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Brackeen v. Bernhardt
Case Summary
November 5, 2020

I. Overview of the Case

Brackeen v. Bernhardt originated in the U.S. District Court for the Northern District of Texas, where three states (Texas, Indiana, and Louisiana) along with non-Native prospective adoptive parents, sought to have the Indian Child Welfare Act (ICWA) declared unconstitutional. Judge Reed O'Connor agreed with the Plaintiffs, finding that ICWA: (1) violated the Equal Protection Clause as an unconstitutional "race-based" statute, (2) inserted the federal government into state affairs by "commandeering" state courts and agencies and thus violated the Tenth Amendment, and (3) impermissibly delegated federal powers to Tribes through Section 1915(c). Judge O'Connor also struck down the 2016 ICWA regulations (known as the "Final Rule"), finding that it implemented an unconstitutional statute and that it exceeded federal authority. The Defendants in the case—the intervening Tribes and the federal government—appealed to the Fifth Circuit Court of Appeals, and were supported along the way by Tribes and other amici curiae including child welfare experts, states, members of Congress, Indian law and Constitutional law scholars, and others. The Fifth Circuit has not yet handed down its decision; and because courts usually give no indication that an opinion is forthcoming, there is no way to know when the court might release its opinion.

II. The Fifth Circuit's Decision

A. Opinion of the Panel

On appeal, the case first was heard by a three judge panel. On August 16, 2019, the panel voted to reverse the District Court's opinion and affirm the constitutionality of ICWA. As discussed below, the panel's decision no longer stands, but it helps provide a useful overview of the issues in this case.

1. Equal Protection

All three judges agreed that ICWA's definition of "Indian child" is a political, not racial, classification. In addition, the panel made two very important points: it wrote that ICWA is "related to tribal self-government and the survival of tribes," Opinion at 21 fn.10; and it wrote that Congress's Indian affairs power is not limited to Indian Country, but instead extends to "Indians and Indian tribes on and off the reservation." *Id.* at 22. The panel then held that non-member children who fall within ICWA's ambit are not swept in solely on the basis of ancestry, but rather because they have a "not-yet-formalized tribal affiliation." *Id.* at 23. Finally, the panel went to great lengths to show why *Rice v. Cayetano*—a case involving Native Hawaiians that Plaintiffs relied heavily upon—does not control here. *Id.* at 25-26.

2. Tenth Amendment / Commandeering

A two-judge majority on the panel rejected the district court's finding that ICWA impermissibly commandeered state agencies. First, it wrote that ICWA's directives to state courts were proper because the Constitution requires state judges to enforce federal law, *id.* at 28-29, and that ICWA's impact on state agencies was likewise permissible, because ICWA "evenhandedly regulate[s] an activity in which both states and private actors engage." *Id.* at 31. Second, the panel wrote that ICWA properly preempts conflicting state laws. The Constitution's Supremacy Clause establishes that, within those spheres, such as Indian affairs, where Congress is empowered to act, federal law trumps conflicting state law. Because ICWA falls within Congress's Indian affairs power, ICWA does not infringe on state prerogatives, but instead preempts conflicting state laws as the Constitution intended. *Id.* at 33-35.

In a partial dissent, Judge Priscilla Owen wrote that she would have found that three sections of ICWA do improperly commandeer the states: § 1912(d) (active efforts), § 1912(e) (qualified expert witnesses), and § 1915(e) (recordkeeping).

3. Nondelegation

All three judges agreed that ICWA does not unconstitutionally delegate of federal power to Tribes. The panel first looked to the long history of Congress incorporating into federal law the law of other sovereigns—both Sates and Tribes—and recognized the inherent authority of Tribes to exercise authority over their members, including domestic relations. *Id.* at 36. In particular, the panel focused on the U.S. Supreme Court's decision in *United States v. Mazurie* (as both Tribal amici and the Defendants encouraged the court to do), and wrote that Section 1915(c)—which provides that a Tribe's established placement preferences control over those specified in ICWA—is not a delegation, but instead is an incorporation of tribal law into federal law. *Id.* at 37-38.

4. Final Rule

The panel wrote that the Department of the Interior, in issuing the Final Rule, sufficiently explained its reasons for doing so after 40 years of reliance on the 1979 non-binding guidelines, *id.* at 41-42, and also rejected the Plaintiffs' argument that the regulations unfairly placed the burden of proving "good cause" upon the party seeking to depart from ICWA's placement preferences. *Id.* at 43-44. Finally, the panel accepted the Federal government's argument that the Final Rule's "clear and convincing evidence" standard for proving good cause is merely a recommendation and is not binding upon the states. *Id.* at 44.

Having resolved all of the issues in favor of the federal government and the Tribes, the court ordered that judgment be entered in favor of the Defendants.

B. En Banc Review

The Fifth Circuit's decision came from a panel of three judges, but a party may petition either for rehearing by the same panel or for rehearing en banc, which includes the full Fifth Circuit bench of 17 judges.[1] On October 1, 2019 the Plaintiffs petitioned the Fifth Circuit to rehear the case en banc. The Fifth Circuit granted the petition and vacated the panel decision, and the parties engaged in a new round of briefing. The intervening Tribes and the federal government again were supported by 486 Tribes and 59 Native Organizations, as well as other amici curiae including child welfare experts, 26 states, 77 members of Congress, Indian law and Constitutional law scholars, and others.

Oral argument was held at the Fifth Circuit courthouse in New Orleans, Louisiana on January 22, 2020. Argument was lively; however, most of the questions came from just six judges—Judges Edith Jones, Leslie Southwick, and Kyle Duncan, whose questions tended to support the plaintiffs, and Judges Jerry Edwin Smith, James L. Dennis, and Gregg Costa, whose questions tended to support the defendants.[2] The Fifth Circuit does not record video, but an audio recording of the hearing is available at http://www.ca5.uscourts.gov/OralArgRecordings/18/18-11479_1-22-2020.mp3.

We are still awaiting a decision from the court, which will replace the panel's decision. Whether the en banc court affirms the district court, or reverses as the three-judge panel would have done, the en banc court's opinion will stand as the opinion of the Fifth Circuit, and would be the basis for any future Supreme Court review.

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[1] One seat on the Fifth Circuit was vacant when the case was reheard en banc, and Judge James C. Ho recused himself, leaving 15 sitting judges; they were joined by Senior Judge Jacques L. Weiner Jr., who was allowed to participate in the en banc court because he was on the three-judge panel that initially decided the case. Thus, rehearing was before 16 judges of the en banc court.

[2] Because of the limited argument time, and the sheer number of judges in an en banc rehearing, it is not uncommon that many—even most—of the judges will not ask any questions.

III. What Comes Next

Regardless of what the en banc Fifth Circuit decides, we anticipate that this case will not stop at the Fifth Circuit, and whichever side loses at the Fifth Circuit will petition the United States Supreme Court for certiorari. Once certiorari has been briefed, the Supreme Court will meet in conference to determine whether to take the case. And if the Supreme Court takes the case, then the parties will brief the merits.

The Supreme Court accepts amicus briefs both at the certiorari stage and at the merits stage. At the certiorari stage, typically only one side receives amicus support; the respondent (the party that won in the circuit court) usually asks its amici to hold off, so as not to draw any more attention than necessary to the case. If the Supreme Court grants certiorari, however, and proceeds to hear the case on the merits, then both sides typically engage their amici again.

The Protect ICWA Campaign stands ready to participate as amici curiae, as needed, in any Supreme Court proceedings.

If you have questions about this case, please contact Native American Rights Fund attorneys Erin Dougherty Lynch (dougherty@narf.org) or Dan Lewerenz (lewerenz@narf.org).