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ICWA DEFENSE PROJECT
BRACKEEN V. HAALAND MEMORANDUM
JUNE 15, 2021

This memorandum analyzes the recent decision of the en banc panel of the Fifth Circuit Court of Appeals in *Brackeen v. Haaland*, No. 18-1147 (formerly *Brackeen v. Bernhardt*), the case concerning the constitutionality of the Indian Child Welfare Act ("ICWA"). The court generally upheld the authority of Congress to enact ICWA, and also held that ICWA's definition of "Indian child" did not operate on the basis of race and, therefore, did not violate the Equal Protection Clause; however, the court also found certain sections of ICWA to be unconstitutional. Ultimately, the Fifth Circuit's decision is fairly limited in terms of its immediate legal impact both as a matter of *precedent* when it comes to other ICWA cases across the country, and as a matter of *substance*, i.e. the validity of ICWA and the 2016 ICWA regulations (known as the "Final Rule"). Below, we discuss the decision in greater detail, the limitations on its application, and potential next steps, including the possibility of an appeal to the U.S. Supreme Court.

I. BACKGROUND: THE UNDERLYING LITIGATION IN FEDERAL COURT IN TEXAS AND APPEAL TO THE FIFTH CIRCUIT COURT OF APPEALS

The *Brackeen* case 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 ICWA declared unconstitutional. The defendants were certain federal government agencies and officials, and a small number of Tribes who intervened. Many of you supported those defendants with an amicus brief to the district court. The district court, however, agreed with the plaintiffs, finding that ICWA: (1) violated the Equal Protection Clause as an unconstitutional "race-based" statute, (2) violated the Tenth Amendment by inserting the federal government into state affairs, effectively "commandeering" state courts and agencies, and (3) impermissibly delegated federal powers to Tribes by providing Tribes with the ability to alter ICWA's placement preferences. The court also struck down the Final Rule, finding that it implemented an unconstitutional statute and that it exceeded federal authority.

The defendants appealed to the Fifth Circuit Court of Appeals, where they had the support of many of you, as signatories to the Tribal Amicus Brief, and other amici curiae including child welfare experts, members of Congress, several states, Indian law and Constitutional law scholars, and others. The Fifth Circuit stayed the district court's order pending the outcome of the case on appeal. The case was first heard by a three judge panel, which issued a 2-1 decision in August 2019 reversing the district court and upholding the constitutionality of ICWA.

The plaintiffs then petitioned for rehearing before the full Fifth Circuit (sitting "en banc"). The defendants again were supported by our Coalition, along with 486 Tribes and dozens of Tribal Organizations, child welfare experts, 26 States, 77 members of Congress, Indian law and Constitutional law scholars, and others. The 16-judge panel heard oral argument in January 2020. After a long delay, the court finally issued its decision (the "En Banc Decision") on April 6, 2021. The court issued its mandate (making the case effective) on June 1, 2021.

II. THE FIFTH CIRCUIT'S EN BANC DECISION

As has been widely reported, the En Banc Decision (available here) is long, complicated, and fractured—325 pages of convoluted and interrelated holdings, spread out over eight separate opinions. The even number of participating judges resulted in several "equally divided" tie votes on particular aspects of ICWA's constitutionality, further limiting the impact of the decision.

Distilled to its essence, a majority of the court narrowly upheld the constitutionality of key components of ICWA and the Final Rule, as well as confirming Congress's authority to enact legislation that protects and benefits Indian Tribes and Native people.[1] However a majority of the court also declared (again, narrowly) that certain provisions in ICWA and the Final Rule impermissibly commandeer state agencies. These holdings are summarized in the court's "per curiam" opinion at the beginning of the decision.[2] We discuss each aspect of the decision below.

A. What Does the En Banc Decision Say About the Validity of ICWA and the Final Rule?

As noted above, the court's En Banc decision consists of eight opinions and the court's ultimate decisions on the substance of ICWA and the Final Rule were narrowly decided; some of the opinions command a majority of the full Fifth Circuit on certain issues, and not on others.[3] Overall, however, most provisions of ICWA survived the court's scrutiny. In this section, we briefly (1) lay out where a majority of the court upheld ICWA and its provisions; (2) note where the court was equally divided as to ICWA's constitutionality; (3) clarify that certain key ICWA provisions were not the subject of

[1] In addition, many sections of ICWA were not challenged in the litigation, and thus remain unaffected by any of the courts' decisions.
[2] En Banc Decision at 2-7.
[3] Each of the eight opinions in the En Banc Decision are individually numbered at the bottom; for convenience and simplicity, we cite throughout to the file-stamped page numbers at the top, which correspond to the total pages in the document.

the appeal (and are thus unaffected by the En Banc Decision); (4) note the few provisions deemed by a majority to be unconstitutional; and (5) describe the court's treatment of the Final Rule.

1. Congress had the Authority to Enact ICWA and Many Provisions of ICWA are Constitutional

Speaking for a narrow majority of the court, Judges Dennis[4] and Costa[5] supported Congress's authority, as a general matter, to enact legislation like ICWA for the benefit of Indian Tribes and Native people. Both opinions on this subject are detailed, thoughtful, and forceful recitations of Congress' power as far-reaching— in terms of the range of legislation Congress may pass, the fact that Congress's authority extends both on- and off-reservation, and that this power is exclusive of state authority.

Also speaking for a narrow majority of the court, Judge Dennis rejected the plaintiffs' equal protection challenge and concluded that ICWA's definition of "Indian child" (§ 1903(4)) is a constitutional, political classification, *not* an unconstitutional, race-based classification.[6] In both of these sections, Judge Dennis relied heavily on pro-tribal amici, and noted in particular that the Tribal Amicus Brief spearheaded by the Coalition strongly supported the notion that ICWA "furthers Congress's legislative aim of discharging its duties to tribes."[7] Finally, speaking for a majority of the court, Judge Dennis rejected the plaintiffs' arguments that § 1915(c), which allows Tribes to reorder placement preferences by tribal resolution, was an unconstitutional delegation of legislative authority to Tribes.[8]

In a more complex portion of the En Banc Decision, Judge Duncan issued an opinion that spoke for a majority of the court as to some, but not all, provisions of ICWA.[9] As noted by the per curiam order, a majority of the court upheld a significant number of ICWA's protections for Indian Tribes and families when applied to state court proceedings, including:

- the right to intervention (§ 1911(c));
- the right to court-appointed counsel (§ 1912(b));
- the right to examine reports and documents (§ 1912(c));
- the right to informed written consent to foster care or adoptive placements, or to termination of parental rights, and to withdraw that consent (§ 1913(a), (b), and (c));
- the right to collaterally attack a state court adoption decree or petition for its invalidation (§§ 1913(d) and 1914));
- the right to petition for return of custody (§ 1916(a));
- the right of adult adoptees to obtain tribal affiliation information (§ 1917);

[4] *Id.* at 59-86.
[5] *Id.* at 317-25.
[6] *Id.* at 112-33.
[7] *Id.* at 127 n.55.
[8] *Id.* at 134-44.
[9] *Id.* at 248-60.

- the placement preferences (§ 1915(a) and (b)) (to the extent applicable to state courts, as opposed to state agencies); and
- heightened evidentiary standards in foster care and termination of parental rights proceedings (§1912(e) and (f)) (to the extent applicable to state courts, as opposed to state agencies).

2. Fifth Circuit Equally Divided as to Certain ICWA Provisions; District Court and Fifth Circuit Decisions Set No Precedent on These Issues

The court was evenly split as to the constitutionality of certain provisions. They include:

- the right to notice of state child welfare proceedings involving Indian children (§ 1912(a));
- the placement preferences (to the extent applicable to state agencies, as opposed to state courts) (§ 1915(a)–(b));
- the adoptive placement preference for "other Indian families" (§ 1915(a)(3));
- the foster care placement preferences for a licensed "Indian foster home" (§ 1915(b)(iii)); and
- that states must provide certain adoption records to the Department of the Interior (§ 1951(a)).

Technically, the district court's holding that these provisions are unconstitutional is affirmed *in this case*; however, because the Fifth Circuit en banc panel was equally divided on the constitutionality of those provisions the decision sets no precedent, and no other court is bound by these determinations.

3. Key ICWA Provisions Were Not at Issue on Appeal, and are Thus Unaffected by En Banc Decision

While the plaintiffs initially challenged nearly all of ICWA's provisions, the district court rejected their claims as to certain provisions, and plaintiffs did not cross-appeal from the district court's holding. This means that certain provisions, most notably exclusive jurisdiction for Indian children domiciled on-reservation (§ 1911(a)); transfer of proceedings to tribal court (§ 1911(b)); full faith and credit for tribal child welfare proceedings, records, and laws (§ 1911(d)); state-tribal intergovernmental agreements (§ 1919); higher standards, whether state or federal, to be applied (§ 1921); and emergency removal or placement provisions (§§ 1920, 1922), are unaffected by the En Banc Decision.

4. Three ICWA Provisions Held Unconstitutional

A narrow majority of the court found that three ICWA provisions violated the Constitution by commandeering state agencies. These provisions, as explained by the per curiam opinion and by Judge Duncan[10] are: the requirement that foster care placements and termination of parental rights be supported by evidence of active efforts designed to prevent the breakup of the Indian family (§

[10] *Id.* at 235-38, 240-42.

1912(d)), and by qualified expert witness testimony (§1912(e) and (f)); and that states maintain records of placements of Indian children pursuant to the placement preferences (§ 1915(e)).

5. Final Rule Mostly Upheld

As noted by the per curiam opinion and by Judge Duncan's opinion,[11] a majority of the court upheld the bulk of the Final Rule against claims that it violated the Administrative Procedure Act, except for (a) the three above-noted provisions, which a majority of the court found unconstitutionally commandeered state agencies,[12] and (b) the Final Rule's implementation of a universal "clear and convincing" standard of proof for state courts to deviate from the placement preferences under § 1915.

B. What Does the En Banc Decision Mean for Other ICWA cases?

It is important to highlight just how limited the decision is with regard to actual ICWA proceedings—those cases that play out every day in state courts across the county.

1. The En Banc Decision is Not Binding on State Courts

As a general matter (and with exceptions that are not relevant here), decisions from a federal circuit court of appeal are binding only on *federal courts*, and only *within the circuit*. This means that, once the Fifth Circuit's decision goes into effect, it will control only the federal courts in three states: Texas, Louisiana, and Mississippi. It also means that, as Judge Costa's opinion notes toward the end of the En Banc Decision, "no state family court is required to follow" what the decision says about ICWA, whether good or bad.[13] Instead, *state courts* across the country will continue to interpret and apply ICWA and the Final Rule as they see fit, and as their higher state courts direct.

As Judges Dennis[14] and Costa[15] both note, this is true even for the ICWA cases pending in state court involving the individual plaintiffs and tribes at issue in the En Banc Decision. While some of these state courts may find the En Banc Decision persuasive (and at least one, the Texas state court considering the adoption of a Navajo child by the Brackeens, has indicated that it will refrain from acting pending the Fifth Circuit's decision), none of these courts will be required to follow the Fifth Circuit's decision or reasoning.[16] If you have questions about whether this decision may impact one of your current cases, you can use this decision tree to assist you.

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[11] *Id.* at 270, 277-80.

[12] Those three provisions are: the requirement that foster care placements and termination of parental rights be supported by evidence of active efforts designed to prevent the breakup of the Indian family (§ 1912(d)), and by qualified expert witness testimony (§1912(e) and (f)); and that states maintain records of placements of Indian children pursuant to the placement preferences (§ 1915(e)). *See* section II.A.4 above.

[13] *Id.* at 307.

[14] *Id.* at 51-52.

[15] *Id.* at 308-11.

[16] The En Banc Decision's lack of applicability to state court proceedings, coupled with certain procedural deficiencies, led several judges (notably Weiner, at 292-99, and Costa, at 306-16) to find that no plaintiffs had standing to challenge

2. Texas, Louisiana, and Indiana Might Seek to Stop Following Certain Provisions of ICWA and the Final Rule that the Fifth Circuit Found to be Invalid

In 2018, following the district court's decision declaring ICWA unconstitutional, the Texas Attorney General issued a directive to state agencies to cease complying with ICWA and the Final Rule in state child welfare proceedings. That directive was withdrawn after the Fifth Circuit ordered a stay of the district court's decision pending further review. The Fifth Circuit has now completed that review, and as noted above issued its mandate making the decision effective on June 1, 2021. It is now theoretically possible that attorneys general for the State Plaintiffs might, as Texas did, direct their state agencies to stop complying with the portions of ICWA and the Final Rule that the Fifth Circuit found invalid (Section II(A)(4) above).

III. WHAT'S NEXT FOR THIS CASE? WHEN DOES IT BECOME EFFECTIVE? AND WILL IT BE APPEALED TO THE SUPREME COURT?

A. In the Fifth Circuit and the District Court

Now that the Fifth Circuit has issued its mandate, the decision is binding and effective to the extent, noted above, of the court's limited jurisdiction concerning these matters. As a practical matter, there is little to nothing left for the Fifth Circuit to do at this point.

It is also possible that certain parties may seek further relief in the district court—for example, to enjoin the enforcement of provisions of ICWA and the Final Rule that the En Banc Decision determined are invalid. But the district court may only order relief as to the parties in the case; like the Fifth Circuit, it cannot bind state courts.

B. In the U.S. Supreme Court

Now that the Fifth Circuit has issued its decision and mandate, the plaintiffs, the United States, and/or the intervening Tribes may choose to seek review by the U.S. Supreme Court through the filing of a petition for certiorari, or "cert." The clock for filing a cert petition is already running. Due to the COVID-19 pandemic, the Supreme Court has extended the cert petition deadline to 150 days[17] from the date of the court's judgment (not the issuance of the mandate). That means any cert petition in this case must be filed no later than Friday, September 3, 2021—150 days from the date of the issuance of the En Banc Decision. That said, a party doesn't have to wait to file a cert petition, and there is nothing to prevent a party from filing before the deadline.

ICWA on equal protection grounds. If any party seeks review by the U.S. Supreme Court, the issue of standing—in other words, whether any plaintiff really is in a position to seek relief from the courts—could take on more prominence.

[17] Ordinarily, the deadline is 90 days, which the Court could extend up to 150 days total upon a party's motion. In effect, the Court has granted a blanket extension so that all parties have 150 days to file a cert petition—and no additional extensions will be granted.

Generally speaking, with few exceptions, the Supreme Court gets to choose which cases it will hear. As a practical matter, the fact that the En Banc Decision declares certain provisions of ICWA unconstitutional increases the likelihood that, if petitioned, the Supreme Court would accept the case. All of this is to say that the case is probably not over, and that there will likely be a future opportunity—and a future need—for tribal participation to support and defend ICWA. If a cert petition is filed in the case or if there are any other substantive developments, we will certainly be in touch.

We hope that this memo explains the important issues in the case and how we expect the case to move forward. If you have any questions, please do not hesitate to reach out to us. As in the past, it has been our sincere honor to stand with you in defending ICWA, and we sincerely thank you for the opportunity and for your continued support.