAD E., ET AL. V. HAALAND, SEC. OF INTERIOR, ET AL.

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The petitions for writs of certiorari are granted. The cases are consolidated, and a total of one hour is allotted for oral argument. Parties that were plaintiffs/appellees in the lower courts shall file opening and reply briefs in conformity with Rules 33.1(g)(v) and 33.1(g)(vii), under the schedule set forth in Rules 25.1 and 25.3. Parties that were defendants/appellants ... conformity with Rule 3... in Rule 25.2.

CERTI...

21-558 HOWARD JARVIS TAXPAYER...
21-634 WRIGHT, ZACHARIAH B. V...

The New York Times

Supreme Court to Hear Challenge to Law on Adopting Native American Children

The Indian Child Welfare Act of 1978 gives preference to adoption solutions that would keep Native children within the

...th-old Navajo girl played out in a Texas court in 2019. ...nd seven people to sue the federal government to ...are Act. Allison V. Smith for The New York Times

...Supreme Court agreed on Monday to hear a ...itutionality of the Indian Child Welfare Act of ...rd to remove Native American children ...r tribes and their heritage.

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High Court To Hear Indian Child Welfare Act Case

By Andrew Westney

Law360 (February 28, 2022, 10:05 AM EST) -- The U.S. Supreme Court on Monday agreed to take up four petitions challenging a highly complicated en banc Fifth Circuit decision on the Indian Child Welfare Act, with Texas and other opponents claiming the law is unconstitutionally race-based, and tribes and the federal government saying the law draws on political classifications that are backed by the high court's precedent.

In its order list Monday, the court granted certiorari to four petitions challenging various parts of the Fifth Circuit's **325-page April decision** overturning a Texas federal judge's ruling that the 1978 ICWA, which sets federal standards for state child custody cases involving Native American children, is illegally race-based.

The Fifth Circuit's decision provided a major victory for states and tribes backing the law, including the Cherokee Nation, Oneida Nation, Quinault Indian Nation and Morongo Band of Mission Indians, as well as the federal government.

State ICWAs

- Extremely important supplement to federal ICWA.
- Many states (including Oregon) have enacted state ICWAs.
- Allow for procedures tailored for localized tribal-state relationships.
- Oregon ICWA:
  - Builds on existing ICWA framework to improve implementation in state court proceedings.
  - Additional clarity concerning (among other areas): notice, custody, best interests, transfer proceedings, active efforts, qualified expert witness testimony.

Tribal Courts

- **25 U.S.C. § 1911.** Indian tribe jurisdiction over Indian child custody proceedings.
  - Tribe has exclusive jurisdiction – child resides or domiciled on reservation (unless tribe is subject to P.L. 280), or if child is ward of tribal court.
  - Tribes/states share concurrent jurisdiction – child domiciled/residing off-reservation.
- **Continuing importance of:**
  - Tribal/state coordination on ICWA implementation.
  - Support for strong tribal judiciaries.

Questions?

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